80849-0

No. 25423-2-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TONY L. STRODE

Appellant.

APPEAL FROM THE SUPERIOR COURT
FERRY COUNTY
HONORABLE REBECCA M. BAKER

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

On July 10, 2006, a jury trial commenced in Ferry County, Washington, wherein the Appellant was charged with Rape of a Child in the First Degree, Attempted Rape of a Child in the First Degree and Child Molestation in the First Degree. The Appellant was present and represented by counsel. The State was represented by the prosecuting attorney.

As the case before us involved allegations that the defendant had sexual contact with a minor child, prior to the trial, the members of the jury pool were given a Confidential Juror Questionnaire (a copy is attached hereto) to answer. This questionnaire requested personal information of the potential jurors concerning whether they (or anyone close to them) had been the victim, of or accused of committing, a sexual offense. Those who answered "yes" to the questionnaire were called one-at-a-time into the judge's chambers for confidential pre-trial interviews centering on whether their past experiences would preclude them from rendering a fair and impartial verdict on a case of this nature.

Present during these interviews were the trial judge, prosecuting attorney, defense counsel and defendant. The judge explained the purpose of the interviews and asked questions of the potential jurors' backgrounds, specifically regarding their answers to the questionnaire leading to their ability to sit as jurors. The prosecutor and defense counsel were given the opportunity to question the potential jurors and excuse each for cause. [RP 1-37].

As a result of this interview process six potential jurors who admitted bias were excused for cause and thereby avoided the tainting of the jury pool, such tainting would most likely have resulted had this interview been conducted in front of the entire jury pool. The remainder of the interviewed potential jurors returned to the jury pool for the commencement of voir dire in open court.

The trial judge then called the entire remaining jury pool into the courtroom, and after a brief introduction, swore in the jury and voir dire commenced. [RP 38-39]

ARGUMENT

The Appellant contends that conducting interviews in chambers of the potential jurors who answered "yes" to the Confidential Juror Questionnaire (with the prosecuting attorney, defense counsel and defendant present) violated the Appellant's constitutional right to a public trial. The State submits that even without the formal recitation of the five factors of *State v. Bone-Club*, 128 Wn.2d 254, 906 P.3d 325 (1995), the actions of the trial court did not violate the defendant's right to a public trial.

The Court in *Bone-Club* acknowledged that the right to a speedy public trial, as guaranteed by article I, section 22 of the Washington State Constitution, is not absolute. Here the Court cited *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed.2d 31 (1984):

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential

> to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

The Court went on to consider guidelines for a closure of a trial and held that the trial court must weigh the competing interests according to five criteria:

> 1. The proponent of closure or sealing must make some showing [of compelling interest], and where that need is based on a right other than an accused's right to a fair trial,, the proponent must show a "serious and imminent threat" to that right.
>
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
>
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
>
> 4. The court must weigh the competing interests of the proponent of closure and the public.
>
> 5. The order must be no broader in its application or duration than necessary to serve its purpose.

In the case before us, the trial court apparently did not make formal findings pursuant to the five criteria of *State v. Bone-Club* (supra); however, the record of interviews in chambers demonstrates that the five factors were addressed. [RP 1-37]

The compelling interest that the court sought to protect the defendant's right to a fair trial by not tainting the jury pool with public disclosure of their fellow members who were victims of sexual abuse and who could not render impartial judgment on a case of sexual abuse involving

a child. Here this overriding interest was protected by select closed action which excused bias potential jurors and returned the rest to the jury pool for the formal voir dire.

The defendant, his counsel and the prosecutor were present. Both counsel were offered the opportunity to question the selected potential jurors and excuse them for cause. Neither the defendant, nor his counsel, objected to this process and freely participated in it.

The State submits that the trial court's methods were the most effective and least restrictive available to protect the defendant's right to a fair trial. The trial court explained to each potential juror interviewed why it was necessary to proceed in chambers as she did, thus weighing any competing interests for openness.

