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SUPREME COURT NO. 86216-8

NO. 65053-04-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

GREGORY SHEARER,

Respondent.

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

The Honorable Charles Snyder, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. SUPPLEMENTAL ISSUE STATEMENTS¹

1. Did the trial court violate Gregory P. Shearer's constitutional right to a public trial, as guaranteed by the Sixth Amendment and article I, sections 10 and 22 of the Washington Constitution, by holding part of the voir dire of one prospective juror in chambers without first conducting a "Bone-Club"² analysis?

2. Did Shearer waive his right by failing to object? More generally, should this Court adopt the waiver rule in this context?

3. Was the brief private voir dire, which involved one prospective juror, too trivial, or de minimis, to implicate the constitutional right to a public trial? More generally, should this Court adopt a triviality standard in this context?

4. Did the closure constitute structural error?

B. SUPPLEMENTAL STATEMENT OF THE CASE

The state charged Gregory P. Shearer with felony harassment and fourth degree assault against his girlfriend, Lynn Honcoop, for events occurring during an argument at their shared residence. CP 94-95. During voir dire, the prosecutor asked whether anyone was a recent victim of or

¹ Counsel also adopts the arguments raised by counsel in the consolidated case of State v. Grisby.

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

knew a recent victim of domestic violence. RPVD 37-38.³ Prospective Juror 7 raised her hand. RPVD 37.

When the prosecutor asked how she felt about it, Juror 7 said she did not want to talk about it. She said it was difficult to discuss it in front of strangers. The trial court asked, "Would it be more comfortable if counsel and you and I were to meet in chambers so you can discuss it with us there? RPVD 38. Juror 7 said, "Yes." RPVD 38.

The court asked, "Is this [*sic*] anyone in this courtroom who would have any objection if we leave the courtroom for a moment? If the court reporter, counsel, and myself, and the defendant went into chambers to ask some questions of Juror Number 7 in private? [¶] Is there anyone here who would object at all to having that take place in that manner?" RPVD 39. Hearing nothing, the court reporter, judge, counsel, and Shearer went into chambers with Juror 7. She revealed her six-month old grandson was killed by his father in her family home. She said she was still healing from the loss and that it would likely affect her decision in Shearer's case. RPVD 39-40. Shearer's counsel moved to excuse for cause and the court granted the motion. RPVD 40-41.

³ "RPVD" represents the verbatim report of the January 12, 2010, jury selection.

Trial commenced, after which a Whatcom County jury found Shearer guilty of each offense. CP 26-27. The trial judge sentenced Shearer within the standard range based on an offender score of 0. CP 15-24.

Shearer appealed, arguing in part that the trial court violated his right to a public trial by conducting private voir dire without first considering the factors this Court set forth in Bone-Club. Supplemental Brief of Appellant (SBOA) at 2-17. In a unanimous unpublished opinion, the Court of Appeals agreed and reversed Shearer's convictions. State v. Shearer, 162 Wn. App. 1007, 2011 WL 2120054425 (No. 65053-0-I, 5/31/2011) (attached as appendix).

The Court rejected the State's argument that the private voir dire was not structural error, did not prejudice Shearer, and thus did not require reversal:

Here, as in Strode,⁴ the record does not indicate that the trial court considered Shearer's public trial right in light of competing interests. Nor does the record establish that Shearer's conduct amounted to a knowing or tactical waiver of the right to a public trial. Accordingly, because the court improperly excluded the public from a portion of jury selection without applying the Bone-Club analysis, Strode requires that we reverse Shearer's conviction and remand for new trial.

⁴ State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009).

Shearer, 2011 WL 2120054425 at *2-3. The Court also rejected the State's claim that the closure was de minimis and not prejudicial. The Court found that under this Court's holdings, prejudice is presumed. And citing Strode, the Court observed Washington courts have not found a public trial violation to be de minimis. Id. at *3.

C. ARGUMENT

THE TRIAL COURT VIOLATED SHEARER'S CONSTITUTIONAL RIGHTS TO A PUBLIC TRIAL AS PROVIDED BY THE SIXTH AMENDMENT AND ARTICLE I, SECTIONS 10 AND 22.

