

No. 59369-2-I

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

STATE OF WASHINGTON, Respondent,

v.

ERIC DWAYNE VENTRESS, Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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2010 APR 22 AM 11:35

FILED
COURT OF APPEALS
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A. SUPPLEMENTAL BRIEF ISSUE

The Court has requested the parties to address the application of State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009) and State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009) to this case.

B. SUMMARY ANSWER

The majority opinion in Momah clearly holds that unless a trial is rendered fundamentally unfair by a courtroom closure, automatic reversal is not required. A trial is not rendered fundamentally unfair where the courtroom closure occurred to protect the defendant's rights and the defendant wasn't actually prejudiced by the closure. Strode, on the other hand, is a plurality opinion with two justices concurring only in the result, in which the concurrence specifically rejects the portion of the plurality's opinion that permits a defendant to raise the public's right to open proceedings under Art. 1 §10. Assuming the closure here was not de minimis,¹ Ventress was not prejudiced by the relatively short in chambers questioning where part of it occurred to avoid tainting the rest of the jury from other jurors' prior knowledge of the case, and the process resulted in

¹ The State still asserts, in accord with its response brief, that the in chambers questioning that lasted probably no more than a half hour had only a de minimis effect on the proceedings and thus did not implicate the defendant's right to a public trial. See State's response brief at 13-17.

one juror being excused for cause based on defense motion. Where, as in Momah, Ventress suffered no prejudice and actually benefitted from the in chambers questioning, no structural error occurred and reversal is not warranted.

C. ARGUMENT

Under the clear majority opinion in Momah no structural error occurred here requiring reversal. In Momah the majority emphasized that the “central aim of any criminal proceeding must be to try the accused fairly,” and that a defendant’s right to public trial does not exist, and cannot be considered, in isolation from his other constitutional rights. Momah, 167 Wn.2d at 147-48. The public trial right is not absolute, but exists so that the public may see that the defendant is dealt with fairly and that his triers are kept keenly aware of their responsibility and the importance of their function. *Id.* at 148. In Momah the judge and the parties used jurors’ responses to a questionnaire to determine which jurors should be questioned individually. Defense counsel not only agreed to question those jurors privately in chambers, but argued for expansion of the in-chambers questioning. *Id.* at 145-46. Defense counsel actively participated in the private questioning and counsel exercised a number of challenges for cause as a result of that questioning. *Id.* at 146-47. The

trial court did not conduct a Bone-Club² analysis prior to in chambers questioning, although it did consider the defendant's public trial rights and balanced them against the defendant's right to a fair and impartial jury.

The court ultimately held that the trial court's closure did not constitute structural error and therefore automatic reversal was not appropriate. Under Momah whether a closure error constitutes structural error necessarily depends upon the nature of the violation: "If, on appeal, the court determines that the defendant's right to public trial has been violated, it devises a remedy appropriate to the violation." *Id.* at 149. If the error is structural, automatic reversal is warranted. *Id.* An error is only structural though if the error "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* (*quoting Washington v. Recuenco*, 548 U.S. 212, 218-19, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)).

The court noted that in its prior cases of State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006) and In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), new trials were required because the trials had been rendered fundamentally unfair by the closure. *Id.* at 150-51. In Easterling, the closure prevented the defendant from being present

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

at a portion of his own trial, without the court ever having consulted with him. Id. at 150. In Orange, the trial was rendered fundamentally unfair because the closure excluded the defendant's family and friends from being present during voir dire, despite the defendant's repeated requests that they be present. Id. at 150-51. In those cases, where the prejudice was sufficiently clear, the errors were deemed to be structural. Id. at 151.

In distinguishing those prior cases where structural error was found, the Court noted that in Momah's case, the defendant had "affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it and benefitted from it." Id. at 151. The court presumed that the defendant made "tactical choices to achieve what he perceived as the fairest result." Id. at 155. In concluding that the closure in Momah was not structural error the court noted that the closure only occurred after the court consulted with the defense and prosecution and found that the record showed that the closure occurred to protect the defendant's right to an impartial jury and did not prejudice him. Id. at 155-56.

Strode, on the other hand, as a plurality opinion provides questionable guidance in addressing the issue under the circumstances of this case. "A plurality opinion has limited precedential value and is not

binding on the courts.” In re Isadore, 151 Wn.2d 294, 303, 88 P.3d 390 (2004). “Where there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds.” State v. Zakel, 61 Wn. App. 805, 808, 812 P.2d 512 (1991) *affirmed*, 119 Wn.2d 563, 834 P.2d 1046 (1992). The plurality in Strode found that the record did not reflect that either the closing of the courtroom was necessary to safeguard the defendant’s right to a fair trial or that there was a knowing and voluntary waiver of that right. Strode, 167 Wn.2d at 234. In Strode, the plurality opinion would hold that a court must perform a Bone-Club analysis on the record prior to closing a courtroom in unexceptional circumstances, and that failure to do so is structural error that can never be harmless. Strode, 167 Wn.2d at 223.

