

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

2008 JAN 30 A 9:58

No. 80849-0

BY RONALD R. CARPENTER

  
CLERK

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

vs.

TONY L. STRODE,

Appellant.

---

REPLY TO AMICUS BRIEF OF  
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

---

DAVID N. GASCH  
WSBA No. 18270  
P. O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
Attorney for Defendant/Petitioner

**FILED AS ATTACHMENT  
TO E-MAIL**

TABLE OF CONTENTS

A. INTRODUCTION.....1

B. ARGUMENT.....2

    1. Introduction.....2

    2. Storde did not invite this error by failing to object.....3

    3. A manifest constitutional error can be raised for the first time on appeal.....5

    4. Storde did not waive his right to a public trial.....7

    5. This Court should not carve out an exception to the *Bone-Club* requirements where a party or the court cites a generalized need for juror privacy.....13

C. CONCLUSION.....19

## TABLE OF AUTHORITIES

### SUPREME COURT CASES

<i>Brady v. United States</i> , 397 U.S. 742 (1970).....	9
<i>Gannett Co., Inc. v. DePasquale</i> , 443 U.S. 368, (1979).....	8
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966).....	9
<i>Moltke v. Gillies</i> , 332 U.S. 708 (1948).....	9
<i>Waller v. Georgia</i> , 467 U.S. 39 (1984).....	10

### FEDERAL CIRCUIT COURT CASES

<i>Walton v. Briley</i> , 361 F.3d 431 (7 <sup>th</sup> Cir. 2004).....	8
---	---

### WASHINGTON CASES

<i>Dreiling v. Jain</i> , 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004).....	14
<i>In re Restraint of Call</i> , 144 Wn.2d 315, 28 P.3d 709 (2001).....	4
<i>In re Restraint of Orange</i> , 152 Wn.2d 795, 100 P.3d 291 (2004).....	<i>passim</i>
<i>Rauch v. Chapman</i> , 16 Wn. 568, 575, 48 P. 253 (1897).....	12
<i>Seattle Times Co. v. Ishikawa</i> , 97 Wn.2d 30, 640 P.2d 716 (1982).....	12
<i>State v. Bone-Club</i> , 128 Wn.2d 254, 906 P.2d 325 (1995).....	<i>passim</i>
<i>State v. Boyer</i> , 91 Wn.2d 342, 588 P.2d 1151 (1979).....	3
<i>State v. Brightman</i> , 155 Wn.2d 506, 122 P.3d 150 (2005).....	<i>passim</i>
<i>State v. Castro</i> , ___ Wn. App. ___, ___ P.3d ___, 2008 WL 200313 (2008)..	10

<i>State v. Collins</i> , 50 Wn.2d 740, 314 P.2d 660 (1957).....	6
<i>State v. Duckett</i> , ___ Wn. App. ___, 173 P.3d 948 (2007).....	10, 12
<i>State v. Easterling</i> , 157 Wn.2d 167, 137 P.3d 825 (2006).....	<i>passim</i>
<i>State v. Frawley</i> , 140 Wn. App. 713, 167 P.3d 593 (2007).....	10
<i>State v. Garrett</i> , 124 Wn.2d 504, 881 P.2d 185 (1994).....	4
<i>State v. Kirkman</i> , 159 Wn.2d 918, 935, 155 P.3d 125 (2007).....	5
<i>State v. Marsh</i> , 126 Wn. 142, 145-146, 217 P. 705 (1923).....	7
<i>State v. Stegall</i> , 124 Wn.2d 719, 881 P.2d 979 (1994).....	8
<i>State v. Sweet</i> , 90 Wn.2d 282, 581 P.2d 579 (1978).....	8
<i>State v. Thomas</i> , 128 Wn.2d 553, 910 P.2d 475 (1996).....	7
<i>State v. Wakefield</i> , 130 Wn.2d 464, 925 P.2d 183 (1996).....	4

DECISIONS OF OTHER STATE COURTS

<i>State v. Tapson</i> , 307 Mont. 428, 41 P.3d 305, 310 (2001).....	9
--	---

OTHER AUTHORITIES

Dale W. Broeder, <i>Voir Dire Examinations: An Empirical Study</i> , 38 S. Cal. L. Rev. 503, 525-26 (1965).....	15
Leonard B. Sand & Steven Alan Reiss, <i>A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit</i> , 60 N.Y.U. L. Rev. 423, 436 (1985).....	15
Newton N. Minow & Fred H. Cate, <i>Who is an Impartial Juror in an Age of Mass Media?</i> , 40 Am. U.L. Rev. 631, 650-51 (1991).....	15

