

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

RENE P. PAUMIER,

Respondent.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Toni Sheldon, Judge

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

Rene P. Paumier, the appellant below, asks this Court to deny the state's petition to review the Court of Appeals decision referred to in Section B.

B. COURT OF APPEALS DECISION

Paumier requests this Court to deny review of the Court of Appeals April 27, 2010, decision in State v. Rene P. Paumier, Court of Appeals No. 36346-1-II, 155 Wn. App. 673, 230 P.3d 212 (2010). A copy of the opinion is attached as an appendix.

C. ISSUES RAISED IN ANSWER

1. The trial court conducted part of the voir dire of five prospective jurors in chambers, with only the judge, parties, and court personnel present. The trial court did not analyze the "Bone-Club"¹ factors before ordering the private voir dire. Numerous cases from the United States Supreme Court, this Court and the Court of Appeals have condemned similar closures as a violation of the right to a public trial. The state contends the Court of Appeals improperly relied on one of those cases, Presley v. Georgia,² because unlike in Presley, the trial court in

¹ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

² ___ U.S. ___, 130 S. Ct. 721, ___ L. Ed. 3d ___ (2010).

Paumier's case did not ask anyone to leave the courtroom. Because there is no difference between removing spectators from the courtroom and moving the proceedings away from spectators, did the state fail to show this case merits review?

2. Does a party "invite" error under State v. Momah³ by merely asking some prospective jurors questions in chambers, when he neither initiated, requested, nor affirmatively advocated for expansion of private voir dire, where the trial court did not consult with the parties, and where the reason for the closure was not to protect the accused's right to a fair trial by an impartial jury?

3. Does a prospective juror's right to confidentiality of medical information under the federal Health Insurance Portability and Accountability Act (HIPAA) irreconcilably conflict with the requirement that analysis under Bone-Club precede closure of voir dire?

4. Did the Court of Appeals reversal of the trial court's summary denial of Paumier's unequivocal request to proceed pro se, which he made after the end of jury selection, conflict with State v. DeWeese,⁴ where Paumier requested neither a different appointed attorney nor a

³ 167 Wn.2d 140, 217 P.3d 321 (2009).

⁴ 117 Wn.2d 369, 816 P.2d 1 (1991).

continuance to prepare for trial, and there was no evidence suggesting Paumier made the request to delay the trial or disrupt the administration of justice?

D. STATEMENT OF THE CASE

The state charged Paumier with residential burglary and second degree theft. CP 53-54. At the outset of voir dire, the trial judge announced potential jurors who wished to disclose matters "of a sensitive nature" in a private setting would be taken into chambers for individual questioning to avoid possible embarrassment. RP3 9-10. The court did not seek input from counsel or offer an opportunity to object. The judge and parties questioned five potential jurors individually in chambers. RP3 13-17, 49-52.

One day after jury selection, the court and parties discussed, and the trial court granted, the state's motion for leave to file an amended information. RP1 4-8. Paumier's counsel entered a plea of not guilty on behalf of his client. RP1 8. Counsel then brought to the court's attention Paumier's desire to represent himself at trial, which he expressed to counsel a day earlier. RP1 8-9. Counsel explained Paumier had a copy of discovery throughout the proceedings and was not satisfied with his representation. RP1 9. Paumier agreed. He said "counsel should have

spoke up for me instead of getting pissed off at me in court." RP1 9. Paumier also said, "I don't feel it should have gotten this far, and I'd just rather present my . . . case myself." RP1 9.

The trial court summarily denied Paumier's request, stating, "I'm not even going to go through the normal colloquy because at this point the request comes too late. We have already picked our jury and we're ready to begin trial at this point, and the Court will find that the request is untimely." RP1 9.

Paumier went to trial with counsel, and the jury found him guilty of residential burglary and third degree theft. CP 23-25. Paumier appealed, contending the trial court violated his right to a public trial by closing the portion of voir dire that took place in chambers without applying the "Bone-Club" factors. Brief of Appellant (BOA) at 6-14. He also maintained the trial court violated his constitutional right to proceed pro se. BOA at 15-23.

The Court of Appeals agreed. The court concluded that in the wake of Momah and Strode,⁵ a trial court must employ a Bone-Club analysis, or its equivalent, before closing a portion of voir dire. Paumier, 230 P.3d at 218. What was not clear after Momah and Strode, according

⁵ State v. Strode, 167 Wn.2d 222, 217 P.3d 321 (2009).

to the court, "is what the appropriate remedy should be when Bone-Club guidelines are not employed prior to closure." Id.

The Court did not reach this question. It instead held the United States Supreme Court decision in Presley v. Georgia controlled. Presley, the court noted, held that under the First and Sixth amendments, voir dire must be open to the public. Paumier, 230 P.3d at 218. The Presley Court held before a trial court may exclude the public from any stage of a criminal trial, it must identify an overriding interest that is likely to be prejudiced if the proceeding remains open, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closure, and it must make sufficient findings to support closure. Paumier, 230 P.3d at 218. Trial courts must consider alternatives even when the parties do not offer them because the public has a right to be present even when no party asserts the right. Id.

The court concluded, "Presley, applying the federal constitution, resolves any question about what a trial court must do before excluding the public from trial proceedings, including voir dire." Paumier, 230 P.3d at 219. Because the trial court in Paumier's case neither made the proper findings nor considered alternatives to closure, the convictions were reversed. Paumier, 230 Wn. App. at 219.

