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Jun 28, 2013, 12:36 pm  
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80727-2

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner/Plaintiff,

v.

BRIAN W. FRAWLEY,

Respondent/Defendant

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PETITIONER'S SUPPLEMENTAL BRIEF

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I. IDENTITY OF PETITIONER

Petitioner, State of Washington, was the plaintiff in the Superior Court, and the respondent in the Court of Appeals.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the decision entered September 13, 2007, by the Court of Appeals which reversed the defendant's conviction for first degree felony murder because the trial court questioned some jurors on private matters in chambers rather than in the courtroom. On appeal, defendant contended that the trial court denied his constitutional right to a public trial by excluding the public during the *voir dire* phase of the trial. The State responded that defendant had waived the right to a public trial prior to the *voir dire* phase. Additionally, the State maintained that the criteria set by this Court in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), was duly considered by the trial court.

A majority of the Court of Appeals reversed defendant's First Degree Felony Murder conviction based upon its strict application of the *Bone-Club* factors and refusal to consider the impact of defendant's actions on the issue. Specifically, that defendant moved pre-trial to sequester the jury on the same basis that necessitated the questionnaire and individual *voir dire*. CP 74-75. The Court of Appeals majority "presumed

prejudice” to the defendant based on a cursory examination of the record regarding whether the defendant’s right to a public trial had been violated. The Court of Appeals based its reversal of the first degree murder conviction on the holdings in: *State v. Bone-Club, supra*; *State v. Brightman*, 155 Wn.2d 506, 122 P.3d 150 (2005); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004); and *State v. Easterling*, 157 Wn.2d 167, 137 P.3d 825 (2006). The Court of Appeals failed to acknowledge the extent that defendant’s actions precipitated and invited the error that defendant assigned on appeal of his first degree murder conviction.

This Court granted review of the decision by the Court of Appeals, then stayed the case pending the decisions in *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009); *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321(2009); and *State v. Wise*, 176 Wn.2d 1, 288 P.2d 1113 (2012).

### III. ISSUES PRESENTED FOR REVIEW IN SUPPLEMENTAL BRIEF

- (1) Does defendant’s failure to object to the questionnaire and the individual *voir dire* of jurors preclude his litigating that issue on appeal pursuant to Rules of Appellate Procedure (“RAP”) 2.5(a)(3)?

- (2) Did defendant's active participation in the *voir dire* phase of trial invite the very error defendant claims prejudiced his right to a fair trial by an impartial jury?
- (3) Did the trial court sufficiently consider the concerns set forth in *State v. Bone-Club* in determining whether to conduct individual *voir dire* in chambers?
- (4) Did defendant waive his constitutional right to a public trial by his failure to object or his active participation in the creation and implementation of the *voir dire* process?
- (5) Should defendant be granted a new trial where the individual *voir dire* of jurors was conducted at his request to ensure for his benefit that he be tried by a fair and impartial jury?

#### IV. STATEMENT OF THE CASE

Defendant Brian Frawley was charged in the Spokane County Superior Court with first degree felony murder<sup>1</sup> arising from the abduction, rape, and strangulation of Margaret Cordova in Spokane

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<sup>1</sup> The trial court ruled that the murder count would be tried independently of other charged crimes --- the rapes of two women, a burglary and theft case, and a failure to register as a sex offender prosecution. Defendant subsequently entered guilty pleas to the failure to register and to six counts out of the burglary matters. RP 52-63.

County. CP 1-2, 19-20, 25; RP 1046-1047.<sup>2</sup> The matter was tried to a jury with the Honorable Neal Rielly presiding. RP 1 *et seq.*

The extensive pre-trial publicity combined with allegations of sexual assault and murder necessitated the use of a questionnaire to screen prospective jurors and determine whether they could be fair and impartial. RP 64-66. Defendant's counsel and defendant agreed that a *voir dire* process that incorporated the questionnaire and individual questioning thereafter was required to ensure that defendant receive a fair trial by an impartial jury. RP 64-82. The questionnaire asked the prospective jurors four questions that focused on exposure to pretrial publicity and personal experiences with sexual assault and homicide. RP 64-65. Trial began on the murder with the defendant waiving his right to be present during individual *voir dire* of jurors whose responses on the questionnaire required additional inquiry. RP 64-68.

