

64676-1

64676-1

NO. 64676-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TRAVIS WILLIAM COLEMAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SHARON ARMSTRONG

BRIEF OF RESPONDENT

2015 OCT 12 PM 1:03
FILED
CLERK OF COURT
KING COUNTY

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A. ISSUES

1. Was sealing of juror questionnaires a *de minimus* closure that did not violate the constitutional right to a public trial?

2. Should this court hold that sealing of court records is not "structural error"?

3. Was any error harmless where the juror questionnaire was simply used as a screening device to identify jurors for additional inquiry, and where that inquiry was conducted in open court, on the record?

4. Was the error preserved?

5. Did the trial court properly exercise its discretion in redacting only juror names and numbers on remand?

B. STATEMENT OF THE CASE

1. BACKGROUND

This court set forth the background facts of this case in its opinion on the first direct appeal of Coleman's conviction.

When TMB was nine years old, he lived for a time with his grandparents and Coleman. When he returned to live with his mother, he disclosed that Coleman had sexually abused him on numerous occasions. His mother immediately contacted the police.

TMB described the abuse to his mother, to a child interview specialist, and to a pediatrician trained in sexual abuse cases. He indicated that Coleman had engaged him in viewing child pornography, kissing with tongues, mutual masturbation, and oral sex. The abuse first occurred during a family trip to a cabin, and regularly thereafter while TMB resided with Coleman (20 to 40 times in all).

The State charged Coleman with one count of rape of a child in the first degree and three counts of first degree child molestation. All counts had the same charging period. Because the incident at the cabin occurred in another county, it was not included among the charges.

At trial, the State introduced recordings of TMB's interviews with the investigator and pediatrician. TMB's live testimony differed from these recorded statements. For example, TMB testified he thought the abuse only happened three times, including the time at the cabin, and he denied that he ever touched Coleman's penis. TMB testified that he was embarrassed to be in court and found it tough to talk about the abuse.

The jury convicted Coleman of two counts of molestation, acquitted him of the third, and did not reach a verdict on the rape charge. Coleman appeals.

State v. Coleman, 151 Wn. App. 614, 617-18, 214 P.3d 158 (2009).

2. *VOIR DIRE*

Voir dire was conducted on January 28-29, 2008. The court began by instructing jurors on their role and swearing the jurors for

service. 01/28/08RP 1-4.¹ The court then informed the jurors that they would receive a questionnaire that would be “somewhat intrusive” in that it covered “sexual matters.” 01/28/08RP 6. After introducing the parties and asking whether jurors knew any proposed witnesses, the court considered whether “hardship” would prevent any individual jurors from serving on the jury. 01/28/08RP 17-18. Twelve jurors were excused for hardships. 01/28/08RP 17. The court then showed the remaining jurors how to complete the juror questionnaire, which the court noted was “quite short.” 01/28/08RP 18-19. The questionnaire was two pages long and asked jurors to check “yes” or “no” to a series of questions. See CP 132-212.

After the jurors filled out the questionnaires the court noted that six jurors requested private *voir dire*. 01/28/08RP 20-21. The court explained that it would question each of these six jurors “privately,” i.e., in the open public courtroom, as the other five jurors remained in the jury room. 01/28/08RP 21-23. Jurors who did not require private questioning were excused for the day with instructions to return in the morning. 01/28/08RP 23-24. One

¹ The State will use Appellant’s method of citing to the verbatim reports. See Br. of App. at 2.

additional juror noted a desire for private questioning after the questionnaires had been returned. 01/28/08RP 26.

The court then questioned the individual juror. 01/28/08RP 26-57. The first juror had been sexually assaulted by a family member. 01/28/08RP 26-28. Both lawyers asked the juror questions. Id. Defense counsel later exercised a preemptory challenge against this juror when she was called into the jury box at the end of *voir dire*. 01/29/08RP 215. The second juror described how her foster son had been falsely accused of a sexual assault; both counsel questioned the juror on this matter. 01/28/08RP 29-33. The prosecutor ultimately used a preemptory challenge for cause against that juror. 01/29/08RP 215. The third juror noted that she and her daughter had both been victims of sexual assault. 01/28/08RP 34-35. This juror was never seated in the jury box. The fourth juror was the victim of rape as a teenager. 01/28/08RP 36. She, too, was never seated in the jury box. The fifth juror described how two family members had been sexually assaulted. 01/28/08RP 38-41. The prosecutor later exercised a preemptory challenge against this juror. 01/29/08RP 217. The sixth juror disclosed that a friend had been victimized by a sexual assault and said that she could not be fair in this case. 01/28/08RP 41-47.

