

**FILED**  
MAR 16 2011  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

85737-7

NO. \_\_\_\_\_

(COA NO. 62872-1-I)

---

**IN THE WASHINGTON SUPREME COURT**

---

STATE OF WASHINGTON,

Respondent-Appellee,

v.

TANER TARHAN,

Petitioner-Appellant.

2011 MAR -9 AM 11:01  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

---

**PETITION FOR REVIEW**

---

Appeal from the King County Superior Court  
The Hon. Susan Craighead, Superior Court Judge  
No. 07-1-05362-6 SEA

---

Steven Witchley, WSBA 20106  
Law Offices of Holmes & Witchley, PLLC  
705 Second Avenue, Suite 401  
Seattle, WA 98104  
(206) 262-0300  
(206) 262-0335 (fax)  
[steve@ehwlawyers.com](mailto:steve@ehwlawyers.com)

**ORIGINAL**

## TABLE OF CONTENTS

I.	IDENTITY OF PETITIONER	1
II.	COURT OF APPEALS DECISION	1
III.	ISSUES PRESENTED FOR REVIEW	1
IV.	STATEMENT OF THE CASE	2
	<u>Procedural Overview</u>	2
	<u>Summary of the Evidence at Trial</u>	3
	<u>Sealing of Juror Questionnaires</u>	4
V.	ARGUMENT	6
	<u>Introduction</u>	6
	<u>Tarhan's Federal and State Constitutional Rights to an Open and Public Trial Were Violated When the Trial Court Sealed Juror Questionnaires Without First Conducting a <i>Bone-Club</i> Hearing.</u>	8
	<i>Introduction</i>	8
	<i>A Hearing Must Precede Any Contemplated Closure or Sealing.</i>	11
	<i>The Right to an Open and Public Trial and the Requirement of a Hearing Applies to Jury Selection in General, and to Juror Questionnaires in Particular.</i>	13
	<i>Violation of the Right to an Open and Public Trial is a Structural Error Which Necessitates a New Trial.</i>	14
	<i>Momah is Distinguishable Because in that Case the Trial Court Held a Bone-Club Hearing or its Equivalent.</i>	15

*Division One's Harm and Remedy Analysis in Coleman Was Implicitly Overruled By Strobe. This Court Should Now Explicitly Overrule that Portion of Coleman.* 18

*Tarhan Is Entitled to a New Trial.* 23

**VI. CONCLUSION** 23

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<i>In Re PRP of Orange</i> , 152 Wash.2d 795, 100 P.3d 291 (2005)	9-10, 12-13, 22
<i>Seattle Times Co. v. Ishikawa</i> , 97 Wash.2d 30, 640 P.2d 716 (1982)	10
<i>State v. Bone-Club</i> , 128 Wn.2d 254, 906 P.2d 325 (1995)	<i>passim</i>
<i>State v. Brightman</i> , 155 Wash.2d 506, 122 P.3d 150 (2005)	10, 13
<i>State v. Coleman</i> , 151 Wash. App. 614, 214 P.3d 158 (2009)	<i>passim</i>
<i>State v. Easterling</i> , 157 Wash.2d 167, 137 P.3d 825 (2006)	9, 13, 15, 22
<i>State v. Leyerle</i> , 158 Wash. App. 474, 242 P.3d 921 (2010)	7
<i>State v. Momah</i> , 167 Wash.2d 140, 217 P.3d 321 (2009)	6, 13, 15-18
<i>State v. Paumier</i> , 155 Wash. App. 673, 230 P.3d 212, <i>rev. granted</i> , 169 Wash.2d 1017 (2010)	7
<i>State v. Strode</i> , 167 Wash.2d 222, 217 P.3d 310 (2009)	<i>passim</i>

### FEDERAL CASES

<i>Presley v. Georgia</i> , ___ U.S. ___, 130 S.Ct. 721 (2010)	6, 8-9, 13
<i>Press-Enterprise Co. v. Superior Court</i> , 464 U.S. 501 (1984)	9, 13
<i>Waller v. Georgia</i> , 467 U.S. 39 (1984)	12

## CONSTITUTIONAL PROVISIONS

United States Constitution, Sixth Amendment	8-9
Washington Constitution, Article 1, § 10	9
Washington Constitution, Article 1, § 22	9

## STATUTES AND COURT RULES

RAP 13.4(b)(1)	8
RAP 13.4(b)(2)	8
RAP 13.4(b)(3)	8
RAP 13.4(b)(4)	8

## **I. IDENTITY OF PETITIONER**

Petitioner-Appellant Taner Tarhan asks the Court to accept review of the Court of Appeals decision described in part B below.

## **II. COURT OF APPEALS DECISION**

Tarhan seeks review of the Court of Appeals decision in *State v. Tarhan*, No. 62872-1-I (February 7, 2011). That decision was published in part. The citation to the published portion of the decision is *State v. Tarhan*, \_\_\_ Wash. App. \_\_\_, 246 P.3d 580 (2011). A copy of the full opinion is attached to this petition as Appendix A.

## **III. ISSUES PRESENTED FOR REVIEW**

1. Does the sealing of confidential juror questionnaires without first holding a “*Bone-Club*” hearing violate a defendant’s federal and state constitutional rights to an open and public trial?
2. Is the failure to hold such a hearing prior to the sealing of confidential juror questionnaires a structural error?

3. Should this Court explicitly overrule Division One's harm and remedy analysis in *State v. Coleman*, 151 Wash. App. 614, 214 P.3d 158 (2009)?

#### **IV. STATEMENT OF THE CASE**

##### Procedural Overview

Taner Tarhan and three co-defendants—Emir Beskurt, Samet Bideratan and Turgut Tarhan (Taner's brother)—were charged by information with one count of second degree rape by forcible compulsion. CP 1-10.

The four defendants were tried jointly before a jury. The jury was unable to reach a verdict on the charge of second degree rape, but found all four defendants guilty of the lesser charge of third degree rape. CP 80-81. On September 8, 2008, the trial court sentenced Tarhan to 10 months in jail.

Tarhan then filed this appeal. CP 115-16. His three co-defendants also appealed. The three co-defendants' cases were consolidated on appeal; Taner Tarhan's appeal proceeded separately. None of the co-defendants raised the public trial

claims at issue in this petition. Their convictions were affirmed in an unpublished decision and this Court denied review. *State v. Beskurt*, 2010 WL 2670826 (2010), *rev. denied*, 170 Wash.2d 1021 (2011).

### Summary of the Evidence at Trial

The Court of Appeals summarized the facts of the case as follows:

In June 2007, twenty-year-old H.W. and her friends, Caroline Concepcion and Spencer Crilly, were relaxing at the women's apartment building in the Capitol Hill neighborhood of Seattle. They planned to make dinner and have a few drinks. While cooking in their kitchen, H.W. and Concepcion looked out the window and saw their male neighbors one floor below. The women waved and gestured for the men to come join them. A few minutes later, Emil Beskurt, Turgut Tarhan, and Samet Bideratan arrived at H.W.'s apartment. Taner, Turgut Tarhan's twin brother, joined the group later.

The men introduced themselves, and H.W. learned that they were visiting from Turkey on student visas. After a few minutes of chatting and drinking beer, the group agreed to go to the apartment downstairs, where Beskurt lived. Crilly, who had an intimate dating relationship with H.W., declined to join the group.

Everyone continued to socialize. H.W. chatted with the four men while sitting on the futon in Beskurt's living room. At

some point, Concepcion slipped out to go to the store. H.W. did not notice her leaving.

During Concepcion's absence from the apartment, Beskurt, Bideratan, Turgut, and Taner all had sexual intercourse with H.W. At trial, she testified that she did not consent to sexual intercourse with any of the men.

*Tarhan*, 246 P.3d at 582; Appendix A at 3.

### Sealing of Juror Questionnaires

Prior to commencement of jury selection, the parties and the court agreed that jurors would complete a questionnaire to help determine whether any jurors needed to be questioned individually. *See, e.g.*, 1 RP 9-29 (extensive discussion of substance and format of questionnaire).<sup>1</sup> The trial court made it clear that it considered the questionnaires confidential and not for public consumption:

Now, I know that counsel want to have more opportunity to look at the questionnaires, but ***I'm very reluctant to have them leave the courtroom***, and so I'm wondering if we give you some time after court today and tomorrow morning, if that would work. . .

---

<sup>1</sup> "1 RP" refers to the Report of Proceedings from June 23, 2008.

*You can imagine why I'm nervous about having [the questionnaires] leave the courthouse.* The thing is I know all of you, and I also -- you are very experienced attorneys and *I think you recognize what a disaster it would be if people thought that their information was going to get Xeroxed and sent around town.* Because you're officers of the court and I have such respect for all of you, I will let you take [the questionnaires] home tonight, and that, I think, will allow us to be more efficient tomorrow.

1 RP 118-19 (emphasis supplied). The questionnaire itself specifically assured jurors that their “*responses on the questionnaire will not be available to the public* and will eliminate having to ask these questions in open court.” See CP 126-1256 (completed juror questionnaires) (emphasis supplied).