In so holding, the court rejected the state's claim that applying Momah and Strode would violate a juror's right to keep his or her medical conditions private under the federal Health Insurance Portability and Accountability Act (HIPAA). The court held that under Presley, this was one factor the trial court should consider in determining whether or not to close voir dire. Paumier, 230 Wn. App. at 219.

The court also found the trial court abused its discretion by summarily denying Paumier's request to represent himself. The court found the request was unequivocal and there was no evidence the trial would have been delayed or its administration impaired had the court granted it. Paumier, 230 P.3d at 220.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. THE COURT OF APPEALS PROPERLY RELIED ON PRESLEY TO FIND A VIOLATION OF THE RIGHT TO PUBLIC TRIAL.

In Presley, the trial court excluded the lone spectator, the accused's uncle, from the courtroom during jury selection. 130 S. Ct. at 722. The state asserts "Paumier's case is distinguishable from Presley, but comparable to Momah and Strode, as there is no record that anyone was asked to leave the courtroom in either of those cases." Petition for Review at 4.

There are several problems with the state's argument. Fundamentally, the state fails to cite RAP 13.4(b) and does not explain whether its argument fits within any of the criteria set forth in that rule.⁶ See Shumway v. Payne, 136 Wn.2d 383, 392-93, 964 P.2d 349 (1998) ("A petition for review will be granted only in certain circumscribed cases, RAP 13.4(b)[.]"). This is reason enough for this Court to reject review.

In any event, not only does the state's argument not fit within any of the four factors that govern review, it is also wrong. There is no difference between excluding a person from the courtroom during voir dire, as in Presley, and moving a part of voir dire into a private room such as a judge's chambers, as in Paumier's case. The effect of both actions is the same – the public cannot watch the proceedings.

Momah makes this perfectly clear. There individual jury voir dire occurred in the judge's chambers. Momah, 167 Wn.2d at 146-47. There is

⁶ RAP 13(4) provides:

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

no indication the trial court closed the courtroom. The Momah Court nevertheless concluded the trial court committed error, just not structural error, by failing to apply the Bone-Club factors. Momah, 167 Wn.2d at 156.

The Court distinguished the "structural error" cases because in each of those cases

the trial court closed the courtroom based on interests other than the defendant's; the closures impacted the fairness of the defendant's proceedings; the court closed the courtroom without seeking objection, input, or assent from the defendant; and in the majority of cases, the record lacked any hint that the trial court considered the defendant's right to a public trial when it closed the courtroom.

Momah, 167 Wn.2d at 151. In contrast, Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Momah, 167 Wn.2d at 151-52. Furthermore the trial judge closed the courtroom only after consulting with the defense and the prosecution. And "perhaps most importantly," the trial judge closed the courtroom only to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests. Id.

If the state is arguing the Momah "remedy" applies here, it is wrong. Paumier did not affirmatively assent to closure, did not argue for

an expanded closure, and was not given the opportunity to object. Importantly, the trial judge closed the voir dire to protect the privacy of the five jurors, "because we don't intend to embarrass you in any way." 3RP 9-10. Finally "the record lacked any hint that the trial court considered the defendant's right to a public trial when it closed the courtroom." Based on this argument, this Court should deny the state's petition.

2. PAUMIER DID NOT INVITE THE TRIAL COURT'S ERROR.

The state claims Paumier "invited" the private voir dire under the reasoning set forth in Momah. Petition at 4-5. Whether or not a party invites a constitutional error is not a question that falls within any of the criteria of 13.4(b), nor does the state assert it does. This Court should deny review.

In addition, this Court considered the invited error doctrine and the factors courts have used in cases applying it only to "harmonize" Momah's competing rights under article I, section 22 of the Washington Constitution. Momah, 167 Wn.2d at 154. Those rights – to both a public trial and an impartial jury – conflicted in Momah because of its unique facts. As the Court observed, "Momah's case was heavily publicized, having received extensive media coverage." Momah, 167 Wn.2d at 145. The heavy coverage gave rise to a very real possibility that some

prospective jurors knew enough about the case that traditional voir dire would result in contamination of the entire venire. Defense counsel did not want that, explaining he wanted all prospective jurors privately questioned because "[t]hey may have prior knowledge to the extent that they might disqualify themselves, or we have the real concern that they will contaminate the rest of the jury." Momah, 167 Wn.2d at 146.

These features set Momah's case apart from Paumier's case. Here no one said anything about publicity or possible juror taint. Nor did the court even hint it brought the jurors into chambers to protect Paumier's right to an impartial jury. The court engaged in private voir dire for one purpose – to prevent potential jurors from possibly embarrassing themselves by revealing matters of a sensitive nature in public. Therefore, there is no need to "harmonize" rights here. Under Momah, therefore, the invited error factors do not come into play.

Finally, Paumier did not invite the trial court's error in the Momah sense. Although defense counsel asked some questions during voir dire, he did not initiate the process, offer any input on its efficacy, affirmatively assent to it, or argue for its expansion. Nor did counsel express any concern about the possibility that prospective jurors might have learned facts about the case because of media coverage. On the record before it,

this court cannot legitimately presume Paumier "made tactical choices to achieve what he perceived as the fairest result." Momah, 167 Wn.2d at 155. By minimally participating in a system dictated by the trial court, Paumier did not invite the court to violate his right to a public trial. This Court should deny review.

