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COURT OF APPEALS
DIVISION II

09 DEC 16 PM 12:08

STATE OF WASHINGTON
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NO. 37086-7-II
Cowlitz Co. Cause NO. 07-1-01025-1

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL LEE LEYERLE,

Appellant.

RESPONDENT'S SUPPLEMENTAL BRIEF

SUSAN I. BAUR
Prosecuting Attorney
MICHELLE L. SHAFFER
Chief Criminal Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

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A. SUPPLEMENTAL ISSUES RAISED BY THE COURT

1. How does *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009), affect Leyerle's assignments of error?
2. How does *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009), affect Leyerle's assignments of error?

B. ARGUMENT

1. LEYERLE'S CASE IS DISTINGUISHABLE FROM *STRODE*

In *Strode*, the trial court conducted individual voir dire of at least 11 prospective jurors in judge's chambers, with only the judge prosecuting attorney, defense counsel and Strode present. *Strode*, 167 Wn.2d at ____, 217 P.3d at 313. The *Strode* court found that this was an unjustified courtroom closure that required reversal of Strode's conviction and a new trial. *Id.* at 312. In Leyerle's case, the hallway questioning was of only one prospective juror. There is nothing to indicate that the hallway was not open to the public. Additionally, as noted in the State's previous briefing, the trial judge and the prosecuting attorney both stated that there were no "spectators" in the courtroom at the time of the questioning. RP 19-21. As such, there was no closure.

Even if the interviewing of a single prospective juror in the hallway is deemed an unjustified courtroom closure, the violation is

insignificant and did not infringe Layerle's constitutional right to a public trial. As noted in *Strode*, the Washington Supreme Court has never found a public trial right violation to be trivial or de minimis. *Id.* at 316. However, given the brevity of the closure and the fact that it was to speak to a single juror, such a finding would be appropriate in this case.

2. LEYERLE'S CASE IS MORE ANALOGOUS *MOMAH*.

In *Momah*, the trial court conducted individual voir dire of at least 24 prospective jurors in judge's chambers. *Momah*, 167 Wn.2d at ____, 217 P.3d at 324. *Momah* affirmatively accepted the closure, argued for the expansion of it, actively participated in it and sought benefit from it. *Id.* at 329. The *Momah* court found that the closure was not a structural error and affirmed *Momah*'s conviction. *Id.* at 324.

Again, in Layerle's case, the hallway questioning was of only one prospective juror. There is nothing to indicate that the hallway used to speak to the single juror was not open to the public. Additionally, as noted in the State's previously briefing, the trial judge and the prosecuting attorney both stated that there were no "spectators" in the courtroom at the time of the questioning. As such, there was no closure.

Furthermore, defense counsel consented to the closure. RP 20-21. The defendant consented to the closure. RP 20. The trial judge asked four brief questions of the juror. RP 19-20. Defense counsel then successfully challenged the juror for cause. RP 21.

The *Momah* court stated that if the reviewing court determines that a defendant's right to a public trial has been violated, the reviewing court is to devise a remedy appropriate to that violation. *Id.* at 326. Only if the error is structural in nature does it warrant automatic reversal of the conviction and remand for a new trial. *Id.* An error is structural when it necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. *Id.* Not all courtroom closures are fundamentally unfair and thus not all are structural errors. *Id.*

As in *Momah*, as a result of the closure, Leyerle was able to exercise a challenge for cause, removing a biased and partial juror from the venire. This was done to promote and safeguard his right to an impartial jury. The underlying facts and impact of the closure in Leyerle's case are significantly different than the long line of cases leading up to the *Momah* decision. Reversal of Leyerle's conviction and remand of his case are not appropriate remedies given the complete lack of

any prejudice to Leyerle and also given that no person wishing to attend the proceedings was excluded.

C. CONCLUSION

Leyerle's conviction should be affirmed.

Respectfully submitted this 11th day of December, 2009.

SUSAN I. BAUR
Prosecuting Attorney

By:

 #31641
MICHELLE L. SHAFFER/WSBA #29869
Chief Criminal Deputy Prosecuting Attorney
Representing Respondent

