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No. 86513-2

IN THE SUPREME COURT FOR THE
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

RONALD APPLGATE, Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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ORIGINAL

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A. ISSUES PRESENTED

1. Whether the defendant waived his right to public trial when he informed the court, through defense counsel, he had no objection to the court questioning one juror in chambers, after the issue was raised in open court and after defendant had an opportunity to consult with counsel.
2. Whether a defendant has standing to assert a violation of Art. 1 §10 where he waived his own Art. 1 §22 right to public trial and where the requested remedy is a new trial.
3. Whether in chambers questioning of one juror without explicit Bone-Club findings implicated defendant's right to public trial where none of the values protected by that right were negatively impacted by the questioning.

B. FACTS

Applegate was charged with six counts of Rape of a Child in the Second Degree in February 1996 for offenses committed against two victims, A.F. and D.B., in 1988 and 1989. CP 78-86. The jury found Applegate guilty of all counts and the aggravating factors of ongoing pattern of sexual abuse, ongoing pattern of domestic violence involving psychological, physical or sexual abuse, and that the offense resulted in the pregnancy of a child victim of rape. CP 20-21, 42-47, 78-80, 119-126. The court imposed an exceptional sentence of the statutory maximum of 10 years based on the jury's aggravating factor finding. CP 75-77. On appeal the Court of Appeals reversed the exceptional sentence, but otherwise upheld his convictions. Court of Appeals No. 56085-9-I.

On remand at a special trial regarding only the aggravating factors, the State pursued only two of the three aggravating factors it originally alleged, the ongoing pattern of sexual abuse and the domestic violence factors. CP 93-110; RP 84-85.¹ Before trial an issue came up regarding how to explain the procedural stance of the case to the jury. VDRP 25. During that discussion the judge noted that there had not been a Washington Supreme Court decision on the right to public trial issue yet. Prior to voir dire the judge inquired of defense counsel, as well as the courtroom, whether there was any objection to taking the voir dire into his chambers if a juror wanted to discuss a questionnaire issue in a less public setting. VDRP 26. Defense counsel responded: "I leave it entirely up to the Court's discretion. This is not an issue for me." Id. The prosecutor noted that it was not entirely a matter for the court's discretion, and defense counsel and the defendant needed to indicate if they were objecting, or not, to speaking privately with jurors where the public would be excluded. VDRP 26-27. The judge indicated it would address the factors² at another time, but directed defense counsel to discuss the issue with Applegate and inform the court as to Applegate's wishes. VDRP 27. Defense counsel stated that approach was fine and requested the judge to

¹ The jury ultimately found each aggravating factor as to each of the six child rape counts, and at sentencing, the court again imposed the same exceptional sentence. CP 16-17, 32-34.

² The judge was referencing the Bone-Club factors.

inquire again if there was any objection from the public regarding going into chambers to discuss sexual abuse issues. VDRP 27-28.³

During general voir dire, defense counsel invited the venire to request in chambers questioning if it would make any of them more comfortable in answering. VDRP 76-77, 85. At the end of the general voir dire, the judge noted that juror no. 2 had requested to speak in private about question 10A, a question about prior experience with sexual abuse. The juror responded that she only wanted to speak privately if questions were going to be asked about that particular question. VDRP 116-17; CP 111-115. Defense counsel informed the judge that he had not questioned her because she had asked to speak in private. VDRP 118. The judge then inquired:

Is there any member of the jury panel or any member of the public who is present who has an objection to our speaking with juror no. 2 in my office? It would be a public proceeding. Any member of the public that is available to come in I will have the outer door open for that purpose. Is there any objection from anyone in the courtroom?"

VDRP 118. The judge indicated he had evaluated the Bone-Club⁴ factors required by caselaw and found that they had been met. VDRP 118-19.

The court specifically inquired of defense counsel if he or Applegate had any objection. VDRP 119. Defense counsel stated "no." When pressed

³ There was no objection from the public and at least one person from the public was present. VDRP 28.

