COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

NO: 263541-III

STATE OF WASHINGTON

v.

JERRY ALLEN HERRON

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY
THE HONORABLE DAVID FRAZIER

BRIEF OF APPELLANT

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STATUTES AND RULES

I. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Appellant's CrR 3.5 motion to suppress statements made to law enforcement made on February 14, 2007, after he said ". . . [I]f I'm going to get charged I probably need an attorney, I didn't do it."

2. The trial court erred by entering the following Conclusions of Law pertaining to the CrR 3.5 hearing:

    5. Defendant's statements to Sergeant Chapman and Office [sic] Aase were voluntarily provided by the defendant, and said statements were not the result of any form of police promises, threats or coercion.
    6. The defendant's statement that he would probably need an attorney if he was going to get charged was not an unequivocal request for an attorney at that point or any other point in the police interview. Likewise, such statement did not rise to the level of an equivocal request for an attorney before proceeding further with the interview. The statement was an expression of the defendant's intent that he would obtain an attorney at a later time - when and if he were [sic] charged with the alleged rape. In other words, it was an expression of defendant's intent to have the assistance of an attorney in fighting the allegations if he was eventually charged with a crime, not a request for the assistance of counsel during the interview process.
    7. The statements made by the defendant to Sergeant Chapman and Office [sic] Aase are admissible in evidence at trial. (CP 80.)

3. The trial court erred when it closed the courtroom and questioned prospective jurors in chambers without conducting the proper analysis and without asking whether the public objected to the closing of the courtroom.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was it error for the trial court to find Appellant's suggestion to police that if he was to be charged he needed an attorney, was merely his plan for the future, when he clearly believed he had asked for an attorney?

2. Did the trial court err in finding Appellant's statements to police admissible when he made at minimum an equivocal request for an attorney during interrogation by police and the police failed to clarify whether he continued to waive his right to remain silent?

2. Was it error for the trial court to find Appellant's statements to police were voluntary when police failed to confirm that he continued to waive his right to remain silent after he tentatively asked for an attorney.

3. Does a trial court violate a defendant's right to a public trial and the public's right to open court proceedings by conducting jury voir dire in private without first establishing a compelling need for courtroom closure and seeking public objections?

4. Does closing the courtroom while conducting voir dire without conducting the proper analysis or seeking public objections warrant remand for a new trial?

III. STATEMENT OF THE CASE

A. FACTUAL HISTORY

Fifth eight year old Jerry Herron got of work at the Zip Trip and got into a conversation with the alleged victim, Kristen Beck. (RP Vol 2 210.) She said she was going to take the bus to Pullman to visit her family. (RP 211.) She said Mr. Herron offered to give her a ride to the bus station; Mr. Herron said she asked him to taker her. (RP 212, CP 45, 53-54.) After she got her ticket at the station, she had about an hour and forty-five minutes to kill so they went to Mr. Herron's house to drink beer. (RP 216.) They stopped at a Shell Station in Airway Heights on the way to buy some more beer. (CP 48.)

They went to Jerry's trailer house and had more beer. (RP 216.) When they got back to the bus station, she missed her bus by a few minutes. (RP 220.) At that point, the victim begged Jerry to drive her down to Pullman, she testified he offered to drive her to Pullman if he could get money for gas. (CP 49, 56.)

They went back to Mr. Herron's house before going to Pullman and were there for about an hour. (CP 48.) While there, she called her father in Pullman to see if he would give Jerry money for gas if he drove her there. (RP 222.) Also while at Jerry's house, according to the victim, Mr. Herron told her he would take her to Pullman if she would have sex with him. (RP 25.) She claimed she left his house and went to the neighbor to call her father again. (RP 226-27.) Jerry remembered she did leave his house for a few minutes, but she went out to play with the neighbor's dog.

(CP 65.) The victim testified she was upset about his proposition. (RP 226.) When she calmed down she said she went back over to Mr. Herron's house, she testified, to get him to drive her back to Spokane. (RP 228.) She said he apologized for what he said and again offered to give her a ride to Pullman. (RP 229.)