3. REQUIRING A BONE-CLUB ANALYSIS BEFORE ORDERING CLOSURE DOES NOT CONFLICT WITH FEDERAL LAW.

The state maintains this Court should accept review to address the "conflict" that arises when a party or the court asks a prospective juror about confidential medical information, because of the Health Information Portability and Accountability Act (HIPAA). Petition at 5-6. By recognizing this conflict exists whether the questioning occurs in open court or privately, the state in effect argues for a ban on questioning about confidential medical matters in voir dire. Petition at 5. Again, the state offers no rationale under RAP 13.4(b) for why this Court should review this argument. Whether a case "conflicts" with a federal statute is not one of the RAP 13.4(b) factors. For this reason this Court should deny review.

Furthermore, the state has no standing to assert the rights of individual jurors. The Court of Appeals said as much in a different context in State v. Wise, where it held the accused had no standing to

assert the public's right to view court proceedings under article I, section 10 of the Washington Constitution. Wise, 148 Wn. App. 425, 442, 200 P.3d 266 (2009), petition for review pending.

The Wise court held:

Wise does not meet the requirements for third party standing to assert a violation of the public's open trial right. Wise does not point to any injury caused by private voir dire. More importantly, Wise does not have a "sufficiently close relationship" to the public open trial right. He was the defendant and not an observer in this case and the trial court did not bar him from the juror questioning it conducted on the record in chambers. Additionally, Wise's interests on appeal are starkly different than the interests of the public: Wise benefited from the private questioning because it allowed jurors to be more forthcoming; whereas the public's interest was in observing the proceedings, Wise's interest was on getting accurate private personal information.

Wise, 148 Wn. App. at 442-43.

The same is true of the state here. With respect to voir dire, both parties share the same interests and have the same goals. See United States v. McDade, 929 F. Supp. 815, 817 (E.D. Pa. 1996) ("when it comes to prying into matters personal to a juror, the interests of counsel on either side of the aisle are not necessarily antagonistic. All the lawyers want to learn just about all they can about all the prospective jurors."). The state does not have a close relationship to a juror's right to privacy. The state has no standing to raise the right here.

Assuming for argument that private questioning regarding confidential medical matters alleviates any conflict with federal law, the Court of Appeals was correct in determining a juror's right to privacy under HIPAA is but one factor a trial court must consider before closing voir dire. Paumier, 230 P.3d at 219. This accords with other courts that have found the juror's right to privacy must be balanced with the defendant's right to a fair trial. See McDade, 929 F. Supp. at 817-18 (trial court must balance parties' right to explore jurors' ability to be fair with jurors' privacy interests); Brandborg v. Lucas, 891 F. Supp. 352, 360 (E. D. Tex. 1995) (trial court must examine questions for relevance and, where necessary to protect juror's right to privacy on an issue, must employ limited private voir dire).

Finally, the state's assertion that HIPAA automatically justifies closure conflicts with this Court's decision in Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993). In that case, a unanimous Court invalidated a statute that prohibited a trial court from disclosing to the public or media the identities of child victims of sexual assault, either by disseminating court records or by allowing the public access to court proceedings. Allied Daily, 121 Wn.2d at 211. This Court found the interests of protecting a child sexual assault from further harm

and ensuring the child's privacy right under article I, section 7 were compelling. Id. Nevertheless, those interests were not in and of themselves sufficient to warrant closure; instead, they were to be considered in each case under the Bone-Club analysis. Id.

An appellate court panel used the same rationale in In re Detention of D.F.F., 144 Wn. App. 214, 183 P.3d 302 (2008), review granted, 164 Wn.2d 1034 (2008). At issue was the constitutionality of MPR 1.3, which closed mental health involuntary commitment proceedings to the public unless the potential committed person or his attorney filed a written request for public proceedings. D.F.F., 144 Wn. App. at 218. The court concluded the rule was unconstitutional because (1) it did not permit case-by-case weighing of the competing interests of the proponent of closure and the public and (2) the presumption of closure of every proceeding was broader in its application or duration than necessary to serve the purpose of protecting privacy. D.F.F., 144 Wn. App. at 225-26.

For these reasons, Paumier requests this Court to deny review of the state's petition.

4. THE TRIAL COURT DEPRIVED PAUMIER OF HIS RIGHT TO SELF-REPRESENTATION.

The state argues the Court of Appeals erred by finding Paumier's request to proceed pro se timely. According to the state, the parties had

already "committed a significant amount of time and effort to selecting the jury" before Paumier made his request. Petition at 6. The state asserts the court's decision conflicts with State v. DeWeese, 117 Wn.2d 377, 816 P.2d 1 (1991).

The decision does nothing of the kind. The issue in DeWeese was whether the trial court violated the accused's constitutional right to counsel by denying a demand for appointment of a third attorney and permitting the accused to represent himself without counsel. DeWeese, 117 Wn.2d at 374. The trial court found the accused failed to justify allowance of a third attorney. Before proceeding, the court engaged in a lengthy colloquy with the accused on the disadvantages of self-representation and advised him about the consequences of waiving counsel. DeWeese, 117 Wn.2d at 378.

This Court found the right to self-representation is not absolute and must be invoked "in a timely fashion, or the right is relinquished and the matter of the defendant's representation is left to the discretion of the trial judge." DeWeese, 117 Wn.2d at 377. The Court also declared "a defendant may not manipulate the right to counsel for the purpose of delaying and disrupting trial." DeWeese, 117 Wn.2d at 379. This Court

concluded the trial court did not abuse its discretion. DeWeese, 117 Wn.2d at 374.