The concurring opinion took exception, however, to the plurality opinion’s requiring an on-the-record colloquy before waiver could be found and permitting a defendant to raise the public’s, and the media’s, right to open proceedings in order to overturn his conviction. *Id.* at 235-36. It concurred in the result in Strode because it concluded that under the facts of the case the defendant’s public trial rights had not been waived or safeguarded per Bone-Club, because the court had not weighed the

defendant's right to public trial against the competing interests. *Id.* at 232, 235.

Ventress has asserted that he should be able to receive a new trial because the public's right to open proceedings under Article 1 §10 of the Washington Constitution was violated. However, only the plurality opinion in Strode would permit Ventress to assert someone else's right in order obtain a new trial. The concurrence in Strode specifically rejected the plurality's merging of the public's right to open proceedings under Article 1 §10 and the defendant's right to a public trial under Article 1 §22. *See, Strode*, 167 Wn.2d at 232, 236 (J. Fairhurst concurring). In Momah, the majority only addressed whether there was a violation of and structural error regarding a violation of the defendant's right to public trial under Art. 1 §22. *See, Momah*, 167 Wn.2d at 147 . While the opinion does reference Art. 1 §10, it does so only in the context of the development of the Bone-Club factors test, which was borrowed from civil cases addressing allegations of Art. 1 §10 violations. *Id.* at 147-48.

Here, some jurors, who had been informed they could answer questions of a personal nature in private, requested to be heard in private. 4RP 16, 25. Defense did not object when the court informed the jurors that if they preferred not to answer a question in front of such a large

group, they could request to go in the judge's chambers, and did not object when the court announced they were going into chambers for individual voir dire. 4RP 9, 128. Individual voir dire was limited. Only seven members of the jury pool were questioned in chambers. CP 584. The individual voir dire lasted less than an hour and probably no more than a half hour. CP 583-84; State's Response Brief at 16 n.11. The jurors were questioned about what they had heard about the case and about being victims of crime. 4RP 128-144. Defense counsel actively questioned some of the jurors, in particular juror number 13. *Id.* Defense challenged for cause juror no. 13, which challenge was granted. 4RP 145-46.

Under the facts of this case, Ventress acquiesced in words and conduct to the in-chambers procedure used by the trial court. Holding individual jury voir dire in chambers regarding jurors' prior familiarity with the case and/or their experiences as victims of crime promoted the jurors' ability to be candid and prevented other prospective jurors from being tainted by any information they would learn from such questioning. As such, conducting individual jury voir dire in chambers safeguarded Ventress's right to a fair and impartial jury and did not prejudice him.

Although there was no discussion regarding the defendant's right to a public trial here like there was in Momah, there is no showing of

prejudice to the defendant as there was in Orange and Easterling. As such, no structural error occurred. As the court summarized in Momah:

... courts grant automatic reversal and remand for a new trial only when errors are structural in nature. An error is structural when it necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. In each case, the remedy must be appropriate to the violation.

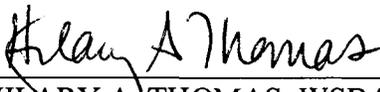
217 P.3d at 155-56. A new trial would not be an appropriate remedy in this case because the closure here did not render Ventress's trial fundamentally unfair.

Furthermore, nothing in Strode or Momah precludes this Court from finding that the closure had a de minimis effect on the proceedings and therefore Ventress's right to a public trial was not implicated or violated. As the court in Brightman acknowledged, trivial closures, those brief in duration or inadvertent, do not necessarily infringe on a defendant's right to public trial. State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150 (2005) ("... even though a trivial closure does not necessarily violate a defendant's public trial right, the closure here was analogous to the closures in *Bone-Club* and *Orange*"). Certainly a de minimis closure such as the one in this case, where there is no hint of actual prejudice to the defendant from the closure, does not warrant reversal of the conviction under Momah.

D. CONCLUSION

The purpose of the defendant's public trial right is to ensure that the defendant is treated fairly. Under Momah, not all closures, or in chambers questioning of jurors, results in structural error requiring reversal. Only those errors that render a trial "fundamentally unfair or an unreliable vehicle for determining guilt or innocence" constitute structural errors. Only where the prejudice is "sufficiently clear," should a new trial be ordered. Momah, 167 Wn.2d at 151. No prejudice can be inferred or presumed from the relatively short in chambers questioning here. Reversal is not warranted in this case.

Respectfully submitted this 21st day of April, 2010.


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CERTIFICATE

I certify that on this date I placed in the mail with proper U.S. postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, Nancy Collins, addressed as follows:

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Legal Assistant

04/21/2010
Date