No. 42938-1-II
Pierce County Superior Court No. 10-1-03148-2

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

STATE OF WASHINGTON,
Plaintiff-Respondent,

v.

REX ALAN MCNICOL,
Defendant-Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable John R Hickman, Judge

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

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

TABLE OF AUTHORITIES

CASES

RULES

STATUTES

CONSTITUTIONAL PROVISIONS

I. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to sustain the conviction of First Degree Perjury.
2. In a case where witness credibility is paramount, the trial court erred in preventing testimony regarding an essential witness's previous conviction for a crime of dishonesty.
3. Defense counsel's representation at trial fell below an objective standard of reasonableness, and such deficient representation prejudiced Mr. McNicol.
4. The trial court erred by sealing the juror questionnaires without a *Bone-Club* hearing.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was there sufficient evidence presented by the State when it failed to produce a credible witness to contradict McNicol's oath?

2. Did the trial court err when it excluded testimony regarding witness Barham's prior conviction for a crime of dishonesty when credible testimony from the witness was critical to the State's case and such error substantially prejudiced McNicol and affected the outcome of the case?

3. Was McNicol's trial counsel's representation ineffective and below an objective standard of reasonableness, thus substantially prejudicing McNicol?

4. Did the trial court err by sealing the jury questionnaires without a *Bone-Club* analysis?

III. STATEMENT OF THE CASE

Rex Alan McNicol was charged with one count of first degree perjury, alleging to have occurred on March 16, 2010. CP 1-2. The state alleged that McNicol made a false statement under oath during a CrR 3.6 hearing when he stated that he did not enter Robert Barham's home to retrieve a firearm.

On January 21, 2009, Pierce County Sheriff's Deputies McNicol and Montgomery were dispatched in response to a 911 call from a young person in a residence, for a "welfare check." CP 3. At some point in response to the call, the deputies learned that one of the occupants, Mr. Barham, had a prior drug conviction. The deputies were told that the caller said Barham had a rifle. Upon their arrival in separate cars, the two deputies made contact with the occupants of Barnham's mobile home residence.

Mr. Barham admitted that he had a rifle in the home, which he said had belonged to his father who recently passed away. At some point in the welfare check at the home, the deputies took possession of the rifle and Mr. Barham was arrested for unlawful possession of a firearm. CP 18.

> On March 16, 2010, Pierce County Superior Court Judge Buckner held a CrR 3.6 suppression hearing regarding the rifle. RP 116. Some time before the hearing, the prosecutor in the case, Ms. Lund, met with Deputies McNicol and Montgomery, and told them the nature of the motion to suppress the evidence, but she explained that she believed the motion would not succeed. RP 117. According to Lund, she thought Barham's motion was "ridiculous". RP 110. Ms. Lund testified that she believed there were two valid legal arguments to keep the rifle in evidence; that Mr. Barham gave consent, and the deputies were at the scene for a welfare check. RP 214.

At the suppression hearing, Ms. Lund called Deputies McNicol and Montgomery. Each of them testified to the following: 1) that they arrived at Mr. Barham's residence; 2) Mr. Barham was cooperative; 3) Barham understood the deputies were at the residence to do a welfare check; 4) Barham admitted to having a firearm in his home and gave the

rifle to Deputy McNicol; and 5) Deputy McNicol read Barham his *Miranda* rights and arrested him. CP 26, 29-31, 62, 67. Mr. Barham's attorney challenged the deputies' testimony, arguing that it varied from a police report prepared by Deputy Montgomery in January of 2009. CP 76. Specifically, Barham's attorney pointed out portions of Deputy Montgomery's police report that indicated the deputies entered Barham's residence to take possession of the rifle. Through their testimony in the hearing, each of the deputies testified that their recollection, 14 months after their response to Barham's home, was that they did not enter the home to get the rifle, but did so after Barham was placed under arrest, to complete their welfare check. CP 31, 64, 67.

After the suppression hearing, Ms. Lund noted in a memo that the deputies' testimony had been inconsistent with one another and the police report written regarding the incident. However, she did not opine that the officers lied. RP 181. In fact, in her closing argument, she argued that "The Court saw Officer Montgomery. He's a young officer. He admitted he made a mistake. I can pretty well guarantee you that he is going to probably be one of the more careful report writers we're going to have from now on." RP 293.

Despite the prosecutor's arguments and the evidence confirmed by three witnesses, the two deputies and Barham himself, that the deputies were at the home for the purposes of conducting a 'welfare check', and Barham's testimony to the effect that he consented to the officer's taking possession of his rifle, Judge Buckner granted Barham's motion and suppressed the rifle as evidence. RP 146.