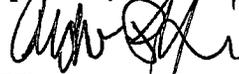
Just as the DeWeese Court did, the Court of Appeals applied the abuse of discretion standard in Paumier's case. There is no evidence Paumier sought to "manipulate the right to counsel" for the purpose of delay and disruption of trial. He did not even request new counsel but instead merely asked to handle the trial on his own. Nor did Paumier ask for additional time to prepare his defense. Under these circumstances, the trial court abused its discretion by summarily denying the request, and the Court of Appeals decision is consistent with DeWeese. This Court should deny the state's petition for review.

F. CONCLUSION

The state fails to show the Court of Appeals opinion falls within the criteria set forth in RAP 13.4(b). The trial court's decisions are sound and so is its rationale. Paumier asks this court to deny review of his case.

DATED this 23 day of June, 2010.

Respectfully submitted,



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APPENDIX

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

RENE P. PAUMIER,

Appellant.

No. 36346-1-II

PUBLISHED OPINION

BRIDGEWATER, J. — Rene Paumier appeals his convictions for residential burglary and third degree theft. Because we hold that the trial court improperly excluded the public from a portion of Paumier's trial and improperly denied his right to represent himself, we reverse his convictions and remand for further proceedings.

FACTS

When Jason Howland returned home after a weekend outing, he discovered that the back door to his residence had been broken open and that several items had been taken from his bedroom, including three knives, two watches, belt buckles, baseball hats, and other clothing items. He called police, who began an investigation regarding the burglary.

Police became interested in Paumier after they interviewed a neighbor who reported having seen Paumier during the weekend of the burglary exit the front of Howland's house and walk down the street. A police officer contacted Paumier, advised him why he wanted to speak

with him, read Paumier his *Miranda*¹ warnings, and requested to search his person and the backpack he was carrying. Paumier consented to being searched, and police found a knife and a belt buckle that Howland identified as having come from his bedroom. The State ultimately charged Paumier with residential burglary and second degree theft.

Following the trial court's rulings on motions in limine, jury selection began on May 8, 2007. The trial court stated at the outset that potential jurors who preferred to answer questions privately to avoid possible embarrassment would be taken into the judge's chambers. Several jurors indicated during the course of voir dire that they preferred to answer certain questions in chambers. The judge and the parties questioned five jurors in chambers, recording the jurors' responses.² Jury selection was completed that same day.

The following day, the trial court permitted the State to amend the information. 1 RP at 8. Paumier then pleaded not guilty and asked to represent himself, stating:

I just don't feel like a—I feel like there's [sic] things about the trial getting this far that it shouldn't have. And I feel that my attorney should have spoke [sic] up for me instead of getting pissed off at me in court. And I just don't feel like he's doing his job like he should. I don't feel it should have gotten this far, and I'd just rather present my, you know, case myself.

1 RP at 9. The court denied the request noting that it came too late. "We have already picked our jury and we're ready to begin trial at this point, and the Court will find that the request is untimely." 1 RP at 9.

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

² Rather than a court reporter, the court used a digital recording system with cordless microphones to make the record.

Following trial, the jury found Paumier guilty of residential burglary and the lesser included offense of third degree theft. The court sentenced Paumier to 25 months in prison for the burglary and 365 days in jail for the theft, suspending the theft sentence upon compliance with a 24-month probation term.

Paumier appealed, arguing that his right to a public trial had been violated and that the trial court improperly denied his request to proceed pro se. On May 1, 2008, we ordered proceedings stayed pending our Supreme Court's decision in *State v. Strode*, no. 80849-0, addressing the public trial issue. On October 8, 2009, our Supreme Court issued its decision in *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009), along with a companion case, *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009).³ We lifted the stay on November 3, 2009, and ordered the parties to provide supplemental briefing on the impact of *Strode* and *Momah* on this case. The parties have provided that briefing and we now consider Paumier's appeal.

DISCUSSION

Public Trial Right

Paumier argues that by conducting a portion of the jury selection in the privacy of chambers the trial court violated his constitutional right to a public trial. We agree.

The state and federal constitutions guarantee the right to a public trial. Article I, section 22 of the Washington Constitution provides: "In criminal prosecutions the accused shall have

³ While *Strode* was pending, the Department of Corrections released Paumier from custody in July of 2009. His appeal is not moot, however, because Paumier asks us in part to reverse his conviction.

the right . . . to have a speedy public trial.” The Sixth Amendment to the United States Constitution states: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” Moreover, article I, section 10 of the Washington Constitution provides that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” This provision secures the public’s right to open and accessible proceedings. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). These provisions assure a fair trial, foster public understanding and trust in the judicial system, and give judges the check of public scrutiny. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); *Dreiling v. Jain*, 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004). While the public trial right is not absolute, it is strictly guarded to assure that proceedings occur outside the public courtroom in only the most unusual circumstances. *Easterling*, 157 Wn.2d at 174-75; *Brightman*, 155 Wn.2d at 509; *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004); *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

The guaranty of open criminal proceedings extends to voir dire. *Orange*, 152 Wn.2d at 804. In *Bone-Club* and *Orange*, our Supreme Court set out the standards for closing all or any portion of a criminal trial. *Bone-Club*, 128 Wn.2d at 258-59; *Orange*, 152 Wn.2d at 805. *Bone-Club* adopted a five-part analysis designed to protect a criminal defendant’s right to a public trial.⁴ *Bone-Club*, 128 Wn.2d at 258-60; see also *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36-39, 640 P.2d 716 (1982) (setting forth five-part analysis under article I, section 10).