⁴ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

whether he was speaking for Applegate, counsel stated he wasn't. *Id.* After being given an opportunity to go into the judge's chambers to discuss the issue with Applegate⁵, defense counsel stated that he had discussed the issue with Applegate and Applegate did not object to going into chambers to question the juror without the public being able to hear. VDRP 119. Juror no. 2 was then questioned in chambers about her ability to be fair. VDRP 120-22.

C. ARGUMENT

Applegate asserts that the judge violated his Sixth Amendment and Art. I §22 constitutional rights when one juror was questioned in chambers regarding her ability to be fair and impartial given her past experience with sexual abuse. Applegate affirmatively waived his right to public trial when defense counsel informed the judge that counsel had discussed the issue with Applegate and he didn't object "to going back into chambers and asking these questions without the public hearing." An on-the-record colloquy is not necessary for a defendant to waive their right to public trial. Here the record clearly demonstrates that Applegate personally waived his right, and that waiver was knowing, intelligent and voluntary. Applegate also asserts a violation of Art. 1 §10, the public's open proceedings right. However, he failed to brief this and does not have

⁵ Applegate was hard of hearing.

standing to assert an Art. 1 §10 violation where he waived his own Art. 1 §22 right. Moreover, the remedy he seeks, a new trial, is not the remedy for violations of Art. 1§10. Finally, only one juror was interviewed in chambers, the court was aware of the Bone-Club factors, considered them and found they had been met before conducting the limited in chambers questioning. As such, the limited closure was de minimis and did not implicate the defendant's right to a public trial.

- 1. Applegate affirmatively waived his right to public trial when defense counsel informed the court that Applegate had no objection to the in chambers questioning.**

Applegate contends questioning one juror in chambers without weighing the Bone-Club factors on the record constituted a violation of his right to a public trial under both the Sixth Amendment and Art. 1 §22 of the Washington Constitution. Applegate waived this issue by explicitly stating, through his attorney, that he had no objection to the in chambers questioning. Applegate's waiver was knowing, voluntary and intelligent: the trial judge specifically required defense counsel to discuss the closure of the courtroom with Applegate. Defense counsel did and Applegate had no objection to the closure.

The question before this Court is whether defense counsel's statement that Applegate didn't object to the closure, made after consultation with Applegate, was an effective waiver of Applegate's right

to public trial. Whether a defendant's right to public trial has been violated involves a question of law and is reviewed de novo. State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2206).⁶

"The right to public trial is not absolute." State v. Wise, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). "The general rule throughout the country is that an accused may waive this right expressly or by failing to object." Wright v. State, 340 So. 2d 74, 79 (Ala. 1976), *citing*, 23 C.J.S. Criminal Law s 963(8); *see also*, Robinson v. State, 976 A.2d 1072, 1083 (Maryland 2009) (listing cases that hold the right to public trial can be waived by affirmative waiver or failure to object). The *Sixth Amendment* right to public trial can be waived, merely by failing to object to a closure of the courtroom. Peretz v. United States, 501 U.S. 923, 936, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991); Freytag v. Commissioner of Internal Revenue, 501 U.S. 868, 896, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991) (if litigant does not assert Sixth Amendment right to public trial in timely fashion, he is foreclosed). While the failure to object, in and of itself, does not effect a waiver of the right to public trial in Washington, intentional

⁶ While the issue in this case turns on the validity of Applegate's waiver, the State recognizes that the issue as to what is effective to waive the right to public trial is an issue of law, and therefore, de novo review as to that issue is appropriate. *See*, State v. Garza, 150 Wn.2d 360, 366, 77 P.3d 347 (2003) (de novo review standard is better applied when appellate court may make determination as matter of law). However, whether a waiver was in fact knowing, voluntary and intelligent is reviewed for abuse of discretion. *Id.* (abuse of discretion review is correct standard of review regarding whether waiver of defendant's right to be present was voluntary).

relinquishment will effect a waiver. State v. Strode, 167 Wn. 2d. 222, 234, 217 P.3d 310 (2009) (J. Fairhurst concurring).