On July 8, 2008, the trial court entered an order sealing the juror questionnaires. CP 119-20. The order states that “Jurors signed confidential questionnaires containing private information concerning sexual abuse with the understanding that the questionnaires would be sealed.” CP 119. No attorney signatures appear on the order.

The trial court did not hold a hearing to address the necessity for sealing the juror questionnaires.

## V. ARGUMENT

### Introduction

The Court of Appeals decision is erroneous in multiple respects. First, the court held that while the sealing of juror questionnaires without a *Bone-Club* hearing violated the *public's* right to open access, it did not violate Tarhan's right to a public trial. *Tarhan*, 246 P.3d at 583; Appendix A at 4. In reaching this holding the Court relied on its own decision in *State v. Coleman*, 151 Wash. App. 614, 621-23, 214 P.3d 158 (2009). *Tarhan*, 246 P.3d at 584-85; Appendix A at 5-6. But *Coleman* conflicts with this Court's decisions in *State v. Strode*, 167 Wash.2d 222, 217 P.3d 310 (2009) and *State v. Momah*, 167 Wash.2d 140, 217 P.3d 321 (2009), and with the United States Supreme Court's recent decision in *Presley v. Georgia*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 721 (2010). Nor can *Coleman* be reconciled with Division Two's post-*Presley* decisions in *State*

*v. Leyerle*, 158 Wash. App. 474, 242 P.3d 921 (2010) or *State v. Paumier*, 155 Wash. App. 673, 230 P.3d 212, *rev. granted*, 169 Wash.2d 1017 (2010).

Next, contrary to every indication in the record and contrary to basic common sense, the Court of Appeals concluded that “Tarhan fails in his burden to show that the questionnaires were unavailable for public inspection during jury selection.” *Tarhan*, 246 P.3d at 587; Appendix A at 8. According to the Court of Appeals, this failure is “fatal to [Tarhan’s] claim that the [trial] court violated his public trial right.” *Id.* The court claimed to be unwilling to “speculate on how the [trial] court would have ruled had anyone mentioned the question of public access to these questionnaires.” *Tarhan*, 246 P.3d at 586; Appendix A at 8. Yet the court was more than willing to speculate—in the face of overwhelming evidence to the contrary—that the public did in fact have access to the questionnaires prior to the entry of the sealing order.

Finally, the Court of Appeals concluded that the appropriate remedy for the violation of the public's right to open access was to remand the case for a "retroactive" *Bone-Club* hearing, a procedure which does not exist and which has never been countenanced by this Court. *Tarhan*, 246 P.3d at 588; Appendix A at 9-10.

The Court of Appeals decision conflicts with decisions of this Court, other Courts of Appeals, and with *Presley* on a significant constitutional issue which is also of substantial public interest. This Court should accept review pursuant to RAP 13.4(b)(1), (2), (3) and (4).

Tarhan's Federal and State Constitutional Rights to an Open and Public Trial Were Violated When the Trial Court Sealed Juror Questionnaires Without First Conducting a *Bone-Club* Hearing.

### ***Introduction***

The right to a public trial is protected by both the federal and the Washington state constitutions. *See* U.S. CONST. AMEND. VI ("In all criminal prosecutions, the accused shall

enjoy the right to a speedy and public trial.”); WASH. CONST., ART. 1, § 22 (“In criminal prosecutions the accused shall have the right . . . to have a speedy public trial.”); WASH. CONST., ART. 1, § 10 (“Justice in all cases shall be administered openly.”). This right includes the right to open jury selection. *State v. Strode*, 167 Wash.2d 222, 226-27, 217 P.3d 310 (2009), citing *In Re PRP of Orange*, 152 Wash.2d 795, 804, 100 P.3d 291 (2005), and *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505 (1984). *See also Presley v. Georgia*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 721, 724 (2010) (“[T]he Sixth Amendment right to a public trial extends to the voir dire of prospective jurors.”).

This Court has scrupulously protected the accused’s and the public’s right to open criminal proceedings. And “[w]hile the right to a public trial is not absolute, it is strictly guarded to assure that proceedings occur outside the public courtroom *in only the most unusual circumstances.*” *Strode*, 167 Wash.2d at 226, citing *State v. Easterling*, 157 Wash.2d 167, 174-75, 137 P.3d 825 (2006) (emphasis supplied). *See also State v.*

*Brightman*, 155 Wash.2d 506, 514, 122 P.3d 150 (2005) (closing courtroom during *voir dire* without first conducting full hearing violated defendant's public trial rights); *Orange*, 152 Wash.2d at 812 (reversing a conviction where the court was closed during *voir dire* and holding that the process of juror selection is a matter of importance, not simply to the adversaries but to the criminal justice system); *State v. Bone-Club*, 128 Wash.2d 254, 256, 906 P.2d 325 (1995) (reversible error to close the courtroom during a suppression motion); *Seattle Times Co. v. Ishikawa*, 97 Wash.2d 30, 36, 640 P.2d 716 (1982) (setting forth guidelines that must be followed *prior* to closing a courtroom or sealing documents). “[P]rotection of this basic constitutional right clearly calls for a trial court to *resist* a closure motion *except under the most unusual circumstances.*” *Orange*, 152 Wash.2d at 805, citing *Bone-Club*, 128 Wash.2d at 259 (emphasis in original).

***A Hearing Must Precede Any Contemplated Closure or Sealing.***

This Court recently re-affirmed the test which must be applied in every case where a closure is contemplated. *Strode*, 167 Wash.2d at 227-28. The factors which the trial court must analyze prior to any closure or sealing—also known as the *Bone-Club* factors—are:

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.

*Strode*, 167 Wash.2d at 227-28, citing *Bone-Club*, 128 Wash.2d at 258-259 (quotations in original). As the test itself demonstrates,

analysis of the five factors must occur *before* the closure or sealing. For example, it is impossible to weigh the reasons given by a member of the press or public opposed to closure if the trial court fails to expressly invite comment on the matter. *See Strode*, 167 Wash.2d at 228-29:

The determination of a compelling interest for courtroom closure is “the affirmative duty of the trial court, not the court of appeals.” *Bone-Club*, 128 Wash.2d at 261, 906 P.2d 325. Nor is it the responsibility of this court to speculate on the justification for closure. Moreover, even if the trial court concluded that there was a compelling interest favoring closure, it must still perform the remaining four *Bone-Club* steps to thoroughly weigh the competing interests. *Id.*

After conducting a full hearing, the trial court must then make findings. The constitutional 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.

*Orange*, 152 Wash.2d at 806, quoting *Waller v. Georgia*, 467 U.S. 39, 45 (1984) (emphasis supplied). These requirements

are necessary to protect both the accused's right to a public trial and the public's right to open proceedings. *Easterling*, 157 Wash.2d at 175.

***The Right to an Open and Public Trial and the Requirement of a Hearing Applies to Jury Selection in General, and to Juror Questionnaires in Particular.***

It is now beyond dispute that the process of jury selection is subject to the *Bone-Club* requirements. See, e.g., *Strode*, 167 Wash.2d at 226-27; *State v. Momah*, 167 Wash.2d 140, 148, 217 P.3d 321 (2009); *Brightman*, 155 Wash.2d at 514; *Orange*, 152 Wash.2d at 804; see also *Presley*, 130 S.Ct. at 724. As the United States Supreme Court stated in *Press-Enterprise Co. v. Superior Court*, 464 U.S. at 505: “(t)he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system.”

There can also be little debate that the completion of juror questionnaires constitutes part of the jury selection process. Jurors are asked to answer questions under oath which go directly to their qualifications to serve as impartial jurors in the

case at bar. *See* CP 126-1256 (completed juror questionnaires); *see also State v. Irby*, \_\_\_ Wash.2d \_\_\_, 246 P.3d 796 (2011) (email exchange between trial court, prosecutor and defense counsel in which multiple jurors were excused constituted a part of jury selection).

Division One of the Court of Appeals has explicitly recognized that the *Bone-Club* requirements apply with equal force to the handling of juror questionnaires. *State v. Coleman*, 151 Wash. App. 614, 621-23, 214 P.3d 158 (2009) (notwithstanding GR 31(j), trial court must hold *Bone-Club* hearing before ordering the sealing of juror questionnaires).

***Violation of the Right to an Open and Public Trial is a Structural Error Which Necessitates a New Trial.***

Determining the harm which flows from the violation of a defendant's right to an open and public trial is not a quantifiable process. Because of the fundamental nature of the public trial right, and because violation of that right does not easily lend itself to harmless error analysis, this Court has announced that

the violation of the right to an open and public trial is a structural error, and that the remedy is reversal of the defendant's conviction(s) and remand for a new trial. *Strode*, 167 Wash.2d at 223:

Here, the trial court violated Tony Strode's right to a public trial by conducting a portion of jury selection in the trial judge's chambers in *unexceptional circumstances* without first performing the required *Bone-Club* analysis. ***This is a structural error that cannot be considered harmless. Therefore, reversal of Strode's conviction and remand for a new trial is required.***

(emphasis supplied); *see also Easterling*, 157 Wash.2d at 181

(“The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis.”).

