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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

26830-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DALLIN D. FORT, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

SUPPLEMENTAL BRIEF OF RESPONDENT

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I.

INTRODUCTION

Respondent, State of Washington, respectfully submits this supplemental brief as requested by the Court on January 14, 2013.

II.

ISSUE PRESENTED

(1) What is the effect of the recent United State Supreme Court decisions in *State v. Wise*, -- Wn.2d --, 288 P.3d 1113 (2012); *State v. Paumier*, -- Wn.2d --, 288 P.3d 1126 (2012); and *In re PRP of Morris*, -- Wn.2d --, 288 P.3d 1140 (2012), on this case?

III.

ARGUMENT

The State has examined *Paumier*, *Wise*, and *Morris*. At the request of this court, the State submits the following supplemental brief.

As noted in the State's previous response, the defendant was not present for the questioning of the jury in chambers. In fact, the defendant wanted to depart and leave his attorney to handle any individual questions. RP 40-41. The trial court did not think this was a good idea and even gave the defendant and his attorney time to discuss the matter between themselves. RP 41.

The defendant stated to the trial court his reasons for not wanting to be present for juror questioning. The defendant noted the effect that his presence might have on potential jurors. RP 41

The decision in *Wise* supports the Court's earlier decision in *State v. Momah*, 167 Wn.2d 140, 152, 217 P.3d 321 (2009). The importance of supporting *Momah* is seen in the part of the holding that notes that the defendant in *Momah* had ample opportunity to object, but did not do so. *Momah, supra* at 155. The *Momah* Court noted the difference between a defendant simply being present at a trial and a defendant that *actively participates* in the questioned jury selection process.

While this court stated in *Momah* that not all closures are fundamentally unfair and thus not all closures are structural error, *Momah* presented a unique set of facts. This court distinguished the public trial right violation in *Momah* from the public trial right violations in *Easterling*, *Brightman*, *Orange*, and *Bone-Club*, which all involved structural error. *Momah* was distinguishable from other public trial violation cases on two principal bases: (1) more than failing to object, the defense affirmatively assented to the closure of voir dire and actively participated in designing the trial closure and (2) though it was not explicit, the trial court in *Momah* effectively considered the *Bone-Club* factors. *Momah* presented a unique confluence of facts: although the court erred in failing to comply with *Bone-Club*, the record made clear that the defendant and public were aware of the rights at stake and that the court weighed those rights, with input from the defense, when considering the closure.

In *Momah*, we implied that "fundamental unfairness" was the test for structural error. However, the United States Supreme Court has clearly stated that "fundamental unfairness" is not the sole criterion of structural error and

that there are other relevant considerations, including “the difficulty of assessing the effect of the error” and “the irrelevance of harmlessness.”

...The unique facts of *Momah* are not present in *Wise*'s case. We emphasize that it is unlikely that we will ever again see a case like *Momah* where there is effective, but not express, compliance with *Bone-Club*.

State v. Wise, 288 P.3d at 1119-20 (citations omitted).

As noted previously, the defendant in this case refused to be present during the selection process. The defendant, despite the trial court's warnings, elected to absent himself from the private juror selection process. The defense counsel elected to proceed with individual questioning without the defendant being present.

This case presents a *Momah* situation in that the defense undertook an active part in the trial court's decision to interview the individual jurors in chambers. Certainly, the defendant was quite aware of what was about to happen. The defendant assented to the in-chambers procedures.

To be sure, the Court in all of the recent cases have drawn a very fine line between what was a failure to follow the guidelines of *State v. Bone-Club*, 128 Wn.2d 254, 256, 906 P.2d 325 (1995), and what was not a failure to follow the *Bone-club* requirements. The Washington State Supreme Court has set a very broad range of trial behaviors which will be deemed to be erroneous and a very narrow range of circumstances which may be deemed to be satisfactory.

This case is one that treads the fine line due to the active participation of the defense in the selection of the jurors and the failure to object to the private questioning of jurors who responded positively to the juror questionnaire. As noted above, the defendant stated on the record the reason why he did not want to personally participate. The defendant felt his presence would be detrimental to his attorney's questioning of potential jurors. RP 41.

IV.

CONCLUSION

The State maintains that *Momah* is controlling and the three cases for which this court asked for the State to prepare a supplemental response are most important in the aspect that they support the continuing validity of *Momah*.

Dated this 1st day of April, 2013.

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