⁴ The *Bone-Club* analysis provides:

Relying on these cases, Division Three held in *State v. Duckett*, 141 Wn. App. 797, 173 P.3d 948 (2007), that the trial court must engage in the five-part *Bone-Club* analysis before conducting all or a portion of voir dire outside of the public forum of the courtroom. *Duckett*, 141 Wn. App. at 802-03. In *Duckett*, as here, the trial court had conducted a portion of voir dire in chambers without engaging in the *Bone-Club* analysis. The *Duckett* court held that the failure to address the *Bone-Club* analysis and enter findings and conclusions on each factor required reversal and a new trial. *Duckett*, 141 Wn. App. at 803, 805, 809; see also *State v. Frawley*, 140 Wn. App. 713, 167 P.3d 593 (2007).

Noting “the court’s independent obligation to safeguard the open administration of justice,” *Duckett* held that “[a]ny closure of a public judicial proceeding required the trial court to engage in the *Bone-Club* analysis.” *Duckett*, 141 Wn. App. at 804, 807. Here, as in *Duckett*, “only a limited portion of voir dire was held outside the courtroom” but that “does not excuse the failure to engage in a *Bone-Club* analysis.” *Duckett*, 141 Wn. App. at 808. Here, as in *Duckett*,

-
1. The proponent of closure or sealing must make some showing [of a 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.

Bone-Club, 128 Wn.2d at 258-59 (quoting *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

the trial court violated the defendant'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." *Duckett*, 141 Wn. App. at 809. *Duckett* was an accurate articulation of the law in Washington prior to our Supreme Court's decision in *Momah*.

As noted, before *Momah's* publication, Washington case law indicated that courtroom closure implicated considerations in addition to the rights of the defendant, that courtroom closure is a circumstances where the burden is placed on the trial court, and that the court must show why closure is necessary. Before *Momah*, our Supreme Court's precedent made the *Bone-Club* guidelines mandatory and directed that the trial court's failure to employ those requirements was reversible error. Prejudice was presumed and remand for a new trial was required. *Orange*, 152 Wn.2d at 814, 821-22.

In *Momah*, our Supreme Court seemed to back away from its earlier articulation in *Orange* that application of the *Bone-Club* guidelines is required and that the failure to so employ them when closing the courtroom is reversible error. Instead, *Momah* seemed to downgrade the *Bone-Club* guidelines by referring to them as "the better practice" rather than as requirements. *Momah*, 167 Wn.2d at 152 n.2. *Momah* noted that all courtroom closures do not trigger a conclusive presumption of prejudice warranting automatic reversal of convictions and a new trial and holds that "[i]n each case the remedy must be appropriate to the violation." *Momah*, 167 Wn.2d at 156.

Momah purportedly applied the United States Supreme Court's decision in *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984), reading that case to require "a showing that the defendant's case was actually rendered unfair by the closure." *Momah*, 167

Wn.2d at 150. *Momah* pointedly noted that the remedy employed in *Waller* was remand for a new suppression hearing, not a new trial. *Momah*, 167 Wn.2d at 150. *Momah* noted that had the court in *Waller* automatically granted the defendant a new trial without requiring a new suppression hearing, the result would have been an improper windfall for the defendant and such result would not be in the public interest. *Momah*, 167 Wn.2d at 150.

Momah's treatment of the public's interest in open court proceedings is also notable. Prior to *Momah*, this was a separate and equally compelling basis for requiring the trial court to comply with the *Bone-Club* guidelines before closing the courtroom. "[T]he constitutional requirement that justice be administered openly is not just a right held by the defendant. It is a constitutional obligation of the courts. . . . When the courtroom doors are locked without a proper prior analysis under *Orange* and . . . [*Bone-Club*], the people deserve a new trial." *Easterling*, 157 Wn.2d at 187 (Chambers, J., concurring). But while *Momah* acknowledged the public's constitutional interest in open proceedings, *see Momah*, 167 Wn.2d at 147-49 (discussing Wash. Const. art. I, § 10), it opined that the requirement of a public trial "is primarily for the benefit of the accused." *Momah*, 167 Wn.2d at 148. *Momah* seems to conflate the public's and the defendant's interests in an open proceeding and subsume the public's interest under the defendant's interest, at least in the particular circumstances present in *Momah*. *Momah*, 167 Wn.2d at 147-49.

Moreover, *Momah* curiously cites the five *Bone-Club* guidelines (complete with each guideline's mandatory "must" language) and acknowledges that *Bone-Club* provides the appropriate criteria for determining if closure is appropriate, but it does not address the failure to comply with the obligatory language in those guidelines. *Momah*, 167 Wn.2d at 148-49. It

merely notes that if the reviewing court determines that the defendant's right to a public trial was violated it should then "devise[] a remedy appropriate to that violation." *Momah*, 167 Wn.2d at 149.

Despite *Momah*'s seeming retreat from prior Washington precedent, *Momah* nevertheless acknowledged that "structural" error "warrants automatic reversal" and remand for a new trial. *Momah*, 167 Wn.2d at 149. *Momah* identifies "structural error" as one that necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. *Momah*, 167 Wn.2d at 149-50, 155-56. *Momah* acknowledged that the court closures in *Bone-Club*, *Easterling*, and *Orange* were such "structural" errors. *Momah*, 167 Wn.2d at 150-51. Key to *Momah*'s determination on that issue as to *Bone-Club* and *Easterling*, was the defendant's exclusion from the proceedings in those cases. *Momah*, 167 Wn.2d at 150-51, 155. In *Orange*, the defendant's family was excluded. See *Momah*, 167 Wn.2d at 150-51 (discussing *Orange*).⁵ The *Momah* court distinguished the circumstance before it noting that the defendant affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in the closed proceeding, and benefitted from such closure. *Momah*, 167 Wn.2d at 151-52. Moreover, the purpose of the closure was to safeguard the defendant's right to a fair trial by an impartial jury rather than to protect any other interests. *Momah*, 167 Wn.2d at 151-52. Accordingly, because the defendant in *Momah* affirmatively accepted and actively participated in the closed hearing, our Supreme Court held that the

⁵ Notably, in *Waller*, upon which *Momah* primarily relies, the defendants were not excluded from the pre-trial suppression hearing that was closed to the public. See *Waller*, 467 U.S. at 42.

courtroom closure in that circumstance was “not a structural error” warranting reversal. *Momah*, 167 Wn.2d at 156.

