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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

Sup. Ct. No. \_\_\_\_\_  
COA No. 25043-1-III

**80727-2**

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

BRIAN W. FRAWLEY,

Defendant/Respondent.

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PETITION FOR REVIEW

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STEVEN J. TUCKER  
Prosecuting Attorney  
Spokane County

Kevin M. Korsmo  
Deputy Prosecuting Attorney

Attorneys for Petitioner

County-City Public Safety Building  
West 1100 Mallon  
Spokane, Washington 99260  
(509) 477-3662

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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 Court of Appeals decision entered September 13, 2007, which reversed the defendant's conviction for first degree felony murder because the trial court had conducted questioning of some jurors on private matters in chambers rather than in the courtroom. A copy of the Court of Appeals opinion is attached as Appendix A.

III.

ISSUES PRESENTED FOR REVIEW

(1) Does a trial court "close" a courtroom when it conducts portions of individual *voir dire* on sensitive matters in chambers?

(2) Does a defendant who waives his right to be present during private *voir dire* also waive his right to public presence at *voir dire* on sensitive matters?

(3) Do prospective jurors in Washington have a right of privacy that continues during jury service?

(4) Where private *voir dire* is conducted for the benefit of the defendant, has he been harmed by the absence of the public from the private *voir dire* to the extent that he should receive a new trial?

#### 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, whose body was found a month after she disappeared from Spokane city streets. CP 1-2, 19-20, 25; RP 1046-1047.<sup>2</sup> The matter was assigned to the Honorable Neal Rielly for jury trial. RP 1 *et seq.*

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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.

<sup>2</sup> RP denoted the consecutively numbered transcription of the trial proceedings. The separately paginated post-trial transcripts are denoted by date/RP.

Because the case had garnered extensive pre-trial publicity and raised the question of sexual assault, a questionnaire was used that asked four questions of prospective jurors. Trial began on the murder count with the defendant waiving his right to be present during individual *voir dire* of jurors whose answers on the pre-trial questionnaire required investigation. 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. At the conclusion of the individual *voir dire*, Judge Rielly indicated 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 during jury selection. “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 at any time. In his opening remarks to counsel before testimony started, Judge Rielly expressly addressed the courtroom audience.

He told 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. He then told the audience how important it was that no one do anything to disrupt the trial. RP 1068-1069.

The prosecution’s case consisted of forensic evidence recovered from the body and crime scene, testimony from family and friends who saw the victim shortly before she disappeared, and testimony from officers that defendant denied knowing the victim. Fibers found 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 1110-1114, 1116-1119, 1123-1124, 1137-1146, 1160, 1171-1185, 1201-1202, 1220, 1241-1243, 1246-1247, 1252, 1287-1289, 1423-1424, 1589-1600, 1669-1677, 1806-1809, 1811-1812, 1866-1868, 1992-1993.

Defendant testified on his own behalf and claimed to have had consensual intercourse with the victim. RP 2027-2034. His time frame for the event was undercut when a Wal-Mart manager testified the store closed an hour earlier than defendant claimed. RP 2074-2075.

Defense counsel argued his client's version of events to the jury. He speculated that either the victim's boyfriend or the boyfriend of her cousin were responsible for the killing. RP 2135-2156. The jury convicted the defendant of first degree murder as charged. RP 2167; CP 111.

A divided Court of Appeals, Division III, reversed the conviction in a published opinion. The majority determined that holding a portion of individual *voir dire* in chambers constituted closure of the courtroom during jury selection. Defendant did not waive his right to have the public present at the private *voir dire* and any juror privacy rights did not trump the right of public trial. The majority also declined to weigh the Bone-Club factors since the trial court had not. *See* Slip opinion at 6-9. Judge Brown, in dissent, argued that defendant had waived his right to have the public present at individual *voir dire*. Slip opinion (dissent) at 1-3.

This petition timely followed.

V.

