

No. 64419-0-I

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

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COURT OF APPEALS
STATE OF WASHINGTON
FILED
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STATE OF WASHINGTON, Respondent,

v.

EDWARD LEE CASTILLO, Appellant.

~~SUPPLEMENTAL~~ BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES

1. Whether Castillo's conviction should be affirmed pursuant to State v. Momah when the trial court gave Castillo and the public the opportunity to object prior to briefly questioning five jurors in chambers on sensitive information and where Castillo encouraged jurors to request to answer questions in chambers if they were not comfortable fully disclosing during general voir dire.
2. Whether the trial court abused its discretion by excluding alleged impeachment witness, Michelle Kitchen's testimony when this witness violated the court's pre-trial order excluding witnesses from the courtroom during trial and where the offer of proof below demonstrates Kitchen's testimony was collateral to the material issues being considered by the jury.

C. PROCEDURAL FACTS

Edward Castillo was charged with first degree rape of a child. CP 90-91. Following a jury trial, Castillo was convicted as charged and sentenced to a minimum term of 171 months and a maximum term of life. CP 20, 63. Castillo's conviction was reversed on appeal because the trial court failed to use the WPIC reasonable doubt instruction. CP 51-62. Following re-trial, Castillo was again convicted and sentenced to 171 months incarceration. CP 3, 29. Castillo timely appeals. CP 15.

D. FACTS

On Thursday August 23rd, 1997 seven year old R.G. spent the night with her seven year old cousin at her Aunt Heather Stutzman's home in Bellingham, Washington. RP 23, 26. Heather arranged to have a roommate keep an eye on the girls during the evening because she was going to a nightclub in Bellingham to attend a private party that was organized by her friend, twenty eight year-old Edward Castillo. RP 29, 149-50,151.

When Heather and Castillo returned from the nightclub sometime after 2 or 3 a.m. drunk, they found R.G. and Heather's daughter, Brooklynn, asleep in Heather's bedroom. RP 156, 310-11, 154. According to Castillo and Heather R.G. and B. were sleeping on opposite sides of Heather's queen size bed. RP 298. R.G. was wearing one of Heather's shirts as a nightgown and underwear. RP 31-23. Castillo, who sometimes stayed the night with Heather and who had met R.G. once or twice before, flopped onto the bed in between both girls. RP 298. Castillo maintained that while he had consumed several shots of alcohol earlier, he remembered everything he did during the night in question. RP 317.

Meanwhile, Heather went to her living room to visit with another friend for about half an hour after she and Castillo returned from the party,

leaving Castillo alone on the bed with both girls. RP 158. Heather confirmed that the bedroom lights were turned off and the bedroom door remained open. RP 158.

R.G. testified she woke up with Castillo, whom she referred to as “Eddie” lying beside her, her cousin lying at her feet and the lights of the bedroom off. RP 33. She testified that Castillo touched her with his finger in her “potty place” where she does pee and that this hurt. RP 34. R.G. told Bellingham Police Detective Jana Bouzek that “Eddie” first started touching her butt and under her shirt and that before he put his fingers in her “potty place” Castillo told her “this will feel really good.” RP 210-212. R.G. also told Detective Bouzek that it “really hurt” when Eddie did this. RP 211. R.G. testified at trial she was wearing underwear when this occurred but told Detective Bouzek in the days following the incident that she was not wearing underwear, just one of her Aunt Heather’s t-shirts. RP 21, 209.

R.G. reported that after Castillo hurt her, she started crying. RP 78. Heather confirmed that when she went in the bedroom, she found R.G. crying, asking for her mom and Castillo patting R.G.’s head and shushing her. RP 163. Heather testified she moved R.G. to the end of the

bed and R.G. went to sleep. RP 163-64. Heather confirmed R.G. was not wearing underwear at this time. RP 165. Castillo denied shushing and trying to calm R.G. down during the night or that he inappropriately touched R.G while he was lying beside her. RP 303, 317.

The next day, R.G.'s dad, Victor, and a friend of Victor's picked R.G. up from Heather's home. RP 73. R.G. immediately informed Victor that she needed to tell him something but didn't want to talk right then. RP 73-4. Later, when Victor and R.G. were alone in the car, on their way back to Heather's home later that weekend, R.G.'s mood changed and she reminded Victor she needed to talk to him. RP 76. R.G. then disclosed that Heather's friend "Eddie" had touched her inappropriately after telling her he wanted R.G. to be his girlfriend. RP 76. R.G. then explained to Victor that she was lying on Heather's bed, wearing only a nightgown and that when Castillo came in he laid down beside her and started rubbing her back and telling her he loved her and wanted her to be his girlfriend. RP 76. R.G. explained Castillo then put his finger in her potty place and that it really hurt. RP 76. R.G. said that when she started to cry, Heather came into the bedroom and she asked for her mommy. RP 76.