In *Strode*, a plurality decision released the same day as *Momah*, the lead opinion reiterated and applied what was the established law in Washington prior to *Momah*—that it is the trial court’s independent obligation to perform the *Bone-Club* analysis prior to courtroom closure to protect both the defendant’s public trial right and the public’s right to open proceedings. *Strode*, 167 Wn.2d 223, 227-30. Where a *Bone-Club* analysis is not conducted prior to courtroom closure, prejudice is presumed (i.e. structural error which cannot be considered harmless) and automatic reversal is mandatory. *Strode*, 167 Wn.2d 231. Only four justices agreed on all these points. Two more justices concurred in the result, agreeing that in the case under consideration the trial court was required to expressly engage in a *Bone-Club* analysis on the record and its failure to do so required automatic reversal and remand. The concurrence disagreed with the lead opinion to the extent it appeared to conflate the defendant’s public trial right with the interests of the media and the public in open proceedings. “A defendant should not be able to assert the right of the public or the press in order to overturn his conviction when his own right to a public trial has been safeguarded as required under *Bone-Club* or has been waived.” *Strode*, 167 Wn.2d 236 (Fairhurst, J., concurring in result only).

Accordingly, despite *Momah*, it appears that six justices agree that a *Bone-Club* analysis (or some equivalent) is required prior to closing the courtroom. What was not clear after *Momah* and *Strode* is what the appropriate remedy should be when *Bone-Club* guidelines are not employed prior to closure. Apparently, the reviewing court is to look to the record to see if the trial court employed some equivalent of *Bone-Club* and then fashion a remedy appropriate to the

violation if the trial court failed to engage in an adequate inquiry. As noted, the remedy deemed appropriate in *Momah* (a new hearing) reflected the circumstances of that case; that is, defendant's affirmative acceptance and active participation in the closed proceedings. The appropriate remedy in *Strode* was automatic reversal (six justices agreed) even though the defendant participated in the closed hearing. This was so because no *Bone-Club* analysis (lead opinion) or its equivalent (conurrence) had occurred.⁶

Three months after *Momah* and *Strode*, the United States Supreme Court decided *Presley v. Georgia*, ___ U.S. ___, 130 S. Ct. 721, ___ L. Ed. 3d ___ (2010), a per curiam opinion holding that under the First and Sixth Amendments, voir dire of prospective jurors *must* be open to the public. *Presley*, 130 S. Ct. at 723-24. This requirement is "binding on the States." *Presley*, 130 S. Ct. at 723. The Court explained that while the accused has a right to insist that the voir dire of the jurors be public, there are exceptions to this general rule. The right to an open trial "may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Presley*, 130 S. Ct. at 724 (quoting *Waller*, 467 U.S. at 45). "Such circumstances will be rare, however, and the balance of interests must be struck with special care." *Presley*, 130 S. Ct. at 724 (quoting *Waller*, 467 U.S. at 45). The *Presley* Court stated that *Waller* provided the

⁶ After *Momah* and *Strode*, it seemed that we would have to await another case for our Supreme Court to clarify the rules and procedures for courtroom closures. That is, whether the five-part *Bone-Club* analysis was mandatory, and what repercussions would follow courtroom closure without such analysis, were issues that seemed to be unsettled after *Momah* and *Strode*.

appropriate standards for courts to apply before excluding the public from any stage of a criminal trial.⁷ *Presley*, 130 S. Ct. at 724.

Noting that “[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials,” *Presley*, 130 S. Ct. at 725, the Court reiterated that “[a]bsent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire*.” *Presley*, 130 S. Ct. at 724 (quoting *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 511, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (*Press-Enterprise I*)). Moreover “trial courts are required to consider alternatives to closure even when they are not offered by the parties,” this is because “[t]he public has a right to be present whether or not any party has asserted the right.” *Presley*, 130 S. Ct. at 724-25.

Additionally, the trial court must make appropriate findings supporting its decision to close the proceedings.

There are no doubt circumstances where a judge could conclude that threats of improper communications with jurors or safety concerns are concrete enough to warrant closing *voir dire*. But in those cases, the particular interest, and threat to that interest, must “be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.”

Presley, 130 S. Ct. at 725 (quoting *Press-Enterprise I*, 464 U.S. at 510). The Court held that “even assuming, *arguendo*, that the trial court had an overriding interest in closing *voir dire*, it

⁷ The *Waller* standards require:

“[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.”

upon it to consider all reasonable alternatives to closure.” *Presley*, 130 S. Ct. at 725. Thus, where the trial court fails to sua sponte consider reasonable alternatives and fails to make the appropriate findings, the proper remedy is reversal of the defendant’s conviction. *Presley*, 130 S. Ct. at 725.

