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SUPREME COURT NO. _____
COURT OF APPEALS NO. 60015-0-I

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

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COURT OF APPEALS
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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Petitioner,

v.

TINH LAM,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES RAMSDELL

PETITION FOR REVIEW

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A. ISSUES

1. Has a defendant preserved a public trial claim for appellate review where there was no contemporaneous objection?

2. Did a defendant receive a public trial where the entire trial was open to the public with the exception of a brief conversation – after the jury had been selected and sworn – with a single juror regarding the juror’s safety concerns?

3. Was the questioning of a single sitting juror a *de minimis* closure that does not violate the constitution?

B. STATEMENT OF RELEVANT FACTS

Tinh Lam was charged on May 13, 2005 with first degree murder. CP 1. Numerous hearings and proceedings were held over the ensuing 22 months. His trial began on March 12, 2007 and ended on March 27, 2007. CP 98-113. A jury convicted him as charged and he was sentenced on April 27, 2007. CP 74-81.

Jury selection occurred on March 14-15, 2007. 3RP 9-149; 4RP 2-65. The verbatim report of proceedings shows that the jury was seated and sworn on March 15th, an introductory instruction was read to the jury, and opening statements followed. 4RP 66. A clerk’s minute entry shows that the jury was sworn and impaneled on March 15th and the jurors are listed by name. CP 102. The clerk’s minute entry also shows:

Juror #10 is questioned outside the presence of the jury.
Court holds in chamber conference with court reporter,
Juror #10 and respective counsel. . . . Court continued until
Monday, March 19, 2007 at 9:00 a.m.

CP 103. A supplemental verbatim report of proceedings shows that a hearing was held in chambers with Juror Number 10, who is identified by name. Supp. RP 2. Present were the judge, the prosecutor, both defense lawyers, and a court reporter. Supp. RP 2. The record suggests that the conference was triggered by a request from Juror No. 10. He said:

I'm sorry for causing any disruption . . . The concern I have is because of the nature of the trial and the potential outcome for the defendant. My name is very, very unusual. . . . And what I'm concerned about is that . . . it would be very easy for somebody who was angry or upset to find me or somebody in my family. . . . Again because of the nature of the trial, it concerns me.

Supp. RP 2. The court listened to Juror No. 10's concerns, explained that juror names were not usually reported in the press, and confirmed that Juror No. 10 would not let his worries interfere with his deliberations on the case. Supp. RP 2-5. The court then asked, "is there is anything else you want to discuss while we've got the chance here? Is that pretty much the sum and substance of it, sir." Supp. RP 5. Juror No. 10 replied:

Absolutely. There were two issues I raised with Charlotte [the bailiff]. One is my name and whether or not it would be released. The other is a good friend is a prosecutor. The question never came up so it didn't seem like a big deal. But they are sort of linked.

Supp. RP 5-6. The prosecutor and one defense lawyer asked Juror No. 10 some questions, the juror left the room, and the parties and the judge agreed the juror could continue to serve. Supp. RP 8-12.

Lam argued on appeal that his murder conviction must be reversed because his right to a public trial and the public's right to the open administration of justice were violated. The State argued that there was no constitutional error at all because no proceeding akin to testimony or *voir dire* was closed, that any error was *de minimis*, and that any error was not preserved. The Court of Appeals decided that "a failure to conduct a Bone-Club analysis before restricting public access to a criminal trial requires reversal in all but the most exceptional circumstances..." and reversed Lam's murder conviction. State v. Lam, No. 60015-0-I, slip op. at 1-2 (Wash.Ct.App. Apr. 18, 2011).

C. REVIEW IS WARRANTED

This case presents an "open courts" claim that is unquestionably at the outer-fringes of the open courtroom doctrine, and it highlights the injustice caused by applying an automatic reversal rule to claims raised for the first time on appeal.

Lam's multiple-week trial was conducted entirely in the open; rulings on legal motions, *voir dire*, opening statements, the questioning of witnesses, and closing arguments were all conducted in a courtroom where

everyone could listen and observe. The lone exception was a brief inquiry of a single juror that could not have lasted more than a few minutes. Neither of Lam's two lawyers objected to the brief private inquiry.

