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NO. 62872-1-I

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

STATE OF WASHINGTON,

Plaintiff-Respondent,

v.

TANER TARHAN,

Defendant-Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON
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APPELLANT'S REPLY BRIEF

Appeal from the King County Superior Court
The Hon. Susan Craighead, Superior Court Judge
No. 07-1-05362-6 SEA

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I. ARGUMENT IN REPLY

Tarhan's Right to an Open and Public Trial Was Violated When the Trial Court Sealed Juror Questionnaires Without First Conducting a *Bone-Club* Hearing.

Introduction

In its *Brief of Respondent* [hereinafter *Response*], the State effectively concedes that (a) the requirement of a *Bone-Club*¹ hearing applies to the sealing of juror questionnaires; and (b) no *Bone-Club* hearing was held in this case. In short, the State implicitly concedes error. Rather than challenge the assertion that error occurred, the State argues that Tarhan's counsel invited the error. *See Response*, at 16-18. The State also contends that if the error was not invited, the appropriate remedy is remand to the Superior Court for a "retroactive"—and therefore meaningless—*Bone-Club* hearing. *Response*, at 12.

In advancing its arguments the State misapprehends the doctrine of invited error, and ignores serious questions about

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

Strode and Momah.² Clinging to the Court’s reasoning in *Coleman*, the State also distorts the record (and reality) by maintaining that the questionnaires were available “to members of the public who wished to review them in the courtroom.” *Response*, at 19. Finally, the State halfheartedly claims that the sealing order itself is the equivalent of a *Bone-Club* hearing. *Response*, at 17.

The Record Supports Only One Reasonable Conclusion: the Questionnaires Were Never Available to the Public.

The trial court entered an order—without a signature from either party’s counsel—sealing the juror questionnaires. CP 119-20. By its terms, the sealing order served but a single “compelling” purpose—to protect jurors’ “private information concerning sexual abuse.” CP 119.

² *State v. Coleman*, 151 Wash. App. 614, 214 P.3d 158 (2009); *State v. Strode*, 167 Wash.2d 222, 217 P.3d 310 (2009); *State v. Momah*, 167 Wash.2d 140, 217 P.3d 321 (2009).

It defies logic to contend that the trial court would allow members of the general public to view this “private information” in the court room *during* jury selection, only to seal those materials *after* jury selection in order to protect jurors’ privacy. The State’s suggestion that this is what occurred is both frivolous and disingenuous.

Moreover, the State’s fantasy that the sealed juror materials may have been publicly available at some point during the trial is flatly contradicted by the trial court’s own comments prior to the commencement of jury selection:

Now, I know that counsel want to have more opportunity to look at the questionnaires, but *I'm very reluctant to have them leave the courtroom*, and so I'm wondering if we give you some time after court today and tomorrow morning, if that would work. . .

You can imagine why I'm nervous about having [the questionnaires] leave the courthouse. The thing is I know all of you, and I also -- you are very experienced attorneys and *I think you recognize what a disaster it would be if people thought that their information was going to get Xeroxed and sent around town. Because you're officers of the court and I have such respect for all of you, I will let you take [the questionnaires] home*

tonight, and that, I think, will allow us to be more efficient tomorrow.

1 RP 118-19 (emphasis supplied).

The trial court's reluctance to allow even officers of the court to remove the questionnaires from the courtroom is entirely consistent with a desire to keep those materials from the view of the general public, and entirely consistent with the sealing order that was entered immediately after completion of jury selection. What it is not consistent with is the State's wishful conjecture that the materials were in the public domain for some period of time, only to be sealed later to protect some already-breached privacy concerns.

A Sealing Order is Not the Equivalent of a Bone-Club Hearing.

The sealing order contains pre-printed language stating that the order is being entered “pursuant to applicable case law and court rules.” CP 119. Incredibly, the State argues that this phrase demonstrates that “the trial court considered—albeit not on the record—the *Bone-Club* factors.” *Response*, at 17.