On the way to Pullman, Jerry stopped a couple of times to urinate. (RP 231, CP 52.) Then, the victim claims, he pulled off the road and told her to have sex with him; she refused. She claims he then put a knife to her neck. She pushed it away resulting in a cut on her finger. She said he held the knife up again scratching her cheek. He told her to take off her clothes. She testified he got on top of her and had sex with her. (RP 233-37.) After that they got back on the road and he took her to Pullman. Where they went first to her brother's house and he was not home, then to a McDonald's where she used the phone to call her father. (RP 241-42.) While she was waiting outside the McDonald's, Mr. Herron got tired of waiting for her father and left without getting his gas money. (CP 46.)

When her father picked her up she reported to him she was raped so he took her to the hospital where they did an examination and the hospital called police. (RP 248.) Several samples were taken during the exam and DNA testing was done. (RP 530-38.) It was determined that Mr. Herron's DNA matched that of sperm cells from the victim's vagina. (RP 538.)

Jerry was arrested by Airway Heights police and later interviewed by Whitman County Sheriff's Deputies. (RP 393.) During his interrogation by the deputy, Mr. Herron repeatedly denied raping the

victim. (CP 49, 51, 57-58, 60, 62.) Twice during the interrogation he questioned whether he needed an attorney (RP 254, 268), he also insisted he did not have sex with the victim. (CP 57-58) Police charged Mr. Herron with Rape 1°.

B. PROCEDURAL HISTORY

On February 16, 2007, an Information and Amended Information were filed charging Rape 1°. (CP 5, 8.) Mr. Herron was arraigned on February 23, 2007. (CP 11-12.) At a 3.5 hearing to determine the admissibility of Mr. Herron's statements to police and a recording of that interview with police, Mr. Herron contested the admissibility of the recording. (CP 37-40.) He argued he made an equivocal request for an attorney while police were interrogating him. (CP 38-40,.) The trial court agreed the police must clarify such a request before further questioning, but ruled that Mr. Herron had not made an equivocal request for an attorney. (CP 80, 235.) The matter went to trial on June 18, 2007. During *voir dire* the court decided to interview some prospective jurors in chambers regarding their answers to questions on a questionnaire. (RP Vol I 68.) The court asked for and received a waiver from Mr. Herron to his right to a public trial in order to conduct these interviews in private. However, no inquiry was made of the public at the trial regarding any objections to jurors being interviewed in private.

Mr. Herron was found guilty of Rape 1°, and the jury answered yes to the question of whether he was armed with a deadly weapon. (CP 179-180.) He was sentenced on July 27, 2007. He was ordered to pay a total

of $7,594.00 in fees, fines and costs (CP 240), to spend 24 months in confinement without accruing good time, and 207 months of confinement with good-time for a total of 231 months, and that he will be on Community Custody for life following his confinement. (CP 242.) This timely appeal followed. (CP 226.)

IV. ARGUMENT

The public's right to a public trial was violated when the trial was closed and prospective jurors were interviewed in judge's chambers without any inquiry of the public whether there were any objections to the private interviews. In addition the trial court erroneously admitted a taped police interrogation into evidence in which he denied having sex with the victim when it was later found through DNA testing they did have sex. During the interrogation, Mr. Herron suggested he needed an attorney and police should have clarified whether he wanted one before continuing to question him.