#### ARGUMENT

The considerations which govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that two of those criteria are implicated in this case: the decision raises significant issues under the Constitution of the State of Washington, RAP 13.4(b)(3), and it presents

issues of public importance in the administration of jury trials.  
RAP 13.4(b)(4).<sup>3</sup>

The primary consideration is guidance to the trial courts in handling cases involving significant pre-trial publicity and concerns about potential jurors' experience with sensitive topics such as rape and violence. Does questioning jurors privately away from the public constitute a "closure" of the courtroom? Does a defendant who waives his own right to be present at private individual *voir dire* and his right to have the public present at general *voir dire* also waive any right to have the public present at the private *voir dire*? Are jurors' "private affairs" a part of the public trial? Should there be a presumption of prejudice in wrongly "closing" a courtroom when it is done on the defendant's behalf? These questions all involve matters of public significance and also present significant constitutional questions concerning the scope of the defendant's right to a public trial as well as jurors' constitutional right to privacy.

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<sup>3</sup> Undersigned counsel is aware of at least eight Spokane County cases in Division Three that raise this same issue: State v. Meyers, 25822-0-III; State v. Livingston, no. 25850-5-III; State v. Burkey, 24215-3-III; State v. Vega, no. 24889-5-III; State v. Lipinski, 25178-1-III; In re PRP of Durfee, no. 26427-1-III; and In re PRP of Williams-Walker, no. 26229-4-III. I also have been advised that many other counties have the same issue presented there. The numbers in Spokane County alone are expected to increase greatly. In addition, counsel is aware of at least two cases raising the same arguments in Division One: In re PRP of Coggins, no. 59960-7-I, and State v. Momah, no. 58004-3-I.

*Courtroom “Closure.”* The initial question presented is whether conducting private questioning outside of the public constitutes a courtroom “closure” even where no order was entered closing the courtroom. This question presents both a significant constitutional question and an issue of public importance.

Article I, §22<sup>4</sup> of the Washington Constitution is entitled “Rights of the Accused.” In very limited part, it says: “In 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 795, 804, 100 P.3d 291 (2004); State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005).

A trial court violates the dictates of Art. I, §22 whenever it enters an order excluding the public from the courtroom. In all previous 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, 128 Wn.2d 254, 906 P.2d 325 (1995) [suppression hearing]; In re Orange, *supra* [jury selection]; State v. Brightman, *supra* [jury selection]; State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006) [pre-trial hearing].

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<sup>4</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, 58 L. Ed. 2d 387, 99 S. Ct. 421 (1978); State v. Walker, 136 Wn.2d 678, 685, 965 P.2d 1079 (1998).

This court has never ruled that a courtroom is “closed” in the absence of an order barring the public from the room. If there is some sort of *de facto* closure doctrine, this court ought to declare it and provide guidance to the trial bench. If questioning prospective jurors in chambers constitutes a courtroom “closure,” what about other chambers conferences? If the test is merely whether the public can see and hear the activity, do side-bar conferences violate the right to a public trial?<sup>5</sup>

The closest this court came to addressing the issue was In re Orange, *supra*. There this court noted that the defendant’s family was excluded from the courtroom during jury selection. 152 Wn.2d at 802, 807-808. The court also noted that the trial court did conduct private individual *voir dire* in chambers concerning eight questions presented in a questionnaire. *Id.* at 801. This court’s analysis of the Article I, section 22 closure issue focused solely on the absence of the family from the courtroom and did not discuss whether the chambers questioning violated the defendant’s right to a public trial. *Id.* at 807-813.

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<sup>5</sup> This court has previously applied “well settled law” to conclude that criminal defendants have no personal right to be present at chambers or side-bar conferences that involve only legal issues. *E.g.*, In re PRP of Pirtle, 136 Wn.2d 467, 483-484, 965 P.2d 593 (1998); In re PRP of Lord, 123 Wn.2d 737, 306, 870 P.2d 964, *cert. denied* 513 U.S. 849 (1994).

The process used by the trial court here is similar to what the United States Supreme Court has said could be done when dealing with sensitive questioning. While holding that the jury selection process is a public one, the court indicated that when dealing with sensitive matters, questioning could be conducted on the record in chambers and a transcript eventually made available to the public. Press-Enterprise v. Superior Court, 464 U.S. 501, 512, 78 L. Ed. 2d 629, 104 S. Ct. 819 (1984). That is what the trial court did here.