Common sense—and *Strode*—foreclose this argument. *Strode* reaffirmed the longstanding rule that analysis of the five *Bone-Club* factors must be enunciated on the record:

Although the trial judge mentioned several times that juror interviews were being conducted in private either for “obvious” reasons, to ensure confidentiality, or so that the inquiry would not be “broadcast” in front of the whole jury panel, ***the record is devoid of any showing that the trial court engaged in the detailed review that is required in order to protect the public trial right.***

Strode, 167 Wash.2d at 228 (emphasis supplied) (citations to record omitted).

The purpose of requiring the trial court to consider and weigh the *Bone-Club* factors on the record is to ensure “that a reviewing court can determine whether the closure order was properly entered.” *Id.* at 227 (quotations omitted). Needless to say, the sealing order’s vague boilerplate reference to “case law and court rules” does nothing to assist this Court in reviewing the propriety of the order. The State’s contention that vague stock language can substitute for a *Bone-Club* analysis is frivolous.

Coleman's Harm and Remedy Analysis Is Not the Law.

In its response the State relies on this Court's decision in *Coleman* for the dual propositions that (a) despite the failure to hold the required *Bone-Club* hearing, sealing of juror questionnaires in this case was not a structural error; and (b) the proper remedy is remand for a "retroactive" *Bone-Club* hearing. *Response*, at 12, 19-20. Yet the State fails to respond at all to Tarhan's argument that *Coleman* was overruled *sub silentio* by *Strode* and *Momah*. See *Opening Brief*, at 38-41. The State's reliance on *Coleman* is misplaced.

Coleman's complete analysis of the structural error issue is as follows:

On these facts, we do not agree that structural error occurred. The questionnaires were used only for selection of the jury, which proceeded in open court. The questionnaires were not sealed until several days after the jury was seated and sworn. Unlike answers given verbally in closed courtrooms, there is nothing to indicate that the questionnaires were not available for public inspection during the jury selection process. Thus, the subsequent sealing order had no effect on Coleman's public trial right,

and did not create defects affecting the framework within which the trial proceeds.

Coleman, 151 Wash. App. at 623-24 (quotations and footnote omitted). As noted in Tarhan's *Opening Brief*, in *Coleman* the Court concluded that the questionnaires were available to the public prior to the sealing order. *Opening Brief*, at 39-40. As discussed above, however, in this case it cannot seriously be posited that the public ever had access to the sealed juror materials. *See also Opening Brief*, at 39-40.

To the extent that *Coleman* rests on any other rationale in rejecting structural error, it conflicts with *Strode*, *Momah*, and the cases which precede them. The fact that the "questionnaires were used only for selection of the jury" is of no moment. In *Strode*, the "private" questioning of jurors was likewise "used only for selection of the jury," yet the Supreme Court held that the failure to hold a *Bone-Club* hearing prior to the closure was a structural error. *See also In Re PRP of Orange*, 152 Wash.2d 795, 100 P.3d 291 (2005) (closure of jury selection without

Bone-Club hearing presumed prejudicial); *State v. Brightman*, 155 Wash.2d 506, 122 P.3d 150 (2005) (same).

Moreover, *Coleman*'s ordering of a "retroactive" *Bone-Club* hearing—the remedy urged here by the State—makes no sense in light of the factors which the trial court must consider. The *Bone-Club* factors require that any closure must be preceded by a finding of a "serious and imminent threat" to a "compelling interest." *Strode*, 167 Wash.2d at 227-28, citing *Bone-Club*, 128 Wash.2d at 258-259. In other words, the threat must be imminent at the time of the closure, not two years later. Further, anyone present must be given an affirmative, contemporaneous opportunity to state objections to closure. That did not happen here at the time the juror questionnaires were sealed, and it is too late for it to occur now, after the trial has been completed.