***Momah is Distinguishable Because in that Case the Trial Court Held a Bone-Club Hearing or its Equivalent.***

*Strode* and *Momah* were argued on the same day, decided on the same day, and involved similar facts—closure of the courtroom during individual voir dire. However, the Court reached opposite conclusions, affirming in *Momah* and

reversing in *Strode*. The legal line that separates *Momah* from *Strode* is simple. In *Momah*, the trial court conducted a *Bone-Club* hearing or its equivalent. In *Strode*, no *Bone-Club* hearing took place.

The *Strode* concurrence noted that “(t)he specific concerns underlying the *Bone-Club* factors were sufficiently addressed by the *Momah* trial court.” *Strode*, 167 Wash.2d at 234 (Fairhurst, J. concurring). While the *Bone-Club* factors could have been more explicitly detailed in the record, the concurrence concluded:

The purpose of the *Bone-Club* inquiry is to ensure that trial courts will carefully and vigorously safeguard the public trial right. Under the circumstances in *Momah*'s case, it is apparent that this purpose was served, and the defendant's right to a public trial was carefully balanced with another right of great magnitude—the right to an impartial jury. . .

Unlike the situation presented in *Momah*, here the record does not show that the court considered the right to a public trial in light of competing interests. The record does not show a knowing waiver of the right to a public trial. Although the dissent addresses the right of jurors to privacy, the record does not show that this interest was considered together with the right to a public trial. I agree

with the dissent that “public exposure of jurors' personal experiences can be both embarrassing and perhaps painful for jurors.” I agree that jurors' privacy is a compelling interest that trial courts must protect. I agree that had the trial judge failed to close a portion of voir dire to the public, he would have “undermined the court's procedural assurances that juror information will remain private [and] would have jeopardized jurors' candidness and *potentially* the defendant's right to an impartial jury.” ***But the potential for jeopardizing a defendant's right to an impartial jury does not necessitate closure; it necessitates a weighing of the competing interests by the trial court. Because, unlike in Momah, the record does not show that this occurred, this case fits into the category of cases where expressly engaging in the Bone-Club analysis on the record is required. The trial court here erred in failing to engage in the Bone-Club analysis.***

*Strode*, 167 Wash.2d at 233, 235-36 (Fairhurst, J. concurring)  
(citations to dissent omitted) (italics in original) (emphasis supplied).

In this case, the trial court did not engage in any weighing of competing interests before entering the sealing order. Indeed, there was no on-the-record discussion at all regarding the sealing order. Moreover, the order's plain language makes it clear that it was entered for the sole purpose of protecting juror privacy—rather than to promote Tarhan's right to a fair

trial. *See Momah*, 167 Wash.2d at 151-52 (“Finally, and perhaps most importantly, the trial judge closed the courtroom to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests.”). This case thus falls into the category of cases controlled by *Strode* (where no *Bone-Club* hearing occurred, quasi- or otherwise), rather than those governed by *Momah* (where the trial court substantially complied with *Bone-Club*).

***Division One’s Harm and Remedy Analysis in Coleman Was Implicitly Overruled By Strode. This Court Should Now Explicitly Overrule that Portion of Coleman.***

The decision below rests almost entirely on *Coleman*.

Division One decided *Coleman* on August 17, 2009, about three months before *Strode* and *Momah* were issued. In *Coleman*, the court recognized that the sealing of juror questionnaires must be preceded by a *Bone-Club* hearing. *Coleman*, 151 Wash. App. at 621-23. Despite the fact no such hearing was held in *Coleman*’s case, the court declined to reverse *Coleman*’s

conviction, instead deciding that “[o]n these facts, we do not agree that structural error occurred.” *Id.* at 623-24.

The Court’s decision not to apply structural error analysis was based on three factors:

1. “The questionnaires were used only for the selection of the jury, which proceeded in open court.”
2. “The questionnaires were not sealed until several days after the jury was seated and sworn.”
3. “[T]here is nothing to indicate that the questionnaires were not available for public inspection during the jury selection.”

*Id.* at 624. From these three factors the court concluded that “the subsequent sealing order had no effect on Coleman’s public trial right.” *Id.*

To the extent that *Coleman’s* harm analysis remains viable in the wake of *Strode*, Tarhan’s case is distinguishable from *Coleman*. Here, unlike in *Coleman*, it is clear from the comments made by the trial court prior to jury selection “that the questionnaires were not available for public inspection during the jury selection.” *Id.* In its pre-trial discussions with counsel, the trial court made it very clear that it considered the

questionnaires to be confidential, that it had serious reservations about allowing the attorneys to remove the questionnaires from the courtroom, and that it only allowed them to do so because it considered them officers of the court who would not disclose the contents of the questionnaires to anyone. *See* 1 RP 118-19. It simply defies logic to contend—as the Court of Appeals did below—that the trial court would allow members of the general public to view the “private information” contained in the questionnaires in the court room *during* jury selection, only to seal those materials *after* jury selection in order to protect jurors’ privacy.

The trial court’s reluctance to allow even officers of the court to remove the questionnaires from the courtroom is entirely consistent with a desire to keep those materials from the view of the general public, and entirely consistent with the sealing order that was entered immediately after completion of jury selection. What it is not consistent with is the Court of Appeals’ conjecture that the materials were in the public

domain for some period of time, only to be sealed later to protect some already-breached privacy concerns.

*Coleman* rejected the argument that a structural error had occurred because it concluded that the record in that case supported an inference that the public had access to the questionnaires for some period of time prior to the sealing order. Here the record supports the opposite conclusion—that the public never had access to the questionnaires, and that the trial court specifically intended that the public not have access. On these facts, the reasoning of *Coleman* is inapposite.

Moreover, it is difficult to defend the outcome in *Coleman* in light of this Court's subsequent decision in *Strode*. *Coleman* appears to suggest—without explicitly stating—that the violation in that case was not a structural error because it was rendered *de minimis* by the public's theoretical access to the questionnaires during and for several days following jury selection before the sealing order was entered. *Strode* squarely rejects this approach:

Some courts in other jurisdictions have held that there may be circumstances where the closure of a trial is too trivial to implicate one's constitutional right. Trivial closures have been defined to be those that are brief and inadvertent. This court, however, "has never found a public trial right violation to be [trivial or] *de minimis*." *Easterling*, 157 Wash.2d at 180, 137 P.3d 825.

Furthermore, the closure here was analogous to the closures in *Bone-Club* and *Orange*. *Orange*, 152 Wash.2d at 804-05, 100 P.3d 291; *Bone-Club*, 128 Wash.2d at 259, 906 P.2d 325. As we have stated above, the trial court and counsel for the State and Strode questioned at least 11 prospective jurors in chambers. At least 6 of those prospective jurors were subsequently dismissed for cause during this period. This closure cannot be said to be brief or inadvertent.

*Strode*, 167 Wash.2d at 230 (federal citations omitted). In Tarhan's case every prospective juror completed the questionnaire to which the public was denied access without a *Bone-Club* hearing. To the extent that *Coleman* suggests that the sealing of juror questionnaires without a hearing is a trivial or *de minimis* violation of the public trial right and is therefore not a structural error, it has been implicitly overruled by *Strode*. This Court should now explicitly overrule *Coleman's* flawed harm and remedy analysis.

***Tarhan Is Entitled to a New Trial.***

Dozens of juror questionnaires were sealed in this case. No *Bone-Club* hearing was held. Indeed, there was no mention whatsoever on the record regarding the sealing of the questionnaires. The sealing of the questionnaires without a hearing violated Tarhan's right to an open and public trial. Under *Strode*, this is a structural error, and Tarhan is entitled to a new trial.

**VI. CONCLUSION**

This Court should accept review, reverse the decision of the Court of Appeals, and remand for a new trial.

DATED this 9<sup>th</sup> day of March, 2011.

Respectfully Submitted:



---

Steven Witchley, WSBA #20106  
Law Offices of Holmes & Witchley, PLLC  
705 Second Avenue, Suite 401  
Seattle, WA 98104  
(206) 262-0300  
[steve@ehwlawyers.com](mailto:steve@ehwlawyers.com)

**CERTIFICATE OF SERVICE**

I, Steven Witchley, hereby certify that on March 9, 2011,  
I served a copy of the attached petition on counsel for the State  
of Washington by causing the same to be hand-delivered to the  
office of:

Randi J. Austell  
Senior Deputy Prosecuting Attorney  
King County Prosecuting Attorney's Office  
516 Third Avenue, Room W554  
Seattle, WA 98104



Steven Witchley

**APPENDIX A:**

*Court of Appeals Decision*  
*State v. Tarhan, 62872-1-I (February 7, 2011)*

246 P.3d 580  
 (Cite as: 246 P.3d 580)

Court of Appeals of Washington,  
 Division 1,  
 STATE of Washington, Respondent,  
 v.  
 Emir BESKURT, Samet Bideratan, Turgut Tarhan,  
 Defendants,  
**Taner Tarhan**, Appellant.