In order for a waiver of a fundamental right to be effective, it must be “an intentional relinquishment or abandonment of a known right or privilege.” State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996), *citing*, Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938). In general the waiver must be knowing, intelligent and voluntary. *Id.* However, a judge does not necessarily need to conduct an on-the-record colloquy in order for the waiver to be knowing. Thomas, 128 Wn.2d at 558. The validity of the waiver, as well as the inquiry required by the court to establish the waiver, depends on the nature of the right being waived, the circumstances of each case and the experience and capabilities of the defendant. State v. Steagall, 124 Wn.2d 719, 725, 881 P.2d 979 (1994); Gonzalez v. United States, 553 U.S. 242, 248-49, 128 S. Ct. 1765, 1769, 170 L. Ed. 2d 616 (2008).

The U.S. Supreme Court has identified only five constitutional rights⁷ that require a defendant’s *personal* consent in order to effectively waive them: right to counsel, right to plead not guilty/guilty, right to jury trial, right to testify and right to appeal. Florida v. Nixon, 543 U.S. 175,

⁷ These rights are sometimes referred to as “fundamental” rights, but what constitutes a “fundamental constitutional right” has not been explicitly defined by the U.S. Supreme Court. *See*, Gonzalez, 553 U.S. at 256-57 (J. Scalia concurring) (“The essence of ‘fundamental’ rights continues to elude.”)

187, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004) (defendant has ultimate authority to decide whether to plead guilty, waive a jury trial, testify at trial and pursue an appeal); Johnson v. Zerbst, 304 U.S. 458, 464–465, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) (right to counsel). Otherwise, defense counsel generally must have “full authority to manage the conduct of the trial,” and absent a claim of ineffective assistance of counsel, defendant will be bound by defense counsel’s actions at trial. Gonzalez, 553 U.S. 248. Constitutional rights that courts have found can be waived by defense counsel over defendant’s objection include the right to speedy trial and the right to confront witnesses. New York v. Hill, 528 U.S. 110, 114–5, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000) (right to speedy trial); U.S. v. Plitman, 194 F.3d 59, 64 (2nd Cir. 1999) (right to confrontation); State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995) (speedy trial); *see also*, State v. Cain, 169 Wn. App. 228, 240, 279 P.3d 926 (2012) (right to confrontation is lost if not timely asserted).⁸

⁸ Under Washington’s Rules of Professional Conduct, an attorney is only obliged to abide by his client’s decision as to the plea to be entered, the right to jury trial and the right to testify. RPC 1.2.; *see also*, Jones v. Barnes, 462 U.S. 745, 753 n.6, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), *citing* ABA Model Rules of Professional Conduct 1.2(a) (with the exception of the plea to be entered, the right to jury trial and the right to testify, counsel’s “duty is to take professional responsibility for the conduct of the case, after consulting with his client.”). The ABA Standards advise that that the decisions a defendant is to make after consultation with counsel are: 1) pleas to be entered; 2) whether to accept a plea agreement; 3) whether to waive jury trial; 4) whether to testify on his or her own behalf; 5) whether to appeal. ABA Standards 4-5.2(a). These guidelines also provide that strategic decisions to be made by defense counsel after consultation with the client include, among others, which jurors to accept or strike. ABA Standards 4-5.2(b).

In differentiating between those fundamental rights that require personal consent from the defendant and those that don't, courts have focused on the nature of the right and strategic considerations. W. Lafave & J. Israel, *Criminal Procedure* §11.6 (1985). Those constitutional rights that require a personal, informed waiver by defendant have been distinguished from other constitutional rights based on the fact that those rights are central to the quality of the guilt determining process and the defendant's ability to participate in that process, as well as that waiver of certain fundamental rights necessarily involves waiver of other constitutional rights. *See, State v. Butterfield*, 784 P.2d 153 (Utah 1989); *People v. Vaughn*, 821 N.W.2d 288, 298 (2012) ("each of the other foundational constitutional rights that are preserved absent a personal waiver necessarily implicates a defendant's *other* constitutional rights").