There is still conflict between appellate court decisions and among this Court's decisions as to whether and when an open court claim may be raised for the first time on review, and as to whether any closure can be *de minimis*. Several cases are pending in this court raising those issues. Thus, the State respectfully asks that review be granted in this murder case and the case be stayed until this court decides the pending cases of State v. Wise, No. 82802-4; State v. Paumier, No. 84585-9; State v. Lormor, No. 84319-8. It strains credulity to say that the Constitution was violated by this fleeting inquiry, and that weeks of trial must be reenacted, presumably without alteration in substance or procedure.

1. THERE IS A CONFLICT AMONG SUPREME COURT AND COURT OF APPEALS OPINIONS OVER WHETHER OPEN COURTS CLAIMS MAY BE RAISED FOR THE FIRST TIME ON APPEAL.

The Court of Appeals rejected the State's argument that Lam's appellate claim was not preserved in the trial court. Lam, slip op. at 5-6. It held that State v. Strobe, 167 Wn.2d 222, 217 P.3d 310 (2009) established a rule that no contemporaneous objection is required to raise an open courts claim on appeal. Id. at 6. This holding conflicts with

numerous Court of Appeals decisions and with previous decisions of this Court.

Ordinarily, an appellate court will consider a constitutional claim for the first time on appeal only if the claim is truly constitutional, and manifest. State v. Davis, 41 Wn.2d 535, 250 P.2d 548 (1953); RAP 2.5(a)(3). “Failure to object deprives the trial court of [its] opportunity to prevent or cure the error.” State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

As pointed out in briefing filed in State v. Wise, et al., there is scant authority for abandoning RAP 2.5(a) and a contemporaneous objection rule as to open courtroom claims; this Court has considered serious constitutional errors when they were manifest but has refused to consider claims at the margins of the constitution, or where the effect of the violation was minimal. Compare Sutton v. Snohomish, 11 Wash. 24, 33, 39 Pac. 273 (1895) (claim that questioning of witness should not have been held at victim’s home could not be raised on appeal where no objection at trial); State v. Collins, 50 Wn.2d 740, 314 P.2d 660 (1957) (closure of court to avoid disruption of closing argument could not be raised for the first time on appeal), citing Keddington v. State, 19 Ariz. 457, 462, 172 P. 273 (1918) (public and press barred from rape trial), with State v. Strode, *supra*. The recent plurality decision in Strode does not

control this case if this Court recognizes that a contemporaneous objection rule is available as to open courtroom claims.¹

Nothing in the record suggests that Lam objected to the in-chambers inquiry of Juror No. 10 and counsel certainly actively participated in questioning the juror. Supp. RP 7-8. Absent any record on the subject, the defendant cannot establish that he is entitled to automatic reversal of his conviction under RAP 2.5(a) analysis. Under that rule, Lam has failed to show that constitutional error occurred, or that the error was manifest, i.e. that it had any effect, whatsoever, on the trial.

This Court should grant review and stay this matter until the pending cases are decided.

2. THIS CASE INVOLVES AN EVENT MORE AKIN TO A SIDEBAR THAN A CLOSED *VOIR DIRE*; THERE WAS NO REVERSIBLE ERROR.

In arguing that his conviction must be reversed, Lam relied on a series of cases dealing with the closure of *voir dire*, including State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009) and State v. Strode, supra. Supp. Br. of App. at 1-6. In those cases, however, the issue was whether a

¹ Federal courts would almost never entertain an unpreserved open courts claim. Levine v. United States, 362 U.S. 610, 619, 80 S. Ct. 1038, 1044, 4 L. Ed. 2d 989 (1960); U.S. v. Marcus, ___ U.S. ___, 130 S. Ct. 2159, 2164-66, 176 L. Ed. 2d 1012 (2010); U.S. v. Cotton, 535 U.S. 625, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002) (open question whether structural errors always satisfy third prong of “plain error” test but still must meet fourth prong); Johnson v. U.S., 520 U.S. 461, 469, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997).

portion of jury selection may be closed without first performing a Bone-Club² analysis on the record. This case does not involve *voir dire*; it involves resolution of a single juror's personal concerns. *Voir dire* itself was wholly open to the public.

The United States Supreme Court and the Washington Supreme Court have both held that *voir dire* must be open because it is a highly significant stage of the proceedings. Presley v. Georgia, 558 U.S. ____, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010) (defendant who objected to violation of right to public trial was entitled to new trial where uncle excluded from *voir dire*); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (six weeks of *voir dire* closed); In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004) (defendant's family excluded from entire *voir dire*).