It was not until two months later, in May 2010, did Lund call the Sheriff's Office and tell them she believed the officers fabricated their testimony. RP 148. She never contacted defense counsel to express her concern that the deputies lied. RP 289. She further admitted, under cross-examination during the perjury trial that although she testified on direct that she had not questioned a deputy's credibility before, she did in fact previously report a police officer whom she believed lied. RP 225.

After she called the Sheriff's office, the Department interviewed the two officers, Mr. Barham, his then-girlfriend, Ms. Rensch, and her son, Jesse, the only individuals having witnessed first-hand the events at Barham's home in January, 2009 when Barham was arrested for unlawful possession of a firearm. In July, 2010, the State filed charges against both deputies, for Perjury in the First Degree. CP 1-5.

In trial, Mr. Barham testified that the officers told him they were at his home for a welfare check RP 231. He also testified that McNicol followed him to his bedroom. RP 234.

Defense counsel argued that evidence regarding Barham's credibility was of the utmost importance in this case. However, in a pre-trial ruling, the trial judge prohibited testimony regarding Mr. Barnham's prior conviction of a crime of dishonesty. RP 93.

Barham's former girlfriend, Doris Resch, who was in the mobile home when the deputies visited for the welfare check on her son back in 2009, also testified at the trial. Her account of events varied greatly from that described by Mr. Barham. According to Ms. Resch, "we told them that, yeah, there was one [a gun/rifle] in the back closet. Then that's when they asked Rob to step outside and onto the porch. They handcuffed him... put him in the car or truck." RP 260. She confirmed that deputies were at the mobile home for the purpose of doing a welfare check on her son. Ms. Resch stated that the deputies "immediately" arrested and handcuffed Barham after they learned that there was a gun in the house. RP 264. She testified that after Barham arrested, she, and not Barham, that took the deputies back to retrieve the gun. RP 264. She could not

recall if she handed the gun to the deputy or if he reached in closet and got it. RP 269.

McNicol testified that he did not prepare a report regarding the incident. RP 443. He stated he read Montgomery's report just before the 3.6 hearing and told Montgomery his report was wrong and they would be cross-examined about the discrepancy. RP 445. He stated he did not consider testifying to the events as stated in the report because that would be a lie. RP 446. He also stated that he told Lund about the problem with the report. *Id* McNicol testified that believed his testimony at the hearing was the truth with all his heart. RP 452. He consistently explained that Barham was told the visit was for a welfare check, that Barham admitted to having a weapon in the home, and that Barham brought him the rifle. McNicol repeated that his recollection was different from that shown in Montgomery's report, with respect to entering the home to get the rifle.

The jury returned a guilty verdict against both defendants, McNicol and Montgomery. CP 373-386. This appeal follows. CP 387-403.

IV. ARGUMENT

A. THE STATE FAILED TO MEET ITS BURDEN OF PROOF TO SUSTAIN A CONVICTION FOR PERJURY IN THE FIRST DEGREE.

Mr. McNicol's perjury conviction should be reversed due to the insufficiency of the evidence, a constitutional defect of the highest magnitude. Mr. McNicol has the right, under the due process clause of the Fourteenth Amendment of the United States Constitution, to be convicted only on evidence sufficient beyond a reasonable doubt. *State v White*, 31 Wn. App. 655, 644 P.2d 693 (1982).

First degree perjury requires a heightened standard of proof from other crimes. To obtain a conviction, the State must prove beyond a reasonable doubt that: 1) the statement was made in an official proceeding, under oath; 2) the statement was false; 3) the defendant knew the statement to be false; and 4) the statement was material to the outcome of the case. RCW 9A.72.020(1).

"Perjury requires a higher measure of proof than any other crime known to the law, treason alone excepted." *State v Wallis*, 50 Wn.2d 350, 311 P.2d 659 (1957).

As summarized by the Court of Appeals, Division III, in its recent *Singh* decision, the testimony of one witness or circumstantial evidence alone is insufficient to convict. *State v Singh*, Wn.App. Div. 3, 2012, May 3, 2012, 275 P.3d 1156 (2012), citing *State v Wallis*, 50 Wn.2d 350, 353, 311 P.2d 659 (1957). To sustain a perjury conviction, sufficient evidence requires:

> ...direct testimony of at least one credible witness, and that testimony to be sufficient must be positive and directly contradictory of the defendant's oath; in addition to such testimony, there must be either another such witness or corroborating circumstances established by independent evidence, and of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence. Otherwise the defendant must be acquitted.