The trial court's use of in-chambers voir dire was a "closure" and therefore required a sua sponte Bone-Club analysis.⁵ Because the trial

⁵ A Bone-Club analysis requires a trial court to consider the following factors before closing part of a trial:

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

court did not engage in the analysis, did not consider alternatives to closure, and did not enter findings to justify the closure, it violated Shearer's right to a public trial under the Sixth Amendment and article I, sections 10 and 22 of the Washington Constitution. The complete closure of a portion of voir dire was not a de minimis error. Shearer did not waive a challenge to the improper closure by failing to object. The trial court's closure error was structural and requires reversal of Shearer's conviction and remand for a new trial.

I. Introduction

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the accused a public trial by an impartial jury. Presley v. Georgia, 558 U.S. 209, 211-12, 130 S. Ct. 721, 175 L. Ed. 2d. 675 (2010); State v. Paumier, 176 Wn.2d 29, 34, 288 P.3d 1126 (2012); State v. Wise, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012).⁶ Additionally, article I, section 10 provides that

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.

⁶ The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury" Article I, section 22 provides that "[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury"

“[j]ustice in all cases shall be administered openly, and without unnecessary delay.” This latter provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). Sections 10 and 22 “serve complementary and interdependent functions in assuring the fairness of our judicial system.” Bone-Club, 128 Wn.2d at 259. The rights serve to ensure a fair trial, remind the prosecutor and judge of their responsibilities and functions, encourage witnesses to participate, and discourage perjury. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

The public trial right is considered to be of such constitutional magnitude that its violation may be challenged for the first time on appeal. Strode, 167 Wn.2d at 229. Whether a trial court procedure violates the right to a public trial is a question of law this Court reviews de novo. State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

2. *The trial court "closed" a portion of Wise's trial.*

Courts first consider whether the proceeding at issue implicates the public trial right, thereby constituting a closure at all. Sublett, 176 Wn.2d at 71. The accused's right to a public trial under both the federal and state constitutions applies to voir dire. Presley, 558 U.S. at 213; State v. Beskurt, 176 Wn.2d 441, 445, 293 P.3d 1159 (2013).

The trial court conducted a portion of voir dire of one prospective juror in chambers. A judge's chambers are "ordinarily not accessible to the public." Wise, 176 Wn.2d at 12; see B.H. v. McDonald, 49 F.3d 294, 297 (7th Cir. 1995) (recognizing chambers as "an area traditionally off-limits to the public eyes and ears.") The in-chambers questioning of prospective Juror 7 constituted a "closure." See Strode, 167 Wn.2d at 227 (questioning of 11 potential jurors in chambers "was a courtroom closure and a denial of the right to a public trial.").

3. *The trial court erred by failing to apply the Bone-Club factors.*

A judge violates a defendant's right to a public trial under the Sixth Amendment by conducting part of jury selection in the judge's chambers without sua sponte considering reasonable alternatives to closure, identifying an overriding interest likely to be prejudiced without closure, and entering specific findings justifying closure. Presley, 130 S. Ct. at 724-25. The same is true under article I, section 22 absent sua sponte consideration of the Bone-Club factors. Wise, 176 Wn.2d at 12-13; Strode, 167 Wn.2d at 228-29; see Brightman, 155 Wn.2d at 518 ("Because the record in this case lacks any hint that the trial court considered Brightman's public trial right as required by Bone-Club, we cannot determine whether the closure was warranted.").

Shearer anticipates the State may argue the trial court substantially complied with Bone-Club by asking members of the gallery whether anyone would object if prospective juror 7 were privately questioned in chambers.⁷ He urges this Court to reject such an argument.

There are five independent factors that must precede an order to close a portion of trial. The trial court's question to the spectators (if any) implicates only factor (2) of the five Bone-Club factors: "Anyone present when the closure motion is made must be given an opportunity to object to the closure." Bone-Club, 128 Wn.2d at 258-59; see also Ishikawa, 97 Wn.2d at 38.

Importantly, the trial court did not make a showing as to the need for the complete closure. The court also did not consider whether there were less restrictive alternatives to convening in chambers. For example, excusing the venire from the courtroom and questioning prospective juror 7 in open court was a less restrictive alternative. Nor did the court weigh the competing interests of the defendant and the public. See Bone-Club, 128 Wn.2d at 261 ("[T]he existence of a compelling interest would not

⁷ The trial court appears to have directed the question to spectators, not the parties: "Is this [*sic*] anyone in this courtroom who would have any objection if we leave the courtroom for a moment? If the court reporter, counsel, and myself, and the defendant went into chambers to ask some questions of Juror Number 7 in private? Is there anyone here who would object at all to having that take place in that manner?" RPVD 39.

necessarily permit closure: the trial court must then perform the remaining four steps to weigh thoroughly the competing interests.").