In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), the Court dealt with the trial court's closure of the courtroom during voir dire as a violation of the defendant's constitutional right to a public trial. In her concurring opinion, Judge Madsen reviewed the five-part test from *State v. Bone-Club* (supra), and warned that a court should not lose sight of the constitutional issue: whether a defendant's rights protected by the open court guarantee have actually been abridged. Judge Madsen maintained that a Court must first determine whether a closure order has been implemented and then whether an unconstitutional closure had occurred. She stated that a reviewing court must not only consider the closure ruling, but also what actually occurred in response to the closure. She also quoted a line of cases

which held that if the effect of an unjustified closure is de minimus in fact, there is no infringement of the defendant's constitutional rights.

Judge Madsen emphasized state that a trial court exercises its own judgment, in the interests of the fair administration of justice, to impose reasonable limitations on access to a trial.

> Thus, courts have found closure justified in order to protect a defendant's right to a fair trial, to protect privacy rights of jurors, informants, and witnesses, to protect the privacy interests of juvenile defendants, and to protect ongoing government investigations. (*Bone-Club* at 825)

Therefore, the ultimate question for the reviewing court is whether there has been an abridgement of the defendant's right to a public trial.

Here the sole purpose of the trial judge interviewing the potential jurors in chambers with counsel and defendant was to protect the defendant's right to a fair public trial. By interviewing those potential jurors who stated they, or someone close to them, had been the victim of sexual abuse or sexual assault, and then excusing those who could not be impartial to this type of case, insulated the remainder of the jury pool from such disclosures in the open voir dire process. The trial court's actions worked, leaving the jury pool untainted by public disclosure from fellow jury pool members and did not infringe on the defendant's right to an open trial.

CONCLUSION

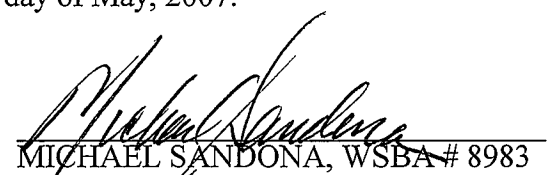
In conclusion, the State submits that the critical inquiry of a reviewing court is whether the effect of removing the complained of interviews into the

court's chambers unwarrantedly abridged the defendant's interests which are protected by the open court guarantee. To this the State maintains that it did not.

The facts of this case clearly demonstrate that there was no closure of the public trial. The interviews took place prior to the commencement of the trial. Further, the interviews were conducted in the presence of the defendant and his attorney for the sole purpose of protecting the defendant from a jury tainted by the public disclosures of potential jurors who stated their inability to impartially hear this case because they had been victims of sexual abuse. Although the trial court did not make a formal record of *Bone-Club* criteria, these criteria can be found in the transcripts of the interviews. And lastly, even if these interviews are found to be a unjustified closure of a public trial, it was de minimus and there was no infringement of the defendant's constitutional rights.

Therefore, the State respectfully requests that this appeal be denied.

DATED this 15th day of May, 2007.



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Confidential Juror Questionnaire

This case involves an allegation of sexual contact by defendant with a minor child. As a result, the court needs you to respond to the following questions. Please be advised that your answers will be revealed only to the Prosecuting Attorney, the Defendant's Attorney, the Defendant, the Judge, her/his staff and the Clerk, each of whom are under court order to keep the information confidential and under seal.

PLEASE ANSWER AS FOLLOWS:

1. Have you, or anyone close to you ever been accused of any kind of sexual offense, including but not limited to rape, child molestation, child rape or statutory rape?

_____**YES** _____**NO**

2. Have you, or anyone close to you, ever been the victim of any sexual abuse or sexual assault, including but not limited to rape, child molestation, child rape or statutory rape?

_____**YES** _____**NO**

I declare under penalty of perjury that my answers to the foregoing questions are true.

DATED: _____

_____

Juror No. _____