State v Rutledge, 37 Wash. 523, 528, 79 P. 1123 (1905). The direct testimony must come "from someone in a position to know of his or her own experience that the facts sworn to by defendant are false." *Nessman v Sumpter*, 27 Wn. App. 18, 24, 615 P.2d 522 (1980). Corroboration is required on the knowledge of falsity element of the crime. *Rutledge, supra*, at 37.

In the case below, the evidence is insufficient to find that defendant's statement was false, that he knew the statement to be false, and that the statement was material to the outcome of the case.

Defendant testified that he provided testimony that was to the best of his belief truthful. He conceded that he may have made errors in professional judgment regarding certain police practices and personal safety issues, but he consistently explained his recollection of the events discussed in this case. Mr. McNicol did not generate a police report. He did not review his partner's police report until long after the incident, at which time he saw that it contained descriptions of events that were not consistent with his memory. Instead of perjuring himself by testifying that he had no memory other than that reflected in his partner's police report, Mr. McNicol stood up for the truth as he understood and remembered it to be, he stated the truth as he knew it to be, and he realized that doing so could jeopardize the prosecution's case against Mr. Barnham. If ever he had a motivation to bend the truth, it was here, where he could have remained quiet about his independent recollection of events, which may have led to Mr. Barham's conviction. He did not. Mr. McNicol was a law enforcement officer with many years of public service, and had everything to lose, but nothing to gain, if he were to perjure himself in any case. He did not.

One purpose of the heightened proof requirement in perjury cases is to "avoid swearing contests that pit one witness's oath against another."

State v Singh, 275 P.3d 1156, at 1160 (2012), citing *State v Dial,* 44 Wn App. 11, 16, 720 P.2d 461 (1986); *State v. White*, 31 Wn. App. 655, 660, 644 P.2d 693 (1982). This purpose ensures that there was a genuine or true lie. *Singh, supra* Another purpose of the rule is to encourage witnesses to voluntarily appear by protecting them from harassment and threats. *Singh,supra,*. citing *State v Nessman,* 27 Wn. App. 18, 23–24, 615 P.2d 522 (1980).

In the record below, the prosecution presented nothing but a swearing contest, between two police officers and two citizen-witnesses -- one of whom was anything but "independent" or "credible", and the sworn testimony of such witnesses was anything but consistent. For a conviction to stand in such circumstances would place law enforcement officers throughout the state in serious jeopardy that their testimony could be contradicted by criminal defendants (with obvious motives of their own) and their associates, and that such evidence could be used to support a perjury charge and possible conviction for any police officer unfortunate enough to tell the truth and harm a prosecutor's case. Officers who recall facts and events different than those described in someone else's report, may be discouraged to appear and testify in future cases, since doing so

could expose them to perjury charges if the number of witnesses differing with their version of events is large enough to carry the day.

It is not a stretch to envision cases where witnesses coalesce against officers to initiate swearing contests in open court, hoping to produce circumstances similar to those in this case, that produce unjust charges and verdicts of perjury for people who are just trying to tell the truth and do their jobs.

The evidence and facts in the record below -- while it may have been insufficient to sustain a *Knapstad* motion seeking dismissal before trial -- was shown though the course of the trial testimony to be insufficient, not credible, and certainly not evidence which is "positive" and "directly contradictory" of defendant's testimony under oath.[2]

For example, in the record below, if all of the trial witnesses who were in or around the mobile home occupied by Barham on the date of the police response to the 911 call are to be believed and taken at their word, four different people went to get the gun. In Ms. Resch's version, she went back to the bedroom and got the gun herself. In Mr. Barham's version, he voluntarily went back to his room to get his gun with one of

[2] In fact, in explaining his ruling to deny the pretrial motion to dismiss the charges Judge Orlando explained. "if the case were tried to me with the facts presented, I would find the defendants not guilty " CP 197

the officers. McNicol testified that Barham voluntarily walked back to his room to get his gun and brought it to the door. Montgomery stated that he took the gun from McNicol at some point and walked it over to the car. In every description, the gun owner, Barham, voluntarily got the gun, or let someone else get the gun. Ms. Resch's version of events, like that of Barham's, is not positive or directly contradictory of anyone's oath.