For example, in order for a guilty plea to be valid, the defendant, not counsel, must consent to the entry of the guilty plea because by pleading he waives a number of other constitutional rights, and because the plea is not a strategic choice, but is itself the conviction. *Nixon*, 543 U.S. at 187; *see also, State v. Likakur*, 26 Wn. App. 297, 302-03, 613 P.2d 156 (1980) (because guilty plea amounts to waiver of all accused constitutional rights, there must be appropriate safeguards to ensure the plea is knowing and intelligent). Waiver of the right to counsel also

implicates the waiver of other constitutional rights given a defendant's lack of experience, and therefore must also be carefully guarded. Likakur, 26 Wn. App. at 303.

Courts have raised concerns that requiring personal, on-the-record approval from a defendant could interfere with the course of the chosen defense strategy, particularly if it occurs in the midst of trial. *See, e.g.*, Gonzalez, 553 U.S. at 250. In emphasizing the need for an attorney to be able to control the course of litigation, the Court in State v. Piche summarized:

To assure the defendant of counsel's best efforts then, the law must afford the attorney a wide latitude and flexibility in his choice of trial psychology and tactics. If counsel is to be stultified at trial by a post trial scrutiny of the myriad choices he must make in the course of a trial: whether to examine on a fact, whether and how much to cross-examine, whether to put some witnesses on the stand and leave others off—indeed, in some instances, whether to interview some witnesses before trial or leave them alone—he will lose the very freedom of action so essential to a skillful representation of the accused.

State v. Piche, 71 Wn. 2d 583, 590, 430 P.2d 522, 526 (1967). An on-the-record colloquy with the defendant is not necessary in order to waive the right to testify due in part to the concern that such a colloquy might negatively impact the defendant's decision not to testify and might intrude upon the attorney-client relationship and disrupt trial strategy. Thomas,

128 Wn.2d at 560⁹; *see also*, U.S. v. Stark, 507 F.3d 512, 516 (7th Cir. 2007) (judges should not inquire about defendant’s right to testify because judge’s insertion of himself into this sensitive aspect of trial strategy intrudes upon the attorney-client relationship); U.S. v. Joelson, 7 F.3d 174, 177 (9th Cir. 1993) (“judicial interference with this strategic decision” regarding right to testify risked appearance of judge encouraging defendant to invoke or waive the right).

The fact that a violation of a constitutional right may be structural error does not dictate whether that right must be waived personally by the defendant. Gonzalez, 553 U.S. at 253; Commonwealth v. Dyer, 955 N.E.2d 271 (Mass. 2011), *cert. den.*, 132 S.Ct. 2693(2012) (“right to public trial, like other structural rights, can be waived”); *see also*, Johnson v. Sherry, 586 F.3d 439, 444 (6th Cir. 2009) (though right to public trial is important structural right, it can be waived by defendant’s failure to object); Robinson v. State, 976 A.2d 1072, 1080 (2009) (though deprivation of right to public trial is structural error, majority of federal and state courts hold the deprivation can be waived by counsel’s failure to object).

⁹ Thomas was decided under the federal constitution, but the same conclusion and analysis was applied to the same claim under the State constitution in State v. Russ, 93 Wn. App. 241, 969 P.2d 106 (1998), *rev. den.*, 137 Wn.2d 1037 (1999).

Even if a right is held personally by the defendant, an on-the-record colloquy is not necessarily required in order for a waiver of that right to be effective. A judge is not required to inform a defendant of his constitutional rights unless otherwise required by statute or court rule. Lynch v. Republic Publishing Co., 40 Wn.2d 379, 392-93, 243 P.2d 636 (1952). Of those constitutional rights requiring defendant's personal consent, only the waiver of the right to counsel and the plea of guilty require an on-the-record colloquy or advisement from the judge. Steagall, 124 Wn.2d at 725; Gonzalez, 553 U.S. 248 (for certain fundamental rights, e.g., right to counsel and right to plead not guilty, the defendant must personally make an informed waiver). In Washington, a full on-the-record colloquy is necessary only for entry of a guilty plea. State v. Pierce, 134 Wn. App. 763, 771-72, 142 P.3d 610 (2006); *see also*, Strode, 167 Wn.2d at 235 (J. Fairhurst concurring) (listing cases that hold certain constitutional rights don't require an on-the-record colloquy). While an on-the-record colloquy is strongly preferred regarding the right to counsel, as long as the record shows that the defendant was sufficiently aware of the risks of self-representation, the court can find that defendant effectively waived that right. City of Bellevue v. Acrey, 103 Wn.2d 203, 208, 691 P.2d 957 (1984).