The fifth Bone-Club factor requires the closure be no broader in its application or duration than is necessary to serve its purpose. Bone-Club, 128 Wn.2d at 328. The private questioning at issue here was properly limited to serve its purpose. Nevertheless, for the aforesaid reasons, the trial court's method fell far short of satisfying the Bone-Club requirements.

4. *Shearer did not waive his public trial right by failing to object and by participating in the in-chambers voir dire.*

This Court has consistently held the accused does not waive the right to challenge closure of a portion of trial on appeal by failing to timely object. Wise, 176 Wn.2d at 15; Strode, 167 Wn.2d at 229; State v. Easterling, 157 Wn.2d 167, 173 n.2, 137 P.3d 825 (2006); State v. Marsh, 126 Wash. 142, 145-47, 217 P. 705 (1923). Consistent with this well-established precedent, this Court should find Shearer did not waive his right to raise the public trial claim for the first time on appeal.

5. *This Court should not apply RAP 2.5(a) to a claim of a public trial violation.*

Requiring a party to object to a closure would ignore the trial court's fundamental obligation to protect the right to a public trial. The Court's current course is correct.

RAP 2.5(a) permits an appellate court to refuse to review any claim of error not raised in the trial court. The customary way to raise a claim of error in the trial court is to object. A timely objection serves to call to the trial court's attention error upon which appellate review may be based so the court has an opportunity to correct it. State v. Fagalde, 85 Wn.2d 730, 731, 539 P.2d 86 (1975). The rule places on trial counsel the burden to timely notify the court that it needs to take action, such as to rule on the admissibility of evidence, provide particular jury instructions or curtail improper argument.

In contrast, the duty to apply the Bone-Club factors is the trial court's, whether a party objects to closure or not. When a trial court is contemplating a closure of any kind, it is aware or should be aware of the implications of its actions. It is the judge and the judge alone who controls public access to his or her courtroom. See Presley, 558 U.S. at 214 ("trial courts are required to consider alternatives to closure even when they are not offered by the parties").

This is the point of this Court's Bone-Club decision. If this Court adopted a contemporaneous objection rule, the parties rather than the trial court would control the Bone-Club requirements. A court would consider the Bone-Club factors only in response to an objection. Such a rule would turn well-established precedent upside down. The trial judge, not the

parties, bears the responsibility to ensure justice is administered openly. See Presley, 558 U.S. at 215 ("Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials."); State v. Momah, 167 Wn.2d 140, 158-59, 217 P.3d 321 (2009) (Alexander, C.J, dissenting) ("Findings spread on the record are particularly critical in a case where no one objects to closure, since in such circumstances the judge has an overriding responsibility to safeguard the constitutional right to a public trial."); State v. Easterling, 157 Wn.2d at 187 (Chambers, J., concurring) ("[T]he constitutional requirement that justice be administered openly is not just a right held by the defendant. It is a constitutional obligation of the courts.").

Furthermore, requiring a contemporaneous objection in the closure context would not foster the purpose of the rule. A contemporaneous objection is designed to call the trial court's attention to possible error so it can be timely corrected. Absent a timely objection, errors go uncorrected. But an unjustified closure of a court proceeding – unjustified because of the failure to apply the Bone-Club factors – is not possible error. It is error that should be obvious to any judge in Washington. See Wise, 176 Wn.2d at 11 ("We typically would never reach the complicated questions presented in Wise's case where a trial court conducts a Bone-Club analysis on the record and concludes that a

closure is warranted. This is because, absent an abuse of discretion, we would be assured that the foundational principle of an open justice system is preserved."). A party should have no burden to call the court's attention to a clear, simple, automatic, per se rule. Applying a waiver rule in this context is misplaced.

Additionally, as this Court held in Strode, a defendant cannot waive the public's article 1, section 10 right to open proceedings. 167 Wn.2d at 229-30. This Court held "the trial court has the independent obligation to perform a Bone-Club analysis." 167 Wn. 2d at 230. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581, 100 S. Ct. 2814, 2829-30, 65 L. Ed. 2d 973 (1980) ("Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.").