A. THE TRIAL COURT ERRONEOUSLY ADMITTED MR. HERRON'S STATEMENTS TO POLICE AT TRIAL IN VIOLATION OF HIS MIRANDA RIGHTS.

In *Miranda*, the United States Supreme Court determined that the Fifth and Fourteenth Amendment prohibitions against compelled self-incrimination require that custodial interrogation be preceded by advice to the accused that he has the right to remain silent and the right to the presence of an attorney. *Miranda v. Arizona*, 384 U.S. 436, 479, 16 L. Ed. 2d 694, 86 S. Ct. 1602, (1966). If the accused indicates in any manner at any time prior to or during questioning that he wishes to remain silent, the interrogation must cease. *Miranda* at 473-474. If the accused requests

counsel, the interrogation must cease until an attorney is present. *Miranda* at 474. The *Miranda* decision recognizes, under certain circumstances, the person being interrogated may validly waive the right to counsel and his right against self-incrimination. *Miranda* at 475. If the interrogation continues without the presence of an attorney, the state has the heavy burden of establishing the defendant's waiver of his privilege against self-incrimination and his right to retained or appointed counsel. *Escobedo v. Illinois*, 378 U.S. 478, 490 n.14, 12 L. Ed. 2d 977, 84 S. Ct. 1758 (1964). The state can satisfy the burden if it can prove the voluntariness of the statements by preponderance of the evidence. *Lego v. Twomey*, 404 U.S. 477, 486-87, 30 L. Ed.2d 618, 92 S. Ct. 619 (1974); *State v. Braun*, 82 Wn.2d 157, 162, 509 P.2d 742 (1973). The waiver must be a knowing, voluntary, and intelligent relinquishment of a known right.[1] Whether a waiver by the defendant is shown depends in each case upon the particular facts and circumstances surrounding that case including the background, experience and conduct of the defendant. *Edwards v. Arizona*. 451 U.S. 477, 482, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981). The standard for waiver is necessarily high and the ultimate responsibility for resolving the constitutional question lies with the courts. *Miranda* at 486 n.55.

Under this principle, where a person unequivocally requests an attorney, all custodial interrogation must stop until an attorney is present

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[1] A waiver of the right to an attorney is valid only where it clearly indicates a knowing and intelligent willingness to forgo this constitutional right. *Davis*, 512 U.S. at 458; *State v. Earls*, 116 Wn.2d 364, 378-779, 805 P.2d 211 (1991) (citing *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S. Ct. 1880, 68L.Ed.2d 378 (1981)).

unless the person waives the right to counsel on his own initiative. *Davis v. United States*, 512 U.S. 452,458, 114 S. Ct. 2350,129 L. Ed. 2d 362 (1994); *State v. Chapman*, 84 Wn.2d 373,377,526 P.2d 64 (1979). An unequivocal request to speak to an attorney must be "scrupulously honored." *State v. Grieb*, 52 Wn. App. 573, 576, 761 P.2d 970 (1988).

1. An Equivocal Request for an Attorney Should Result in the Police Asking for Clarification Whether the Suspect Wants an Attorney or to Continue Answering Questions.

Not all requests for an attorney are black and white. Washington courts recognize that some requests for counsel are equivocal. An equivocal request for an attorney is one that expresses both a desire for counsel and a desire to continue the interview without counsel. *State v. Quillin*. 49 Wn. App. 155, 159, 741 P.2d 589 (1987), *review denied*. 109 Wn.2d 1027 (1988). Once an equivocal request for counsel is made, an officer must limit questions to clarifying whether or not the accused intends to exercise his right to an attorney. *State v. Robtoy*. 98 Wn.2d 30, 38-39, 653 P.2d 284 (1982).[2] If, after clarification, the suspect waives his right to counsel, questioning may resume. *Id.* In determining whether a request for an attorney is equivocal, courts use an objective standard, i.e., whether a reasonable police officer in the circumstances would understand the state-

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[2] When an accused makes a statement that is an equivocal request, officers must not continue interrogation but may ask questions that are "strictly confined" to clarifying the suspect's request. *Robtoy*, 98 Wn.2d at 39. "Where a person makes an equivocal request for an attorney, the scope of that interrogation is immediately narrowed to one subject and one only. Further questioning thereafter must be limited to clarifying that request until it is clarified." *Id.* (emphasis added).

ment to be a request for an attorney. *Davis v. United States*. 512 U.S. 452, 459, 129 L. Ed. 2d 362, 114 S. Ct. 2350 (1994).

