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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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NO. 37086-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL LEE LEYERLE,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable James Stonier, Judge

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SUPPLEMENTAL APPELLANT'S BRIEF

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**A. SUPPLEMENTAL ISSUE**

**Whether, under Momah and Strode, the trial court denied Mr. Leyerle a public trial by conducting individual voir dire in a hallway outside of the courtroom without giving any consideration to Mr. Leyerle's public trial right?**

**B. SUPPLEMENTAL ARGUMENT**

**The arbitrary closure of Mr. Leyerle's courtroom during voir dire violate Momah and Strode.**

**(1) Mr. Leyerle is entitled to a public trial.**

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a ... public trial." Article I, § 22 of the Washington Constitution similarly guarantees that "[i]n criminal prosecutions the accused shall have the right ... to have a ... public trial." Article I, § 10 of the Washington Constitution also provides that "[j]ustice in all cases shall be administered openly." The presumption of openness extends to voir dire because the "[t]he process of jury selection .... is itself a matter of importance, not simply to the adversaries but to the criminal justice system." State v. Momah, \_\_\_ Wn.2d \_\_\_, 217 P.3d 321, 325 (2009) (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)).

**(2) A defendant's right to a public trial is violated if the trial court does not weigh the public trial right using the Bone-Club factors.**

While the right to a public trial is not absolute, it is strictly guarded to assure that proceedings occur outside the public courtroom in only the most unusual circumstances. State v. Strode, \_\_ Wn.2d \_\_, 217 P.3d 310, 314 (2009). To prevent closure of a trial under less than unusual circumstances, the trial court must engage in an analysis using the factors set out in Bone-Club:

1. The proponent of closure or sealing 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.

State v. Bone-Club, 128 Wn.2d at 258-59, 906 P.2d 325 (1995).

**(3) The State Supreme Court reiterated in Momah and Strode that a trial court cannot close a courtroom without conducting a Bone-Club analysis.**

Momah is an usual case. The defendant, a gynecologist, was charged with rape and other sex offenses against patients during routine

physical examinations. Momah, 217 P.3d at 323-324. There was a great deal of pretrial publicity. Id. at 324. An extra large jury pool was called and jurors were given a jury questionnaire to aid the prosecution and the defense in discovering which jurors had prior knowledge about the case. Id. In order to safeguard Momah's right to an impartial jury, the trial court decided to question individual jurors who indicated knowledge about the case in chambers with only the prosecutor, the defense attorney, and Momah present. Defense counsel agreed to individual questioning. Prior to the commencement of voir dire, the court advised Momah that all proceedings are presumptively public. Strode 217 P.3d at 318 (Fairhurst, J. dissent). Momah did not object to the juror questioning in chambers. Momah, 217 P.3d at 327. Many jurors were questioned in chambers and many were excused for cause. Id. at 324.

On review, the Supreme Court held that the trial court had adequately applied the Bone-Club factors to the courtroom closure issue. Momah, 217 P.3d at 326-327. The trial court weighed Momah's right to a public trial against his right to an impartial jury and came up with the appropriately narrow solution of limited voir dire of selected jurors in chambers so as not to taint other prospective jurors who did not know about the case. Id. at 327. In addition, Momah did not incur any prejudice related to the trial court's well-reasoned decision.

Strode, like Momah, was charged with various sex crimes. Strode was a typical case in that it did not suffer from an abundance of pre-trial publicity and prospective jury taint. Strode, 217 P.3d at 312-313. Because the case involved allegations of sexual abuse of a child, prospective jurors were given a jury questionnaire asking them to answer “yes” if they themselves or someone close to them had been a victim of sexual abuse or accused of committing a sexual offense. Id. at 312. The court questioned 11 prospective jurors in chambers with only the defendant, the defense attorney, and the prosecutor present. Id. In questioning some of the jurors, the trial court alluded to doing so in chambers to ensure confidentiality and to avoid broadcasting the answers in front of the jury pool in the courtroom. Id. at 313. The court excused 6 of the prospective jurors for cause. Id.

On appeal, the Supreme Court held that the absence of a Bone-Club hearing, prior to the in-chambers voir dire, was an unconstitutional closure of the courtroom and a denial of Strode’s right to a public trial. The Court found that as closing the courtroom was a structural error, no prejudice to Strode need be found, and reversed Strode’s convictions. Strode, 217 P.3d at 316. It did not matter that Strode did not object to the in-chambers voir dire as there was no knowing, intelligent, and voluntary waiver of his right to a public trial on the record. Id. at 315.

Mr. Leyerle's case, like Strode, is a typical case. Mr. Leyerle was charged with possession of methamphetamine and unlawful display of a weapon. CP 5-6. During voir dire, a juror, Mr. O'Connor, told the court he was retired after 36 years in California law enforcement and that he carried prejudices into the courtroom. RP Voir Dire at 7, 10. The court later asked the jury panel if there was anyone who "might not be able to try this case impartially." RP Voir Dire at 18. The court then asked Mr. O'Connor to step out of the courtroom. The prosecutor and defense attorney attended the recorded hall conference. RP Voir Dire at 19-21. Mr. Leyerle did not. Defense counsel, Mr. Furman, told the court that Mr. Leyerle did not want to be "here." RP Voir Dire at 20. Mr. Furman volunteered that he did not want "jurors anywhere near my client." RP Voir Dire at 20. Mr. Furman challenged Mr. O'Connor for cause and the court did so before returning to the courtroom. PR Voir Dire at 21.

There were no other individual juror conferences outside of the courtroom. The court's only justification for the hallway conference with Mr. O'Connor was that the court thought "it's the only way that we can possibly do this without having jurors go out in the lobby for one juror." RP Voir Dire at 21.

Mr. Leyerle's case is of the common variety, the type of case heard every court day in Washington. There is nothing unusual about it and

nothing that justifies a courtroom closure. Because, as in Strode, the closure is a structural error, no prejudice need be proven. Finally, Mr. Leyerle did not waive his right to challenge the closure by declining to go out in the hall for the individual voir dire. Just as in Strode, nothing in the record suggests that Mr. Leyerle made a knowing, intelligent, and voluntary waiver of his right to an open courtroom and a public trial.

**C. CONCLUSION**

Because the trial court violated Mr. Leyerle's and the public's right to a public trial, Mr. Leyerle's conviction should be reversed.

Respectfully submitted this 16<sup>th</sup> day of November 2009.



LISA E. TABBUT/WSBA #21344  
Attorney for Appellant

CERTIFICATE OF SERVICE/MAILING

State of Washington, Respondent, v. Michael Lee Leyerle , Appellant  
No. 37087-7-II

I certify that I served a copy of Appellant's Supplemental Brief and Motion to Accept Over-Length Brief on:

Cowlitz County Prosecuting Attorney  
312 S.W. First Ave.  
Kelso, WA 98626

And that I mailed a copy of Appellant's Supplemental Brief to:

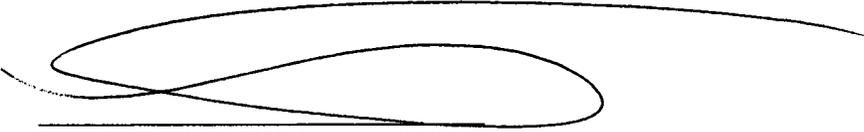
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And that I sent an original and one copy of Appellant's Supplemental Brief and Motion to Accept Late-Filed Brief to the Court of Appeals, Division II, for filing:

All postage prepaid, on November 16, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT .

Signed at Longview, Washington, on November 16, 2009.

  
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