

61479-7

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No. 61479-7-I

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

STATE OF WASHINGTON, Respondent,

v.

TYLER HAWKER, Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON
FILED

SUPPLEMENTAL BRIEF OF RESPONDENT

**DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By KIMBERLY THULIN
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #21210**

**Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784**

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO SUPPLEMENTAL BRIEF

This Court has ordered additional briefing from the parties to address the applicability of the decisions in 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 Hawker's assertion, raised for the first time on appeal, that his right to a public trial was violated when the parties conducted limited questioning of potential jurors on sensitive issues in chambers during voir dire.

C. ARGUMENT

- 1. Reversal of Hawker's conviction is not required pursuant to Strode and Momah because nothing in the record demonstrates Hawker suffered actual prejudice as a result of the limited in chamber questioning of potential jurors. To the contrary, Hawker knowingly participated and benefited from the proceedings wherein potential jurors disclosed sensitive information relevant to ensuring Hawker's could obtain a fair trial.**

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, as in this case, the judge and the parties used jurors' responses to a jury questionnaire to determine if some jurors wished to be questioned in chambers on sensitive issues relevant to jury selection. RP 19 (1/29/08). Defense counsel in Momah, as in Hawker's case, agreed to question those jurors in chambers and actively participated in the private questioning and, exercised challenges for cause as a result of the information obtained during questioning. Momah at 146-47, RP 79-84 (1/29/08). The trial court in Momah and in this case however, did not conduct a Bone-Club analysis prior to going in chambers to question potential jurors. Although, in Momah the court did consider the defendant's public trial rights in conjunction to considering the defendant's right to a fair and impartial jury when the court decided to use judicial chambers for part of voir dire. And in this case, the trial court aware of Hawker's right to a public trial, did ask both parties and the defendant if the limited in chamber's proceeding was acceptable to them and asked if anyone in the courtroom objected to proceeding in such a manner, prior to retreating briefly in chambers with the parties and the court reporter to inquire of five potential jurors on sensitive issues. RP 79.

Our State Supreme Court held in Momah that while the trial court's in chamber voir dire did constitute a constitutional violation of Momah's right to a public trial, the error was not a per se structural error and automatic reversal was therefore not appropriate. In Momah the majority held that the determination of 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 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. In concluding that the closure in Momah was not structural error, that the closure occurred to protect the defendant's rights and did not prejudice him, the court presumed that the defendant made "tactical choices to achieve what he perceived as the fairest result." *Id.* at 155. In addition, the court noted that the closure only occurred after the court consulted with the defense and prosecution. *Id.* Finally, the closure had occurred to safeguard the defendant's constitutional right to an impartial jury. *Id.*

In contrast to the Momah decision, the plurality opinion Strode provides little guidance in addressing the remedy for a violation of the right a defendant's right to a public trial under the circumstances of this or any other 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 in Strode 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 held 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, 217 P.3d at ¶1. The concurring opinion took exception to the plurality opinion’s requiring an on-the-record colloquy before waiver could be found and to allowing a defendant to raise the public’s, and the media’s, right to open proceedings on appeal in order to overturn his conviction. *Id.* at ¶26, 28. The concurring opinion therefore concurred in the result only because it concluded that under the facts of the Strode case the defendant’s public trial rights had not been waived or safeguarded per State v. Bone-Club¹ as it asserted it was in Momah, because the court did

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

not weigh the right to public trial against competing interests. Id. at 232, 235.

Both the trial court and Hawker's attorney safeguarded Hawker's right to both a public and a fair trial in this case. Hawker and his attorney affirmatively agreed to proceed in chambers for limited questioning for the Hawker's benefit. Additionally, the trial court confirmed that nobody in the courtroom objected to the parties temporarily retreating in chambers for a limited portion of voir dire. These measures safeguarded Hawker's right to a public trial and to obtaining both an impartial jury and receiving a fair trial. Under these circumstances Hawker cannot show that the violation of his right to a public trial was not waived as previously argued or that he suffered the requisite prejudice that would warrant reversal 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 Hawker's trial fundamentally unfair. To the contrary, this process assisted Hawker's

attorney in ensuring Hawker obtained a fair trial. As such, Hawker willingly sacrificed his right to have all of voir dire conducted in public in order to protect his right to an impartial jury and fair trial.