Prospective jurors filled out questionnaires and then were summoned, if needed, to chambers for individual questioning about their responses. RP 434-449, 462-474, 493-858. Prior to the individual questioning, the trial court advised the prospective jurors in open court that the *voir dire* process was designed to determine if they were biased or

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<sup>2</sup> RP denoted the consecutively numbered transcription of the trial proceedings.

had preconceived ideas that could affect the trial. RP 438-439. The trial court further advised the prospective jurors that:

Anytime that we have a case that there might be some kind of sexual allegations or something like that, it's important for us to find out jurors that may have had some personal experiences or friends or family members that had personal experiences in these particular areas so that we can talk to them and try to find out what kind of impact that may have had on them...in view of trying to find jurors that can be fair and impartial...these are the kind of things that make it very difficult for people to talk about in the courtroom...very personal things...(494)...So, we've developed this questionnaire-type method where we try to determine if people have had these kinds of experiences or other experiences...and we can ask them about it here on the record...because it's a trial and it has to be on the record -- and try to provide some kind of privacy and yet still get the kind of information we needed.

RP 493-494.

The trial court reiterated that statement to each of the thirty-one prospective jurors who affirmatively answered the questionnaire.

RP 493-853.

At the conclusion of the individual *voir dire*, the trial court advised that he wanted to do general *voir dire* in his courtroom and inquired whether the defendant would be willing to waive the right to have the public present. "Otherwise, I'm going to try to have to locate a larger courtroom somewhere." RP 859. Defense counsel indicated his client would waive public presence. RP 859-860.

The court went through the issue with defendant personally the next day prior to general *voir dire*. Defendant waived his right to have the public present during general *voir dire*. RP 864-866.

The record does not reflect that the courtroom was ever closed to the public. Prior to testimony, the trial court expressly advised the spectators that “the court is always open to the public as it should be. I believe our court should always be open to the public, and that’s why I allow the press to come into the courtroom and that’s important.” RP 1068.

The State’s case included: forensic evidence from the body and scene; testimony by family and friends who saw the victim shortly before she disappeared; and testimony by officers that defendant denied knowing the victim. Fibers on the victim’s clothing were consistent with fiber samples from the seat of a car defendant drove. DNA testing showed that semen recovered from the victim’s vagina belonged to the defendant. RP 1110-1185, 1201-1289, 1423-1424, 1589-1600, 1669-1677, 1806-1868, 1992-1993. Defendant claimed he had consensual intercourse with the victim. RP 2027-2034. His time frame for the event was contradicted by the testimony by a Wal-Mart manager that the store closed an hour earlier than defendant claimed. RP 2074-2075. The jury convicted defendant of first degree murder. RP 2167; CP 111.

A divided Court of Appeals reversed the conviction with the majority ruling that: conducting a portion of individual *voir dire* in chambers constituted closure of the courtroom; defendant had not waived his right to have the public present during the individual *voir dire*; and any juror privacy rights did not trump the right of public trial. The majority declined to do a *Bone-Club* analysis of the record because it had concluded that the trial court had not. The dissent concluded that defendant had waived his right to have the public present at individual *voir dire*.

The State timely filed this petition thereafter.

V. ARGUMENT

A. THE FAILURE TO OBJECT TO THE INDIVIDUAL *VOIR DIRE* OF JURORS SHOULD PRECLUDE DEFENDANT FROM LITIGATING THAT ISSUE FOR THE FIRST TIME ON APPEAL PURSUANT TO RAP 2.5(a)(3).

Article I, § 22 of the Washington State Constitution is entitled

“Rights of the Accused” and provides, in pertinent part, that:

In...prosecutions the accused shall have *the right to a speedy public trial by an impartial jury* of the County in which the offense is charged to have been committed.

Article I, § 22.

This one clause encompasses the accused's constitutional rights of a speedy trial subject to public scrutiny before an impartial jury. The clause makes each of these constitutional rights coexistent and equal. As rights individual to the accused, each of these rights may be waived by either affirmative action and/or by acquiescence. The constitutional right to a public trial is well established, yet it is not absolute so as to prevent a trial court from closing the courtroom in certain circumstances. *State v. Momah*, 167 Wn.2d at 148. The constitutional right to a trial by an impartial jury is of critical importance to the rule of law because the alternative is justice meted out by mob rule typically motivated by vengeance and retribution.