This court should decide whether Article I, §22 is violated in the absence of an order forbidding the public to be in the courtroom.

*Waiver.* Defendant waived his own right to take part in the private *voir dire*. He also waived his right to have the public present during jury selection. He was not expressly asked about his right to have the public present at the private questioning. Given that the purpose of individual *voir dire* was to permit jurors to speak openly about private matters, the defendant's two waivers should be construed to include any right he had to have the public present. It makes no sense to have the defendant step aside to further juror candor, but then expect those same jurors to open up to other strangers.

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]. That rule should apply here as well. Defendant waived his right to be present and consented to questioning jurors in chambers in order to obtain necessary information. Any right he had to have the public present should be considered waived as well.

This court ought to address the scope of any necessary waiver of the right to a public trial in this context in order to provide to the bench and trial bar.

*Juror Privacy.* Washington citizens maintain a right of privacy under Article I, §7 of the state constitution: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Washington courts recognize that this right of privacy extends through jury service and that the public’s right of access to court records “is not absolute,” but, instead, “shall be consistent with reasonable expectations of personal privacy as provided by article 1, section 7 of the Washington State Constitution.” GR 31(a). To this end, GR 31(j) provides in part: “Individual juror information, other than name, is presumed to be private.” Juror information can only be obtained upon a showing of good cause. Id.

The limited private questioning in this case involved responses to questionnaires that themselves are recognized as private documents. GR 31(j). The subject matter of those answers should not become public simply because there is need for follow-up questioning about them. The individual *voir dire* involved the jurors' private affairs and was not part of the public trial. Article I, §7. There was no right of public access to that portion of the hearing.

This court should determine whether the "private affairs" of the jurors must give way to the defendant's right to a public trial under Article I, § 22.

*Prejudice Requirement.* 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.

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 private questioning and it was conducted for defendant’s benefit. Why should prejudice to his rights be presumed when he is the one asking for the trial court to do what it did?

It is one thing to presume prejudice and reverse for a new trial when a defendant fails to object to trial court action. It is an entirely different situation, however, when the defendant embarks on a course of conduct undertaken for his benefit. Why should prejudice be presumed in such a situation? Indeed, why should it even be considered erroneous? There is no reason at all 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. 39, 50, 81 L. Ed. 2d 31, 104 S. Ct. 2210 (1984). There 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.

This court should consider whether the automatic reversal rule of State v. Bone-Club should apply in this circumstance. 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.

This case presents significant constitutional issues under both Article I, § 7 and Article I, § 22 of the Washington Constitution. It also presents issues of public significance on which this court can provide guidance to the trial bench and bar. Review is appropriate. RAP 13.4(b)(3), (4).

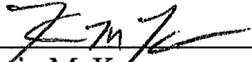
VI.

CONCLUSION

Petitioner asks this Court to grant the petition for review, reverse the decision of the Court of Appeals, and affirm the conviction.

Respectfully submitted this 4<sup>th</sup> day of October, 2007.

STEVEN J. TUCKER  
Prosecuting Attorney

  
\_\_\_\_\_  
Kevin M. Korsmo #12934  
Deputy Prosecuting Attorney

Attorney for Petitioner

# APPENDIX A

**FILED**

SEP 13 2007

In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

<b>STATE OF WASHINGTON,</b>	)	<b>No. 25043-1-III</b>
	)	
<b>Respondent,</b>	)	
	)	<b>Division Three</b>
<b>v.</b>	)	
	)	
<b>BRIAN W. FRAWLEY,</b>	)	
	)	<b>PUBLISHED OPINION</b>
<b>Appellant.</b>	)	

SWEENEY, C.J.—Our Supreme Court has made it clear that the trial of a criminal defendant may not be closed to the public absent a rigorous evaluation and balancing of a number of factors. *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). Here, the trial judge excluded the public by conducting a portion of the jury voir dire in chambers without waivers from either the defendant or anyone present in the courtroom. We accordingly reverse and remand for a new trial.