Furthermore, the right to a public trial benefits not only the defendant but the criminal justice system at large. "The public has a right to be present whether or not any party has asserted the right." Presley, 558 U.S. at 214. "The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 821, 78 L. Ed. 2d 629 (1984). "The Sixth Amendment right to a public trial enures to the benefit of the criminal justice system itself as

well as the defendant" United States v. DeLuca, 137 F.3d 24, 33, cert. denied, 525 U.S. 874 (1st Cir. 1998); see Marsh, 126 Wash. at 147 ("[T]he whole body politic suffers an actual injury when a constitutional safeguard erected to protect the rights of citizens has been violated[.]")

Applying waiver in this context would give defendants and the State control over a fundamental systemic safeguard that courts are obliged to protect. It would deprive the appellate courts of the opportunity to promote system-wide fairness. Finally, it would trigger a flood of ineffective assistance claims. This Court has struggled with this issue and has created a rule that is fair, simple to understand and straightforward to apply. For these reasons, this Court should not apply a waiver rule in this context.

6. *Even if RAP 2.5(a) applies, this Court should excuse the failure to object here or find Shearer did not knowingly waive his public trial right.*

The general rule in Washington is that issues not raised in the trial court may not be raised for the first time on appeal. RAP 2.5(a). The rule, however, is discretionary rather than absolute. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). RAP 2.5(a) does not expressly prohibit an appellate court from accepting review of an issue not raised in the trial court. The Court of Appeals reviewed the merits of Shearer's public trial claim, so its decision is properly before this Court. See State v. Russell,

171 Wn.2d 118, 122, 249 P.3d 604 (2011) (this Court chooses to review challenge to trial court's failure to give limiting instruction under ER 404(b) because Court of Appeals accepted review of issue). This Court should exercise its discretion and consider the merits of Shearer's claim.

Alternatively, this Court should find the record does not establish Shearer sufficiently waived this fundamental constitutional right. Like the right to a jury trial, the right to a public trial can be waived only in a knowing, voluntary, and intelligent manner. Strode, 167 Wn. at 229 n.3. There is nothing in the record to suggest Shearer knew about his right to question jurors in a courtroom open to the public. "[A] defendant must have knowledge of a right to waive it." In re Personal Restraint of Morris, 176 Wn.2d 157, 167, 288 P.3d 1140 (2012). His silence, therefore, cannot be considered an effective waiver.

7. *The trial court's error was not de minimis.*

Shearer anticipates the State will argue the trial court's violation of the right to a public trial should be excused as de minimis. This Court has never seen fit to apply a de minimis standard to courtroom closures. Strode, 167 Wn.2d at 230. In Easterling, this Court noted that although some jurisdictions have determined that improper courtroom closures may not necessarily violate the public trial right, a majority of this Court has not. 157 Wn.2d at 180-81.

The Ninth Circuit recently addressed two such decisions in United States v. Rivera, 682 F.3d 1223, 1231 (9th Cir. 2012). The State in Easterling cited one of them, Peterson v. Williams, 85 F.3d 39, 42 (2nd Cir.1996). Easterling, 157 Wn.2d at 180-81. In Peterson, the courtroom was inadvertently left closed during the defendant's testimony, which lasted about 15 or 20 minutes. 85 F.3d at 41. But defense counsel repeated nearly all the testimony that was relevant during his closing argument. 85 F.3d at 43. The appellate court, noting that "[t]he circumstances of this case are more unique than rare[,]" 85 F.3d at 42, held "that in the context of this case," the closure did not violate the Sixth Amendment because the closure was brief, followed by a helpful summation, and inadvertent. 85 F.3d at 44. See also United States v. Al-Smadi, 15 F.3d 153, 154-55 (10th Cir. 1994) (no violation when closure of courthouse led to brief and inadvertent closure of courtroom to public).

The second case discussed in Rivera was United States v. Ivester, 316 F.3d 955 (9th Cir. 2003). In Ivester, the district court judge questioned an alternate juror alone, and then the rest of the jury, in the closed courtroom about a perceived lack of security. Ivester, 316 F.3d at 957-58. On appeal, the court relied on Peterson and held the closure was too trivial to trigger the Sixth Amendment right to a public trial. Id. at 960. The court reasoned the questioning was brief and addressed only an

"administrative jury problem" that did not affect witness testimony or closing arguments, and was not an attack on the government. Id.