This juror was excused for cause. 01/28/08RP 47. The seventh juror was the victim of a sexual assault at the age of 13 years. 01/28/08RP 48-49. She, too, was excused for cause by the court. 01/28/08RP 50.

The next day, January 29, 2008, general *voir dire* was conducted in open court and a jury was ultimately selected and sworn. 01/29/08RP 52-219.

Three court days later, the court, apparently on its own motion, ordered the questionnaires sealed making the following finding:

The court finds compelling circumstances for sealing the documents indicated below:

Jury questionnaires containing personal sexual history of prospective jurors related to issues in this case. The individual juror's right to privacy in this information greatly outweighs the public's right to access the court files.

CP 123. Counsel were "authorized to review the documents and to purchase copies thereof without further court order." Id. The order provided that "[i]n the event of an application for the opening or copying of the sealed documents, notice shall be given or attempted to and hearing noted." Id.

Coleman appealed this ruling, arguing that failure to conduct the proper analysis before sealing a court record is structural error that requires a new trial. This court held that Coleman failed to show a structural error because “the questionnaires were used only for selection of the jury, which proceeded in open court.” Coleman, at 624. This Court also noted that “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 defect[s] affecting the framework within which the trial proceeds.” Id. Because the trial court failed to balance the competing interests between sealing or not sealing the questionnaires, however, this Court remanded the case to the trial court to expressly consider whether the questionnaires should be sealed. Id.

3. HEARING ON REMAND

A hearing was held on November 24, 2009 to consider whether the questionnaires should remain sealed. The State asked the court to consider the jurors’ privacy interests, especially given the highly sensitive nature of the questions that were asked.

11/24/09RP 6. To protect the jurors who disclosed a history of sexual abuse, the prosecutor recommended that names and juror numbers be redacted. 11/24/09RP 6-8. Any lesser redaction would sacrifice juror privacy because the jurors could be identified. Id. Coleman argued that it was appropriate to redact names but not juror numbers. 11/24/09RP 10.

The trial court then ruled that portions of the questionnaires should be redacted. 11/24/09RP 10-18; CP 126-31. As to the first Bone-Club factor, the court ruled that juror privacy was a compelling interest. 11/24/09RP 10-11; CP 128-29. Specifically, the court said that

the need for juror privacy is not only a fundamental fairness to the juror, who has a right to refuse to show up and once under oath has not right to refuse to answer these questions; but we need to advise jurors that this information will be held privately so that they will offer the information. If they refuse to offer that information, our ability to select a fair jury, one that does not have experience with sexual assault, for example, that opportunity of all of us to guarantee the defendant a fair trial will be lost. Because had we not told jurors, "We are using a questionnaire to protect your privacy and no one will have access to the questionnaires except for the lawyers and the Court," had we not told them that, I am quite certain that jurors would have declined to be as forthright as they were. So in order to guarantee a fair trial by a fair jury, we have to try to make some promises to jurors.

11/24/09RP 11.

As to the second Bone-Club factor, the court noted that various family and friends of the defendant objected to sealing. 11/24/09RP 12. At the end of the hearing, the court invited those people to express their views. Coleman's mother, Linda, agreed that it was fitting to redact juror names and numbers. 11/24/09RP 20. She acknowledged that she was not present during *voir dire*. 11/24/09RP 21. Still, she said it "would have been nice" if she had been able to see the questionnaires and that she would have offered insight to defense counsel. 11/24/09RP 22. Larry Coleman, the defendant's father, then addressed the court. 11/24/09RP 22. Mr. Coleman confirmed that he, too, was absent during *voir dire*, but he stated that he would have wanted to have access to the questionnaires had he been present. 11/24/09RP 23. Nicole Lloyd, Coleman's aunt, expressed a preference for open questionnaires. 11/24/09RP 23. She also said that a potential juror who was unwilling to answer to a public questionnaire should probably be excused from the jury. Another aunt said that she had been molested as a child and would be willing to discuss that in open court as a juror. 11/24/09RP 25. Virginia Cutchett, another aunt, expressed a preference for open courts. She had not attended trial in Coleman's case. 11/24/09RP 26. Coleman's

sister, Bonnie Raymond, seemed to say that questionnaires should not be sealed because jurors who said they had been abused in the past could not possibly be unbiased jurors. 11/24/09RP 27-28. The court explained that jurors with such experience were questioned and could have been excused for cause or by preemptory challenge. 11/24/09RP 28. None of the people who addressed the court at the remand hearing had attended the trial. Defense counsel at the remand hearing did not identify any juror who – based on the questionnaire – should have been subject to private *voir dire* but was not. Defense counsel also failed to identify any person present at *voir dire* who wanted to participate but was not allowed.