## A. INTRODUCTION

More than a decade ago, this Court faced “a matter of first impression” regarding a trial court's responsibility to protect the right to a public trial holding that a trial court should “resist a closure motion except under the most unusual circumstances.” *State v. Bone-Club*, 128 Wn.2d 254, 256, 259, 906 P.2d 325 (1995). To assure “careful, case-by-case analysis of a closure motion,” this Court directed that a trial court must perform a weighing test consisting of five criteria *anytime* a closure of the courtroom is requested or contemplated. *Id.*

Since that time, several closed courtroom cases have come before this Court—all with the same result. “This court has strictly watched over the accused's and the public's right to open public criminal proceedings.” *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). This Court's consistent jurisprudence is premised on the “compelling interest” in protecting the “transparency and fairness of criminal trials” by ensuring that all stages of courtroom proceedings remain open unless the trial court identifies a compelling interest to be served by closure. *Id.*

Nevertheless, WAPA now argues that this Court should abandon the *Bone-Club* test and replace it with a new rule permitting closure of the courtroom without a hearing anytime jurors are questioned about what the Court or the parties characterize as sensitive or private matters. There is no reason to abandon a test that has worked well in protecting the various, sometimes competing interests that arise when a courtroom closure is contemplated. While recognizing an interest in juror candor, Strode argues that closure for a portion of *voir dire* is justified only where a trial court first applies the required *Bone-Club* factors and makes findings on the record—something that did not happen in this case.

**B. ARGUMENT**

1. Introduction

The basic facts remain undisputed: the trial court fully closed the courtroom for a portion of *voir dire* without an objection from defense counsel, but also without first conducting a *Bone-Club* hearing. Applying this Court's prior decisions to these facts, the outcome is clear. Reversal is required. Apparently recognizing that

result, WAPA asks this Court to overrule, either implicitly or explicitly, numerous decisions.

WAPA gives this Court no reason to give up on good law. Instead, proper application of the *Bone-Club* test allows trial (and reviewing) courts to contemplate options that maximize juror candor, but also requires those same courts to consider and weigh the other interests present when a courtroom closing is contemplated.

2. Strode Did Not Invite This Error by Failing To Object

WAPA begins by claiming that this is a case of invited error. *Brief*, p. 11. WAPA correctly notes that a defendant does not invite error by failing to object. However, WAPA then asks this Court to redraw the definition of invited error, arguing that “acquiescence” and subsequent “participation” in the closed courtroom proceeding waives a defendant’s Sixth Amendment right to a public trial.

Invited error occurs when the defense *proposes* the same course of action complained about on appeal. *State v. Boyer*, 91 Wn.2d 342, 588 P.2d 1151 (1979) (“A party may not request an instruction and later complain on appeal that the requested instruction was given.”). The invited error doctrine applies only

where the defendant engages in some affirmative action by which he knowingly and voluntarily set up the error. Participation without an objection does not constitute invited error. *See In re Personal Restraint of Call*, 144 Wn.2d 315, 326-28, 28 P.3d 709 (2001) (no invited error where technical defect in sentence calculation was inadvertent); *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996) (no invited error where defense counsel requested trial court to participate in plea negotiations but participation went beyond defense counsel's request). Otherwise, defense counsel would be required to refuse to participate in the otherwise normal conduct of trial, something that courts have strongly chastised attorneys for doing. *See e.g., State v. Garrett*, 124 Wn.2d 504, 881 P.2d 185 (1994) (after dispute with trial judge over conduct of jury selection, defense counsel stopped questioning remaining jurors, an act this Court termed "conscious unprofessionalism").

WAPA's construction of the invited error doctrine finds no current place in the law. Adopting such an unworkable test would be nothing short of disastrous.

3. A Manifest Constitutional Error can be Raised for the First Time on Appeal

Next, WAPA argues that this issue cannot be reviewed on appeal without a timely objection below. *Brief*, p. 11. Once again, WAPA asks this Court to overrule past precedent.

RAP 2.5(a)(3) does not permit *all* asserted constitutional claims to be raised for the first time on appeal, but only certain questions of “manifest” constitutional magnitude. This Court has refused to find a “manifest” error where the failure to object deprives the trial court of this opportunity to prevent or cure the error. *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). However, this Court has made it clear any request to close the courtroom *triggers* the trial court’s duty to conduct a hearing. Thus, this is not one of those instances where the failure to object deprives the trial court of the opportunity to correct an error. In addition, a “manifest” error is one where the defense can demonstrate prejudice. That standard is easily met here, since improperly closing a courtroom is automatically reversible. *Easterling*, 157 Wn.2d at 181.