The right to jury trial, the right to remain silent, and the right to confront witnesses are treated differently and do not require the same inquiry. All that is required for the waiver of a jury trial is a personal expression from the defendant, whether it be by written waiver signed by the defendant, personal expression by defendant of intent to waive or by informed acquiescence.¹⁰ State v. Cham, 165 Wn. App. 438, 448, 267 P.3d 528 (2011), *rev. granted, cause remanded on other grounds*, 175 Wn.2d 1022, 289 P.3d 627 (2012); *see also*, Steagall, 124 Wn.2d at 725. While only the defendant may relinquish the right to testify, a defendant's waiver of the right may be inferred from defendant's conduct and is presumed from the defendant's failure to testify. Joelson, 7 F.3d at 177.

Other jurisdictions have held that defense counsel's conduct can waive the defendant's right to public trial. *See, e.g.*, Commonwealth v. Lavoie, 981 N.E.2d 192, 198 (Mass. 2013) ("counsel may waive, with or without defendant's express consent, the right to public trial during jury selection where the waiver is a tactical decision as part of counsel's trial strategy"); Johnson v. Sherry, 586 F.3d 439 (6th Cir. 2009) (where defense counsel's acquiescence to closure waived defendant's right to public trial, matter remanded to determine if counsel was ineffective for failing to object to closure); U.S. v. Sorrentino, 175 F.2d 721, 723-24 (3d Cir. 1949)

¹⁰ The court rules require that a defendant file a written waiver. CrR 6.1(a).

(defense counsel's waiver of defendant's right to public trial bound defendant where defendant never indicated to the court he was dissatisfied with this aspect of counsel's representation).¹¹ The U.S. Supreme Court has *not* held that the Sixth Amendment right to public trial "is so fundamental to the protection of a defendant's other constitutional rights that it falls within this exceedingly narrow class of rights that ... require a personal and informed waiver." People v. Vaughn, 821 N.W.2d 288, 298 (Mich. 2012). "The right to a public trial is 'of a different order' because the violation of that right 'does not necessarily affect the guilt-determining process or the defendant's ability to participate in that process.'" *Id.*

The waiver of the right to public trial, particularly in the context of jury voir dire, should be treated similarly to the right to testify. Given the important and personal nature of the right, it is a right that defense counsel should discuss with his client before waiving. The decision to voir dire a juror in chambers, however, frequently is a strategic consideration that defense counsel is in the best position to make. An on the record colloquy

¹¹ See also, U.S. v. Hitt, 473 F.3d 146, 155 (5th Cir. 2006) (defense attorney's failure to object with knowledge of the government's motion to close courtroom waived defendant's right to public trial); Berkuta v. State, 788 So.2d 1081, 1082-83 (Fla. 2001), *rev. den.*, 816 So.2d 125 (2002) (counsel's affirmative representation to the court that the defendant consents to excluding persons entitled to be present in the courtroom is sufficient to effectively waive defendant's right to a public trial); State v. Overline, 296 P.3d 420 (Id. 2013) (counsel waived defendant's right to public trial by informing court that it was fine to clear the courtroom); People v. Webb, 642 N.E.2d 871, 958-59 (Ill. 1994), *rev. den.* 647 N.E. 2d 1016 (1995) (counsel can waive defendant's right to public trial); People v. Vaughn, 821 N.W.2d 288 (Mich. 2012).

could jeopardize defense counsel's strategy and interfere with the attorney-client relationship. Just like the right to testify, this Court should hold that the right can be waived by defense counsel's conduct, including acquiescence. If defense counsel fails to consult with his client, then the defendant would have recourse in a personal restraint petition alleging ineffective assistance of counsel.