Instead, she described some events the same, and some slightly differently, with respect to sequence, locations, and commentary amongst people at the scene. The same could be said for every other witness at the scene, as reflected in the transcripts of testimony below. Such evidence is far below that which is, or should be, required in a perjury case. It is insufficient to support a conviction for first degree perjury.

B. THE TRIAL COURT ERRED IN BARRING TESTIMONY REGARDING A KEY PROSECUTION WITNESS'S PREVIOUS CONVICTION FOR A CRIME OF DISHONESTY

Possession of stolen property is a crime of dishonesty. *State v McKinsey*, 116 Wn.2d 911, 913, 810 P.2d 907 (1991). Prior convictions for crimes of dishonesty are admissible for impeachment purposes. ER 609(a)(2). If a prior conviction falls within the scope of ER 609(a)(2), it is *per se* admissible and the court is not required to balance its value against

its prejudicial effect. *State v Brown*, 113 Wn.2d 520, 532-33, 782 P.2d 1013 (1991).

The balancing factors required for determining if a prior conviction record can be used for witness impeachment purposes is set forth in *State v Alexis*, 95 Wn.2d 15, 621 P.2d 1269 (1980):

> [F]actors that may be considered in weighing probative value of credibility against potential prejudice include: (1) the length of the defendant's criminal record; (2) remoteness of the prior conviction; (3) nature of the prior crime; (4) the age and circumstances of the defendant; (5) centrality of the credibility issue; and (6) the impeachment value of the prior crime. See *United States v Hayes*, 553 F.2d 824 (2d Cir. 1977), cert. denied, **1272 434 U.S. 867, 98 S.Ct. 204, 54 L.Ed.2d 143 (1977); *United States v Mahone*, 537 F.2d 922 (7th Cir. 1976), cert. denied, 429 U.S. 1025, 97 S.Ct. 646, 50 L.Ed.2d 627 (1976); 3 J. Weinstein & M. Berger, Evidence P 609(03a) at 609-72 to 609-80.4 (1978). In each case, the balancing procedure should be followed. There is no place for a per se rule.

Alexis, at 19.

Arguably, the reasoning in *Alexis* was strongly influenced by the fact that Alexis was the defendant. In the case at hand, ER 609 was used to exclude evidence that could seriously affect the credibility of a key prosecution witness in the eyes of the jury. RP 93. The fact that the jury was not presented evidence that Barham had a prior conviction of a crime of dishonesty in this case, when he was called as a critical witness used to

support the prosecution's perjury charges against the defendants, materially affected the outcome of this case.

Barham faced little, if any, prejudice if the jury learned of his dishonesty-related conviction. He was free to go home, facing no repercussions. Instead, the absence of the jury's knowledge of Barham's criminal history on matters touching upon dishonesty unjustly aided the prosecution in convincing a jury that it had two "credible" witnesses to support the perjury charge.

The court below cited the age of Barham's dishonesty-related conviction as the primary reason for barring evidence of such crime in the case below. ER 609(b) expressly provides that a trial court may permit testimony regarding convictions that are more than 10 years old if the "court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." However, in this case, given the nature of the charges, the heightened standard of proof, the centrality of the witness's credibility to satisfying the sort of proof required to find a defendant guilty in a perjury case, all constitute facts and circumstances that outweigh any potential prejudicial effect that the prosecution witness, Barham, might experience. On the other hand, the deliberate exclusion of

such evidence in a perjury case, after defense counsel made a showing sufficient to satisfy ER 609(b), could be viewed as grossly prejudicial to the defendant/appellant.

In this case, Barham's prior conviction of a crime of dishonesty (Attempted Possession of Stolen Property in the Second Degree) occurred on March 7, 2001. RP 88-90. The State filed its Information, formally pursuing perjury charges against the defendants, in July 26, 2010. CP 1-2. Under ER 609(a), Barham's prior conviction would have been *per se* admissible without any considerations as to time, had defendant's case gone to trial at some point before March 7, 2011. The trial below occurred just several months later, in September of 2011. In circumstances such as those presented in this case, the trial court erred by excluding such evidence. Excluding evidence in cases such as this solely based on the 10 year time limit, which had not expired until well after the time charges were filed against the defendants, might serve to encourage tactical, manipulative strategies by both sides involved in criminal cases in order to obtain "bright-line" rulings in their favor, one way or the other, excluding evidence that they see as hurtful to their particular case.

ER 609(b) has a relief valve to avoid this problem, in the form of judicial discretion to permit use of evidence if the court determines in the

interests of justice, that the probative value of the conviction information substantially outweighs its prejudicial effect. The interests of justice and the value of Barham's conviction far outweighs any potential prejudicial effect.