**FACTS**

Margaret Cordova disappeared during the early morning hours of January 17, 2004, in Spokane, Washington. Jerome Tanks, a friend and relative of Ms. Cordova, was the last person to see her alive. Ms. Cordova left his apartment between 2:00 a.m. and

2:30 a.m. on January 17. He assumed that she had returned to the apartment of other relatives within the same apartment complex. Ms. Cordova never arrived at the other apartment. Her boyfriend and her mother reported her missing on January 18, 2004.

A man who was collecting firewood north of Spokane discovered Ms. Cordova's body on February 22, 2004. Animals had eaten away much of the upper part of the body and little remained but the skeleton. Police found a ligature around her neck with one end secured to her right wrist.

The lower body from the hips to the feet was fairly intact; however, it was unclothed except for a pair of panties that was torn and hanging around her right leg. Ms. Cordova's ankles were tied by a blue drawstring from pajama bottoms she had been wearing.

Dr. Sally Aiken is the Chief Medical Examiner for Spokane County. She testified that it was impossible to determine exactly where or when Ms. Cordova died. Dr. Aiken could not determine whether the ligature around her neck was applied before or after she died. All of the soft tissue around Ms. Cordova's neck was gone. Dr. Aiken concluded that about 20 bruises on Ms. Cordova's lower body were inflicted before her death. She also concluded that the ligatures on Ms. Cordova's legs were tied before she was killed. The DNA<sup>1</sup> of the semen taken from Ms. Cordova's body matched Brian Frawley's DNA.

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<sup>1</sup> Deoxyribonucleic acid.

Mr. Frawley lived in an apartment complex in Spokane with his girl friend, Jessica Hensley, and her brother, Josh Hensley. Mr. Frawley occasionally used Ms. Hensley's Pontiac Grand Am car. Mr. Hensley worked at Northern Farms, which is located next to the area where Ms. Cordova's body was found. Ms. Hensley or Mr. Frawley often drove Mr. Hensley to work. The Washington State Patrol Crime Laboratory found fabric fibers on Ms. Cordova's sweatshirt and pajama bottoms consistent with fibers from the seat of the Pontiac Grand Am.

Mr. Hensley recalled that in either December or January, he, Mr. Frawley, and another friend smoked methamphetamine in the apartment after Ms. Hensley had gone to bed. Sometime between 10:00 and 12:00 p.m., Mr. Frawley left in Ms. Hensley's Pontiac. He took the drugs and Ms. Hensley's cell phone with him. Mr. Hensley and his friend called the phone repeatedly because they wanted Mr. Frawley to bring the drugs back to the apartment. Mr. Frawley returned early the next morning. He was crying and upset. He reported that he had hit a girl with Ms. Hensley's car and buried her in the woods. Mr. Hensley checked the car but saw no damage.

Records for Ms. Hensley's cell phone showed a series of six short phone calls received between 10:00 p.m. on January 16 and 3:12 a.m. on January 17. Ms. Cordova disappeared during that time.

Police detectives interviewed Mr. Frawley. He acknowledged his relationship with Ms. Hensley and that he had access to her car. He denied knowing or ever having had sex with Ms. Cordova. He told the detectives that he did not kill Ms. Cordova.

The State charged Mr. Frawley with first degree felony murder. It alleged first or second degree rape or first or second degree kidnapping as the underlying felony.

Mr. Frawley testified at his trial. He said that he first met Ms. Cordova in July or August 2003. Ms. Cordova had been hitchhiking. Mr. Frawley gave her a lift to a shopping mall. He said that they smoked some marijuana together and then went their separate ways. Mr. Frawley said that he next saw Ms. Cordova on January 16, around 10:00 p.m. She was talking on a pay phone outside a fast food restaurant when she recognized him from their previous encounter. She approached him, and they decided to drive to a more private location to smoke methamphetamine. Mr. Frawley said that he and Ms. Cordova drove to a parking lot in back of a drug store where Ms. Cordova traded sex for methamphetamine.