Generally, an appellate court will only accept for review a constitutional claim for the first time on appeal where the claim is truly constitutional, and manifest. *State v. Davis*, 41 Wn.2d 535, 250 P.2d 548 (1953); RAP 2.5(a)(3). This procedural position is based upon the recognition that when a party fails to object, that failure deprives the trial court of the opportunity to either prevent or cure the error. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Here, defendant did not object to the individual *voir dire* process. Rather, the record clearly shows that defendant fully supported the individual *voir dire* of the prospective jurors as the best means of seating a fair and

impartial jury for his trial and derived a significant benefit therefrom. RP 64-68; 435-867. Accordingly, RAP 2.5(a) should apply to foreclose the issue being considered on appeal because defendant failed to establish that a constitutional error occurred that had any impact on the trial of his case.

B. THE DEFENDANT'S ACTIVE PARTICIPATION  
IN THE *VOIR DIRE* PHASE OF TRIAL INVITED  
THE ERROR, IF ANY, THAT DEFENDANT  
CLAIMS VIOLATED HIS PUBLIC TRIAL RIGHT.

Here, defendant did not merely waive his right to public *voir dire* by his acquiescence or failure to timely object to the private individual questioning. Defendant acknowledged his constitutional right and then affirmatively advised the court that he was waiving his right as a means of facilitating the seating of a fair and impartial jury. RP 64-83; 857-867. So important was the right to a trial by a fair and impartial jury that defendant brought a pretrial motion to sequester the jury throughout the entire trial to thereby avoid its exposure to and potential poisoning by the media coverage of the trial. CP 74-75.

Here, as was the circumstance in *Momah*, defendant actively participated in the design, creation, and implementation of the *voir dire* phase of his trial. Defendant agreed with the necessity of the juror questionnaire as the best means of identifying those prospective jurors

who had prior exposure to the media coverage of the case as well as personal experiences with crimes of sexual assault or homicide. RP 64-83. The questionnaire responses identified numerous prospective jurors who were eventually excused for cause by the trial court based upon defendant's motion. RP 493-854. The record reflects that the defendant derived a substantial benefit from the private individual questioning of the prospective jurors. As in *Momah*, this Court should find that defendant's affirmative agreement to active participation in, and derived benefit from the private *voir dire* herein, amounted to an "invited error." "The basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial." *State v. Momah*, 167 Wn.2d at 153. To decide otherwise would be to confer upon the defendant a windfall for essentially "sandbagging" the trial court and should neither be allowed nor condoned.

Nevertheless, the Court of Appeals decided there was a "structural error" that rendered defendant's trial herein fundamentally flawed without consideration of how his right to a trial by an impartial jury was enhanced by the trial court's *voir dire* process. Again, this Court's analysis and decision in *Momah* provides the answer that best serves the interests of justice. "Not all courtroom closures are fundamentally unfair and thus not all are structural errors." *Momah*, 167 Wn.2d at 150. "An error is

structural when it ‘necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.’” *Id.*, at 149 (quoting *Washington v. Recuenco*, 548 U.S. 212, 218-219, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (quoting *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999))). “A violation of the public trial right is presumed to be structural error if the closure occurs *over an objection*. See *Waller v. Georgia*, 467 U.S. 39, 47, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). A closure defect that transpired *without objection*, however, should be subject to harmless error review unless a showing of prejudice is made. *Momah*, 167 Wn.2d at 150.

In *Momah*, the court relied upon the United States Supreme Court’s reasoning in *Waller v. Georgia*, *supra*, to fashion a rule in Washington State that recognized that not all closures of a courtroom render a criminal trial fundamentally unfair. The *Momah* court reaffirmed its *Waller* based perspective that “the remedy must be appropriate to the violation” to the extent that a new trial is only required when the closure rendered the trial fundamentally unfair. *Id.*, 167 Wn.2d at 150. Herein, as noted, defendant affirmatively assented to the questionnaire and the individual questioning, argued that the jury be sequestered due to the extensive pretrial publicity, elected not to object to the individual questioning despite numerous opportunities to do so, actively participated

in the questioning through counsel, and benefited from the process. The trial court noted several times that the courtroom is and should be open to the public. The trial court only agreed to the questionnaire and individual questioning after consultation with defense and prosecutor. Finally, the trial court noted numerous times throughout the process that the individual questioning was being conducted to safeguard the defendant's constitutional right to a fair trial by an impartial jury and not to protect any other interests. The error by the trial court, if any, was invited by the defendant's decisions and actions. As a result, the defendant should not have been granted the "windfall" by the Court of Appeals of the presumption of a structural error and an automatic new trial.