In Rivera, the trial court directed Rivera's family members, including his seven-year-old son, to leave the courtroom during sentencing. 682 F.3d at 1230-31. On appeal, the court rejected the government's argument that the closure – which was for about 35 minutes – was brief enough to be considered trivial. The court held brevity alone did not dictate the results in Peterson and Ivester. Instead, the combination of factors present in Peterson, and the subject of the jury questioning in Ivester were the reasons for the holdings there. Id. at 1231.

The same is true in Shearer's case. Although relatively brief, the private questioning of prospective juror 7 was neither inadvertent nor involving an administrative matter. Instead, the subject matter was domestic violence, precisely what the State accused Shearer of committing. For these reasons, the closed session was not trivial or de minimis under the Peterson or Ivester rationale.

Some courts distinguish between total closure, during which no members of the public may attend, and partial closure. See, Snyder v. Coiner, 510 F.2d 224, 230 (4th Cir. 1975) (unauthorized closure of courtroom by bailiff for short time during arguments of counsel to jury found "entirely too trivial to amount to a constitutional deprivation")

because closure was brief and there were no restrictions placed on defendant's family or spectators already in courtroom); State v. Lindsey, 632 N.W.2d 652, 657 (Minn. 2001) (trial court's ejection of two children from otherwise open courtroom considered trivial; court observed that "[a]t no time was the courtroom cleared of all spectators. The trial was open to the general public and the press at all times"; record did not suggest that members of the public and press were absent during any stage of trial, or that defendant, his family, his friends, or any witnesses were improperly excluded); People v. Woodward, 4 Cal. 4th 376, 384, 841 P.2d 954, 958, 14 Cal.Rptr.2d 434 (1992) (cases that address total closures found "inapposite" because "existing spectators were allowed to remain in the courtroom, and any member of the public could enter the courtroom during specified recesses."), cert. denied, 507 U.S. 1053 (1993).

This Court has similarly distinguished a partial closure from a full one. In State v. Lormor, the trial court ordered the exclusion of one person, the defendant's four-year-old, terminally ill daughter, from the courtroom. 172 Wn.2d 85, 87-89, 257 P.3d 624 (2011). The child was wheelchair-bound and used a ventilator to breathe. The judge could hear the ventilator operating from the bench and did not want the noise to distract jurors. Id. at 87-88. No other member of the public was excluded from the courtroom. Id. at 92-93.

This Court discussed the pertinent closure cases and the requirement that the Bone-Club factors be applied. But it held, "These rules come into play when the public is fully excluded from proceedings within a courtroom." Lormor, 172 Wn.2d at 92. It concluded that excluding one person only and allowing everyone else is not a closure. "Rather, a 'closure' of a courtroom occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." Id. at 93.

In Shearer's case, the trial court effectuated a full closure. No members of the public were invited into chambers. The closure was not trivial. For the above reasons, Shearer urges this Court to not adopt a triviality, or de minimis, standard to apply in determining whether a total closure violated a defendant's right to an open and public trial. Or if it chooses to approve of a triviality test, it should find the closure here was not trivial.

For a practical reason as well, this Court should reject a de minimis standard. The standard would not only require a fact-specific, case-by-case approach, but would necessarily involve awkward and subjective line-drawing that raises obvious questions. For example, would a 30-minute closure be de minimis, but not a 60-minute one? Would private questioning of one prospective juror be trivial, but not three jurors?

Would closure of a motion to sever counts or defendant be trivial, but a motion to suppress evidence not?

Adopting a de minimis standard would be a disaster to apply, especially where it is so easy for trial judges to apply the Bone-Club factors before excluding the public. This Court should reject the de minimis standard.

8. *The trial court's error was structural.*

The trial court's error was structural under the Sixth Amendment. See Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 1833, 144 L. Ed. 2d 35 (1999) (violation of right to public trial is structural, citing Waller); Arizona v. Fulminante, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (same); State v. Grenning, 169 Wn.2d 47, 60 n.11, 234 P.3d 169 (2010); State v. Levy, 156 Wn.2d 709, 724 n.3, 132 P.3d 1076 (2006)

The same is true under the state constitution. This Court has consistently found the denial of the right to a public trial to be structural error presumed to be prejudicial. Wise, 176 Wn.2d at 14; Easterling, 157 Wn.2d at 181; Orange, 152 Wn.2d at 814; Bone-Club, 128 Wn.2d at 261-62; Marsh, 126 Wash. at 146-47. The structural error remedy of reversal will always apply absent extraordinary circumstances. See Strode, 167 Wn. 2d at 226 (right to public trial is "strictly guarded to assure that

proceedings occur outside the public courtroom in only the most unusual circumstances"), citing Easterling, 157 Wn.2d at 174-75.