As to the third Bone-Club factor, the court ruled that the least restrictive means of effectively redacting the documents required removal of both names and juror numbers; lesser redactions would permit someone to identify those jurors, and invade their privacy. 11/24/09RP 12-13; CP 130.

The court then balanced the respective interests and ruled that the names and numbers of jurors were not essential to a fair trial, and the interests in favor of redaction “far outweigh the interest of open access.” 11/24/09RP 13. The court noted that the

questionnaire called for short, terse answers, whereas the follow-up conversation about those matters was discussed extensively in open court. 11/24/09RP 14; CP 130.

Finally, the court ruled that the sealing order was no broader in application or duration than required to accomplish its purpose. 11/24/09RP 14-15.

Defense counsel objected that sealing the questionnaires prevented Coleman's family from participating in *voir dire*. The trial court disagreed, noting that all the jurors were questioned in open court, so family members could have shared their views with defense counsel if they had so desired. 11/24/09RP 18-19.

C. ARGUMENT

Coleman makes two categories of argument in this second appeal. First, he renews the argument made in his first appeal that the trial court should not have sealed the questionnaires without first balancing the Ishikawa factors, and that reversal of his conviction is the required remedy. This argument should be rejected for a number of reasons: a) sealing questionnaires without first applying the Ishikawa factors is a *de minimus* closure that does not violate the constitution; b) sealing the questionnaires was not

“structural error” as that term has been defined by the United States Supreme Court because sealing documents is different than closing proceedings, and nor was the error preserved; and c) any error in sealing these records after *voir dire* was harmless.

Second, Coleman argues that the trial court erred on remand by redacting both names and juror numbers. This argument should be rejected because even Coleman agreed that *names* could be redacted, and he cannot show that the trial court abused its discretion by taking the additional step of redacting juror *numbers*.

1. COLEMAN'S RENEWED ARGUMENTS FOR A NEW TRIAL SHOULD BE REJECTED.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution each guarantee a criminal accused the right to a public trial. Cohen v. Everett City Council, 85 Wn.2d 385, 387, 535 P.2d 801 (1975). In addition, article I, section 10 of the Washington Constitution states that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” This provision provides the public and press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). Thus, to

protect the constitutional right to a public trial, the trial court may not close a courtroom without first considering the five requirements enumerated in Ishikawa. The court must enter specific findings to justify the closure order.² State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995); State v. Russell, 141 Wn. App. 733, 738, 172 P.3d 361, 363 (2007). The constitutional requirements require access to records as well as proceedings. State v. Waldon, 148 Wn. App. 952, 202 P.3d 325 (2009).

The right to a public trial applies to *voir dire*. See In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004). The trial court may conduct *voir dire* of individual jurors in the courtroom, separate from the other jurors as long as the courtroom remains open to the general public. State v. Erickson,

² The five factors are:

1. The proponent of closure ... must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

In re Personal Restraint of Orange, 152 Wn.2d 795, 806-07, 100 P.3d 291, 296-97 (2004).

146 Wn. App. 200, 206 n.2, 189 P.3d 245 (2008), *citing* State v. Vega, 144 Wn. App. 914, 917, 184 P.3d 677 (2008).

Whether a defendant's right to a public trial has been violated is a question of law, subject to de novo review on direct appeal. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150, 154 (2005).

Coleman argued in his first appeal that the trial court's failure to address the Bone-Club³ factors before sealing juror questionnaires was structural error that mandated reversal of his conviction. This court rejected that argument, noting that "there is nothing to indicate that the questionnaires were not available for public inspection during the jury selection process." Coleman, at 624. As it turns out, the questionnaires appear to have been held by the Court, and the public was prevented from seeing those documents before and after the order sealing the documents, so this portion of the court's decision is untenable. Still, this court's holding was correct for the reasons explained below.

³ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

a. Sealing The Jury Questionnaires In This Case Was A *De Minimus* Closure That Does Not Offend The Constitution.

The Washington Supreme Court has observed that “a trivial [courtroom] closure does not necessarily violate a defendant’s public trial right.” State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150 (2005). However, several justices have cautioned in dicta that the Washington Supreme Court has never actually found a closure to be trivial. State v. Easterling, 157 Wn.2d 167, 180-81, 137 P.3d 825 (2006). Justice Madsen has argued that Washington should, like many foreign jurisdictions, recognize the *de minimus* closure standard, which “applies when a trial closure is too trivial to implicate the constitutional right to a public trial. . . i.e., no violation of the right to a public trial occurred at all.” Easterling, 157 Wn.2d at 183-84 (Madsen, J. concurring). The standard can apply to either inadvertent or deliberate closures. Id. Other justices have argued that “the people deserve a new trial” each and every time a courtroom is closed, no matter how insignificant the closure. Id. at 185 (Chambers, J. concurring). Thus, it is undecided whether a closure can be *de minimus* under Washington law.

This case illustrates the wisdom of a *de minimus* standard. The juror questionnaire was simply used as a screening device to

identify jurors who might need to be questioned in private. The questionnaire did not, itself, serve as a basis to decide whether a person served on the jury or was excused. Rather, the questionnaire triggered additional questioning, and it was the dialogue during that questioning in open court that told the lawyers and the trial judge whether a juror was fit to serve. Thus, given the limited scope of this questionnaire and the limited manner in which it was used at trial, sealing the questionnaire was not a violation of open courtroom principles.

- b. Few Errors Are “Structural” And The Supreme Court Has Never Held That Failure To Balance Interests Before Sealing A Document Is One Of Those Few.

Coleman argues that failure to apply the Ishikawa factors before sealing was a structural error that demands automatic reversal. He is mistaken.

“Structural error” is a term that originated in United States Supreme Court cases to describe a type of error that is so fundamental, far-reaching and inchoate that the error permeates the proceedings to such a degree its effect cannot be assessed. This sort of error is simply not subject to harmless error analysis.

Although the unwarranted closure of court *proceedings* without a balancing of interests has been held to be structural error, the Supreme Court has never held that failure to balance interests before sealing a *document* is structural error, especially where the matters touched upon in that document are discussed at length in an open courtroom. A consideration of the nature of structural error illustrates that Coleman's claim must be rejected.

The practice of reviewing error in order to determine whether it was harmless is rooted in 19th century English jurisprudence, and was a response to rules developed in English appellate courts that presumed prejudice as to insignificant errors. R. Traynor, The Riddle of Harmless Error 4-13 (1970) (hereinafter "Harmless Error"); 5 W. LaFave et al., Criminal Procedure § 27.6(a), at 99 (3rd ed. 2007). Under those old English rules, reversal for technical reasons had become commonplace, and English appellate courts resembled "impregnable citadels of technicality" under which English litigation "seem[ed] to survive until the parties expired." 5 LaFave, et al. supra, § 27.6(a), at 100. The reform movement gave clear direction to English appellate courts to reverse only where an error actually resulted in prejudice. Id.

American courts were slower to adopt similar reforms but American appellate courts, too, ultimately came under heavy and protracted criticism for reversing convictions based upon seemingly insignificant errors. Traynor, Harmless Error, *supra*, at 13-14; 5 LaFave et al. *supra*, § 27.6(a), at 100. Eventually, "out of widespread and deep conviction over the general course of appellate review in American criminal causes[.]" by the mid-1960s the federal government and each state had adopted some form of statutory harmless-error rule. LaFave, at 100; Traynor, Harmless Error, *supra*, at 13-14.

With the increased constitutionalization of criminal law in the 1960's, the Supreme Court was more often asked to decide matters of criminal procedure and, consequently, to decide whether constitutional errors in criminal law could be harmless. In Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), the Court held that constitutional errors could be harmless if an appellate court could say beyond a reasonable doubt that the error did not contribute to the verdict. 386 U.S. at 22. *See also* Kotteakos v. United States, 328 U.S. 750, 759, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946). Since Chapman, the Supreme Court has found a wide variety of constitutional errors to be susceptible to harmless

error analysis.⁴ The Court recognized that "while there are some errors to which Chapman does not apply, they are the exception and not the rule." Rose v. Clark, 478 U.S. 570, 578, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986).