Victor arrived at Heather's home enraged and went into the house with a hammer demanding to know who this "Eddie" was. RP 79. When confronted with the allegations, several people present defended Eddie

telling Victor he could never do anything like this and Victor countered back to her that there was no way R.G. would make something like this up. RP 80. Victor didn't notify the authorities right away because he wanted to talk to R.G.'s mother, Teri Gotelaere and tried to find "Eddie." RP 80. When Victor confronted Castillo on the telephone, Castillo told him to call the cops if he believed the allegations. RP 322. After R.G.'s mother, Teri Gotelaere, was informed of the allegations, Teri called the police. RP 130. Victor and R.G.'s mother decided however, given the passage of time, they did not want R.G. to be subjected to a rape examination, believing such examination would only serve to further traumatize R.G. RP 94.

When R.G. finally spoke to her mom, she confirmed that while she was sleeping she felt "Eddie" put his finger in her potty place, it hurt and she started to cry. RP 126-7. R.G. said that Castillo told her he wanted to be her boyfriend but she told him she wasn't allowed to date until she was sixteen. RP 127. R.G. explained that after she started crying, Castillo put his hand around her mouth and told her to hush. RP 126.

E. ARGUMENT

- 1. Limited in chamber questioning of five potential jurors, while a violation of Castillo's right to a public trial, does not warrant reversal because the trial court waited until the end of voir dire to determine if in chamber questioning of some jurors was necessary, gave the public and the parties an opportunity to object to the limited in chambers questioning, and because Castillo encouraged jurors to request to answer questions in chambers if they were uncomfortable fully disclosing during general voir dire.**

During voir dire, the venire panel was informed by the trial court:

[I]f a question is asked and for any reason you are hesitant to answer this question in front of this large group of people, if you do need to give an answer, please raise your hand and let us know you would rather answer the question in a more private setting. And then if its possible for us to do that at a later time we can go back into my chambers with the attorneys, the defendant, myself and the court reporter present so you will have a smaller group of people to answer the question.

RP 8-9. Later during dire, Castillo's attorney also told potential jurors:

I want to follow up on some of the stuff that came up on questionnaires and if you did indicate sensitive I'm not going to ask you about it here. If you didn't indicate you wanted to discuss it in private and when I bring it up and you want to discuss it in private, please just say that and we'll do that.

RP 95. Thereafter, the trial court determined five potential jurors wished to answer some of the questions posed by the parties in a more private setting. RP 104. First however, the trial court inquired and confirmed on the record that there were no objections to proposed in chambers

questioning of these potential jurors. Now, Castillo asserts for the first time on appeal, that his right to a public trial was violated by the trial court and that he is therefore entitled to yet another trial even though he did not object to the proceedings, encouraged and participated in the limited in chamber questioning.

A close examination of the State Supreme Court decisions pertaining to this issue 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) reveal reversal is not mandated in this case because it is clear the trial court was aware of Castillo's right to a open trial when it inquired if anyone objected to the proposed in chambers proceedings toward the end of voir dire. As in Momah, Castillo participated in and encouraged jurors to request in chamber questioning if they were uncomfortable disclosing in front of the general venire pool. Under these circumstances, Castillo suffered no prejudice as a result on the de minimus in chamber proceedings and should not be entitled to a new 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 any jurors wished to be questioned individually on sensitive issues relevant to jury selection. Momah at 146-47, RP 8-9, 71, 95. And in this case, as in Momah, Castillo's attorney encouraged jurors to request more private questioning if they did not want to discuss matters in front of the entire venire pool, did not object to the proposed procedure and actively participated in the limited in chamber questioning presumably to ensure full disclosure of all material information to ensure Castillo obtained a fair trial from an impartial jury. Understandingly, because Castillo was facing a child rape charge, it was critical to the fairness of his trial that potential jurors fully disclosed all material and sometimes sensitive information during voir dire.