No. 62872-1-I.  
 Feb. 7, 2011.

**Background:** Defendant was convicted in the Superior Court, King County, Susan J. Craighead, J., of rape in the third degree. Defendant appealed.

**Holdings:** The Court of Appeals, Cox, J., held that:  
 (1) trial court's failure to conduct Bone-Club analysis prior to sealing completed juror questionnaires did not violate defendant's right to a public trial;  
 (2) trial court's failure to conduct Bone-Club analysis prior to sealing completed juror questionnaires violated the public's right to open court proceedings; but  
 (3) error was not structural, and thus the appropriate remedy was to remand for reconsideration of the sealing order.

Remanded for reconsideration of sealing order; affirmed in all other respects.

West Headnotes

**[1] Criminal Law 110**  **1181.5(1)**

110 Criminal Law  
 110XXIV Review  
 110XXIV(U) Determination and Disposition  
 of Cause  
 110k1181.5 Remand in General; Vacation  
 110k1181.5(1) k. In general. Most Cited  
 Cases

If an appellate court determines that the defendant's right to a fair public trial has been violated, it devises a remedy appropriate to that violation. U.S.C.A. Const.Amend. 6; West's RCWA Const. Art. 1, § 22.

**[2] Criminal Law 110**  **1166.7**

110 Criminal Law  
 110XXIV Review  
 110XXIV(Q) Harmless and Reversible Error  
 110k1166.5 Conduct of Trial in General  
 110k1166.7 k. Public or open trial; spectators; publicity. Most Cited Cases

**Criminal Law 110**  **1181.5(1)**

110 Criminal Law  
 110XXIV Review  
 110XXIV(U) Determination and Disposition  
 of Cause  
 110k1181.5 Remand in General; Vacation  
 110k1181.5(1) k. In general. Most Cited  
 Cases

If a violation of defendant's right to a fair public trial is structural in nature, automatic reversal of the conviction and remand for a new trial are required. U.S.C.A. Const.Amend. 6; West's RCWA Const. Art. 1, § 22.

**[3] Criminal Law 110**  **1162**

110 Criminal Law  
 110XXIV Review  
 110XXIV(Q) Harmless and Reversible Error  
 110k1162 k. Prejudice to rights of party as ground of review. Most Cited Cases

An error is "structural" when it necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.

**[4] Criminal Law 110**  **1139**

110 Criminal Law  
 110XXIV Review  
 110XXIV(L) Scope of Review in General  
 110XXIV(L)13 Review De Novo  
 110k1139 k. In general. Most Cited  
 Cases

246 P.3d 580  
(Cite as: 246 P.3d 580)

Whether a defendant's right to a public trial has been violated is a question of law, subject to de novo review. U.S.C.A. Const.Amend. 6; West's RCWA Const. Art. 1, § 22.

**[5] Criminal Law 110 ↪ 635.7(4)**

110 Criminal Law  
110XX Trial

110XX(B) Course and Conduct of Trial in General

110k635 Public Trial  
110k635.7 Nature of Proceeding Affecting Propriety of Closure  
110k635.7(4) k. Jury selection. Most Cited Cases

**Records 326 ↪ 32**

326 Records

326II Public Access  
326II(A) In General  
326k32 k. Court records. Most Cited Cases

Defendant failed to show that completed juror questionnaires were unavailable for public inspection during jury selection, and thus trial court's failure to conduct the five-part analysis applicable to the sealing of court documents prior to sealing the questionnaires, which included questions concerning venire members' sexual histories, did not violate defendant's right to a public trial, where jury selection was held in open court, defendant failed to show that the questionnaires were used for anything other than jury selection, the sealing order was entered days after the parties accepted the jury, it was unclear whether court's expressed concern about sending copies of the questionnaires out of the courtroom with the attorneys represented a decision to deny public access to the completed questionnaires during voir dire, no one broached the subject of public access to the questionnaires, and record was silent on where questionnaires were located during the selection of the jury. U.S.C.A. Const.Amend. 6; West's RCWA Const. Art. 1, § 22.

**[6] Criminal Law 110 ↪ 635.7(4)**

110 Criminal Law  
110XX Trial

110XX(B) Course and Conduct of Trial in General

110k635 Public Trial  
110k635.7 Nature of Proceeding Affecting Propriety of Closure  
110k635.7(4) k. Jury selection. Most Cited Cases

**Records 326 ↪ 32**

326 Records

326II Public Access  
326II(A) In General  
326k32 k. Court records. Most Cited Cases

Trial court's failure to conduct the five-part analysis applicable to the sealing of court documents prior to sealing completed juror questionnaires that included questions certain venire members' sexual histories violated the public's right to open court proceedings. West's RCWA Const. Art. 1, § 10.

**[7] Criminal Law 110 ↪ 1181.5(3.1)**

110 Criminal Law

110XXIV Review  
110XXIV(U) Determination and Disposition of Cause  
110k1181.5 Remand in General; Vacation  
110k1181.5(3) Remand for Determination or Reconsideration of Particular Matters  
110k1181.5(3.1) k. In general. Most Cited Cases

Trial court's error in failing to conduct the five-part analysis applicable to the sealing of court documents prior to sealing completed juror questionnaires, in violation of public's right to open court proceedings, was not structural, and thus the appropriate remedy was to remand for reconsideration of the sealing order. West's RCWA Const. Art. 1, § 10.

\*581 Randi J. Austell, Attorney at Law, King Co. Pros. Attorney, Seattle, WA, for Respondent.

\*582 Steven Witchley, Ellis Holmes & Witchley PLLC, Seattle, WA, for Appellant.

PUBLISHED IN PART

COX, J.

246 P.3d 580  
(Cite as: 246 P.3d 580)

¶ 1 **Taner Tarhan** appeals his conviction for rape in the third degree. The conviction arose from a group sexual encounter with H.W. that involved Taner and three other defendants.<sup>FN1</sup> All defendants were jointly prosecuted and tried together before a jury.

<sup>FN1</sup>. Because of the common surname of the defendant twin brothers, Turgut Tarhan and **Taner Tarhan**, we adopt Taner's naming convention in his briefing on appeal. The use of "Taner" to identify **Taner Tarhan** is also consistent with the naming convention used in this court's prior opinion regarding the appeal of the other three defendants. That opinion, *State v. Beskurt et al.*, was filed on July 6, 2010, and is noted at 156 Wash.App. 1045, 2010 WL 2670826.

¶ 2 Tarhan primarily argues on appeal that we should reverse his conviction and grant him a new trial because the trial court sealed preliminary juror questionnaires used during voir dire of the venire without first conducting a *Bone-Club* analysis.<sup>FN2</sup> We hold that there was no violation of Taner's constitutional right to a public trial. But because the trial court sealed the questionnaires without first conducting the required analysis, we remand for a Bone-Club hearing and reconsideration of the sealing order.

<sup>FN2</sup>. See *State v. Bone-Club*, 128 Wash.2d 254, 906 P.2d 325 (1995).

¶ 3 Taner's remaining claims on appeal are primarily based on arguments that this court previously addressed in the opinion disposing of the appeals of his co-defendants. Because the reasoning in that opinion applies to this case, we reject Taner's remaining claims in this appeal.

¶ 4 In June 2007, twenty-year-old H.W. and her friends, Caroline Concepcion and Spencer Crilly, were relaxing at the women's apartment building in the Capitol Hill neighborhood of Seattle. They planned to make dinner and have a few drinks. While cooking in their kitchen, H.W. and Concepcion looked out the window and saw their male neighbors one floor below. The women waved and gestured for the men to come join them. A few minutes later, Emil Beskurt, Turgut Tarhan, and Samet Bideratan arrived at H.W.'s apartment. Taner, Turgut Tarhan's twin brother, joined the group later.

¶ 5 The men introduced themselves, and H.W. learned that they were visiting from Turkey on student visas. After a few minutes of chatting and drinking beer, the group agreed to go to the apartment downstairs, where Beskurt lived. Crilly, who had an intimate dating relationship with H.W., declined to join the group.

¶ 6 Everyone continued to socialize. H.W. chatted with the four men while sitting on the futon in Beskurt's living room. At some point, Concepcion slipped out to go to the store. H.W. did not notice her leaving.

¶ 7 During Concepcion's absence from the apartment, Beskurt, Bideratan, Turgut, and Taner all had sexual intercourse with H.W. At trial, she testified that she did not consent to sexual intercourse with any of the men.

¶ 8 The State charged all four men with rape in the second degree, contrary to RCW 9A.44.050(1)(a).<sup>FN3</sup> They were tried jointly before a jury.

<sup>FN3</sup>. RCW 9A.44.050(1)(a) states: "A person is guilty of rape in the second degree when ... the person engages in sexual intercourse with another person by forcible compulsion."