The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.

Rose, 478 U.S. at 579. The harmless error rule "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." Arizona v. Fulminante, 499 U.S. 279, 308,

⁴ The Supreme Court has expressly held that the following errors can be harmless: unconstitutional burden-shifting malice instruction; error in jury instructions defining element of crime; jury instruction containing an erroneous conclusive presumption; admission of evidence at sentencing stage of a capital case in violation of the Sixth Amendment Counsel Clause; jury instruction misstating an element of the offense; jury instruction containing an erroneous rebuttable presumption; erroneous exclusion of defendant's testimony regarding the circumstances of his confession; failure to permit cross-examination concerning witness bias; denial of right to be present at critical stage of proceedings; improper comment on defendant's failure to testify; admission of witness identification obtained in violation of right to counsel; admission of the out-of-court statement of a nontestifying codefendant in violation of the Sixth Amendment Counsel Clause; admission of confession obtained in violation of right to counsel; admission of evidence obtained in violation of the Fourth Amendment; denial of counsel at a preliminary hearing in violation of the Sixth Amendment Confrontation Clause; denial of Sixth Amendment right to confront witnesses; comment on the right against self-incrimination; unconstitutionally overbroad jury instructions at the sentencing stage of a capital case. LaFave, § 27.6(d) at 118-19 (case citations omitted).

111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)). "If the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless error analysis." Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (quoting Rose, 478 U.S. at 579).

A very limited class of cases is not subject to Chapman harmless error analysis. Johnson v. United States, 520 U.S. 461, 468, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997). Such errors are "structural" because they "contain a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Neder, 527 U.S. at 8 (quoting Fulminante, 499 U.S. at 310). Such errors "infect the entire trial process," Brecht v. Abrahamson, 507 U.S. 619, 630, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993), so as to "necessarily render a trial fundamentally unfair." Rose, 478 U.S. at 577.

There are only six specified structural errors that occur at trial. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (the complete denial of counsel); Tumey v.

Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927) (trial by a biased judge); Vasquez v. Hillery, 474 U.S. 254, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986) (racial discrimination in selection of a grand jury); McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984) (denial of self-representation); Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (denial of public trial); and Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (a defective reasonable-doubt jury instruction). Each of these errors is "unquantifiable and indeterminate" such that an appellate court could never discern whether the error did not prejudice the defendant. Sullivan, 508 U.S. at 282. If an appellate court cannot make such a determination, then the "criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." Fulminante, 499 U.S. at 310 (quoting Rose, 478 U.S. at 577-78) (citation omitted).

In sum, these decisions recognize that the appellate court's role is to protect constitutional rights without burdening trial courts with unnecessary retrials when rights were not meaningfully impinged. The harmless error doctrine ensures public confidence

in the criminal justice system by reducing the risk that guilty defendants may go free. Johnson v. United States, 520 U.S. at 470 (quoting Traynor, Harmless Error, supra, at 50: "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it."). The doctrine conserves judicial resources by preventing costly, time-consuming and unnecessary remands, and thus promotes the constitutional right to a "speedy trial" by reducing the number of cases on trial court dockets. Traynor, Harmless Error, supra, at 14, 51. Finally, the doctrine promotes stability and predictability in the law because appellate judges will be less likely to bend, stretch, or adapt the law in order to avoid a clearly unwarranted reversal. Id. at 455. See Mitchell v. Esparza, 540 U.S. 12 (2003). There is no state constitutional rule preventing harmless error analysis. State v. Brown, 147 Wn.2d 330, 340, 58 P.3d 889 (2002).

In the open courtroom cases, the United States Supreme Court has held that it is structural error to close an entire suppression hearing over the defendant's objection. Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). The Court has held that it is structural error to close six weeks of *voir dire* over the defendant's objection without balancing the

interests of closure versus the interests of openness. Press-Enter. Co. v. Superior Court, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (Press Enterprise I). The Court has also held that it is structural error to exclude a person from *voir dire* without first setting forth reasons for the exclusion. Presley v. Georgia, ___ U.S. ___, 130 S. Ct. 721, ___ L. Ed. 2d ___ (2010). Each of these closures deprived the public of the opportunity to view critical proceedings as they occurred, and there was no way to quantify or assess the effect of the error.