Because witness credibility is always a jury question, *State v Williams*, 96 Wn.2d 215, 222, 634 P.2d 868 (1981); *State v Robinson*, 35 Wn. App. 898, 901, 671 P.2d 256 (1983), the jury should hear all relevant evidence pertaining to the credibility of key witnesses before they are asked to render a verdict -- especially where that witness is not the defendant, and not subject to the special protections afforded defendants-as-witnesses. ER 609. Knowledge that one of the two witnesses necessary for the State to prove its perjury case against the defendants in the case below *has previously been convicted of a crime of dishonesty* is certainly a solid piece of information that should weigh heavily on any juror's assessment of credibility. That was not allowed to occur in this case. Such an omission runs counter to one of the safeguards used to prevent erroneous convictions for perjury· the requirement that there be two credible witnesses. If the credibility of one of the two required witnesses is artificially elevated through exclusion of evidence regarding his prior conviction for a crime of dishonesty, it can hardly be said that the

defendants below were given a fair trial. Once the two witness rule is satisfied, it is for the jury to decide the trustworthiness of the evidence, what weight it should be accorded and the credibility of the witnesses *United States v Davis*, 548 F.2d 840, 843–44 (9th Cir.1977); *Tanner v. State*, 681 S.W.2d 626, 628 (Tex.Ct.App.1983) ("it has long been within the province of the jury to determine for themselves whether they believe a particular witness in a perjury trial.") Here, the scales of credibility were over-weighted for the prosecution since one of its key witnesses' prior convictions for a crime of dishonesty was improperly excluded from the trial testimony.

Because perjury is a charge in which credibility is always the central issue, "the centrality of the credibility issue" in this case heavily favors admission of the prosecution witness's prior conviction of a crime of dishonesty. Absent knowledge of such conviction, the jury was deprived of a material piece of evidence that would have likely affected their assessment of the witness's credibility.

The jury's knowledge of such background of a critical witness can, and should, have a substantial effect on a jury's assessment of witness credibility. In a "swearing contest" such as this, it is impossible to

conclude that the jury's verdict would have been the same had the witness's conviction of dishonesty not been excluded.

As explained in *State v White*, 31 Wn. App. 655, 644 P.2d 693 (1982), "when the appellate court is unable to say from the record whether the defendant would or would not have been convicted but for the error, then the error may not be deemed harmless." *State v. Martin*, 73 Wn.2d 616, 440 P.2d 429 (1968). A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case. *State v Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947), *State v Oswalt*, 62 Wn.2d 118, 381 P.2d 617 (1963). In *Oswalt*, the Court reversed a conviction because the defendant's alibi witness had been impeached on a collateral matter. The Court stated:

> The defense apparently rested upon alibi. The state seemingly considered the testimony of witness Ardiss sufficiently credible to require this attack. The defendant was convicted. It is difficult, therefore, to classify admission of the testimony in question trivial, formal, academic, or harmless, and to conclude that such did not affect the outcome of the case. The alternative is that it was prejudicial. We so hold.

Oswalt at 122-23. The same standard should control in this case.

In the case below, the prosecution's entire case turned on the credibility of its witnesses. One of its two primary witnesses who testified as to events in and around the mobile home on the date of the police response in question, Barham, had a prior conviction for a crime of dishonesty. Evidence of the witness's conviction was excluded from consideration by the jury, based upon the State's objection to such evidence in pre-trial motions. As in the *Oswalt*, where the *admission* of evidence was found to be unfairly prejudicial to a convicted defendant in the course of his own trial, it is difficult to conclude that the *exclusion* of testimony regarding a key witness's prior conviction of a crime of dishonesty in a case of perjury did not affect the outcome of this case. It is especially true here, where credibility of witnesses is at the very heart of the case. Under such circumstances, the error cannot be deemed harmless, trivial, or to have had no impact on the outcome of this case. Accordingly, the perjury conviction should be reversed.

C. DEFENSE COUNSEL'S REPRESENTATION AT TRIAL FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS, AND SUCH DEFICIENT REPRESENTATION PREJUDICED THE DEFENDANT.