C. THE TRIAL COURT HAD IN MIND THE CONCERNS UNDERLYING THE *STATE v. BONE-CLUB* DECISION WHEN IT AGREED TO CONDUCT INDIVIDUAL *VOIR DIRE* OF THE PROSPECTIVE JURORS.

The Court of Appeals reversed defendant's conviction because it found that the trial court had not properly conducted a *Bone-Club* analysis prior to conducting individual *voir dire* of prospective jurors. A careful review of the record does not support such an interpretation. Herein, the trial court articulated its reasons for conducting individual *voir dire* of prospective jurors with the defendant and the prosecutor actively

participating in the entire process. The trial court went on the record with almost every prospective juror and explained the reasons for of the process being used. The trial court advised:

Anytime that we have a case that there might be some kind of sexual allegations or something like that, it's important for us to find out jurors that may have had some personal experiences or friends or family members that had personal; experiences in these particular areas so that we can talk to them and try to find out what kind of impact that may have had on them...in view of trying to find jurors that can be fair and impartial...these are the kind of things that make it very difficult for people to talk about in the courtroom...very personal things...(494)...So, we've developed this questionnaire-type method where we try to determine if people have had these kinds of experiences or other experiences...and we can ask them about it here on the record...because it's a trial and it has to be on the record -- and try to provide some kind of privacy and yet still get the kind of information we needed.

RP 493-494.

Presuming that every "closure" that is not preceded by a formal *Bone-Club* analysis requires a new trial is not helpful if the primary concern is guidance for the trial courts handling cases involving significant pre-trial publicity and concerns about potential jurors' experience with sensitive topics such as rape and violence.

As noted, Article I, § 22<sup>3</sup> of the Washington Constitution is entitled "Rights of the Accused" and provides, in pertinent part: "In

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<sup>3</sup> The right of public access to justice, Article I, § 10 of the Washington Constitution, is not at issue in this appeal. Defendant lacks standing to assert the rights of others. *E.g.*, *Rakas v. Illinois*, 439 U.S. 128, 138, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978); *State v. Walker*, 136 Wn.2d 678, 685, 965 P.2d 1079 (1998).

criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury . . . .” Jury selection is part of the public trial. *In re Orange*, 152 Wn.2d at 804; *State v. Brightman*, *supra*.

A trial court violates the dictates of Article I, §22 whenever it enters an order excluding the public from the courtroom. In the following examples, courts closed various hearings or portions of trial to the public by issuing orders prohibiting the public from entering the courtroom. *E.g.*, *State v. Bone-Club*, *supra* [suppression hearing]; *In re Orange*, *supra* [jury selection]; *State v. Brightman*, *supra* [jury selection]; *State v. Easterling*, *supra* [pre-trial hearing]. No such order was issued by the trial court herein.

Unlike in *Bone-Club*, the trial court did not summarily clear the courtroom. The trial court gave the questionnaire and conducted the individual questioning of the prospective jurors only after defendant had agreed to the process. The defendant acknowledged to the trial court that the questionnaire and individual questioning was designed to determine: whether pretrial publicity would damage the trial (RP 64-65); what experience prospective jurors had with the sensitive issues to be presented at trial (RP 65); and whether those prospective jurors who answered the questionnaire affirmatively were fit to serve on the jury. RP 65. Defendant affirmatively waived his and the public’s presence during the

individual questioning by acknowledging that his absence would better facilitate the process. RP 67-68. Accordingly, the trial court found that defendant had knowingly and intelligently waived his constitutional right to have the individual questioning of the prospective jurors conducted in public. RP 68.

Unlike in *Brightman*, the trial court did not *sua sponte* order the courtroom closed for the entire *voir dire* process by excluding defendant's family and friends. The trial court never formally closed the courtroom. The trial court conducted the individual questioning of the prospective jurors only at the request and agreement of the defendant. RP 66. Here, unlike in *Orange*, the trial court did not summarily order the defendant's family and friends excluded from the entire *voir dire*. The trial court explicitly inquired and was advised by both parties that none of the family or friends of the defendant or victim (members of the public) wanted to attend the *voir dire*. RP 857-860. The trial court advised that if the public wished to attend, then arrangements would be made for a larger courtroom. RP 858. No such request was made. Finally, unlike in *Easterling*, the trial court did not exclude the defendant and/or defense counsel from the courtroom at any time during the *voir dire* process.