- c. This Court Should Hold That Failure To Balance Interests Before Sealing A Document Is Not Structural Error.

The section above demonstrates the rarity and uniqueness of structural errors. The Supreme Court has never held that the improper sealing of a court record is structural error. Under usual Supreme Court analysis, the failure to balance interests before sealing a juror questionnaire should not be considered structural error.

Analysis of this question should begin with Press-Enterprise I where the Supreme Court explained the value of open jury selection:

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Press-Enterprise I, 464 U.S. at 508 (citation omitted). Two years later, in Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 12-13, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press-Enterprise II), the Court established a test⁵ for determining what is within the scope of the public-trial right, premised on whether such a right was consistent with "experience and logic." Press-Enterprise II, 478 U.S. at 8-9.

The "experience" inquiry is whether there has been a "tradition of accessibility." Press-Enterprise II, 478 U.S. at 8. That is, a court looks to "whether the place and process have historically been open to the press and general public." Id.

The "logic" inquiry is "whether public access plays a significant positive role in the functioning of the particular process in question." Press-Enterprise II, 478 U.S. at 8. A court should consider whether

⁵ The test was first described by Justice Brennan in his concurring opinion in Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605-06, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982).

the process enhances the fairness of the criminal trial as well as "the appearance of fairness so essential to public confidence in the system." Id. at 9.

Turning first to the experience factor, sealing of juror questionnaires is common practice in Washington trial courts. Washington court rules reflect a presumption that such questionnaires are not public documents: GR 31(j) provides that "individual juror information, other than name, is presumed to be private."⁶ Numerous other practices and procedures exist to protect juror confidentiality. See State v. Strode, 167 Wn.2d 222, 236-42, 217 P.3d 310 (2009) (C. Johnson, *dissenting*). Thus, it is clear that the prevailing practice in Washington has long been to shield jurors from unwanted prying into their personal information.

Nor is Washington alone in this conclusion. The overwhelming majority of states that have addressed the issue by statute or rule conclude that juror questionnaires should not be available to the general public. See, e.g., Ala. R. Ct. 18.2(b) (juror questionnaire in record on appeal shall be available for inspection only by the court and parties); Alaska R. Admin. 15(j)(2)-(3)

⁶ The holding of State v. Duckett, 141 Wn. App. 797, 173 P.3d 948 (2007), that GR 31(j) is limited by Bone-Club, does not minimize the significance of this presumption in the Press-Enterprise analysis.

(questionnaires are confidential); Colo. Rev. Stat. §13-71-115(2) (original completed questionnaires shall be sealed in an envelope and retained in court file, but shall not constitute a public record); Conn. Gen. Stat. 51-232(c) (questionnaires may be viewed only by court and parties and are not public records); Idaho Crim. R. 23(1) ("In order to provide for open, complete and candid responses to juror questionnaires and to protect juror privacy, information derived from or answers to juror questionnaires shall be confidential and shall not be disclosed to anyone except pursuant to court order."); Kan. Dist. Ct. R. 167 (suggested form informs jurors that the questionnaire is not a public record and is only made available to the court and parties); 14 Maine Rev. Stat. §1254-A(7)-(9) (questionnaires may be provided to parties for use in *voir dire* at the discretion of the court but information not further disclosed without court authorization); Mass. Gen Laws, ch. 234A, §22 (notice of confidentiality shall appear prominently on face of questionnaire; information is not a public record); Mich. Ct. R. 2.510(C)(1) and 6.412(A) (questionnaires available only to parties and court absent court order); Mo. S.Ct. R. 27.09(b) (questionnaires accessible only to court and parties; information collected is confidential and shall not be disclosed absent showing of good cause); N.H. Super. Ct. R. 61-A (attorneys receive

copies of questionnaires but shall not exhibit to anyone other than client and other members of attorney's firm); N.J.R. Gen. Applic. 1:38(c) (questionnaires confidential and not public records); N.M. Stat. § 38-5-11(C) (questionnaires available to any person having good cause for access); Pa. R. Crim. Pro. 632(B) (questionnaires confidential and limited to use for jury selection; except for disclosures during *voir dire*, or other court order, information made available only to judge and parties); Tex. Gov't Code § 62.0132(f)-(g) (questionnaires confidential, may be disclosed only to court and parties); Cf Ark. Code §16-32-111(b) (questionnaires may be sealed on showing of good cause); La. Code Crim. Pro. art. 416.1(C) (questionnaire "may" be made part of record); Minn. R. Crim. P. Form 50 (form advising jurors that answers are public record).