Effective counsel is guaranteed by the Sixth Amendment to the United States Constitution and by article I, section 22 of the Washington

State Constitution. *State v Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To prove ineffective assistance of counsel, the defendant must show that defense counsel's representation fell below an objective standard of reasonableness, and that this deficient representation prejudiced the defendant. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). The defendant carries the burden to show ineffective assistance based on the record established in the trial proceedings. *McFarland, supra.*

In the case below, appellant's trial counsel submitted no pre-trial motions of his own, no written responses to the State's motions, and failed to submit persuasive legal authority available to him on critical issues now raised on appeal. Had he done so, this case should have been dismissed before trial, or at the conclusion of the state's case, as it did not meet its burden during its case in chief.

Significantly, following the jury's verdict, appellant's trial counsel haplessly recommended jail time, and other conditions for appellant, admitting that he was doing so without conferring first with his client. Appellant was wrongly convicted, but even in light of his conviction, at sentencing, his attorney owed him the common sense and decency to advocate for minimal conditions and penalties, as applied to other first-

time offenders with no prior record. The record below illustrates that appellant's trial counsel was asleep at the wheel, and allowed the prosecution to run circles around him in the courtroom. Defendant's conviction despite the weak case presented by the prosecution is sufficient proof of the prejudice experienced by the defendant.

D. THE APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE THE TRIAL JUDGE SEALED THE JUROR QUESTIONNAIRES WITHOUT A *BONE-CLUB*[3] HEARING.

The Washington Supreme Court recently accepted review of a Court of Appeals, Division I decision, *State v Tarhan* (Sup. Ct. # 85737-7), which will address the question of the proper remedy for a trial court's violation of a defendant's right to a public trial under Washington State Const. Art. 1, sec. 22.

As argued by *Tarhan*, the Washington Supreme Court has scrupulously protected the accused's and the public's right to open 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." *State v Strode,* 167 Wn.2d 222, 226, 217 P.3d 310 (2009), citing *State v.*

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

Easterling, 157 Wn.2d 167, 174-75, 137 P.3d 825 (2006) (emphasis added). *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); *In re Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004), *as amended on denial of reconsideration* (2005) - (reversing a conviction where the court was closed during voir dire and holding that the process of juror selection is a matter of importance, not simply to the adversaries but to the criminal justice system); *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." *In re Orange*, 152 Wn.2d at 805, citing *Bone-Club*, 128 Wn.2d at 259 (emphasis in original).

Determining the harm which 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.

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.").

The *Tarhan* decision from Division One relies almost entirely on *State v Coleman*, 151 Wn App. 614, 214 P.3d 158 (2009). Division One decided *Coleman* on August 17, 2009, about three months before *Strode* was issued. In *Coleman*, the court recognized that the sealing of juror questionnaires must be preceded by a *Bone-Club* hearing. *Coleman*, 151 Wn. App. at 621-23. Despite the fact that no such hearing was held in Coleman's case, the court declined to reverse Coleman's conviction, instead deciding that "[o]n these facts, we do not agree that structural error occurred." *Supra* at 623-24.

The Court's decision not to apply structural error analysis was based on three factors:

> 1. The questionnaires were used only for the selection of the jury, which proceeded in open court.
>
> 2. The questionnaires were not sealed until several days after the jury was seated and sworn.
>
> 3. [T]here is nothing to indicate that the questionnaires were not available for public inspection during the jury selection.

Supra at 624. From these three factors the court concluded that "the subsequent sealing order had no effect on Coleman's public trial right."

But *Coleman's* harm analysis is no longer viable in the wake of *Strode*, and its value as precedent is dubious in light of the Supreme Court's subsequent decision in *Strode*.

In the case below, every prospective juror completed the questionnaire to which the public was denied access without a *Bone-Club* hearing. To the extent that *Coleman* or any other case suggests that the sealing of juror questionnaires without a hearing is a trivial or de minimis violation of the public trial right and is therefore not a structural error, it has been implicitly overruled by the Washington Supreme Court in *Strode*. Simply put, in the instant case, the trial court's decision to seal the jury questionnaires is a structural error that cannot be considered harmless.

Therefore, reversal of McNicol's conviction and remand for a new trial is required.

V. CONCLUSION

For the reasons explained above, this court should reverse Mr. McNicol's conviction for perjury.

DATED this 25 day of June, 2012.

Respectfully submitted,

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON Appellee, v. REX MCNICOL, Appellant.	No. 42938-1-II DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I caused to be served by ABC Legal Messengers a copy of the attached "Opening Brief of Appellant" upon the following counsel of record:

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DATED at Seattle, Washington, this 25th day of June, 2012.

LAW OFFICES OF
JOHN HENRY BROWNE, P.S.

Lorie J. Hutt