2. Washington State Supreme Court has not adopted *Davis* rationale, *Robtoy* still applies.

The Washington State Supreme Court, however, has not completely adopted the rationale from *Davis*, though two of the three Divisions of the Court of Appeals have. *State v. Burke*, 78528-7 (Wash. 3-13-2008), *State v. Radcliffe*, 139 Wn. App. 214, 224, 159 P.3d 486 (Div. II 2007), *State v. Walker*, 129 Wn. App. 258, 276, 118 P.3d 935 (Div. I 2005).

In *Burke*, the most recent Washington Supreme Court case to address this issue, the court in dicta said it might follow *Davis*, but did not indicate it absolutely would. *Burke* 78528-7 (Wash. 3-13-2008). Until it does, *Robtoy* is still the standard set down by the state supreme court. Accordingly, an officer when confronted with an equivocal request for an attorney must pause, not discontinue, his questioning and clarify whether the suspect is asking for an attorney before continuing questioning. *Robtoy*, 98 Wn.2d at 38-39. This does not place an undue burden on law enforcement, and it does give an inarticulate suspect, who may be intimidated by police, his request for counsel.

3. An Equivocal Request by a Suspect May Be Perceived by Him/her as a Legitimate Request for Counsel.

A suspect who begins answering police questions might be hesitant to later assert his rights for fear of angering the officers. Consequently, his request for counsel might be in the form of a suggestion or a question. The Supreme Court's *Davis* decision allows police to ignore such a tentative

request. This is contrary to *Miranda* which was designed to make sure an individual gets counsel if he wants it. *Miranda* at 473-474. If one who is being questioned must make an unequivocal or unambiguous request for counsel, then *Miranda* warnings should state just that in simple language anyone can understand. Rather than changing the *Miranda* warnings, on the other hand, a simpler solution would be that if a suspect who probably wants an attorney, but merely suggests "maybe I should have an attorney," or questions officers "do you think I need an attorney," police should be required to ask "do you want an attorney, or can we keep talking?" Either courts are committed to *Miranda* or they are not. If what courts want to do is to abandon *Miranda* warnings, then they should do away with them. What seems to be happening instead is that *Miranda* is dying a slow death by a thousand cuts as the courts keep slicing (distinguishing) away and with each cut further narrowing its application, and consequently eroding every citizen's right to remain silent.

4. Mr. Herron's Rights to Remain Silent Were Not Honored, and He Believed He Had Requested Counsel While Being Interrogated by Police.

Clearly, Mr. Herron did finally unequivocally assert he was done talking. (CP 66.) Yet instead of discontinuing the interview, the police officer continued asking him questions. *Id.* Mr. Herron made it clear he did not want to talk any longer, yet the interview continued. This was clearly a violation of his rights. *Miranda* at 473-474. The moment Jerry said he was done talking (CP 66), the officer should have discontinued the interrogation. He did not. That is a clear indication the officer did not

intend to honor Mr. Herron's right to remain silent in any case. In addition, Mr. Herron believed he had asked for counsel while being questioned because when asked at the end of the interrogation whether he had requested an attorney, Mr. Herron answered he had. (CP 66.)

B. THE TRIAL COURT IMPERMISSIBLY CONDUCTED A PORTION OF JURY VOIR DIRE IN PRIVATE WITHOUT FIRST CONDUCTING THE PROPER ANALYSIS AND PROCEDURE, THUS DENYING THE PUBLIC ITS RIGHT TO A PUBLIC TRIAL.

1. The Federal and State Constitutions Provide the Accused the Right to a Public Trial and Also Guarantee Public Access to Court Proceedings.

Public criminal trials are a hallmark of the Anglo-American justice system. *Globe Newspaper Co. v. Superior Court*. 457 U.S. 596, 605, 102 S. Ct 2613, 73 L Ed.2d 248 (1982); *Richmond Newspapers. Inc. v. Virginia*, 448 U.S. 555, 564-73, 100 S. Ct. 2814, 65 L. Ed.2d 973 (1980) (plurality) (outlining history of public trials from before Roman Conquest of England through Colonial times). "A trial is a public event. What transpires in the court room is public property." *State v. Coe*. 101 Wn.2d 364, 380, 679 P.2d 353 (1984), quoting *Craig v. Harney*, 331 U.S. 367, 374, 67 S. Ct. 1249, 91 L. Ed.2d 1546 (1947).