The "logic" inquiry does not support Coleman's claim, either. In Richmond Newspapers v. Virginia, 448 U.S. 555, 569-72, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980), the Court identified the purposes served by openness in criminal proceedings: (1) ensuring proceedings are conducted fairly; (2) discouraging perjury, misconduct of participants, and biased decisions; (3) providing a controlled outlet for community emotion; (4) securing public confidence in a trial's results through appearance of fairness; and

(5) inspiring confidence in judicial proceedings through education on the methods of government and judicial remedies. None of these interests is compromised by sealing jury questionnaires.

In sum, both the experience and logic prongs of the Press-Enterprise II test support the conclusion that jury questionnaires are not within the scope of the right to a public trial, at least to the extent that failure to balance interests before sealing questionnaires should be considered structural error.

Moreover, proceedings are simply different in character from documents. The differences suggest that a different remedy should follow when records are inappropriately closed.

Court proceedings are transitory or fleeting; what occurs cannot be re-witnessed, and only a facsimile can be reproduced in the form of a transcript of the proceedings. Needless to say, a transcript captures only the words spoken. It does not capture any number of intangible factors like body language, intonation of voices, or facial expressions. There is a long legal tradition demanding openness of proceedings because a closed proceeding deprives spectators of the opportunity to assess such intangibles. By its very nature it is impossible to assess or quantify prejudice when a person is robbed of these intangible benefits.

Records are different. A person viewing a record tomorrow or next year can assess its content just as easily as if it had been viewed today. A record improperly sealed can later be unsealed and the parties and public can review it. This does not mean, however, that all instances of improper sealing of records will be harmless error. If a sealed record contains a material fact that a party or the public was unable to use during trial, the error in sealing may be deemed harmful, and reversal of a conviction may be required. But, the error is not *structural* because it is possible to assess the effects of an improper order sealing records.

Thus, the improper sealing of a record should not be deemed structural error. This Court should analyze whether the failure to conduct the Ishikawa analysis was harmless beyond a reasonable doubt.

d. Failure To Balance Ishikawa Factors Before Sealing Was Harmless Error In This Case.

There is no allegation in this case that a juror was challenged or stricken on the basis of information contained solely in the questionnaires. The forms included only "yes or no" questions that identified subjects the attorneys explored with particular jurors during

individual *voir dire*, which was conducted in open court. None of the goals identified by Richmond Newspapers is offended by this procedure, and there is no suggestion that Coleman's defense was in any way hampered. Further, Coleman's counsel clearly had access to the questionnaires throughout *voir dire* and could have interposed objections if he had them.

The procedure used here both protects juror privacy and encourages candid responses. The case at bar is a sexual assault case, in which questions must be asked of jurors regarding their private personal experiences with an often very painful subject that may not previously have been revealed to persons outside the family. Nothing suggests that Coleman was thwarted in conducting a full *voir dire*. Any error in failing to balance interests on the record before sealing the questionnaires was harmless beyond a reasonable doubt.

e. Coleman's Claim Was Not Preserved For Review.

It should follow from the difference between sealing documents and closing courtrooms that the normal rules regarding preservation of error should apply to the former even if they do not apply to the latter. Under federal law, an unpreserved open

courtroom claim will not be considered on appeal. Levine v. United States, 362 U.S. 610, 619, 80 S. Ct. 1038, 4 L.Ed.2d 989 (1960); Waller v. Georgia, 467 U.S. at 42 n. 2 (1984); Puckett v. U.S., ___ U.S. ___, 129 S. Ct. 1423, 1428-29, 173 L. Ed. 2d 266 (2009).

Although the Washington Supreme Court seems to apply a somewhat different analysis to claims that a trial proceeding was improperly closed,⁷ that analysis has only applied to closed proceedings; no case holds that a party can remain silent when a document is sealed, and then ask for a new trial on appeal because the document was sealed.

The usual rules for preservation of error should apply when a "sealed document" claim is raised for the first time on appeal. See RAP 2.5(a). Under those standards, Coleman cannot show that his claim involves "manifest constitutional error." The claim should not be considered for the first time on appeal.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SEALING JUROR NUMBERS.