¶ 9 Prior to commencing jury selection, the parties stipulated and the court agreed that the members of the venire would complete a confidential questionnaire that included questions concerning their sexual histories. After the answers were made available to counsel, they questioned the members of the venire in open court. Thereafter, all parties selected and accepted the jury, as constituted.

¶ 10 Following the selection, acceptance, and swearing of the jury, the court entered an order sealing the completed questionnaires. That order, entered on July 8, 2008, states:

The court having reviewed the applicant's motion and declaration to seal specific documents or this file, and pursuant to applicable case law and court rules, finds compelling\*583 circumstances to grant the order exist as follows:

246 P.3d 580  
(Cite as: 246 P.3d 580)

Jurors signed confidential questionnaires containing private information concerning sexual abuse with the understanding that the questionnaires would be sealed.<sup>[FN4]</sup>

FN4. Clerk's Papers at 119.

Despite the wording in the typed first paragraph of this order, there is nothing in the record showing that any party moved to seal the questionnaires. It is undisputed that the trial court did not hold a *Bone-Club* hearing before entering this sealing order.

¶ 11 A jury convicted Taner of the lesser included offense of rape in the third degree, contrary to RCW 9A.44.060(1)(a).<sup>FN5</sup> The court sentenced all defendants to 10 months confinement and 36 to 48 months of community custody.<sup>FN6</sup>

FN5. RCW 9A.44.060(1)(a) states: "A person is guilty of rape in the third degree when ... such person engages in sexual intercourse with another person, not married to the perpetrator where the victim did not consent ... to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct."

FN6. The State properly concedes a sentencing error, which the trial court corrected by modifying the judgments and sentences of all defendants during the pendency of this appeal. Clerk's Papers at 1288-289.

¶ 12 Taner appeals.

#### OPEN AND PUBLIC TRIAL

¶ 13 Taner argues that the trial judge violated his right to an "open and public" trial by sealing preliminary juror questionnaires without first conducting a *Bone-Club* analysis on the record.<sup>FN7</sup> We hold that there was no violation of his right to a public trial. But the trial court's failure to conduct a *Bone-Club* hearing before sealing the questionnaires is inconsistent with the public's right of open access to court records. Accordingly, remand for reconsideration of the sealing order at such a hearing is required.

FN7. Appellant's Opening Brief at 28.

¶ 14 An accused's right to a public trial is protected by both the state and federal constitutions. The Sixth Amendment provides, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."<sup>FN8</sup> Similarly, article I, section 22 of the Washington Constitution provides "[i]n criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury."<sup>FN9</sup>

FN8. U.S. CONST. amend. VI.

FN9. Wash. CONST. art. 1, § 22.

¶ 15 Article I, section 10 of the Washington Constitution also provides that "[j]ustice in all cases shall be administered openly."<sup>FN10</sup> This provision has been interpreted as protecting the right of the public and the press to open and accessible court proceedings, similar to the public's right under the First Amendment.<sup>FN11</sup>

FN10. Wash. CONST. art. 1, § 10.

FN11. *State v. Easterling*, 157 Wash.2d 167, 174, 179, 137 P.3d 825 (2006) (citing *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)).

These [respective constitutional] provisions "assure a fair trial, foster public understanding and trust in the judicial system, and give judges the check of public scrutiny." The guarantee of open criminal proceedings extends to jury selection, which is important "not simply to the adversaries but to the criminal justice system."<sup>[FN12]</sup>

FN12. *State v. Coleman*, 151 Wash.App. 614, 620, 214 P.3d 158 (2009) (quoting *State v. Duckett*, 141 Wash.App. 797, 803, 173 P.3d 948 (2007); *In re Pers. Restraint of Orange*, 152 Wash.2d 795, 804, 100 P.3d 291 (2004) (quoting *Press-Enterprise*, 464 U.S. at 505, 104 S.Ct. 819)).

¶ 16 In *State v. Bone-Club*,<sup>FN13</sup> the Washington Supreme Court set out the standards for closing all or any portion of a criminal trial.<sup>FN14</sup> The court adopted a five part analysis that applies to protect both the pub-

246 P.3d 580  
(Cite as: 246 P.3d 580)

lic's right under article I, section 10, and the defendant's right under article I, section 22:

FN13. 128 Wash.2d 254, 906 P.2d 325 (1995).

FN14. Id. at 258-59, 906 P.2d 325.

"1. The proponent of closure or sealing must make some showing [of a compelling \*584 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."<sup>[FN15]</sup>

FN15. Id. (quoting *Allied Daily Newspapers v. Eikenberry*, 121 Wash.2d 205, 210-11, 848 P.2d 1258 (1993)).

In *State v. Waldon*,<sup>FN16</sup> this court held the same analysis applies to the sealing of court documents.<sup>FN17</sup>

FN16. 148 Wash.App. 952, 202 P.3d 325. review denied, 166 Wash.2d 1026, 217 P.3d 338 (2009).

FN17. Id. at 967, 202 P.3d 325.

[1][2][3] ¶ 17 If this court determines that the defendant's right to a fair public trial has been violated, it devises a remedy appropriate to that violation.<sup>FN18</sup> If the error is structural in nature, automatic reversal of the conviction and remand for a new trial are required.<sup>FN19</sup> An error is structural when it "

'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'"<sup>FN20</sup> However, in each case the "remedy must be appropriate to the violation."<sup>FN21</sup>

FN18. *State v. Momah*, 167 Wash.2d 140, 149, 217 P.3d 321 (2009), cert. denied. --- U.S. ---, 131 S.Ct. 160, 178 L.Ed.2d 40 (2010).

FN19. Id.

FN20. Id. (quoting *Washington v. Recuenco*, 548 U.S. 212, 218-19, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)).

FN21. Id. at 150, 155-56, 217 P.3d 321.

[4] ¶ 18 Whether a defendant's right to a public trial has been violated is a question of law, subject to de novo review.<sup>FN22</sup>

FN22. *State v. Strobe*, 167 Wash.2d 222, 225, 217 P.3d 310 (2009).

[5] ¶ 19 Here, Taner argues that the sealing of the jury questionnaires violated his public trial right under article I, section 22.<sup>FN23</sup> But he also cites to article I, section 10, which generally requires public access to court records, in support of his claim.<sup>FN24</sup>

FN23. Appellant's Opening Brief at 29.

FN24. Id. at 40.

¶ 20 This court addressed the question of whether sealing of juror questionnaires violated these two constitutional provisions in *State v. Coleman*.<sup>FN25</sup> That case was a prosecution for rape and multiple counts of first degree child molestation that allegedly involved a nine-year-old.<sup>FN26</sup> The members of the venire completed questionnaires that included matters concerning their sexual histories.<sup>FN27</sup> Once the completed questionnaires were provided to counsel, selection of the jury proceeded in open court.<sup>FN28</sup> The parties accepted the jury, as constituted, and the court swore the jury.<sup>FN29</sup>

FN25. 151 Wash.App. 614, 621, 214 P.3d 158 (2009).

246 P.3d 580  
(Cite as: 246 P.3d 580)

FN26. *Id.* at 617-18, 214 P.3d 158.

FN27. *Id.* at 618, 214 P.3d 158.

FN28. *Id.*

FN29. *Id.*

¶ 21 Three days after the jury was sworn, the court ordered the questionnaires sealed, finding:

The court finds compelling circumstances for sealing the documents indicated below:

Jury questionnaires containing personal sexual history of prospective jurors related to issues in this case. The individual juror's right to privacy in this information greatly outweighs the public's right to access the court files.<sup>[FN30]</sup>

FN30. *Id.*

The court did not hold a *Bone-Club* hearing to consider whether sealing was proper and \*585 appears to have ordered sealing on its own motion.<sup>[FN31]</sup> The jury convicted Coleman of two counts of molestation, acquitted him of a third, and failed to reach a verdict on the rape charge.<sup>[FN32]</sup>

FN31. *Id.* at 618-19, 214 P.3d 158.

FN32. *Id.* at 618, 214 P.3d 158.

¶ 22 On appeal, Coleman argued that the trial court's failure to undertake a *Bone-Club* analysis before entering its sealing order violated both "his right and that of the public to an open and public trial."<sup>[FN33]</sup> He further claimed that these violations constituted structural error, requiring a new trial.

FN33. *Id.* at 619, 214 P.3d 158.

¶ 23 This court concluded that the failure to conduct a *Bone-Club* analysis prior to sealing the juror questionnaires did not violate Coleman's right to a public trial under article 1, section 22.<sup>[FN34]</sup> Rather, this court held that the failure to conduct that analysis violated the public's right to open and accessible court

proceedings under article I, section 10. of the state constitution.<sup>[FN35]</sup>

FN34. *Id.* at 623-24, 214 P.3d 158.