Defense counsel did not object in *Easterling*. Nevertheless, this Court succinctly concluded: “A criminal accused's rights to a public

trial and to be present at his criminal trial are issues of constitutional magnitude that may be raised for the first time on appeal.” *Id.* at 173, fn. 2. *See also Brightman*, 155 Wn.2d at 514-15 (defendant's failure to object at trial to improper courtroom closure does not effect a waiver, and does not free the reviewing court from having to consider the defendant's right to a public trial); *Bone-Club*, 128 Wn.2d at 257.

WAPA ignores these cases while urging this Court to apply *State v. Collins*, 50 Wn.2d 740, 314 P.2d 660 (1957), a case where the trial court ordered the courtroom doors locked to prevent overcrowding while allowing a reasonable number of spectators to remain. However, contrary to WAPA’s characterization, *Collins* actually held that no violation of the right to public trial took place because there was only a “partial” closing of the courtroom. This case does not involve a partially closed courtroom.

On the other hand, *Collins* was quite clear regarding the ability of a defendant to raised a claim regarding a fully closed courtroom for the first time on appeal: “If an order of a trial court clearly deprives a defendant of his right to a public trial....it is

unnecessary for the defendant to raise the question by objection at the time of trial.” 50 Wn.2d 747-48, *citing State v. Marsh*, 126 Wash. 142, 145-146, 217 P. 705 (1923).

Strode can raise this issue for the first time on appeal.

4. Strode Did Not Waive His Right to a Public Trial

Next, WAPA argues that Strode waived his right to an open and public trial because neither Strode nor his counsel objected to the closed courtroom-proceedings. Once again, WAPA’s position is contradicted by past precedent.

Under the *Bone-Club* criteria, the burden is placed upon the trial court to seek the defendant's objection to the courtroom closure. *See Easterling*, 157 Wn.2d at 176 (“Additionally, under the *Bone-Club* criteria, the burden is placed upon the trial court to seek the defendant's objection to the courtroom closure. The record in this case shows that the trial court did not affirmatively provide Easterling with such an opportunity.”).

Fundamental constitutional rights cannot be abrogated by the court or, even, by defense counsel. *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996). Instead, a defendant may choose to waive

his constitutional rights, in part or in whole, upon a “knowing, intelligent, and voluntary act [ ].” *State v. Stegall*, 124 Wn.2d 719, 724, 881 P.2d 979 (1994). “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). A defendant may waive a constitutional right upon a personal expression of waiver; “no ... colloquy or on-the-record advice as to the consequences of a waiver is required.” *Id.* at 725.

The right to a public trial is one of a defendant's fundamental rights. *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 381 (1979) (“[T]he public trial provision of the Sixth Amendment is a ‘guarantee to an accused’ ... [and] a necessary component of an accused's right to a fair trial ...”) (quoting *Estes v. Texas*, 381 U.S. 532, 583, Warren, C.J., concurring). The distinct nature of the public trial right is clear from the rigor of the constitutional analysis required under *Bone Club*. For that reason, a defendant does not waive his right to a public trial by failing to object. Instead, there must be a showing that a defendant knowingly and voluntarily waived such a right. *Walton v. Briley*, 361 F.3d 431, 434 (7th

Cir.2004) (“The record does not indicate that Walton intelligently and voluntarily relinquished a known right. Therefore, we hold that Walton's right to a public trial was not waived by failing to object at trial.”); *State v. Tapson*, 307 Mont. 428, 435, 41 P.3d 305, 310 (2001) (“While Tapson's counsel professed to waive these rights, there is nothing in the record to indicate that Tapson himself was apprised of these rights, nor is there anything in the record indicating that he personally made a knowing, intelligent and voluntary waiver of these rights.”).

This heightened standard of waiver has been applied to plea agreements, the right against self-incrimination, the right to a trial, the right to a trial by jury, the right to an attorney, and the right to confront witnesses. *See, e.g., Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *Moltke v. Gillies*, 332 U.S. 708, 723-26, 68 S.Ct. 316, 92 L.Ed. 309 (1948).

The common element of the cases mentioned is the fact that the rights with which they deal all concern the fairness of the trial. The right to a *public* trial also concerns the right to a *fair* trial.