Coleman argues that the trial court's order should be reversed because the court improperly considered the Ishikawa

⁷ See State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009) and State v. Strobe, supra.

factors. Br. of App. at 15-16. When a trial court applies the Ishikawa factors an appellate court reviews the trial court's order for an abuse of discretion. Rufer v. Abbot Labs, 154 Wn.2d 530, 550, 114 P.3d 1182 (2005); Dreiling v. Jain, 151 Wn.2d 900, 907, 93 P.3d 861 (2004). Coleman cannot show that the trial court abused its discretion in this case.

There is very little difference between the trial court's ruling and the defense position. The defense agreed that names could be redacted but argued that numbers could not be redacted. RP 9-10. Thus, the question presented here is whether the trial court abused its discretion in sealing juror *numbers*. Clearly, it did not.

Moreover, Coleman devotes little more than one page to his argument that the trial court's application of the Ishikawa factors was error. He does not assign error to the trial court's findings or conclusions in this regard; he simply asserts that the court erred and challenges a few comments made by the court. Br. of App. at 2. This is insufficient to show an abuse of discretion. The record as a whole shows that the trial court properly considered the Ishikawa factors.

First, the trial court correctly ruled that jurors have a right to privacy and that a *voir dire* requiring disclosure of one's history as a

victim of sexual assault can intrude upon that right. RP 10-11; CP 128-29. Coleman does not challenge these findings and conclusions. The trial court's conclusions are consistent with the observations of two Washington Supreme Court justices. See State v. Strobe, 167 Wn.2d at 236-42 (C. Johnson, *dissenting*). Coleman has not shown an abuse of discretion as to the first Ishikawa factor.

Second, the trial court properly applied the second factor on remand. Objections by Coleman's family that were offered at the remand hearing do not substantially alter the calculus for several reasons. None of those people attended *voir dire*. Thus, those people were not prevented from considering the questionnaires by any act of the court, they simply chose not to attend the proceeding at all. Their views on the subject are no more relevant than the views of some random person standing at the bus stop outside the courthouse. Moreover, the objections offered were of a generic sort; not tied to the questionnaires prepared in Coleman's case. Objections required by the Ishikawa analysis must, to be relevant, contribute to the balance or counter-balance between the competing interests. In other words, the objecting person should be able to point to a questionnaire and identify some interest that

will be harmed by sealing. None of the speakers on remand could do so, and defense counsel never established that *other* spectators were present during *voir dire*. The court's exercise of discretion was proper.

The trial court's implementation of the third factor was not an abuse of discretion. The court recognized that a failure to redact both names and numbers would nullify any effort to protect the jurors' identity and their privacy. CP 130. Coleman is simply incorrect in alleging that redacting both name and number rendered the questionnaires "completely useless." Br. of App. at 16. A careful reading of the verbatim report of proceedings together with the redacted questionnaires shows that people who responded to the questionnaires were later questioned in open court. Trial counsel had the unredacted questionnaires and could challenge misstatement as to which jurors required additional questioning. The trial court's attempt to balance the competing interests was appropriate.

The trial court also appropriately applied the fourth factor and kept redactions to a minimum, excising only that information that would potentially identify a juror but allowing public review of the rest. Finally, under the circumstances, the sealing order had to

be for an indefinite period of time because there would be no point at which the jurors' right to privacy would be somehow less acute.

For these reasons, the trial court did not abuse its discretion in redacting juror numbers from the questionnaires. Should this court disagree, and decide that the trial court abused its discretion as to application of one or more of these factors, the remedy should be reversal of the sealing order and remand for rehearing. Coleman has cited no authority for the proposition that error in applying Ishikawa factors vitiates a judgment.

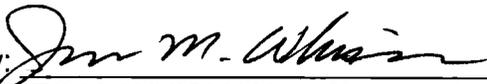
D. CONCLUSION

For the foregoing reasons, the State respectfully asks this court to affirm the trial court's order redacting the questionnaires, and affirm Coleman's conviction.

DATED this 12th day of October, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Cassandra Stamm, the attorney for the appellant, at The Law Offices of Cassandra Stamm PLLC, 800 Fifth Avenue, Suite 4100, Seattle, WA 98104-3100, containing a copy of the Brief of Respondent, in STATE V. TRAVIS WILLIAM COLEMAN, Cause No. 64676-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame

Name
Done in Seattle, Washington

10/12/10
Date 10/12/10

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