Both the federal and state constitutions guarantee the accused the right to a public trial. The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial..." Article I, section 22 of the Washington Constitution also guarantees "[i]n criminal prosecutions, the accused shall have the right to ... a speedy public trial."

The public also has a vital interest in access to the criminal justice system. The Washington Constitution provides, "Justice in all cases shall be administered openly, and without unnecessary delay." Wash. Const, art. I, section 10; see U.S. Const, amend. 1. This clear constitutional provision entitles the public and the press to openly administered justice. *Seattle Times Co. v. Ishikawa,* 97 Wn.2d 30, 36, 640 P.2d 716 (1982); *Federated Publications Inc. v. Kurtz*, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980). Public access to the courts is further supported by article 1, section 5, which establishes the freedom of every person to speak and publish on any topic. *Kurtz*. 94 Wn.2d at 58. In the federal constitution, the First Amendment's guarantees of free speech and a free press also protect the right of the public to attend a trial. *Globe Newspaper*, 457 U.S. at 603-05; *Richmond Newspapers*, 448 U.S. at 580 (plurality).

Although the defendant's right to a public trial and the public's right to open access to the court system are different, they serve "complimentary and interdependent functions in assuring the fairness of our judicial system." *State v. Bone-Club*, 128Wn.2d 254, 259, 906 P.2d 325 (1995).

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.

Id., quoting *In re Oliver*, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L. Ed. 682 (1948).

Open public access to the judicial system is also necessary for a healthy democracy, providing a check on the judicial process. *Globe*

Newspaper, 457 U.S. at 606; *Richmond Newspapers*, 448 U.S. at 572-73 (plurality). Criminal trials may provide an outlet for community concern or outrage concerning violent crimes. *Press-Enterprise Co. v. Superior Court*. 464 U.S. 501, 509, 104 S. Ct. 819, 78 L. Ed.2d 629 (1984) (*Press-Enterprise I*). When trials are open to the public, citizens may be confident that established, fair procedures are being followed and that deviations from those standards will be made known. *Press-Enterprise I,* 464 U.S. at 508. Openness thus "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Id.* at 501. The role of public access to the court system in maintaining public confidence was also noted by the Washington Supreme Court.

> We adhere to the constitutional principle that it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice. Openness of courts is essential to the courts' ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity.

Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993).

The right to a public trial includes the right to have public access to pre-trial proceedings. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006) (public trial right includes pre-trial hearing regarding co-defendant's interest in pleading guilty); *In re Personal Restraint of Orange,* 152 Wn.2d 75, 812, 100 P.3d 291 (2004) (public trial right applies to jury voir dire); *Bone-Club*, 128 Wn.2d at 257 (public trial right at pre-trial suppression hearing).

2. Washington Courts Apply a Five-part Test When Addressing a Request for Full or Temporary Exclusion of the Public from a Trial.

In order to protect the accused's constitutional right to a public trial, a trial court may not conduct secret or closed proceedings "without, first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure order." *Easterling*, 157 Wn.2d at 175

The presumption of openness may be overcome only by a finding that closure is necessary to "preserve higher values" and the closure must be narrowly tailored to serve that interest. *Waller v. Georgia*, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed2d 31 (1984), citing *Press-Enterprise I*, 464 U.S. at 510. Moreover, the trial court must enter specific findings identifying the interest so that a reviewing court may determine if the closure was proper. *Id.*

A Washington court faced with a request for closure must perform a weighing test based upon the five criteria adopted in *Bone-Club* and *Ishikawa*. which mirrors the Waller decision. *Bone-Club*, 128 Wn.2d at 259-60. The test requires:

1. The proponent of closure or sealing must make some showing [of a compelling state interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right;

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

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

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

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

Bone-Club, 128 Wn.2d at 258-59, quoting *Eikenberry*. 121 Wn.2d at 210-11. *Accord, Dreiling v. Jain*, 151 Wn.2d 900, 913-15, 93 P.3d 861 (2004) (test applied to motion to seal information filed in support of civil motions); *Orange*, 152 Wn.2d at 806-07; *Ishikawa*, 97 Wn.2d at 37-39.