*Waller v. Gerogia*, 467 U.S. 39, 46 (1984) (“The requirement of a public trial is for the benefit of the accused; that the public may see he is *fairly* dealt with and not unjustly condemned ....”) (emphasis added). So, like other fundamental trial rights, the right to a public trial may be relinquished only upon a showing that the defendant knowingly and voluntarily waived such a right.

This is also the result reached by the Court of Appeals in three recent cases: *State v. Castro*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2008 WL 200313 (2008); *State v. Duckett*, \_\_\_ Wn. App. \_\_\_, 173 P.3d 948 (2007); and *State v. Frawley*, 140 Wn. App. 713, 167 P.3d 593 (2007). In *Duckett*, the Court held: “the burden is on the trial court to affirmatively provide the defendant and members of the public an opportunity to object.” 173 P.3d at 952. “Here, the court never advised Mr. Duckett of his public trial right or asked him to waive it. He certainly could not then make a knowing, intelligent and voluntary waiver of this constitutional right.” *Id.* at 952. *See also Frawley*, 140 Wn. App. at 720 (“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.”).

Because Strode did not waive his right to a public trial, there is no reason for this Court to reach the issue of whether reversal is required in a criminal case where only the public right to open proceedings survives. However, it appears that this Court has already answered this question:

Were we to conclude that the closure did not violate Easterling's constitutional right to a public trial, the trial court's failure to comply with *Bone-Club* still constitutes a violation of the public's right under article I, section 10 to an open public trial, which exists separately from Easterling's right.

*Easterling*, 157 Wn.2d at 179. This Court continued:

However, contrary to what case law and constitutional protections required, the trial court erred when it neither identified a compelling interest warranting the public's exclusion from the pretrial process nor made specific findings that showed it weighed the competing interest of Jackson as the proponent of closure against the public's interest in maintaining unhindered access to judicial proceedings.

*Id.* “It was the request to close itself, and not the party who made the request, that triggered the trial court's duty to apply the five-part *Bone-Club* requirements. The trial court's failure to apply that test constitutes reversible error.” *Id.* at 180.

WAPA's argument to the contrary fails to "appreciate the court's independent obligation to safeguard the open administration of justice. Article I, section 10 is mandatory." *Duckett*, 173 P.3d at 951-52; citing *Rauch v. Chapman*, 16 Wash. 568, 575, 48 P. 253 (1897). Moreover, the right secured by article I, section 10 is fully present even when a defendant asserts only rights under article I, section 22 and the Sixth Amendment, as the court has adopted the *Ishikawa* analysis in this context. *Bone-Club*, 128 Wn.2d at 259 (noting "the same closure standard for both the section 10 and section 22 rights").

This Court should reject WAPA's claim that Strode waived his right to a public trial and need not reach its claim that reversal is not required where only the public right to open proceedings is violated. If this Court finds it is necessary to reach the latter issue, WAPA has presented no compelling reason to depart from settled law.

5. This Court Should Not Carve Out an Exception to the *Bone-Club* Requirements Where a Party or the Court Cites a Generalized Need for Juror Privacy.

WAPA's last argument invites this Court to make a radical departure from caselaw based on speculative concerns that many jurors routinely refuse to provide truthful answer to questions (asked under oath) because members of the public are able to attend trials. WAPA then asserts that these same jurors would answer the same questions truthfully if the jurors could answer the questions only in front of the judge, her staff, the prosecutor (and any case detective or other assistant), defense counsel, defendant (and jail officers, if the defendant is in custody), and a court reporter (who records the juror's answer and whose transcript is subject to public disclosure). Proceeding from this highly doubtful premise, WAPA asks this Court to dispense with the requirement of a *Bone-Club* hearing anytime any participant cites a need for juror privacy.

WAPA's argument actually begins with the oft-rejected argument that closing a courtroom for a portion of jury selection does not implicate the right to a public trial. *Brief*, p. 22. There is no material distinction between individual *voir dire* of jurors *in*

*camera* and general *voir dire* of the jury panel. *Orange*, 152 Wn.2d at 804. As a result, there is no need to depart from the rule that a trial court must engage in the five-part analysis set out in *Bone-Club*, before conducting all or a portion of *voir dire* outside of the public forum of the courtroom.