The *Bone-Club* test also requires the court to utilize the least restrictive means to avert the "serious and imminent threat" to whatever compelling interest is at stake. *Strode*, 167

Wash.2d at 227-28, citing *Bone-Club*, 128 Wash.2d at 258-259. It is difficult to fashion a less restrictive measure now, over two years after the questionnaires were sealed outright. Similarly, the order “must be no broader in its application or duration than necessary to serve its purpose.” *Strode*, 167 Wash.2d at 227-28, citing *Bone-Club*, 128 Wash.2d at 258-259. Given the time that has passed since the trial in this case, the application and duration of the order have already been to a large extent determined. And finally, the test requires the court to weigh competing interests. Because the trial court here did not seek any contemporaneous objections, there is no way to weigh competing interests.

Retrospective explanations of why the trial court ignored the *Bone-Club* requirements is not the same as complying with those requirements at the time of the closure. To the extent that *Coleman* suggests that such a practice is permissible, it conflicts with *Bone-Club* and all of the Washington Supreme Court cases which have followed.

Tarhan Did Not Invite the Error.

In support of its invited error claim, the State seizes on language in the defense's proposed juror questionnaire:

Your responses will be available only to the judge, the defendant and the attorneys for both parties in this case, and will be destroyed if you are not selected. Even if you are selected, your responses will be sealed in the permanent record and thus not available for public scrutiny.

CP 1311. Of course, the trial court opted not to use the defense proposed questionnaire, instead choosing to use and adapt the questionnaire submitted by the State. CP 1319 ("I would like to stick with the State's formatting."). The State's questionnaire included the following introductory language:

Your responses on the questionnaire will not be available to the public and will eliminate having to ask these questions in open court. If any follow-up is required, a hearing with only the judge and attorneys can be conducted to protect your privacy.

CP ____, Sub No. 69, King County Superior Court No. 07-1-05360-0, *State's Trial Memorandum*.³

While both the defense and the State's proposed questionnaires contained language which *assumed* that the questionnaires would ultimately be sealed and unavailable to the public, neither the defense nor the State *advocated* that the trial court should abdicate its responsibility to conduct a *Bone-Club* hearing prior to the entry of any sealing order. The sealing order was not presented to the trial court by either the defense or the state, but rather appears to have been entered *sua sponte* by the court without input from either party. *See* CP 119-20 (order signed by trial court but signature lines for parties left blank). Under these circumstances, where the record does not demonstrate that trial counsel had any input whatsoever in the sealing order, it can hardly be said that counsel invited the error engendered by the trial court's

³ Undersigned counsel has filed a *Second Supplemental Designation of Clerk's Papers* to make the State's trial memorandum part of the record on appeal.

entering the sealing order without first conducting the required *Bone-Club* hearing.

Meanwhile, it is worth examining the discussions of invited error in both *Momah* and *Strode*. In *Momah*, the Washington Supreme Court determined that Momah not only benefited from the individual questioning of jurors, but that he also affirmatively advocated for conducting the questioning in a closed proceeding, and that he further argued for expansion of the closure. *Momah*, 167 Wash.2d at 151, 155-56.

Nevertheless, the Supreme Court still concluded that “*Momah* does not present a classic case of invited error.” *Id.* at 154. If the invited error doctrine did not apply in *Momah*, it is difficult to conceive how it could apply here, where there is no evidence to suggest that Tarhan’s trial counsel advocated for the sealing of questionnaires without a *Bone-Club* hearing.

The inapplicability of the invited error doctrine is further underscored by *State v. Strode*, 167 Wash.2d 222, 217 P.3d 310 (2009). There, the Supreme Court rejected the State’s argument

that Strode had either invited the error or waived the issue by failing to object:

We have held that a defendant's failure to lodge a contemporaneous objection at trial [does] not effect a waiver. Strode's failure to object to the closure or his counsel's participation in closed questioning of prospective jurors did not, as the dissent suggests, constitute a waiver of his right to a public trial.

Strode, 167 Wash.2d at 229 (quotations and citations omitted; alteration in original). In other words, both *Momah* and *Strode* recently rejected application of the invited error doctrine in the closed courtroom context. Given this legal landscape, the State's invited error argument makes little sense.