Mr. Frawley said that he then drove her back to where he had picked her up because she was expecting someone to give her a ride. Mr. Frawley says he dropped her off and then drove to Wal-Mart to buy a headlight. He then headed home to the apartment where he arrived at approximately 11:20 p.m. A Wal-Mart manager testified that the store closed at 10 p.m. on January 16.

## VOIR DIRE

At trial, the court divided the voir dire of the jurors into two parts. The first consisted of the voir dire of individual jurors (individual voir dire). This involved a short interview with each juror based on the answers he or she gave in response to a questionnaire. This was conducted in the judge's chambers outside the presence of the public or Mr. Frawley. It is undisputed that Mr. Frawley waived his right to be present at this phase of the trial. The court did not, however, ask whether Mr. Frawley would waive his constitutional right to have the public present. Nor did the court ask any of those in the courtroom whether they would waive the right to a public trial.

The court conducted the second phase of the voir dire (general voir dire) in the courtroom. The court, after appropriate inquiry of Mr. Frawley, concluded that Mr. Frawley knowingly and voluntarily waived his right to have the public present during this phase of the voir dire. The court did not request a waiver from any member of the public or press, if any were present.

The jury found Mr. Frawley guilty of first degree felony murder.

## DISCUSSION

### PUBLIC TRIAL

Mr. Frawley contends that the trial court denied him his constitutional right to a public trial by excluding the public during the voir dire phase of his trial. The State responds that Mr. Frawley freely waived any right to a public trial before the general voir

dire of the jury panel. The State also argues that the individual voir dire was appropriately kept from public view because of GR 31(j),<sup>2</sup> which presumes the privacy of juror information. In any event, the State continues, the *Bone-Club* factors were satisfied so there was no violation of Mr. Frawley's rights.

Whether a defendant's right to a public trial has been violated is a question of law that we review de novo. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). The right to a public trial is guaranteed by the state constitution. Article I, section 10 of the Washington State Constitution guarantees that justice in all cases shall be administered openly. And article I, section 22 of our constitution guarantees that "[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial." These same rights are also guaranteed in the Fourth amendment to the United States Constitution.

Our state Supreme Court has recently held that these guarantees include "'the process of juror selection' which 'is itself a matter of importance, not simply to the adversaries but to the criminal justice system.'" *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (quoting *Press-Enter. Co. v. Superior Court*, 464

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<sup>2</sup> Individual juror information, other than name, is presumed to be private. The court may permit access only upon a showing of good cause, and may require that the information not be disclosed to other persons.

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U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)); *see Brightman*, 155 Wn.2d at 517; *State v. Easterling*, 157 Wn.2d 167, 179-82, 137 P.3d 825 (2006).

The State argues that jury questionnaires are typically private documents and that access to them can only be acquired by petitioning the court upon a showing of good cause under GR 31(j). The State urges that this “private” status extends also to any question/response made in relation to that questionnaire. But, it offers no authority for this position. Further, the State’s position is undercut by the fact that all discussion of the questionnaires was held on the record. Report of Proceedings at 66.

We can find no material distinction between individual voir dire of jurors in camera and general voir dire of the jury panel. Jury selection is jury selection. *Orange*, 152 Wn.2d at 804 (quoting *Press-Enter.*, 464 U.S. at 505); *see Brightman*, 155 Wn.2d at 517; *Easterling*, 157 Wn.2d at 179-82.

Second, while court rules, specifically GR 31(j), or other considerations of jury privacy can and should influence the judge’s decision to exclude the public from certain phases of a trial, they do not trump constitutional requirements that the trial be public. *State v. Pelkey*, 109 Wn.2d 484, 490, 745 P.2d 854 (1987) (court cannot sustain an interpretation of a court rule which contravenes the constitution); CrRLJ 1.1 (“These rules shall not be construed to affect or derogate from the constitutional rights of any defendant.”).

In this case, there was no discussion one way or the other about excluding the public from the individual voir dire. And “[a] waiver is the intentional relinquishment . . . of a known right or privilege.” *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). Here, Mr. Frawley was never presented with an opportunity to waive his right to have the public present at the individual voir dire, therefore he cannot have knowingly and intelligently waived that right.