Here, the Court of Appeals said “[w]e perceive no principled basis for distinguishing either the process or purpose of *voir dire* and the questioning of juror 10.” Lam, slip op. at 6. This decision was in error. *Voir dire* is easily distinguished from the questioning of juror 10.

Jury selection was held over a period of two days, entirely in public view and in the defendant's presence. It was only after the jury was selected and sworn (and perhaps after opening statements had occurred)

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

that a single juror asked, through the bailiff, to address the court on two matters, one of which dealt with his personal safety. The Court apparently acquiesced and answered the juror's questions in private to avoid undue exposure for the juror, especially in light of the fact that the juror's fear was that he would be subject to reprisals if it became widely known that he was sitting on this jury.

The core of the constitutional right to be present is the right to be present at trial proceedings like *voir dir*, or when evidence is being presented, like during a suppression hearing. United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985) (per curiam); Press-Enterprise, *supra.*; State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). Beyond that, the defendant has a "right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge....'" Gagnon, 470 U.S. at 526 (quoting Snyder v. Massachusetts, 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674, 90 A.L.R. 575 (1934)). The defendant does not, therefore, have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters, United States v. Williams, 455 F.2d 361 (9th Cir.), *cert. denied*, 409 U.S. 857 (1972), at least where those matters do not require a resolution of disputed facts. People v. Dokes, 79 N.Y.2d 656, 584 N.Y.S.2d 761, 595 N.E.2d 836

(1992) (right to be present during hearing on admissibility of prior conviction). Id.

In Richmond Newspapers v. Virginia, 448 U.S. 555, 569-72, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980), the Court identified the purposes served by openness in criminal proceedings: (1) ensuring proceedings are conducted fairly; (2) discouraging perjury, misconduct of participants, and biased decisions; (3) providing a controlled outlet for community emotion; (4) securing public confidence in a trial's results through appearance of fairness; and (5) inspiring confidence in judicial proceedings through education on the methods of government and judicial remedies. None of these interests is threatened by the short inquiry here.

This situation is more akin to sidebars and the like where this Court has held that the defendant and the public do not have an absolute right to attend. In re Personal Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (no right to public trial at numerous conferences between lawyers and judge where purely legal discussion transpired); In re Personal Restraint of Pirtle, 136 Wn.2d 467, 484, 965 P.2d 593 (1998) (defendant need not be present for discussions about the wording of jury instructions, ministerial matters, or whether a jury should be sequestered). See also State v. Sadler, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008); State v. Rivera, 108 Wn. App. 645, 32 P.3d 292 (2001) (jurors complained

about the hygiene of another juror); State v. Bremer, 98 Wn. App. 832, 835, 991 P.2d 118 (2000) (proposed jury instructions; no questions of fact); State v. Walker, 13 Wn. App. 545, 536 P.2d 657 (1975) (post-trial motion to determine competency because factual matters were determined).

Moreover, it is clear the Framers always understood that the principle that justice be administered openly was not violated when judicial business occurred in chambers. When the state constitution was adopted, judges “at chambers” had broad powers to entertain, try, hear and determine all actions, causes, motions, demurrers, and other matters not requiring a trial by jury, all of which could occur in the judge’s chambers. Peterson v. Dillon, 27 Wash. 78, 84, 67 P. 397 (1901) (citing Section 2138, Code of 1881 -- commissioner could exercise duties of judge at chambers). See also Meisenheimer v. Meisenheimer, 55 Wash. 32, 42-43, 104 P. 159 (1909) (dissolution order is valid; judge exercised authority in chambers rather than in open courtroom).

The brief, mid-trial, in-chambers conference that occurred here with a single juror was much more akin to the proceedings described above than it is to *voir dire*. Indeed, both parties in this case had already participated in a full *voir dire* where potential jurors, including Juror No. 10, were vetted in public and in the defendant’s presence. The inquiry

of Juror No. 10 was simply a housekeeping matter. It is easily distinguished from *voir dire*. The Court of Appeals' ruling conflicts with decisions of this Court and the Court of Appeals.