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

Although there was no colloquy regarding the defendant's right to a public trial in this case, Castillo's counsel, like Momah's, did more than merely fail to object to the in chambers process, rather she encouraged

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

jurors to alert her if they wished to answer any questions in chambers instead during general voir dire and she actively participated in the in chamber questioning to the benefit of her client Castillo. Additionally, the trial court gave the public and the parties an opportunity to object prior to the in chambers proceedings. These measures safeguarded Castillo's right to both obtaining an impartial jury and receiving a fair trial and demonstrate Castillo did not suffer actual 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, in this case the questioning of five potential jurors in chambers, here did not render Castillo's trial fundamentally unfair. To the contrary, this process assisted Castillo's attorney in ensuring Castillo obtained a fair trial. As such, Castillo willingly balanced his right to have all of voir dire conducted in public in order against his right to obtain an impartial jury and obtain a fair trial.

State v. Paumier, __ Wn.App. __, __ P.2d __ (Slip Op 36346-II 4/27/2010), Division II 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 predicated existing precedent 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 and determined reversal was appropriate because the court neither considered reasonable alternatives nor made findings to justify the closed proceeding.

Contrary to Paumier, Presley does not provide any new guidance to this case or alter the applicability of the Momah decision because Castillo did not object below, actively participated in limited private voir dire and nothing in the record demonstrates the Castillo suffered any actual prejudice as a result of the violation. 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.

As in Momah, Castillo encouraged jurors to request in chamber questioning if they were uncomfortable fully disclosing information during general voir dire, did not object when given the opportunity by the trial court to do so. Castillo also actively participated in the limited in

chamber questioning and benefited from it by learning sensitive information that was relevant to determining whether potential jurors would serve as unbiased jurors. Conducting individual jury voir dire in chambers regarding sensitive issues regarding the jurors' experiences with sexual abuse 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 limited individual jury voir dire in chambers, while procedurally conducted in error, safeguarded rather than undermined Castillo's right to a fair and impartial jury.² Therefore pursuant to Momah and Strode, the de minimus violation of Castillo's right to a public trial does not warrant reversal of his conviction because these proceedings did not undermine the fundamental fairness of this trial.

2. The trial court acted within its discretion to exclude proposed impeachment witness, Michelle Kitchen's testimony after she violated the in limine order excluding witnesses from the courtroom and after, the trial court determined her proposed testimony was collateral to the issues before the jury.

Next, Castillo contends the trial court abused its discretion by excluding proposed impeachment witness, Michelle Kitchen's testimony,

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

after the trial court determined Kitchen violated the trial court's pre-trial order excluding witnesses from the trial pursuant to ER 615. The trial court acted well within its discretion to exclude Kitchen's proposed impeachment testimony; particularly after the court determined Kitchen's testimony was collateral to the issues before the jury.

A decision to allow or exclude a witness who has violated an exclusion order lies within the broad discretion of the trial court and will not be disturbed absent a manifest abuse of discretion. State v. Dixon, 37 Wn.App. 867, 684 P.2d 725 (1984).

ER 615 states, in relevant part:

At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion ...

At Castillo's request, the trial court pronounced pre-trial it was excluding witnesses from the trial. CP 49-50, RP 3. Nevertheless, after the state rested, Castillo proposed to call his fiancée, Michelle Kitchen to impeach witness Heather Stuzman regarding a statement Stuzman allegedly made over the phone to Castillo after R.G.'s allegations arose, even though Kitchen sat in the courtroom during Stuzman's testimony. RP 283-284. The trial court excluded Kitchen's testimony initially predicated on the

defendant, we find no prejudice to the defendant from the setting in which this voir dire was conducted.")

pre-trial order excluding witnesses. After Castillo requested the trial court reconsider, Castillo made an offer of proof re: the substance of Kitchen's testimony. RP 288.

In the offer of proof, Kitchen testified Castillo was living with her in Birch Bay the weekend R.G. disclosed to her parents that Castillo raped her when she spent the night at Stuzman's home. RP 285. According to Kitchen, she overheard Heather Stuzman tell Castillo over the phone that she did not believe Castillo did anything but that she needed money for rent. RP 287.

After listening to Kitchen's testimony, the trial court acknowledged it would not have precluded Kitchen from testifying if her testimony was material but because her testimony pertained to a collateral matter, the court was abiding by its earlier decision to exclude the testimony. RP 288. Castillo maintains however, the trial court abused its considerable discretion because Kitchen was a material impeachment witness for the defense. The trial court appropriately determined Kitchen's testimony was collateral to the issues before the jury and therefore appropriately excluded her testimony.