FN35. *Id.*

¶ 24 This court reasoned:

Under these authorities, the court should have conducted a *Bone-Club* analysis before sealing the questionnaires. *Violation of the public's right to open court records requires remand for reconsideration of the order.*

Coleman contends that sealing the questionnaires without conducting the *Bone-Club* analysis amounted to structural error, from which prejudice is presumed and for which a new trial is warranted. On these facts, we do not agree that structural error occurred. The questionnaires were used only for selection of the jury, which proceeded in open court. The questionnaires were not sealed until several days after the jury was seated and sworn. Unlike answers given verbally in closed courtrooms, there is nothing to indicate that the questionnaires were not available for public inspection during the jury selection process. *Thus, the subsequent sealing order had no effect on Coleman's public trial right, and did not "create 'defect[s] affecting the framework within which the trial proceeds.'"*

The error was not structural.<sup>[FN36]</sup>

FN36. *Id.* (internal citations omitted) (emphasis added).

¶ 25 The facts of this case are substantially similar to those in *Coleman*. Taner fails to point to any part of this record in which jury selection was not held in open court.

¶ 26 More importantly, he fails to point to anything in this record to show that the completed questionnaires were used for anything other than jury selection, which proceeded in open court. Thus, he fails to show any factual distinction between this case and *Coleman* respecting this factor.

¶ 27 In *Coleman*, the trial court entered the seal-

246 P.3d 580  
(Cite as: 246 P.3d 580)

ing order days after the parties accepted the jury, as constituted. Here, the same is true. All parties accepted the jury on July 2, 2008, six days before the court entered the order sealing the questionnaires. Taner fails to identify any reason to distinguish this case from *Coleman* based on this factor.

¶ 28 Taner attempts to distinguish *Coleman* solely on the basis of the third factor that this court discussed in that case: whether the questionnaires were available to the public during voir dire of the venire. He chiefly relies on the following colloquy between the court and counsel for support:

THE COURT: ... Now, I know that counsel want to have more opportunity to look at the [completed] questionnaires, but I'm very reluctant to have them leave the courtroom, and so I'm wondering if we give you some time after court today and tomorrow morning, if that would work.

[THE PROSECUTOR]: Your Honor, I have an interview scheduled at 4:00, and another interview scheduled at 5:00.

THE COURT: That's not going to help you.

[THE PROSECUTOR]: No, that doesn't help me. If the court-certainly it's easier for me to do this than it is for \*586 the other attorneys, I could certainly assure the court they wouldn't be taken out of the courthouse and would simply be in the prosecutor's office, but I recognize that doesn't help any of these four gentlemen, so it had been my hope, in all honesty, to have some time to sort of spread everything out on the table and compare the yellow questionnaires with questionnaires that the court did, a lot of information to synthesize in a short amount of time. I understand the court's concerns, but-

THE COURT: Let me hear from some of defense counsel.

[DEFENSE COUNSEL]: Not much more to add, except that I had an opportunity down at the Regional Justice Center to go through a questionnaire case three weeks ago ... where we also had a questionnaire and the opportunity to have a lot of information, and I think it's important for all the

lawyers, and I know you can trust us that we'll bring it all back to you and it will be in exactly the same condition, without even the staples being removed, so I would also like to have the opportunity to have the information.

THE COURT: Well, there is an awful lot here. You can imagine why I'm nervous about having [the questionnaires] leave the courthouse. The thing is I know all of you, and I also-you are very experienced attorneys and I think you recognize what a disaster it would be if people thought that their information was going to be Xeroxed and sent around town.

Because you're officers of the court and I have such respect for all of you, I will let you take it home tonight, and that, I think, will allow us to be more efficient tomorrow.<sup>FN37</sup>

FN37. Report of Proceedings (June 23, 2008) at 118-19.

¶ 29 Read in context, this exchange shows that Taner had full access to the questionnaires prior to the sealing order. Whether this exchange evidences either an express or de facto sealing, contrary to the right of public access to court documents, is at issue. Also, at issue is whether any claimed error is "structural," requiring a new trial.<sup>FN38</sup>

FN38. The U.S. Supreme Court has identified a limited list of trial errors in criminal cases as not being subject to harmless error analysis. See *Arizona v. Fulminante*, 499 U.S. 279, 309-10, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Such "structural" errors include: total deprivation of the right to counsel at trial, *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); a judge was not impartial, *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); unlawful exclusion of members of the defendant's race from a grand jury, *Yasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986); the right to self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 177-78 n. 8, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984); and the right to a public trial, *Waller v. Georgia*, 467 U.S. 39, 49 n. 9, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

246 P.3d 580  
(Cite as: 246 P.3d 580)

¶ 30 It is unclear from this record whether the court's comments, read in context, represented a decision to deny public access to the completed questionnaires during voir dire. What the exchange does show is that the court recognized that the jurors filled out the questionnaires with the expectation that their answers would be confidential. The court expressed concern about sending copies of the questionnaires out of the courtroom with five different attorneys. The court's remark that the questionnaires not get "Xeroxed and sent around town" reflects this concern.

¶ 31 No one broached the subject of public access to the questionnaires during this colloquy. We do not suggest that the failure to raise the issue constituted a waiver of the claim on appeal. Likewise, it did not diminish the responsibility of the court to protect the constitutional safeguards that are before us. Nevertheless, on this limited record, we will not speculate on how the court would have ruled had anyone mentioned the question of public access to these questionnaires. In sum, this colloquy between court and counsel tells us little if anything about whether the questionnaires were unavailable to the public during voir dire of the venire in the following days of jury selection.

¶ 32 We also note that this record is silent on where these questionnaires were located during the selection of the jury following this colloquy. This is a fact that would be important to any determination of whether the \*587 public had access to them. Yet, Taner fails to point to anything in this record to fill this void.

¶ 33 In short, on this record, Taner fails in his burden to show that the questionnaires were unavailable for public inspection during jury selection.<sup>FN39</sup> This is fatal to his claim that the court violated his public trial right. As in *Coleman*, the trial court's failure in this case to conduct a *Bone-Club* analysis prior to entering the sealing order did not violate Taner's article 1, section 22 right to a public trial. Taner's attempts to distinguish that case are unpersuasive.

FN39. We need not decide whether Taner has standing to raise the public's right of public access to court records. He focuses his arguments on article 1, section 22, the public trial right, not article 1, section 10, the right

to public access to court records.

¶ 34 Taner next argues that *Coleman* appears to suggest-without explicitly stating-that the violation in that case was de minimus, not structural.<sup>FN40</sup> We do not read that case to make any such suggestion. The supreme court has consistently rejected such characterizations of constitutional violations.<sup>FN41</sup> Nothing in *Coleman* departs from that guidance.

FN40. Appellant's Opening Brief at 40-41.

FN41. See *Strode*, 167 Wash.2d at 230-31, 217 P.3d 310.

¶ 35 He next argues that *Coleman* was overruled sub silentio by *State v. Strode*<sup>FN42</sup> and *State v. Momah*.<sup>FN43</sup> We disagree.

FN42. 167 Wash.2d 222, 217 P.3d 310 (2009).

FN43. 167 Wash.2d 140, 217 P.3d 321 (2009).

¶ 36 In both of those cases, the supreme court decided that the trial court either expressly or implicitly closed the courtroom by conducting a portion of voir dire in chambers.<sup>FN44</sup> A plurality of the supreme court concluded in *Strode* that "full courtroom closure during jury selection" must be preceded by the "*Bone-Club* analysis; failure to do so results in violation of the defendant's public trial rights."<sup>FN45</sup> Addressing the appropriate remedy, the court in *Strode* held that "denial of the public trial right is deemed to be a structural error and prejudice is presumed."<sup>FN46</sup> "[T]herefore, Strode's convictions are reversed and the case is remanded for a new trial."<sup>FN47</sup> Two justices concurred in that result, writing separately in doing so.

FN44. *Strode*, 167 Wash.2d at 223-24, 217 P.3d 310; *Momah*, 167 Wash.2d at 145-46, 217 P.3d 321.

FN45. *Strode*, 167 Wash.2d at 228, 217 P.3d 310.

FN46. *Id.* at 231, 217 P.3d 310.

FN47. *Id.*

246 P.3d 580  
(Cite as: 246 P.3d 580)

¶ 37 Likewise, in *Momah*, the supreme court held that a trial court must undertake the *Bone-Club* analysis prior to a de facto closing of the courtroom during voir dire.<sup>FN48</sup> But in *Momah*, the supreme court concluded that there was no structural error because the trial court weighed the appropriate factors on the record prior to closing the courtroom, effectively engaging in a *Bone-Club* analysis.<sup>FN49</sup>

FN48. *Momah*, 167 Wash.2d at 149-50, 217 P.3d 321.

FN49. *Id.* at 155-56, 217 P.3d 321.

¶ 38 In our view, neither *Strode*, a plurality decision, nor *Momah* overrules *Coleman*.<sup>FN50</sup> First, neither case addresses the issue here: whether sealing juror questionnaires without first conducting a *Bone-Club* analysis violates a defendant's right to a public trial under article 1, section 22 or the Sixth Amendment. Rather, both deal with the factually distinguishable issue of whether such an analysis must be done before closing the courtroom for voir dire.