3. ANY VIOLATION OF THE RIGHT TO OPEN COURTS WAS *DE MINIMIS*.

The Court of Appeals held that dicta from prior decisions proves there is no *de minimis* exception to the open courts doctrine in Washington. That decision was premature. This Court has observed that “a trivial [courtroom] closure does not necessarily violate a defendant’s public trial right.” State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150 (2005). Several justices have said in *dicta* that the Court has never actually found such a closure to be trivial. State v. Easterling, 157 Wn.2d 167, 180-81, 137 P.3d 825 (2006). Justice Madsen has argued that Washington should recognize the *de minimis* closure standard, which “applies when a trial closure is too trivial to implicate the constitutional right to a public trial. . . i.e., no violation of the right to a public trial occurred at all.” Easterling, 157 Wn.2d at 183-84 (Madsen, J. concurring). The standard can apply to either inadvertent or deliberate closures. Id. Other justices have argued that “the people deserve a new trial” each and every time a courtroom is closed, no matter how insignificant. Id. at 185 (Chambers, J. concurring). Thus, whether a

closure can be *de minimis* under Washington law is an open question of law under this court's precedents.

The closure in this case presents a perfect opportunity for this Court to recognize that some closures are, indeed, *de minimis* and do not rise to the level of a constitutional violation.

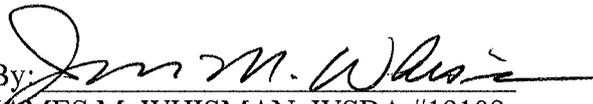
D. CONCLUSION

For the foregoing reasons, this court should reject Lam's open courtroom challenge and affirm his conviction.

DATED this 17th day of May, 2011.

Respectfully submitted,

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King County Prosecuting Attorney

By: 

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, and to Jordan McCabe, PO Box 6324, Bellevue, WA 98008-0324 containing a copy of the Petition for Review, in STATE V. TINH LAM, Cause No. 60015-0-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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Name

Done in Seattle, Washington

5/17/11

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 60015-0-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	PUBLISHED OPINION
TINH TRINH LAM,)	
)	
Appellant.)	FILED: April 18, 2011

LEACH, A.C.J. — Tinh Trinh Lam appeals his conviction for first degree murder. He contends that the trial court violated his constitutional right to a public trial by interviewing a previously seated juror in chambers without first conducting a Bone-Club¹ analysis. Lam also contends that he received ineffective assistance of counsel on several grounds, including failure to adequately cross-examine the State's forensic experts, failure to present a plausible counter-scenario of Lam's innocence in closing arguments, and failure to object to the trial court's response to a juror question that advised the jury that the case did not involve capital punishment. Because a failure to conduct a Bone-Club analysis before restricting public access to a criminal trial requires

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

reversal in all but the most exceptional circumstances, we reverse Lam's conviction and remand for a new trial without reaching the other issues presented.

FACTS

On May 13, 2005, the State charged Lam with the first degree murder of his one-time girl friend and business partner, Nguyet Minh Nguyen. Over the next 22 months, numerous hearings and proceedings were held. Lam's trial began on March 12, 2007. Jury selection began on March 14 and ended on March 15.

On March 15, after the jury was sworn and seated, the judge read a preliminary instruction, and counsel gave opening statements. The court then recessed until the following Monday and met in chambers with juror 10, defense counsel, and the prosecutor. The record does not indicate the defendant's presence. At the outset of this conference, the judge stated, "For purposes of the record, this portion of the record will be filed under seal until further order of the Court." Statements in the transcript make clear that the court closed the conference to the public and the press.

The court called the conference because of safety concerns that juror 10 expressed to the bailiff. In chambers, juror 10 described these concerns to the judge and counsel:

THE COURT: Why don't you tell us what the concern is.

JUROR NO. 10: Sure. I'm sorry for causing any disruption.

THE COURT: That's okay.

JUROR NO. 10: The concern I have is because of the nature of the trial and the potential outcome for the defendant. My name is very, very unusual. . . . And what I'm concerned about is that . . . it would be very easy for somebody who was angry or upset to find me or somebody in my family.

The court listened to a further explanation of these concerns and inquired about the juror's ability to give either side a fair trial. Juror 10 responded, "No. It won't impact my judgment. . . . The fact is, my judgment will be based on what I see and hear." After the prosecutor and one of Lam's defense lawyers asked a few questions, juror 10 left. Counsel and the court then discussed the situation, and counsel for both parties agreed juror 10 could continue to serve.