Here, even if an effective waiver requires more than what is effective to waive the right to testify, Applegate's waiver was effective because it was knowing, intelligent and voluntary. The issue of in chambers questioning of jurors was raised in front of the defendant both before and during voir dire. Defense counsel had been directed to discuss the issue with Applegate. When the issue arose during voir dire, after the judge stated that he had evaluated the Bone-Club factors, defense counsel told the court he did not object to the in chambers questioning. When pressed, defense counsel admitted he wasn't speaking for Applegate despite the fact that the judge had asked if he or Applegate had an objection. Defense counsel was given an opportunity to discuss the issue with Applegate, and afterwards stated he had discussed the issue with Applegate, and Applegate did not object to going into chambers. Applegate was informed of the issue regarding closing the courtroom and

consulted with counsel about it before affirmatively waiving his right to public trial. Applegate effectively waived his right to public trial.

2. Applegate cannot assert a violation of the public's open proceedings rights under Art. 1 Section 10 in seeking reversal.

Applegate also assigned error based on a violation of Art. 1 §10, the right of the public to open proceedings. However, he failed to brief the issue under Art. 1 §10. As noted by the Court of Appeals below, “[a]n appellant waives an assignment of error if he fails to support it with argument or citation to authority.” RAP 10.3(a)(6); Satomi Owner’s Ass’n. v. Satomi LLC, 167 Wn.2d 781, 808, 225 P.3d 213 (2009); In re Disciplinary Proceedings Against Behrman, 165 Wn.2d 414, 422, 197 P.3d 1177 (2008).

Moreover, Applegate does not have standing to assert the public’s open proceedings right under Art. 1 §10. State v. Strobe, 167 Wn.2d 222, 236, 217 P.3d 310 (2009) (J. Fairhurst concurring). Under federal law a defendant who waives his right to public trial under the Sixth Amendment cannot rely on the public’s right to open proceedings derived from the First Amendment in order to assert standing to raise this claim. Hutchins v. Garrison, 724 F.2d 1425, 1432 (4th Cir. 1983); *see also*, State v. Williams, 328 S.W.3d 366, 373 (Mo. App. 2010), *cert. den.* 132 S.Ct. 129 (2011) (defendant’s express advocacy for closure of courtroom foreclosed

him from raising the public's First Amendment open proceedings claim). "[T]hrough related and often overlapping a defendant's and the public's rights are separate." State v. Beskurt, 176 Wn.2d 441, 446, 293 P.3d 1159 (2013) (plurality opinion). An assertion that a violation of Art. 1 §10 necessarily violates the Art. 1 §22 right to public trial conflates a defendant's rights with those of the public's. *Id.* Absent a §22 violation, a new trial is not warranted. *Id.* Applegate may not rely on Art. 1 §10 to obtain a new sentencing trial.

3. Applegate's right to public trial was not implicated by the judge's failure to make Bone-Club findings where the judge considered the Bone-Club factors and no one objected to the closure.

The limited in chambers questioning of one prospective juror regarding her experience with sexual abuse was de minimis and as such did not implicate Applegate's right to public trial.¹² This Court should adopt the de minimis rationale and find it applicable to this case. Applegate does not assert that there wasn't a valid basis for the closure, just that the court did not make the required Bone-Club findings on the record. This infringement upon Applegate's right to public trial was minimal and caused at least in part by his informing the court he did not object to the closure. The judge was aware of the open courtroom issue,

¹² The State did not assert this argument at the Court of Appeals but the grant of review directed the parties to brief it.

indicated he had considered the Bone-Club factors, and even invited the public to attend the in chambers questioning. Under these circumstances the in chambers questioning of one juror regarding her experience with sexual abuse did not implicate the concerns that the right to public trial is intended to protect. If this Court finds Applegate did not effectively waive his right to public trial, remand for entry of findings would be the appropriate remedy.