The Sixth Amendment of the Federal Constitution and Washington Constitution Article I, §22 guarantee an accused the right to present a defense. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996).

This right is not absolute however, and does not guarantee the right to present irrelevant or inadmissible evidence. State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004). Moreover, a witness cannot be impeached on matters collateral to principle issues being tried. State v. Allen, 50 Wn.App. 412, 423, 749 P.2d 702, *review denied*, 110 Wn.2d 1024 (1988).

Proposed evidence bearing on a witness's credibility must be material and relevant to matters sought to be proved and specific enough to be free from vagueness. State v. Jones, 67 Wn.2d 506, 408 P.2d 247 (1965). Relevant evidence is evidence that has a tendency to make more or less probable the existence of any fact of consequence to the determination of the action. ER 401. There must be a logical nexus between the evidence and the fact to be established. State v. Burkins, 94 Wn.App. 677, 692, 973 P.2d 15, *review denied*, 138 Wn.2d 1014, 989 P.2d 1142 (1999). The proponent of the evidence sought to be introduced has the burden of demonstrating that the evidence is relevant. State v. McDaniel, 83 Wn.App.179, 185, 920 P.2d 1218 (1996), *review denied*, 131 Wn.2d 1011 (1997).

The exclusion of such evidence lies within the sound discretion of the trial court and such decisions will not be reversed absent an abuse of discretion. State v. C.J. 148 Wn.2d 672, 686, 63 P.3d 675 (2003). A trial

court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable grounds. *Id.*

Castillo contends Kitchen's proposed testimony would have demonstrated R.G. and her family had a motive to fabricate rape allegations. Yet, nothing in Kitchen's offer of proof demonstrates how Stuzman's alleged request for help with rent from Castillo, whom she was in a romantic relationship with gave her niece, R.G. a motive to fabricate rape allegations. R.G. did not disclose the rape allegations to Stuzman but instead told her father and then her mother, who then decided to call the police. Therefore, Kitchen's proposed testimony does not provide the requisite nexus between Stuzman's alleged request for money and a motive for R.G. to fabricate rape allegations. *See, State v. Lubers*, 81 Wn. App. 614, 915 P.2d 1157, *review denied*, 130 Wn.2d 1008, 928 P.2d 413 (1996) (the appellate court affirmed the trial court's decision to exclude evidence the victim's cousin had previously assaulted the defendant's girlfriends because Luber could not demonstrate how the alleged assault related to motive of the victim to fabricate rape allegations).

In context to the issues before the jury, Kitchen's proposed testimony therefore sheds little light on Stuzman's credibility and was

appropriately determined to be collateral evidence. The trial court therefore did not abuse its considerable discretion by excluding this evidence.

Moreover, this alleged evidence was presented to the jury through Castillo's own testimony. Castillo testified in detail to the substance of his phone calls with Stuzman after the rape allegation arose. RP 306-7. He testified Stuzman told him she didn't believe the allegations, that she wanted to run away with Castillo and her daughter Brooklyn and that she needed rent money. *Id.* Under these circumstances, any error in excluding Kitchen's testimony was harmless beyond a reasonable doubt because even if this evidence was presented to the jury (which it was through Castillo), the jury would (did) reach the same conclusion. State v. Maupin, 128 Wn.2d at 928-29.

F. CONCLUSION

The in chambers voir dire which safeguarded Castillo's right to an impartial jury and fair trial, did not result in any actual prejudice to Castillo, did not render his trial fundamentally unfair and does not require reversal. Additionally, the trial court did not abuse its discretion by excluding proposed witness Kitchen's testimony, particularly where such evidence was introduced through the defendant's own testimony. For the

reasons stated above, the State respectfully requests that this court affirm
Castillo's conviction for one count of first degree rape of a child.

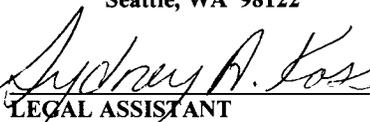
Respectfully submitted this 15th day of July, 2010.


HILARY A. THOMAS, WSBA #22007
for 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, Jennifer Sweigert, addressed as follows:

Nielsen, Broman & Koch, PLLC
1908 E. Madison Street
Seattle, WA 98122


LEGAL ASSISTANT 07/16/2010
DATE