After the jury found Lam guilty of murder in the first degree, Lam appealed, contending in part that his right to a public trial had been violated. This court ordered the proceedings stayed pending our Supreme Court's decision in State v. Strode² and State v. Momah.³ On October 8, 2009, our Supreme Court issued its decisions in these cases. We lifted the stay and ordered supplemental briefing on the impact of Strode and Momah.

² 167 Wn.2d 222, 217 P.3d 310 (2009).

³ 167 Wn.2d 140, 217 P.3d 321 (2009), cert. denied, 131 S. Ct. 160 (2010).

ANALYSIS

Lam contends the court violated his right to a public trial under article I, section 22 of the Washington State Constitution and the Sixth Amendment by questioning juror 10 in chambers without first applying and weighing the five Bone-Club factors. We agree.

Whether a trial court procedure violates a criminal defendant's right to a public trial is a question of law that we review de novo.⁴ Section 22 provides, "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial."⁵ The Sixth Amendment includes a similar provision. These provisions assure a fair trial, foster public understanding and trust in the judicial system, and provide judges with the check of public scrutiny.⁶ While the public trial right is not absolute, Washington courts strictly guard it to assure that proceedings occur outside the public courtroom in only the most unusual circumstances.⁷

⁴ State v. Easterling, 157 Wn.2d 167, 173-74, 137 P.3d 825 (2006).

⁵ Additionally, article I, section 10 of the Washington State 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 and is not at issue here.

⁶ State v. Duckett, 141 Wn. App. 797, 803, 173 P.3d 948 (2007) (citing 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)).

⁷ Easterling, 157 Wn.2d at 174-75; Brightman, 155 Wn.2d at 514-15; In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004); Bone-Club, 128 Wn.2d at 258-59.

To protect the defendant's right to a public trial, our Supreme Court held in Bone-Club that a trial court must apply and weigh five factors before restricting public access to a portion of a criminal trial.⁸ Also, the court must enter specific findings justifying its closure order.⁹ Generally, if the record indicates a violation of a defendant's public trial right, we presume prejudice,¹⁰ reverse the conviction, and remand for a new trial.¹¹

As a threshold matter, the State asserts that Lam failed to preserve the public trial issue for appellate review because he failed to raise this issue before the trial court. However, RAP 2.5(a) allows a party to raise for the first time on appeal manifest error affecting a constitutional right. In three recent cases, our Supreme Court has allowed a party to assert the denial of a public trial right for

⁸ Under Bone-Club,

"1. The proponent of closure . . . 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 (second alteration in original) (quoting Allied Daily Newspapers of Wash. v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

⁹ Easterling, 157 Wn.2d at 175 (citing Bone-Club, 128 Wn.2d at 258-59).

¹⁰ Easterling, 157 Wn.2d at 181 (citing Bone-Club, 128 Wn.2d at 261-62).

¹¹ Easterling, 157 Wn.2d at 174 (citing Orange, 152 Wn.2d at 814).

the first time on appeal, In re Personal Restraint of Orange,¹² State v. Momah, and State v. Strode. These cases recognize the constitutional magnitude of the public trial right and presume that its denial is prejudicial. If Lam can establish that the questioning of juror 10 violated his public trial rights, he may raise the issue for the first time on appeal.

The State next contends that no violation of Lam's right to a public trial occurred. It acknowledges that both the United States Supreme Court and the Washington Supreme Court have held that closure of voir dire is prohibited.¹³ But it argues that the questioning of juror 10 in chambers is more like a side bar than voir dire. Because the jury had already been questioned and selected in a public proceeding, the State characterizes this in-chambers questioning as "simply a housekeeping matter." Therefore, the State reasons, Lam had no right to be present during the questioning, and his public trial right did not apply. We disagree.

We perceive no principled basis for distinguishing either the process or purpose of voir dire and the questioning of juror 10. In each instance, a judge and counsel question an individual to gather facts needed to decide whether that person will serve as a juror. The questioning of juror 10 conducted after the jury was selected was procedurally similar to and conducted for the same purpose as

¹² 152 Wn.2d 795, 100 P.3d 291 (2004).

¹³ See Presley v. Georgia, ___ U.S. ___, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); Orange, 152 Wn.2d at 804.

voir dire, determining an individual's ability to serve as a juror. Since a defendant's public trial rights apply to voir dire, by analogy they apply to the questioning of a sworn juror in chambers conducted for the purpose of determining whether that juror will continue to serve.