3. The trial court did not apply the five-part Bone-Club test before closing the courtroom before questioning jurors in private.

In *State v. Frawley*, 140 Wn. App. 713, 167 P.3d 713 (2007), the Court of Appeals reversed a first degree murder conviction because a trial court conducted part of jury voir dire in chambers. There was no discussion of the reasons for conducting individual voir dire in a closed courtroom in that case. *Id.* at 718, 720. The trial court "did not go through the *Bone-Club* requirements on the record, nor did it enter specific findings justifying the closure." *Id.* 721.

The *Frawley* Court refused to determine on appeal whether the *Bone-Club* factors would have been met since the trial court had not done so. *Id.* The court ruled that it would be an inappropriate exercise of appellate review. *Id.* The Supreme Court also rejected requests to conduct the *Bone-Club* analysis for the first time on appeal in *Bone-Club* and *Brightman*. *Bone-Club*, 128 Wn.2d at 261; *State v. Brightman,* 155 Wn.2d 506, 518, 122 P.3d 150 (2005).

A similar error occurred in *State v. Duckett*, 141 Wn. App. 797,

2007. In this case involving multiple rape allegations, the court told prospective jurors that it would discuss privately issues regarding sexual abuse and media exposure. *Id.* at 801. Writing for the majority, then-Judge Deborah Stephens ruled that any time the trial court closes portions of the proceedings to the public, including jury selection, its failure to engage in the necessary analysis is an error that cannot be cured by an appellate court's post hoc justifications. *Id.* at 805.

> . . . the burden is on the trial court to affirmatively provide the defendant *and members of the public* an opportunity to object. See *Easterling*, 157 Wn.2d at 176 & n. 8. There is no meaningful opportunity to object "unless the court informs potential objectors of the nature of the asserted interests." *Bone-Club*, 128 Wn.2d at 261; *Ishikawa*, 97 Wn.2d at 39.

Duckett, 141 Wn. App. at 806 (emphasis added).

The *Duckett* Court also rejected the prosecution's efforts to distinguish a juror's request to impart private information from other court proceedings that are presumptively open to the public. As with all court rules, GR 31's provisions regarding jury privacy are subject to the constitutional requirements of open court proceedings. *Id.* at 808. A court's legitimate reasons for conducting a portion of jury void dire in closed proceedings must simply comply with the requirements of *Bone-Club*, *Id.*

This Court distinguished *Frawley* in *State v. Momah*. 141 Wn. App.705, 171 P.3d 1064 (2007). In *Momah*, the trial court acceded to the parties' request that jurors be questioned individually in chambers regarding their ability to be fair in a high-profile sexual assault case. *Id.* at 1065.

Defense counsel expressly sought such private questioning of the jurors based on the fear that the rest of the jury could be contaminated. *Id.* at 1066. The *Momah* Court held that it could not tell from the record whether the judge's chambers in which the individual questioning occurred was actually closed to the public, even though the intent of the individual questioning was to speak with the jurors privately and the judge announced that the door to the chamber was closed. *Id.* at 1067. With all due respect, the *Momah* Court's contention is illogical that proceedings held in a judge's chambers in which the door is closed and after explicit conversations regarding the desire to hold private courtroom sessions does not constitute a closed court proceeding. The *Momah* Court in distinguishing *Frawley*, made a distinction without a difference, *Momah* does not dictate the result here.