Instead, the process used by the trial court was similar to what the United States Supreme Court ruled could be done when dealing with

sensitive questioning. Though public, the jury selection process may include questioning in chambers on the record when dealing with sensitive matters. *Press-Enterprise v. Superior Court*, 464 U.S. 501, 512, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). Such is precisely the process used by the trial court here. Here, the record does not support the finding that the trial court committed a “structural” error that required reversal and a new trial due to a lack of consideration of the *Bone-Club* factors.

D. DEFENDANT WAIVED HIS RIGHT TO A PUBLIC TRIAL BY HIS MOTIONS, DISCUSSIONS WITH THE TRIAL COURT AND COUNSEL’S REPRESENTATIONS REGARDING THE INDIVIDUAL PHASE OF *VOIR DIRE*.

Defendant contends that his failure to object to the individual questioning did not constitute a waiver of his public trial right. Defendant further argues that the trial court’s failure to expressly ask whether he waived his public trial right with regard to *voir dire* cannot be construed as waiver.

The record reflects that the defendant waived his right to take part in the individual *voir dire* as well as his right to have the public present during jury selection. Defendant acknowledged on the record that the purpose of the individual questioning was to facilitate the seating of a jury that would be fair and impartial in trying his case. Defendant’s

acknowledgement of that purpose should be taken into account when considering whether his two waivers included the right to have the public present. Defendant acknowledged to the trial court that it made sense for him to not be present during the individual questioning to further juror candor. RP 64-68. To now argue that the presence of the public would make those same jurors willing to discuss those sensitive issues in front of other strangers is not logical.

As noted, waivers of constitutional rights also can be effectuated by conduct. *E.g., State v. Thomas*, 128 Wn.2d 553, 559, 910 P.2d 475 (1996) [waiver of right to testify at trial]. Such should be the rule that applies in this circumstance. Defendant waived his right to be present and consented to questioning jurors in chambers as a means of gaining information to facilitate the seating of a fair and impartial jury for his trial. As a result of that process, defendant derived the benefit of having the trial court excuse nine jurors for cause. Accordingly, any right defendant had to have the public present should be considered waived as well.

E. THE REMEDY FOR THE VIOLATION, IF ANY,  
SHOULD NOT BE A NEW TRIAL UNDER THE  
CIRCUMSTANCES OF THIS CASE.

Prejudice will be presumed when the right to a public trial has been infringed. *State v. Bone-Club, supra* at 261-262. Therefore, the typical

remedy for a violation of the defendant's right to a public trial is to grant a new trial. *Id.*; *In re Orange, supra* at 814. Such is precisely the position adopted by the majority opinion of the Court of Appeals in this case. As noted in *Orange*:

The failure to raise the courtroom closure issue was not the product of 'strategic' or 'tactical' thinking, and it deprived Orange of the opportunity to have the constitutional error deemed per se prejudicial on direct appeal. The remedy for counsel's failure to raise on appeal the violation of Orange's public trial right is remand for a new trial.

152 Wn.2d at 814.

This case, however, presents a different fact pattern. The "closure" occurred because the defense wanted the individual questioning and it was conducted for defendant's benefit. Prejudice to his rights should not be presumed when he is a proponent asking the trial court to do implement the very procedure that he claimed as error on appeal.

Here, unlike in *State v. Paumier*, 176 Wn.2d 29, 288 P.3d 1126 (2012), the defendant actively participated in the design and implementation of the questionnaire and individual questioning conducted to ensure his constitutional right to a fair trial before an impartial jury. Here, the record reflects that the trial court was very much aware and considered the purposes underlying the *Bone-Club* factors.

Here, unlike in *State v. Wise, supra*, the record reflects that the trial court was well aware of the purposes underlying the factors articulated in *Bone-Club*. The trial court knew that it had to seat an impartial jury to ensure that defendant's constitutional right to a fair trial was secured. RP 64-68; 435-854.

In *Wise*, the Court noted that a closure of the courtroom can be lawful despite a lack of an explicit *Bone-Club* analysis where the record shows that the standard for closure was satisfied. *State v. Wise, supra*. Here, the trial court implicitly satisfied *Bone-Club* and thereby prevented a violation of the open court rights. First, numerous times the trial court noted that this entire process had to be on the record because of the right to a public trial. RP 64-67; 435-854. The trial court had open discussions in the open courtroom on the record regarding the *voir dire* process the parties had agreed to utilize to seat a jury in this case. RP 64-67; 435-854. Second, the record reflects that no one present in the courtroom, parties or public, proffered an objection to the proposed process for individual questioning of the prospective jurors. RP 64-67; 435-854. Third, the trial court used the least restrictive means available as evidenced by its discussions with the parties, especially the defendant. Specifically, that the best means available to facilitate open disclosures by the prospective jurors was individual questioning which would inure to the defendant's