The State also contends that Lam waived his public trial rights by failing to object to the procedure used by the court and by participating in the questioning of juror 10. A defendant's failure to object to closure at trial does not waive his public trial rights.¹⁴ Neither does defense counsel's participation in the closed questioning of a juror.¹⁵ Lam did not waive his public trial rights.

The State attempts to distinguish this case on the basis of the length of time spent questioning juror 10. Essentially, this is an argument for a de minimis or trivial closure rule, an argument that the State presents separately. Although the Washington Supreme Court has not decided whether a violation of a public trial right can be de minimis, dicta in State v. Easterling¹⁶ strongly suggests that it cannot.

In Easterling, the majority opinion responded to then Justice Madsen's concurring opinion in which she advocated for a de minimis closure standard and explained her position that this standard comports with a constitutional right to a public trial.¹⁷ The opinion observed that a majority of the Washington Supreme

¹⁴ Brightman, 155 Wn.2d at 517-18, (citing Bone-Club, 128 Wn.2d at 257).

¹⁵ Strode, 167 Wn.2d at 229.

¹⁶ 157 Wn.2d 167, 180-81, 137 P.3d 825 (2006).

¹⁷ Easterling, 157 Wn.2d at 182-85 (Madsen, J., concurring).

Court has never found a public trial right to be de minimis.¹⁸ It noted that a majority of the cases cited by Justice Madsen were federal cases and distinguished them on the basis that the United States Constitution does not contain an open administration of justice provision like that contained in article I, section 10 of the Washington State Constitution.¹⁹ The majority concluded its response as follows,

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. See Bone-Club, 128 Wn.2d at 261-62; Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (citing Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). Prejudice is necessarily presumed where a violation of the public trial right occurs. Bone-Club, 128 Wn.2d at 261-62 (citing State v. Marsh, 126 Wash. 142, 146-47, 217 P. 705 (1923)). As a result, precedent directs that the appropriate remedy for the trial court's constitutional error is reversal of Easterling's unlawful delivery of cocaine conviction and remand for new trial.^[20]

Justice Chambers, in a concurring opinion joined by Justices Owens and Sanders, expressed the view that under the open administration of justice provision of our state constitution, "there is no case where the harm to the principle of openness, as enshrined in our state constitution, can properly be described as de minimis."²¹

Although the discussion of a de minimis rule in Easterling is dicta, we are persuaded that no de minimis rule is applicable to a public trial right violation.

¹⁸ Easterling, 157 Wn.2d at 180.

¹⁹ Easterling, 157 Wn.2d at 181 n.12.

²⁰ Easterling, 157 Wn.2d at 181.

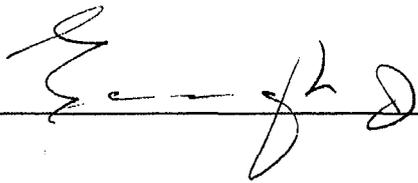
²¹ Easterling, 157 Wn.2d at 186 (Chambers, J., concurring).

However, even if a “trivial closure” rule existed, it would not apply in this case. In Easterling, the court stated that a closure cannot be placed in that category if it is deliberately ordered and is neither ministerial nor trivial in result.²² Here the court ordered the closure. As explained above, the questioning of juror 10 was not ministerial. Finally, a decision to retain or excuse a juror in a criminal case in a jurisdiction requiring a unanimous verdict to convict is not trivial.

Because the court improperly excluded the public from the questioning of juror 10 in unexceptional circumstances without first conducting a Bone-Club analysis, this case requires a new trial as the proper remedy. In view of this disposition, we do not reach the other issues raised by Lam.

Reversed and remanded for a new trial.

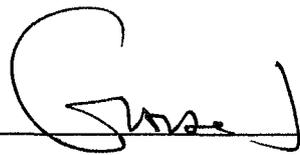
WE CONCUR:



A handwritten signature in black ink, appearing to be 'J. H. D.', written over a horizontal line.



A handwritten signature in black ink, appearing to be 'Reach, A. C. J.', written over a horizontal line.



A handwritten signature in black ink, appearing to be 'Gunn', written over a horizontal line.

²² Easterling, 157 Wn.2d at 180-81..