FN50. *Coleman* was decided on August 17, 2009, just under two months prior to *Strode* and *Momah*, which were decided on October 8, 2009. *Coleman* was not the subject of a petition for review, but *In re Detention of Townsend*, noted at 157 Wash.App. 1039, 2010 WL 3221940, which follows *Coleman*, is the subject of a currently pending petition for review.

¶ 39 Second, neither case addresses the appropriate remedy where a court errs by failing to conduct the *Bone-Club* analysis prior to sealing juror questionnaires. Thus, the remedy for an article 1, section 10 violation, rather than an article 1, section 22 \*588 violation, was not at issue in either case, as it is here.

¶ 40 Finally, *Strode* and *Momah* recognize that a defendant should not receive a new trial where his right to a public trial has been safeguarded,<sup>FN51</sup> or where this would be a “windfall” remedy.<sup>FN52</sup> This is consistent with the holding in *Coleman*. In *Coleman*, this court recognized that there is no easy distinction between juror questionnaires as part of open court proceedings and juror questionnaires as court records.

Nevertheless, this court concluded that *Coleman* had not demonstrated that sealing juror questionnaires after jury selection was complete rendered his trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. In short, there was no structural error.

FN51. *Strode*, 167 Wash.2d at 236, 217 P.3d 310 (Fairhurst, J. and Madsen, J., concurring).

FN52. *Momah*, 167 Wash.2d at 150, 217 P.3d 321.

¶ 41 We conclude that the holding in *Coleman* is not inconsistent with subsequent supreme court authority. *Taner* has failed to show any violation of his public trial right under article 1, section 22 or the Sixth Amendment.

[6][7] ¶ 42 After *Coleman*, there can be no serious dispute that the trial court in this case erred by failing to conduct a *Bone-Club* hearing before entering its sealing order under the public's article 1, section 10 right to open court proceedings. Thus, the question is what remedy is appropriate for this error. We conclude that the appropriate remedy here is remand for the trial court to conduct a *Bone-Club* hearing and to reconsider its closing order.

¶ 43 Further, we conclude that remand for reconsideration of the sealing order is consistent with other relevant case law. For example, *Coleman* relies on *Waldon*. There, the trial court granted *Waldon*'s motion to seal her court record based on the legal standard articulated in General Rule (GR) 15 rather than the five part constitutional test articulated in *Seattle Times Co. v. Ishikawa*.<sup>FN53</sup> This court reversed, concluding that GR 15 must be read in harmony with the five factor constitutional test.<sup>FN54</sup> Because the trial court applied the incorrect legal standard in reaching its decision to seal the court record, this court determined that the correct remedy was to remand for the trial court to reconsider the motion to seal under the correct legal standard.<sup>FN55</sup>

FN53. *Waldon*, 148 Wash.App. at 955-56, 202 P.3d 325 (citing 97 Wash.2d 30, 640 P.2d 716 (1982)).

246 P.3d 580  
(Cite as: 246 P.3d 580)

FN54. *Id.* at 966, 202 P.3d 325.

FN55. *Id.* at 957, 967, 202 P.3d 325.

¶ 44 Likewise, this remedy is also consistent with *Ishikawa*, a supreme court case that held that the trial court erred, among other things, in sealing the record from a hearing without first analyzing the five factors outlined by the court.<sup>FN56</sup> The trial court also erred in failing to address these factors prior to denying the motions of two regional newspapers to unseal the records from the hearing.<sup>FN57</sup> Significantly, the supreme court remanded the matter to the trial court to reconsider the newspapers' motions to unseal the records in accordance with the articulated standard.<sup>FN58</sup> No more severe remedy was imposed in that case. While *Ishikawa* was a civil case, it nonetheless provides guidance that we believe is helpful in this criminal case.

FN56. *Ishikawa*, 97 Wash.2d at 42-46, 640 P.2d 716.

FN57. *Id.*

FN58. *Id.* at 45-46, 640 P.2d 716.

¶ 45 Finally, in *Waller v. Georgia*,<sup>FN59</sup> after concluding that the trial court erred in closing a pretrial suppression hearing to the public,<sup>FN60</sup> the U.S. Supreme Court remanded for a new suppression hearing.<sup>FN61</sup> The court concluded that a new trial was required only if the new suppression hearing resulted in suppression of material evidence not suppressed at the first, closed hearing.<sup>FN62</sup>

FN59. 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

FN60. *Id.* at 48-49, 104 S.Ct. 2210.

FN61. *Id.*

FN62. *Id.*

\*589 ¶ 46 In sum, on this record, there was no violation of Taner's right to a public trial. Nevertheless, the trial court erred by sealing the juror questionnaires without first conducting the required *Bone-Club* analysis. That error was not structural.

Thus, the appropriate remedy is to remand this case for reconsideration of the sealing order in light of *Bone-Club* and other relevant authority.

¶ 47 We remand for reconsideration of the sealing order and affirm in all other respects.

¶ 48 The balance of this opinion has no precedential value. Accordingly, pursuant to RCW 2.06.040, it shall not be published.

#### PROSECUTORIAL MISCONDUCT

¶ 49 Taner also argues that the prosecutor committed reversible misconduct at several points during the trial. We disagree.

¶ 50 A defendant claiming prosecutorial misconduct bears the burden of establishing both the impropriety of the prosecuting attorney's comments and their prejudicial effect.<sup>FN63</sup> Prejudice is established if the defendant demonstrates a substantial likelihood that the misconduct affected the jury's verdict.<sup>FN64</sup> A defendant who does not timely object and request a curative instruction waives any claim on appeal unless the argument is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury."<sup>FN65</sup>

FN63. *State v. McKenzie*, 157 Wash.2d 44, 52, 134 P.3d 221 (2006).

FN64. *Id.*

FN65. *State v. Brown*, 132 Wash.2d 529, 561, 940 P.2d 546 (1997).

¶ 51 This court reviews allegedly improper comments in the context of the prosecutor's entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.<sup>FN66</sup> Prosecutorial misconduct is grounds for reversal only when the conduct "was both improper and prejudicial in the context of the entire record and circumstances at trial."<sup>FN67</sup>

FN66. *State v. Bryant*, 89 Wash.App. 857, 873, 950 P.2d 1004 (1998).

FN67. *State v. Hughes*, 118 Wash.App. 713,

246 P.3d 580  
(Cite as: 246 P.3d 580)

727, 77 P.3d 681 (2003).

*Opinion Testimony of Detective Witness*

¶ 52 Taner argues for the first time on appeal that the prosecutor committed misconduct by improperly eliciting opinion testimony from the lead detective. Because Taner did not object below, we conclude that he has waived any claim of error.

¶ 53 Detective Kizzier was the lead detective in charge of investigating the case. During direct examination, the prosecutor elicited the following testimony:

Q. Do you then file charges, or what do you do once you've investigated a case?

A. In the state of Washington the police department is not responsible for filing charges, that's under the purview of the prosecutor's office, and they decide whether or not charges will be filed through the State.

Q. Can you estimate for us approximately how many cases you investigate a year as a detective in the special assault unit?

A. I know that I've done approximately 300 cases to date in my four years, so when I went back and actually kind of looked at rough numbers, I'm kind of surprised to see that some years it's more than others. I've had busier years than others, but the average year to date for me is about 300 cases that I've been the primary lead detective on. There have probably been another 100 where I've assisted and it's been another detective whose responsibility it was to conduct that investigation.

Q. And those 300 cases that you investigate, are those all then referred to the prosecutor's office?

A. No.

Q. What happens with-

A. Again, as I said, my job is really more of gatherer of facts. We'll get cases that in some cases we don't have enough information. It goes to the prosecutor's office when I'm able to determine that, yes, a crime was committed and someone has been identified,

and it goes to the prosecutor's office to decide whether or not they are now going to file charges against that individual or individuals. If I'm unable to determine who did it, if I don't have a complete case, if I'm absent some element of the crime in order to show that a crime occurred, then it won't go to the prosecutor's office.<sup>[FN68]</sup>

FN68. Report of Proceedings (July 21, 2008) at 54-56.

¶ 54 Later, in the context of discussing joint interviews, the prosecutor elicited testimony from Detective Kizzier that not all cases referred to the prosecutor's office result in charges being filed.

¶ 55 Taner argues that the prosecutor committed misconduct by turning herself into an unsworn witness for the State. He claims that this was accomplished by eliciting testimony from Detective Kizzier suggesting that he would not have referred the case for the filing of criminal charges unless he believed that the defendants were guilty. Or that the prosecutor would not have filed charges unless she believed the defendants were guilty.

¶ 56 But, in State v. Kirkman,<sup>FN69</sup> the supreme court held that the admission of improper opinion testimony may be raised for the first time on appeal only if it constitutes an explicit or almost explicit expression of personal opinion on the defendant's guilt.<sup>FN70</sup> The above cited testimony from Detective Kizzier does not meet this standard. The challenged comments by Detective Kizzier were all made within the context of explaining how a criminal case is *generally* investigated and filed. And none of the challenged statements touched directly on the credibility of any witness or any issue at trial.

FN69. 159 Wash.2d 918, 155 P.3d 125 (2007).