“In order to protect the accused’s constitutional public trial right, a trial court may not close a courtroom without, first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure order.” *Easterling*, 157 Wn.2d at 175; *Bone-Club*, 128 Wn.2d at 261 (“Lacking a trial court record showing any consideration of Defendant’s public trial right, we cannot determine whether closure was warranted.”); *Brightman*, 155 Wn.2d at 518 (“Because the record in this case lacks any hint that the trial court considered Brightman’s public trial right as required by *Bone-Club*, we cannot determine whether the closure was warranted.”). Here, it is undisputed that the trial court did not go through the *Bone-Club* requirements on the record, nor did it enter specific findings justifying the closure.

The State invites us to weigh the *Bone-Club* factors on review and decide whether the trial process in this case was properly closed to the public. Resp’t’s Br. at 10-14. We review a trial judge’s consideration of these factors as found in the record; we do not consider them for the first time on appeal. *Bone-Club*, 128 Wn.2d at 261; *Brightman*,

155 Wn.2d at 518. And, in any event, the trial court record and the briefing on appeal here are inadequate to weigh and balance those factors.

“Prejudice is necessarily presumed where a violation of the public trial right occurs.” *Easterling*, 157 Wn.2d at 181. “The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis.” *Id.* The remedy here is reversal and a new trial. *Id.* at 174.

#### SUFFICIENCY OF THE EVIDENCE

Mr. Frawley next argues that the evidence is insufficient to convict him of Ms. Cordova’s murder. He argues that the evidence does not support the necessary predicates for felony murder, here rape and kidnapping.

Evidence must be sufficient to support each element of the crime. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). We will draw all reasonable inferences from the evidence in favor of the State. *State v. Lopez*, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995). Circumstantial evidence is just as reliable as direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).

Here, the State charged Mr. Frawley with murdering Ms. Cordova in the course of committing first or second degree rape or first or second degree kidnapping. Clerk’s Papers at 25. The State must then prove each element of the predicate felony. *State v. Quillin*, 49 Wn. App. 155, 164, 741 P.2d 589 (1987) (citing *State v. Gamboa*, 38 Wn. App. 409, 412, 685 P.2d 643 (1984)). The court did not instruct the jury that it had to

unanimously agree on a specific predicate crime or crimes. *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984). Therefore, we must be able to conclude that substantial evidence supports each alternative predicate crime to remand for new trial. *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007).

The State charged first or second degree rape or first or second degree kidnapping as the alternative predicate crimes. The higher degree of those crimes necessarily includes the inferior degree. RCW 10.61.003; *State v. Tamalini* 134 Wn.2d 725, 731, 953 P.2d 450 (1998). Therefore, we need only decide whether the evidence is sufficient to support first degree rape and first degree kidnapping. If the State presented sufficient evidence to support those crimes, it necessarily presented evidence sufficient to support the inferior degree crime (in both cases second degree). *State v. Berlin*, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997) (citing *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)).

First degree murder includes murder committed in the course of rape or kidnapping. RCW 9A.32.030(1)(c).<sup>3</sup>

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<sup>3</sup> RCW 9A.32.030 provides:

(1) A person is guilty of murder in the first degree when:

....

(c) He or she commits or attempts to commit the crime of either . . .  
(2) rape in the first or second degree, . . . (5) kidnapping in the first or second degree, and in the course of or in furtherance of such crime . . . he or she, or another participant, causes the death of a person other than one of the participants.

To prove first degree kidnapping, the State must show that the defendant intentionally abducted the victim with the intent to inflict bodily injury or extreme mental distress.<sup>4</sup> To prove first degree rape, the State must show that the defendant engaged in sexual intercourse with the victim by forcible compulsion and that the defendant either kidnapped the victim, inflicted serious physical injury on the victim, or used or threatened to use a deadly weapon.<sup>5</sup> We then look for sufficient evidence in this record for both first degree rape and first degree kidnapping. *Quillin*, 49 Wn. App. at 164 (citing *Gamboa*, 38 Wn. App. at 412).