Thus *Presley*, applying the federal constitution, resolves any question about what a trial court must do before excluding the public from trial proceedings, including voir dire. Here, the trial court closed a portion of voir dire by interviewing certain jurors in chambers. By shutting out the public without first considering alternatives to closure and making appropriate findings explaining why closure was necessary, the trial court violated Paumier’s and the public’s right to an open proceeding. *Presley* requires reversal of Paumier’s burglary conviction, and we so hold.

In his supplemental briefing, Paumier argues that this case is factually more like *Strode* than it is like *Momah*. That is so, but as we have explained *Presley* has eclipsed *Momah* and *Strode* and controls the outcome of Paumier’s case.

The State argues in its supplemental briefing that applying *Momah* and *Strode* would violate a juror’s right to keep his or her medical conditions and treatment private under the federal Health Insurance Portability and Accountability Act (HIPAA). Again, *Presley* resolves the matter. As discussed above, *Presley* does not require all proceedings to be open in all circumstances. *Presley* requires a trial court to consider reasonable alternatives to closure and to make appropriate findings explaining why closure is necessary under the particular

Presley, 130 S. Ct. at 724 (quoting *Waller*, 467 U.S. at 48).

circumstances of the case *before* closing the proceeding. Accordingly, a proceeding may be closed under *Presley*, when these requirements are met. *Presley*, 130 S. Ct. at 725.

In sum, for the reasons discussed, we reverse Paumier's convictions for residential burglary and third degree theft.

Right to Self-Representation

Paumier also asserts that the trial court violated his constitutional right to represent himself by summarily denying his request to so proceed. We agree.

A criminal defendant has an independent constitutional right to represent himself or herself without the assistance of legal counsel. *State v. Breedlove*, 79 Wn. App. 101, 106, 900 P.2d 586 (1995). The exercise of this right must be requested by the defendant. The request must be knowingly and intelligently made, unequivocal, and "timely, i.e., it may not be used to delay one's trial or obstruct justice." *Breedlove*, 79 Wn. App. at 106. We review the trial court's disposition of a request to proceed pro se for abuse of discretion, mindful of the guidelines enunciated in *State v. Fritz*, 21 Wn. App. 354, 361, 585 P.2d 173 (1978), *review denied*, 92 Wn.2d 1002 (1979).

Under *Fritz*, the trial court's discretion lies along a continuum that corresponds with the timeliness of the request to proceed pro se. Accordingly, where a defendant makes a proper demand for self-representation well before the trial, the right of self-representation exists as a matter of law. Where the demand is made on the eve of trial, the existence of the right depends on the particular facts of the case with a measure of discretion reposing in the trial court. Finally, where the request is made during the trial, the right to proceed pro se rests largely in the informed discretion of the trial court. *Fritz*, 21 Wn. App. at 361; *see also Breedlove*, 79 Wn.

App. at 106-07. Thus, if the request is made just before or during trial, the trial court “must exercise its discretion by balancing the important interests implicated by the decision,” namely, the defendant’s interest in self-representation and society’s interest in the orderly administration of justice. *Breedlove*, 79 Wn. App. at 107.

Further, *Breedlove* held that “the timeliness requirement should not operate as a bar to a defendant’s right to defend pro se.” *Breedlove*, 79 Wn. App. at 109. The *Breedlove* court held that the trial court abused its discretion in denying the defendant’s request to represent himself because there was no evidence that his motion was designed to delay his trial or that granting it would have impaired the orderly administration of justice. *Breedlove*, 79 Wn. App. at 110. “The erroneous denial of a defendant’s motion to proceed pro se requires reversal without any showing of prejudice.” *Breedlove*, 79 Wn. App. at 110; *see also State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997) (unjustified denial of defendant’s right to represent himself requires reversal), *cert. denied*, 523 U.S. 1008 (1998).

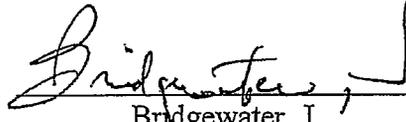
Here, Paumier’s request to represent himself was made after the jury was selected but before it was sworn. Paumier expressed his dissatisfaction with his attorney and simply said he would rather present his case himself. He did not ask for a continuance.⁸ The trial court denied the request on the sole basis that it was untimely.

⁸ Moreover, Paumier’s criminal history, which includes multiple prior theft convictions and a prior burglary conviction, indicates that he was familiar with the charges and perhaps the criminal court proceeding that he faced. Also, defense counsel told the trial court that Paumier “has had copies of discovery throughout the proceedings.” 1 RP at 9.

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As in *Breedlove*, Paumier's request to represent himself was clear, and there is no evidence that the trial would have been delayed or that granting his request would impair the orderly administration of justice. Accordingly, we hold that the trial court abused its discretion in denying Paumier's request to represent himself.

Because the unjustified denial of this right requires reversal, we reverse Paumier's convictions and remand for further proceedings consistent with this opinion.⁹


Bridgewater, J.

I concur:


Houghton, P.J.

⁹ We would normally order a new trial, but because Paumier is no longer in custody we leave to the parties the pursuit of further proceedings as they deem appropriate.

QUINN-BRINTNALL, J. (dissenting) — Because Rene P. Paumier failed to timely object and preserve the “closed courtroom” issue for our review, I disagree with the majority’s decision to address the merits of the alleged public trial right violation and respectfully dissent. I also disagree with the majority’s reliance on the United States Supreme Court opinion in *Presley v. Georgia*, ___ U.S. ___, 130 S. Ct. 721, ___ L. Ed. 3d ___ (2010), to reverse Paumier’s convictions.