WAPA then argues that a trial court should be permitted to close a courtroom for *voir dire* when generalized privacy concerns are raised. Ultimately, Strode contends that trial courts should be permitted to develop procedures that respect the privacy interests of prospective jurors and encourage more forthright answers to sensitive *voir dire* questions. However, such procedures must comply with *Bone-Club*. *Dreiling v. Jain*, 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004) (the right of the public, including the press, to access trials and court records may be limited only to protect significant interests, and any limitation must be *carefully considered and specifically justified*).

Here, the trial court conducted a portion of *voir dire* in chambers without engaging in the necessary *Bone-Club* analysis. This requires reversal, and the remedy is a new trial.

Finally, Strobe briefly addresses WAPA's suggestion that it is highly unlikely jurors will answer sensitive questions truthfully if members of the public are present. The notion that prospective jurors in general are less likely to reveal politically incorrect or sensitive personal matters in an open court may or may not be true as a statistical matter. *See, e.g.*, Newton N. Minow & Fred H. Cate, "Who is an Impartial Juror in an Age of Mass Media?", 40 *Am. U.L. Rev.* 631, 650-51 (1991) (citing studies that indicate that prospective jurors are unlikely to publicly admit bigotry or any of their "true prejudices and preconceptions," though acknowledging that some jurors admit to biases in order to be excused from jury duty); Leonard B. Sand & Steven Alan Reiss, "A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit," 60 *N.Y.U. L. Rev.* 423, 436 (1985) ("[A]t least one study has shown that jurors do not regard traditional voir dire as sufficiently embarrassing or upsetting to warrant a change toward in camera examination" and noting that some judges surveyed felt jurors are more candid about themselves after listening to the questioning of other panelists) (citing Dale W. Broeder, "Voir Dire

Examinations: An Empirical Study,” 38 S. Cal. L. Rev. 503, 525-26 (1965)).

In addition, to the extent that WAPA invites this Court to engage in speculation about when jurors (and witnesses, for that matter) might be less than candid, it seems at least as likely that the threat of public disclosure will prompt candor as opposed to discouraging it. Further, it is hard to imagine that a juror with some kind of racial, ethnic, gender, or other bias against a defendant would be willing to admit it in the defendant's presence, but not if reporters were present as well.

However, while venire members may feel embarrassed when they are questioned closely on sensitive subjects by a judge or lawyers and must confess to their prejudices (or where their past experiences might lead to such prejudices), the structure of our judicial system means that we must hope and believe that jurors will cooperate and be candid. We also have to trust that if they are given the opportunity to tell the court they have something to discuss in private, that they will do so, and the judge can then decide if secrecy is indeed warranted.

However valid WAPA's concern about candor, the proper procedure for the closure of *voir dire* examination of prospective jurors must still require that the trial court consider the utility of alternatives to closure. And prior to ordering closure, the trial court must establish an overriding interest justifying closure, articulated with enough specificity in the findings that a reviewing court can determine whether the closure order was properly entered.

The contrary position set forth by WAPA is untenable. It means we must accept the proposition that in cases involving sensitive matters, venire members are likely to have pre-existing opinions based on life experiences that will affect their impartiality, and be unwilling to reveal those opinions if they know the public will learn of their responses (something that could happen with the release of a transcript). At the same time, we must also assume their reticence will not extend to confessing their prejudices before the judge and the very defendant on whom those prejudices center. We must further presume that a person is less willing to confess to his/her biases when s/he hears others confessing to theirs.

The WAPA position further requires us to ignore the possibility that there may be venire members who have discussed their biases with other people outside the courtroom. Those other people might be monitoring the trial, thus compelling prospective jurors to feel more constrained to be honest, knowing their answers will be publicized rather than kept secret.

There will virtually always be means short of total closure that will guarantee the kind of candor necessary to ensure the defendant a fair trial. For example, questioning jurors separate from other jurors is an alternative means that is less-restrictive than closing the courtroom. Thus, the concerns raised by WAPA do not provide a compelling reason to depart from the rule requiring a contemporaneous hearing where all competing interested can be identified and weighted. To do otherwise, forces this Court to engage in the *post-hoc* evaluation of a closure—the exact harm that *Bone-Club* sought to prevent.<sup>1</sup>

---

<sup>1</sup> WACDL member Jeffrey E Ellis contributed significantly to the content of this brief.

**D. CONCLUSION**

The trial court violated Mr. Strobe's public trial right by conducting a portion of *voir dire* in chambers without first weighing the necessary factors. Prejudice is presumed, and the remedy is a new trial.

Respectfully submitted this 29<sup>th</sup> day of January, 2008.

---

David N. Gasch #18270  
Attorney for Appellant

---