Here, the State showed that Ms. Cordova was in a car Mr. Frawley used. Mr. Frawley's semen was in Ms. Cordova's body. Ms. Cordova was bound by the feet and neck. Her panties were torn and pulled down around her right thigh. She was left in a

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<sup>4</sup> RCW 9A.40.020 provides:

(1) A person is guilty of kidnapping in the first degree if he intentionally abducts another person with intent:

....

- (c) To inflict bodily injury on him; or
- (d) To inflict extreme mental distress on him.

<sup>5</sup> RCW 9A.44.040 provides:

(1) A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory:

- (a) Uses or threatens to use a deadly weapon or what appears to be a deadly weapon; or
- (b) Kidnaps the victim; or
- (c) Inflicts serious physical injury, including but not limited to physical injury which renders the victim unconscious.

place where no one would be likely to find her. Mr. Frawley was familiar with that location. The cause of Ms. Cordova's death was homicide. Mr. Frawley told a friend that he had hit a girl with his car and taken her body to the woods on the same day that Ms. Cordova went missing. The testimony of multiple witnesses described Ms. Cordova as being in a committed and happy relationship with her child's father. Members of Ms. Cordova's family testified that she did not use methamphetamine. Finally, nothing corroborated Mr. Frawley's version of events.

The evidence supports the abduction and ultimate death of Ms. Cordova at Mr. Frawley's hand. The showing supports a finding of first degree kidnapping based on any of three separate means: with intention (1) to commit a felony (here rape), (2) to inflict bodily injury (ligatures around the neck and feet, pre-mortem injuries and death), and (3) to inflict extreme mental distress (ligatures around the neck and feet, pre-mortem injuries, panties pulled down, and death). RCW 9A.40.020(1)(b), (c), (d).

First degree rape requires a showing that the defendant engaged in sexual intercourse with another person by forcible compulsion where the defendant kidnaps the victim or inflicts serious physical injury. RCW 9A.44.040(1)(b), (c). Here, Mr. Frawley had sexual intercourse with Ms. Cordova. Again, Ms. Cordova was bound by the neck. Her pajama pants drawstring was tied around her legs. Her panties were torn and pulled down around her right thigh.

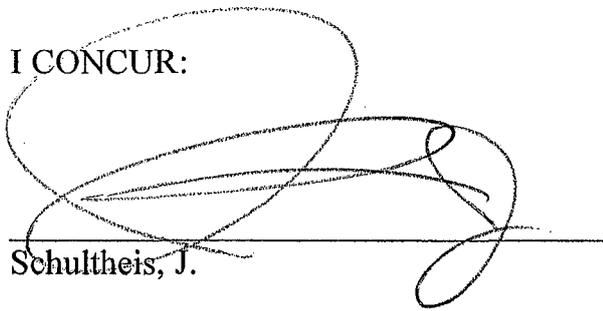
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State v. Frawley

In sum, the evidence supports a jury finding that Mr. Frawley kidnapped Ms. Cordova, elevating the rape to first degree. RCW 9A.44.040(1)(b). The evidence that Mr. Frawley inflicted serious physical injury to Ms. Cordova provides an alternate means of first degree rape. RCW 9A.44.040(1)(c).

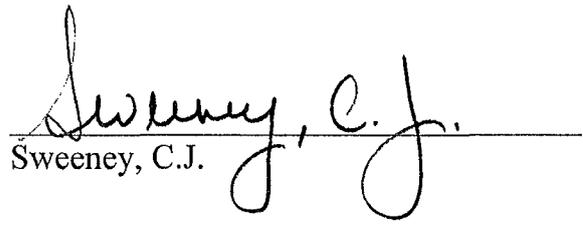
Pro se Mr. Frawley makes a number of other assignments of error. But we need not address them given our disposition of the case.

We reverse the conviction and remand for new trial.

I CONCUR:



Schultheis, J.



Sweeney, C.J.