In *Presley*, without applying the standards set out in *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984), the trial court, *over the defendant’s objections*, excluded Presley’s uncle (and apparently any other member of the public) from attending the jury selection proceedings, stating that there was insufficient room in the courtroom to accommodate prospective jurors and one observer. 130 S. Ct. at 722. Presley’s counsel expressly objected to the exclusion of his client’s uncle, who might well have been of assistance to the defense in selecting a jury, as well as other members of the public, from the jury selection process. *Presley*, 130 S. Ct. at 722.

Thus, in *Presley*, our nation’s highest Court had before it a trial court that—over the clear objection of the defendant and the observer—closed the courtroom without applying standards necessary to insure protection of the defendant’s Sixth and the public’s First Amendment rights to a public trial. In contrast, Paumier did not assert, and in my opinion waived, his Sixth Amendment right to a public trial by failing to object to the trial court’s decision to allow jurors to answer questions they considered embarrassing in chambers on the record with all parties present.

Although *Presley* holds that the defendant's Sixth Amendment right to a public trial extends to the jury selection process,¹⁰ it does not hold that this error cannot be waived or that the public trial right under the federal constitution need not be preserved for review. See *Reid v. Georgia*, 286 Ga. 484, ___ S.E.2d ___, 2010 WL 423110 at *3 (distinguishing *Presley* on the basis that Reid did not object to the trial court's temporary courtroom closure and reasoning, "The improper closing of a courtroom is structural error requiring reversal only if the defendant properly objected at trial and raised the issue on direct appeal."); but see *State v. Strobe*, 167 Wn.2d 222, 229, 217 P.3d 310 (2009) ("defendant's failure to lodge a contemporaneous objection at trial [does] not effect a waiver [of defendant's public trial right]" (alterations in original) (quoting *State v. Brightman*, 155 Wn.2d 506, 517, 122 P.3d 150 (2005))). Under the invited error doctrine, a reviewing court should decline to address the merits of a claimed error if the appealing party induced the court to commit the conduct later asserted to be error. *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). The invited error doctrine applies even to manifest constitutional errors. *State v. McLoyd*, 87 Wn. App. 66, 70, 939 P.2d 1255 (1997), *aff'd by State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999).

Here, although Paumier did not actively seek to have jurors questioned about sensitive matters in chambers, the record shows that he participated in the process and accepted the benefit of obtaining more candid answers to embarrassing questions. Accordingly, I would hold that

¹⁰ The United States Supreme Court has similarly held that the public's First Amendment right to a public trial extends to the jury selection process. *Press-Enter. Co. v. Super. Ct. of Cal., Riverside County*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).

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Paumier has failed to preserve any objection to the trial court's in-chambers questioning of potential jurors for appellate review. I am aware of contrary authority but cannot agree that it rests on sound constitutional basis.

In addition, Paumier lacks standing to assert the public's First Amendment right to a public trial. The standing doctrine generally prohibits a party from suing to vindicate another's rights. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 138, 744 P.2d 1032, 750 P.2d 254 (1987). Neither *Presley* nor any other case expressly holds that a criminal defendant may assert the public's rights to a public trial, although it has ruled on the public's right through a criminal defendant's appeal. *See, e.g., State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995).

I wholeheartedly agree with the statement in the plurality opinion in *Strode* that a defendant "cannot waive the public's right to open proceedings." 167 Wn.2d at 229. But it does not follow that he has standing to assert that right to overturn a verdict entered by an impartial group, the public's representatives on the jury. Importantly, this is not a situation in which the defendant's and the public's right to a public trial are aligned to the degree that the defendant can fairly represent the public's interest in exercising its public trial rights or impartially decide whether to press to extend precious taxpayer resources on a new trial. In the context of jury selection, those rights may clearly be in conflict. As demonstrated here, Paumier had an interest in allowing jurors to be questioned privately in order to encourage candid answers to his questions. The public, in contrast, has an interest in knowing that the jury selection process was fair and to discover how, by whom, and, in challenges for cause, why potential jurors were challenged or removed from jury service. I continue to believe that the defendant's and the

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public's interests in a public trial are not sufficiently aligned to allow a defendant who does not object to a juror's request to be questioned on the record in chambers to remain silent and then allege a violation of the public's right to a public trial for the first time on appeal.

I also cannot agree that the record before us supports a determination that the trial court abused its discretion by denying Paumier's untimely request that he represent himself. Unlike the trial court's file, the record before us in this appeal does not contain any indication of Paumier's level of function or a history of his relationships with counsel. I am loathe to baldly rule that a trial judge has abused her discretion on such an inadequate record.

In addition, Paumier chose to appeal the judgment in this case. Assuming the majority's opinion reversing that judgment stands, the correct remedy is a remand for a new trial. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). As always, following reversal of a defendant's conviction, the State may decide not to retry the defendant or the defendant and the State may reach an agreement. That does not, in my opinion, alter the proper statement of the remedy. The evidence presented at trial was sufficient to support the decision of the fair and impartial jury that rendered it and double jeopardy does not bar retrial. Accordingly, even under the majority analysis, our authority is limited to reversing the judgment and remanding to the superior court for a new trial or other proceeding consistent with the majority opinion.


QUINN-BRINTNALL, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)	
)	
Petitioner,)	
)	
vs.)	NO. 84585-9
)	
RENE P. PAUMIER,)	
)	
Respondent.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 24TH DAY OF JUNE 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **ANSWER TO PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

EDWARD LOMBARDO
MASON COUNTY PROSECUTOR'S OFFICE
521 N. 4TH AVENUE
SUITE A
P.O. BOX 639
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF JUNE 2010.

x Patrick Mayovsky