In the case at bar, the court conducted a portion of the jury voir dire in the judge's chambers, outside of the public at the suggestion of the court. (RP Vol I 68, 103.) The defense did not seek these private conferences, nor did the prosecution but both agreed to the procedure. (RP Vol I 69-70.)

Prior to privately questioning prospective jurors in chambers, no party sought private questioning of jurors. The court did not discuss whether there was a serious and imminent threat that required private questioning of the jurors. The court did not give anyone present an opportunity to object to the private questioning of individual jurors, as it is required to do by the second *Bone-Club* factor. *Easterling*, 157 Wn.2d at 176.

Contrary to the remaining *Bone-Club* factors, the court did not make any finding that the proposed closure was the least restrictive method available for protecting the threatened interests. Having failed to identify the compelling interests at stake, the court did not weigh the public's right of access and importance of a public trial against the need for closure. Because there was no finding, the court violated the constitutional requirement of open court proceedings.

4. The Court Violated the Public's Right of Access.

The requirements for protecting the public's right to open courtrooms "mirrors" the requirements used in criminal cases. *Easterling,* 157 Wn.2d at 175. The court may not close the courtroom without "first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure order." *Id.* (citing *Bone-Club*, 128 Wn.2d at 258-59; and *Ishikawa*, 97 Wn.2d at 37); see *Easterling*, 157 Wn.2d at 174-75 (trial court must "*resist a closure motion except under the most unusual circumstance.*" Emphasis in original).

A member of the public is not required to assert the public's right of access in order to preserve this issue for appeal. *Easterling,* 157 Wn.2d at 176 n.8. In *Easterling,* the Supreme Court reversed a criminal conviction due to the trial court's closure of the courtroom during a pre-trial hearing that solely involved the co-defendant, whose case had previously been severed from the defendant. *Id.* at 178, 180 n.11. The trial court in *Easterling* erred by not articulating the necessary grounds for closing the courtroom, even absent any objection to the courtroom closure.

Id.

In *Easterling*, there was no objection to the courtroom closure yet the court's failure to articulate a sufficiently compelling reason for closing the hearing to the public violated both the public's and the defendant's rights to an open and public trial. *Id.* at 179.

> This decision to close a part of a criminal trial to the public runs afoul of the article I, section 10 guarantee of providing open access to criminal proceedings. It also runs contrary to this court's consistent position of strictly protecting the public's and the press's right to view the administration of justice. *Accord Eikenberry*, 121 Wn.2d 205; *Ishikawa*, 97 Wn.2d 30.

Easterling, 157 Wn.2d at 179.

As the *Easterling* Court ruled, the public has a right to access court proceedings unless there is a compelling need for closure. Generic and even reasonable concerns for juror privacy do not trump the constitutional right of public proceedings. *Frawley,* 140Wn.App. at 10.

5. Reversal is required.

The remedy for a violation of the public's right of access is remand for a new trial. *Easterling,* 157 Wn.2d at 179-80. In *Easterling*. the court rejected the possibility that a courtroom closure may be de minimis, even for a limited closure applicable to a limited hearing for a separately charged co-defendant. *Easterling,* 157 Wn.2d at 180 ("a majority of this court has never found a public trial right de minimis. Where a portion of the proceedings are closed to the public, the closure is not trivial or de minimis and requires reversal. *Easterling,* 157 Wn.2d at 174, 180 n. 12. Beyond that, "[t]he denial of the Constitutional right to a public trial is one of the

limited of classes of fundamental rights not subject to harmless error analysis. *Id.* at 181. In *Frawley* and *Duckett* the remedy was reversal and a new trial. *Frawley,* 140 Wn. App. at 721, *Duckett,* 141 Wn. App. at 809.

V. CONCLUSION

The trial court erroneously admitted a recording of Mr. Herron's interrogation by police because the police failed to clarify whether he wanted counsel when he suggested he should have an attorney. The trial court also violated the public's right to open court proceedings by closing the trial and questioning prospective jurors in chambers without conducting the proper analysis or asking if the public objected.

Respectfully submitted on this 21st day of May, 2008.

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