benefit by seating a fair and impartial jury. RP 64-67; 435-854. Fourth, the trial court numerous times weighed the defendant's interest in seating a fair and impartial jury versus the public's right to an open forum. RP 64-67; 435-854. It is somewhat counter-intuitive for the trial court to engage in such a balancing of interests when the defendant is the proponent and an active participant. Finally, the record reflects that the closure was as minimal as possible to ferret out possible biases and prejudices based upon the personal experiences of the prospective jurors to sexual abuse and violence. The individual questioning was also utilized to discover and prevent pretrial publicity from impacting the venire and eventual jury. RP 64-67; 435-854. This record demonstrates that the trial court was aware of, considered, and complied with the purpose underlying the reasoning in *State v. Bone-Club*.

Even though the trial court did not follow the *Bone-Club* analysis verbatim, it still fulfilled the underlying reason for *Bone-Club*. Unlike, in *State v. Wise*, here the defendant did actively participate in effecting the courtroom "closure" during a portion of the *voir dire*. Hence, the holding in *State v. Momah*, should apply here to reverse the Court of Appeals and affirm the jury's verdict finding defendant guilty. The trial court closed a portion of *voir dire* to safeguard defendant's right to trial and an impartial jury. It narrowly tailored the process, so there was no structural error.

F. THE DEFENDANT ACTIVELY AND PASSIVELY  
WAIVED HIS RIGHT TO THE PUBLIC'S  
PREJUDICE DURING *VOIR DIRE*.

The defendant's actions vis-à-vis the jury questionnaire and individual *voir dire* can reasonably be construed as both an active and a passive waiver of his right to the public's presence.

It is a harsh remedy to presume prejudice and reverse for a new trial when a defendant fails to object to a trial court action (passive waiver). An entirely different remedy should apply when the defendant embarks on a course of conduct undertaken for his benefit (active waiver). These types of trial procedures do not and should not result in a presumption of prejudice because they are undertaken to ensure a fair and impartial trial for the defendant. Here, the defendant derived significant benefits from the procedure used to seat a jury. Under such circumstances, the process should not even be considered erroneous. There is no reason to presume prejudice or reverse the conviction under these facts.

In dealing with the situation where a court had wrongly closed a suppression hearing to the public, the United States Supreme Court noted that "the remedy should be appropriate to the violation." *Waller v. Georgia*, 467 U.S. at 50. The Court concluded that the appropriate remedy was to remand for a new suppression hearing. If the same

evidence was suppressed as in the original hearing, then there would be no need to order a new trial as it would be an inappropriate “windfall” to the defendant. *Id.*

Here, the issue is whether the automatic reversal rule of *State v. Bone-Club* should apply under the circumstances of this case. To blindly apply that rule to a “violation” designed to help the defendant is nothing but an in appropriate “windfall” that is not required by the United States Constitution.

VI. CONCLUSION

Respectfully, petitioner asks this Court to reverse the decision of the Court of Appeals, and affirm the conviction.

Respectfully submitted this 28<sup>th</sup> day of June, 2013.

STEVEN J. TUCKER  
Prosecuting Attorney



Mark E. Lindsey #18272  
Senior Deputy Prosecuting Attorney  
Attorney for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, )  
 )  
 ) Petitioner, )  
 )  
 ) v. )  
 )  
 ) CERTIFICATE OF MAILING  
 )  
 ) BRIAN W. FRAWLEY, )  
 )  
 ) Respondent, )

---

CERTIFICATE

I certify under penalty of perjury under the laws of the State of Washington, that on June 28, 2013, I mailed a copy of the Petitioner's Supplemental Brief in this matter, addressed to:

David N. Gasch  
Attorney at Law  
P O Box 30339  
Spokane WA 99223

Hilary Thomas  
Attorney at Law  
311 Grand Ave  
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Lila Silverstein  
Attorney at Law  
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

6/28/2013  
(Date)

Spokane, WA  
(Place)

*Hathleen H. Owens*  
(Signature)

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Please find attached Plaintiff's Supplemental Brief w/ Service, regarding State v. Frawley #80727-2.

Kathleen Owens, Legal Assistant  
for Mark E. Lindsey  
Sr. Deputy Prosecutor  
for Spokane County