This Court in State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150 (2005), recognized that closures that have a de minimis effect on a proceeding do not necessarily violate the right to public trial, although it held in that case that the closure that occurred there was not de minimis. Brightman, 155 Wn.2d at 517. In order to determine whether the right to a public trial is implicated by a closure, courts look to whether the principles underlying the right to public trial are negatively impacted by the closure.

State v. Easterling, 157 Wn.2d 167, 183-84, 137 P.3d 825 (2006) (J. Madsen concurring). “[T]he right to public trial serves to ensure a fair trial, to remind prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.” State v. Sublett, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). In the context of a closure of voir dire, the public nature of the proceeding permits the defendant’s family to contribute their

knowledge or insight to jury selection and permits the venire to see the interested individuals. Brightman, 155 Wn.2d at 515.

In addition to considering the values guaranteed by the public trial right in determining whether a closure is de minimis, courts have also considered the duration of the closure. U.S. v. Ivester, 316 F.3d 955, 960 (9th Cir. 2003); *see also*, Peterson v. Williams, 85 F.3d 39 (2nd Cir. 1996), *cert. den.*, 519 U.S. 878 (1996) (inadvertent closure of courtroom during defendant's testimony for 20 minutes met de minimis standard); Snyder v. Coiner, 510 F.2d 224, 230 (4th Cir. 1975) (short closure of courtroom during closing arguments was too trivial to implicate right to public trial). The de minimis standard has been applied in cases where closure was purposeful as well as unintentional. Easterling, 157 Wn.2d at 184-85 (J. Madsen concurring).

None of the values underlying the right to public trial was implicated by the in-chambers colloquy with one juror regarding her prior experience with sexual abuse. The venire, including juror no. 2, were able to see the interested individuals during the rest of the voir dire, and vice versa. Applegate's family, even assuming they were present, would have been able to provide input into jury selection with respect to every other juror. Requiring the juror to speak in public concerning this sensitive issue would not have helped to ensure that the prosecutor and the judge

carried out their duties responsibly. They were aware the entire in chambers questioning was being transcribed. Nothing in the record indicates that either court officer did not take their respective roles in Applegate's sentencing trial seriously. Finally, the third and fourth values regarding the right to public trial are not implicated at all in this context. No witnesses were presented and no testimony was taken. Requiring juror no. 2 to state her concerns in public would not have encouraged any witnesses to come forward and would not have discouraged any perjury at trial.

Moreover, the judge was aware of the open courtroom issue and did consider the Bone-Club factors, he just failed to weigh the factors on the record. The appropriate remedy for failure to make adequate findings on the record is remand for entry of findings. *See, State v. Sublett*, 176 Wn.2d at 105-06 (J. Madsen concurring) (listing cases from other jurisdictions which held remand for findings was appropriate remedy); *see also, State v. Alvarez*, 128 Wn.2d 1, 19, 904 P.2d 754 (1995) ("An error of the court in entering judgment without findings of fact and conclusions of law is remedied by subsequent entry of findings, conclusions and judgment"); *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1996) (remand for entry of findings is appropriate remedy for failure to make written findings under CrR 6.1(d)). Moreover, the record demonstrates

that the judge did not abuse his discretion in finding the Bone-Club factors had been met: there was a compelling interest, the juror's privacy and the defendant's right to fair and impartial jury, which the judge weighed against the desire for openness, despite no objection from Applegate or the public, and the questioning was limited to addressing the juror's issue regarding her prior sexual abuse experience. The judge's failure to make Bone-Club findings on the record was a de minimis violation such that Applegate's right to public trial was not implicated.

D. CONCLUSION

For the foregoing reasons, the State requests that the Court affirm Applegate's exceptional sentence.

DATED this 28th day of June, 2013.

Respectfully submitted,



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CERTIFICATE

I certify that on this date I placed a copy of the attached document in the in the United States mail with proper postage thereon, or otherwise caused to be delivered, to this Court and all Counsel, addressed as follows:

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Attached please find Respondent, State of Washington's, Supplemental Brief in the above-referenced matter, as well as the State's Motion for Permission to File Overlength Brief.

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