**No. 25043-1-III**

BROWN, J. (dissenting) — I agree that the evidence sufficiently supports Brian William Frawley's conviction. However, because Mr. Frawley waived his right to be present for the follow-up, in chamber questioning of individual potential jurors regarding their answers to pretrial publicity questionnaires and requested that process, I disagree that his public trial right was violated. Our facts differ significantly from those in *State v. Brightman*, 155 Wn.2d 506, 122 P.3d 150 (2005) where the court reversed, partly for failure to provide a public trial.

In *Brightman*, the court, sua sponte, told the attorneys, without defense objection, that the courtroom would be closed during jury selection. *Id.* at 511. The *Brightman* court favorably discussed *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004) where, over a defense objection, the trial court directed individual in chambers voir dire. Mr. Frawley argues *Brightman* and *Orange* mandate a reversal. I disagree.

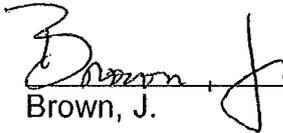
Here, unlike the facts in *Brightman* and *Orange*, Mr. Frawley's counsel, not the court, initiated the waiver process by telling the court that Mr. Frawley would waive his

presence for the individual in chambers voir dire. Then, the court thoroughly examined Mr. Frawley about his decision to permit in chambers voir dire to assure a knowing, voluntary, and intelligent waiver with advice of counsel. See Report of Proceedings (RP) at 64-68. Further, unlike *Brightman* and *Orange* where the trial courts preemptively ordered closure, the trial court flatly offered to conduct the individual questioning in open court or on the record, in chambers at Mr. Frawley's choice. Certainly, a defendant can waive a constitutional right. See *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (waiver of right to counsel). And a waiver may even be inferred by the defendant's conduct. See *State v. Thomas*, 128 Wn.2d 553, 559, 910 P.2d 475 (1966) ("As with the right to self-representation, the right not to testify, and the right to confront witnesses, the judge may assume a knowing waiver of the right from the defendant's conduct."). Mr. Frawley's conduct and his waivers are consistent. Mr. Frawley specifically waived his public trial right for the subsequent general voir dire. See RP at 864-866.

In *Brightman*, Mr. Brightman's counsel was found ineffective for failing to object to closing jury selection. In contrast, Mr. Frawley's counsel advised Mr. Frawley about the waiver and advanced Mr. Frawley's waiver decision and the in chambers procedure. Mr. Frawley personally expressed his understanding to the court that the potential jurors would more likely answer freely and honestly if interrogation was conducted in chambers, outside the presence of persons in the courtroom. It follows that Mr. Frawley

understood the public needed to be excluded to accomplish the desired purpose of furthering his opportunity to select a fair and impartial jury.

In sum, our focus has been the individual in chambers voir dire. No disagreement exists that Mr. Frawley's additional specific waiver of his right to a public trial during the general voir dire is fully supported in this record. Mr. Frawley's conduct and his waivers are consistent; both undermine his claim that he was deprived of a fair trial. Further, I would hold that the trial court did not err in failing to sequester the jury and in failing to give a unanimity instruction, issues not reached by the majority. In my view, Mr. Frawley received a fair trial. I would affirm. Accordingly, I respectfully dissent.

  
Brown, J.

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FILED

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

**COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON**

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 BRIAN W. FRAWLEY, )  
 )  
 Appellant. )

No. 25043-1-III

ORDER CORRECTING  
OPINION

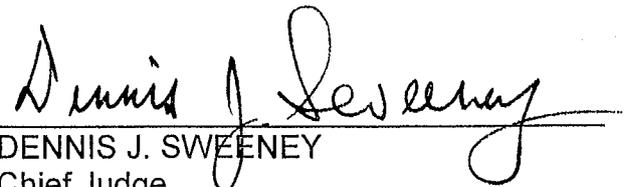
IT IS ORDERED the court's opinion of September 13, 2007, is corrected as follows:

On page 6, line 11, delete "Fourth amendment" and insert "Sixth Amendment" in its place.

On page 7, line 8, delete "Report of Proceedings at 66."

DATED: November 8, 2007

FOR THE COURT:

  
DENNIS J. SWEENEY  
Chief Judge