FN70. Id. at 936-37, 155 P.3d 125.

¶ 57 Because there was no explicit statement of opinion on the credibility of the defendants by Detective Kizzier, there was no manifest constitutional error.

*Nature of Reasonable Doubt*

246 P.3d 580  
(Cite as: 246 P.3d 580)

¶ 58 Taner argues that the prosecutor committed misconduct by misstating the nature of reasonable doubt. We disagree.

¶ 59 During her closing argument the prosecutor argued,

if you all believe [H.W.], that would be enough, enough to convict these four men of rape in the second degree. There is no law, there is no requirement, that the State corroborate [H.W.'s] testimony in any way. If you believe her, it is enough.<sup>[FN71]</sup>

FN71. Report of Proceedings (July 29, 2008) at 31.

¶ 60 Later, the prosecutor urged the jury to consider what evidence they would consider sufficient to convict the defendants if H.W. was their daughter.

[Turgut's attorney] asked you if your sons were on trial, what evidence would be enough. Well, ladies and gentlemen, if your daughter had been the victim, what kind of evidence would be enough?<sup>[FN72]</sup>

FN72. Report of Proceedings (July 30, 2008) at 29.

¶ 61 Taner argues that both of these statements distort the nature of reasonable doubt and misrepresent the State's burden of proof. He contends that this court's opinion in *State v. Fleming*<sup>FN73</sup> supports this argument. A careful review of that case shows that it does not.

FN73. 83 Wash.App. 209, 921 P.2d 1076 (1996).

¶ 62 In *Fleming*, the prosecutor in a rape trial argued the following during closing:

"Ladies and gentlemen of the jury, *for you to find the defendants, Derek Lee and Dwight Fleming, not guilty of the crime of rape in the second degree*, with which each of them have been charged, based on the unequivocal testimony of [D.S.] as to what occurred to her back in her bedroom that night, *you would have to find either that [D.S.] has lied about what occurred in that bedroom or that she*

*was confused; essentially that she fantasized what occurred back in that bedroom.*"<sup>[FN74]</sup>

FN74. *Id.* at 213, 921 P.2d 1076.

The defendants were both convicted of second degree rape and subsequently appealed on the grounds that the above comment misstated the law and misrepresented the burden of proof to the jury.

¶ 63 This court agreed, holding that "it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken."<sup>FN75</sup> The court concluded that the prosecutor's statements constituted a "flagrant and ill-intentioned" violation of the rules, shifting the burden of proof and invading the defendants' rights to a fair trial.<sup>FN76</sup> "Contrary to the State's argument, the jury did not need to find that [the complaining witness] was mistaken or lying in order to acquit; instead, the jury 'was *required* to acquit *unless* it had an abiding conviction in the truth of her testimony.'"<sup>FN77</sup>

FN75. *Id.*

FN76. *Id.* at 214, 921 P.2d 1076.

FN77. *State v. Larios-Lopez*, 156 Wash.App. 257, 261, 233 P.3d 899 (2010) (quoting *Fleming*, 83 Wash.App. at 213, 921 P.2d 1076).

¶ 64 *Fleming* is distinguishable. Here, rather than arguing that the jury was required to find that the complaining witness was lying in order to acquit, the prosecutor argued that the complaining witness's testimony, if accepted as true, was sufficient to convict. These two propositions are fundamentally distinct. As this court recognized in *Fleming*, the second proposition is not improper. If the jury had an abiding conviction in the truth of the complaining witness's testimony, that would be enough to convict. This does not state or imply that a conviction would be proper if the State did not meet its burden of proof for each element of the crime—it merely suggests that H.W.'s testimony, if true, was sufficient to establish each essential element of rape in the second degree. Here, the prosecutor's comment was not improper.

246 P.3d 580  
(Cite as: 246 P.3d 580)

*Appeal to Passion and Prejudice of the Jury*

¶ 65 Taner also argues that the prosecutor's admonition to the jury to think of H.W. as their daughter effectively told the jury to ignore the evidence and rely on their emotions. But a prosecutor's remarks are not misconduct if they are in reply to or retaliation for defense counsel's acts, unless they "go beyond a pertinent reply and bring before the jury extraneous matters not in the record, or are so prejudicial that an instruction would not cure them."<sup>FN78</sup> "[T]he prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel."<sup>FN79</sup>

<sup>FN78.</sup> *State v. Dennison*, 72 Wash.2d 842, 849, 435 P.2d 526 (1967); *State v. Jones*, 144 Wash.App. 284, 299, 183 P.3d 307 (2008).

<sup>FN79.</sup> *State v. Russell*, 125 Wash.2d 24, 87, 882 P.2d 747 (1994).

¶ 66 In closing, Turgut's counsel discussed the burden of proof.

"Now, many of you are parents. *What would you demand if it were one of your children that was on trial for this or another serious crime, what proof would you demand the State bring in order for your son or daughter to be convicted?* And I think that's a way to give you sort of a gut feeling of what is required in proof beyond a reasonable doubt, because you can look at my client, and you know he has a family, they've been pointed out to you, and he may not be a perfect person, he may not be a perfect son, he may not be, certainly on June of last year, a perfect boyfriend, but he is not a rapist, and the evidence has not overcome that presumption of innocence, which he deserves."<sup>FN80</sup>

<sup>FN80.</sup> Report of Proceedings (July 29, 2008) at 129-30 (emphasis added).

¶ 67 In this context, the prosecutor's remarks were not misconduct. Her statement to the jury to think of H.W. as their daughter was in direct response to Turgut's counsel's admonition to the jury to think of the defendants as their children. Her comments were in response to defense counsels' earlier arguments and were limited to the issues in the case.

¶ 68 Taner repeats several arguments that this

court previously addressed in the separate appeal of his co-defendants at trial.<sup>FN81</sup> We apply the same reasoning in rejecting the claims he repeats here.

<sup>FN81.</sup> See *State v. Beskurt*, noted at 156 Wash.App. 1045, 2010 WL 2670826.

¶ 69 His claim here that the prosecutor impermissibly commented to the jury on his constitutional rights, requiring reversal is unpersuasive. This court addressed that claim in the prior opinion.<sup>FN82</sup> Likewise, his claim that the court improperly limited cross-examination of the complaining witness is also unpersuasive.<sup>FN83</sup>

<sup>FN82.</sup> *Id.* at \*10-11.

<sup>FN83.</sup> *Id.* at \*12-13.

#### INEFFECTIVE ASSISTANCE OF COUNSEL

¶ 70 Taner argues in the alternative that he received ineffective assistance of counsel when his counsel failed to object to prosecutorial misconduct. We again disagree.

¶ 71 To prevail on his claim of ineffective assistance of counsel, Taner must show that counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances and that the deficient performance prejudiced the trial.<sup>FN84</sup> The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.<sup>FN85</sup> In order to show prejudice, the defendant must prove that, but for the deficient performance, there is a reasonable probability that the outcome would have been different.<sup>FN86</sup>

<sup>FN84.</sup> *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Nichols*, 161 Wash.2d 1, 8, 162 P.3d 1122 (2007).

<sup>FN85.</sup> *State v. McFarland*, 127 Wash.2d 322, 336, 899 P.2d 1251 (1995).

<sup>FN86.</sup> *In re Pers. Restraint of Pirtle*, 136 Wash.2d 467, 487, 965 P.2d 593 (1998).

246 P.3d 580  
(Cite as: 246 P.3d 580)

¶ 72 Taner's defense counsel's performance did not fall below the standard of reasonableness. Taner's counsel acted reasonably. Because counsel's performance was not deficient, we need not address prejudice.<sup>FN87</sup>

FN87. Strickland, 466 U.S. at 697, 104 S.Ct. 2052; Foster, 140 Wash.App. at 273, 166 P.3d 726.

#### CUMULATIVE ERROR

¶ 73 Taner argues that cumulative errors deprived him of a fair trial and require reversal. This claim is also unpersuasive.

¶ 74 A defendant may be entitled to a new trial when errors, though not individually reversible, cumulatively result in a trial that was fundamentally unfair.<sup>FN88</sup> This court may exercise its discretion under RAP 2.5(a)(3) to review all claims, even those that were not properly preserved for appeal, where it finds that the cumulative effect of errors is to deny the defendant a fair trial.<sup>FN89</sup>

FN88. State v. Coe, 101 Wash.2d 772, 789, 684 P.2d 668 (1984).

FN89. State v. Alexander, 64 Wash.App. 147, 150-51, 822 P.2d 1250 (1992).

¶ 75 Here, we have discussed each of the claims Taner makes on appeal. While he argues their cumulative effect requires reversal, he presents no reasoned argument to this effect beyond what he already argued. Accordingly, we do not further address this claim.

¶ 76 We remand for reconsideration of the sealing order and affirm in all other respects.

WE CONCUR: LEACH, A.C.J., and ELLINGTON, J.

Wash.App. Div. 1,2011.  
State v. Beskurt  
246 P.3d 580

END OF DOCUMENT