Both Strode and Momah Require Reversal and Remand for a New Trial.

The State—perhaps recognizing that *Strode* requires reversal here—gives short shrift to *Strode* in its *Response*. In *Strode*, six justices agreed that in the context of a closed courtroom claim structural error analysis is dependent on *two very specific facts*: Did the trial court engage in a *Bone-Club*

analysis or its equivalent?; and, Did the defendant knowingly and voluntarily waive his right to a public trial?

The *Strode* concurrence parts ways with the lead opinion in only two respects, neither of which is relevant to the disposition of this appeal. First, the concurrence states that the lead opinion “conflates the rights of the defendant, the media, and the public.” *Strode*, 167 Wash.2d at 232 (Fairhurst, J., concurring). And second, the concurrence disagrees with the lead opinion to the extent that “the lead opinion means that only an on-the-record colloquy showing . . . a waiver [of the public trial right] will suffice.” *Id.* at 235 (Fairhurst, J., concurring).

Notwithstanding these two minor distinctions, the concurrence joins the lead opinion in holding that “Tony L. Strode's right to a public trial has not been waived nor has it been safeguarded as required under *State v. Bone-Club*.” *Id.* at 232 (Fairhurst, J., concurring).

Unlike the situation presented in *Momah*, here the record does not show that the court considered the right to a public trial in light of competing interests. The record

does not show a knowing waiver of the right to a public trial. Although the dissent addresses the right of jurors to privacy, the record does not show that this interest was considered together with the right to a public trial. I agree with the dissent that “public exposure of jurors' personal experiences can be both embarrassing and perhaps painful for jurors.” I agree that jurors' privacy is a compelling interest that trial courts must protect. I agree that had the trial judge failed to close a portion of voir dire to the public, he would have “undermined the court's procedural assurances that juror information will remain private [and] would have jeopardized jurors' candidness and *potentially* the defendant's right to an impartial jury.” But ***the potential for jeopardizing a defendant's right to an impartial jury does not necessitate closure; it necessitates a weighing of the competing interests by the trial court. Because, unlike in Momah, the record does not show that this occurred, this case fits into the category of cases where expressly engaging in the Bone-Club analysis on the record is required. The trial court here erred in failing to engage in the Bone-Club analysis.***

While I agree with the lead opinion's result in this case, I do not agree with its conflation of the rights of the defendant, the media, and the public. A defendant should not be able to assert the right of the public or the press in order to overturn his conviction when his own right to a public trial has been safeguarded as required under *Bone-Club* or has been waived.

For the foregoing reasons, I concur with the lead opinion's holding requiring ***automatic reversal*** and remand.

Id. at 235-36 (Fairhurst, J., concurring) (citations to dissent omitted) (italics in original) (bold italics supplied).

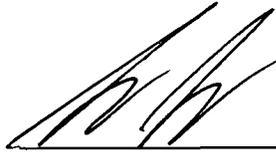
It is uncontested that the trial court did not hold a *Bone-Club* hearing prior to sealing the juror questionnaires. Nor does the State contend that Tarhan knowingly and voluntarily waived his right to a public trial. Under *Strode* and *Momah* the sealing of the juror questionnaires without first conducting a *Bone-Club* hearing was structural error. Tarhan is entitled to reversal and remand for a new trial.

II. CONCLUSION

For the foregoing reasons, as well as those set forth in Tarhan's *Opening Brief*, this Court should reverse Tarhan's conviction and remand for a new trial.

DATED this 17th day of August.

Respectfully Submitted:

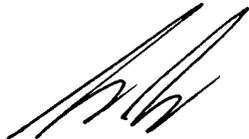


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CERTIFICATE OF SERVICE

I, Steven Witchley, hereby certify that on August 17, 2010, I served a copy of the attached brief on counsel for the State of Washington by causing the same to be mailed, first-class postage prepaid, to:

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