In State v. Paumier, __ Wn.App. __, __ P.2d __ (Slip Op 36346-1-II filed 4/27/2010), division two recently held that despite Momah, that the appropriate remedy when a defendant's right to a public trial is violated is automatic reversal unless the trial court considers reasonable alternatives or makes findings appropriately justifying the closure, pursuant to the United States Supreme Court decision in Presley v. Georgia, __ U.S. __, 130 S.Ct. 721, __ L.Ed.3d (2010). The Presley decision on which the Paumier court relied however, was a per curium decision where the trial court violated the defendant's right to a public trial by excluding the public from the voir dire proceedings over Presley's objection. Under those circumstances the Presley court summarily confirmed Presley's right to a public trial had been violated pursuant to existing precedent and determined reversal was appropriate because the trial court neither considered reasonable alternatives nor made findings to justify closing the voir dire to the public.

Contrary to Paumier opinion, Presley does not provide any new guidance to this case or alter the applicability of the Momah decision because Hawker consented to the limited in chamber questioning, actively

participated in the proceedings to his benefit and nothing in the record demonstrates the Hawker suffered any actual prejudice as a result of the limited in chambers proceedings. The Presley court acknowledged consistent with Momah that while a defendant has the right to insist that voir dire be public there are exceptions where this constitutional right “may give way in certain cases to other rights or interests, such as the defendant’s right to a fair trial or the governments interests in inhibiting disclosure of sensitive information.” Presley at 130 S.Ct. at 724 (*quoting* Waller v. Georgia, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). That is precisely what happened in this case; therefore automatic reversal is not appropriate.

While Momah and Strode make clear that the process of conducting limited voir dire of potential jurors in chambers on sensitive issues does violate a defendant’s constitutional right to a public trial, these cases do not require automatic reversal. Momah makes clear that only when the violation is structural in nature, undermines the fundamental fairness of the trial, is reversal required. Strode suggests that the court should also examine the facts of the violation to determine if the defendant waived his rights, whether the violation was necessary to safeguard the fairness of the defendant’s trial or whether the trial court safeguarded those rights pursuant to the Bone-Club factors.

Pursuant to Momah and Strode, Hawker waived his right to public trial by consenting to the in chamber questioning, by actively participating in the in limited in chambers voir dire and by benefiting from those proceedings by learning sensitive information that was relevant to determining whether these potential jurors could be unbiased and give him a fair trial. As such, conducting limited individual jury voir dire in chambers, while procedurally conducted in error, was done with Hawker's consent and participation and ultimately safeguarded rather than undermined Hawker's right to a fair and impartial jury.²

Therefore pursuant to Momah and Strode, as examined together, Hawker's public trial violation allegations does not undermine the fundamental fairness of his trial, does not constitute a structural error and therefore automatic reversal is not required.

D. CONCLUSION

The in chambers voir dire of potential jurors, which safeguarded Hawker's right to an impartial jury and fair trial, did not result in any actual prejudice to Hawker and therefore did not render his trial fundamentally unfair. Under Momah and Strode no structural error

² See, Commonwealth v. Horton, 753 N.E.2d 119, 128 (Mass. 2001) ("In light of the defendant's consent to the procedure, his presence throughout the voir dire, and the fact that the less public setting for the voir dire in all likelihood helped rather than harmed the defendant, we find no prejudice to the defendant from the setting in which this voir dire was conducted.")

occurred and reversal is not warranted. For the reasons stated above, the State respectfully requests that this court affirm Hawker's conviction for one count of rape in the second degree.

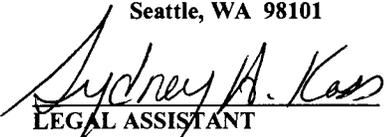
Respectfully submitted this 30 day of April, 2010.


KIMBERLY A. THULIN, WSBA#21210
Appellate Deputy Prosecuting Attorney
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, Susan Wilk, addressed as follows:

Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101


LEGAL ASSISTANT 04/30/2010
DATE