The only case in which this Court held the closure of part of voir dire was not structural error was Momah, 167 Wn.2d at 156. Momah is easily distinguishable because of its unusual facts. In Momah, defense counsel affirmatively assented to the closure, argued for its expansion, and did not object to closure when given the chance. Momah's counsel deliberately chose to pursue an in-chambers conference. Momah, 167 Wn. 2d at 155. This Court found that "due to the publicity of Momah's case, the defense and the trial court had legitimate concerns about biased jurors or those with prior knowledge of Momah's case." Id. at 156.

None of those facts exist in Shearer's case. Defense counsel did not affirmatively assent to questioning in chambers, did not argue for its expansion, and was not directly asked whether she objected. The trial court, not the parties, deliberately chose to retire to chambers for the voir dire. Finally, the record does not suggest publicity gave rise to the possibility of contaminated jurors.

As a practical matter, reversal and retrial is the only available remedy for improper closure of voir dire absent extraordinary circumstances. A suppression hearing, such as the one found to be improperly closed in Waller, can be easily redone. Voir dire, in contrast,

involves a jury. Remand for public voir dire is a meaningless remedy absent a new trial. It is also a waste of time, for the new jury will have nothing to do. The proper remedy for Shearer is the structural error remedy – a new trial.

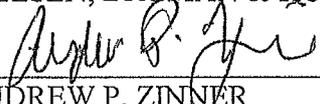
D. CONCLUSION

For the aforesaid reasons, this Court should uphold the Court of Appeals opinion, reverse Shearer's convictions, and remand for a new trial.

DATED this 26 day of June, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 65053-0-1
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
GREGORY PIERCE SHEARER,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: May 31, 2011
_____)		

LAU, J. — Article I, section 22 of the Washington State Constitution guarantees a criminal defendant the right to a public trial. In this case, the trial court conducted voir dire of an individual juror in chambers without first addressing and weighing the five factors set forth in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). Because a failure to conduct a Bone-Club analysis before closing criminal trial proceedings requires reversal in all but the most exceptional circumstances, we reverse Gregory Shearer's convictions for felony harassment and fourth degree assault and remand.

FACTS

The State charged Gregory Shearer with felony harassment and fourth degree assault of his girl friend, Lynn Honcoop, for events occurring during an argument at their shared residence. During voir dire, the prosecutor asked whether anyone was a recent

victim of or knew a recent victim of domestic violence. Prospective juror 7 raised her hand.

When the prosecutor asked how she felt about it, juror 7 said she did not want to talk about it. She said it was difficult to discuss in front of strangers. The trial court asked, "Would it be more comfortable if counsel and you and I were to meet in chambers so you can discuss it with us there?" Juror 7 said, "Yes." Report of Proceedings, Voir Dire (Jan. 12, 2010) (RPVD) at 38. The court asked whether

anyone in this courtroom who would have any objection if the court reporter, counsel, and myself, and the defendant went into chambers to ask some questions of Juror Number 7 in private? Is there anyone here who would object at all to having that take place in that manner?

RPVD at 39. Hearing no objections, the court reporter, judge, counsel, and Shearer went into chambers with juror 7. She then revealed her six-month-old grandson was killed by his father in her family home. She said she was still healing from the loss and that it would likely affect her decision in Shearer's case. Shearer's counsel moved to excuse for cause and the court granted the motion.

ANALYSIS

Shearer contends that the trial court violated his right to a public trial when it conducted voir dire of individual jurors in chambers. 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. State v. Easterling, 157 Wn.2d 167, 173-74, 137 P.3d 825 (2006).

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

Amendment to the United States Constitution states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial"¹ These provisions assure a fair trial, foster public understanding and trust in the judicial system, and give judges the check of public scrutiny. State v. 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)). While the right to a public trial is not absolute, Washington courts strictly guard it to assure that proceedings occur outside the public courtroom in only the most unusual circumstances. State v. Strode, 167 Wn.2d 222, 226, 217 P.3d 310 (2009); Easterling, 157 Wn.2d at 174-75; In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004).

To protect the defendant's right to a public trial, our Supreme Court held in Bone-Club that a court must analyze and weigh five factors before closing part of a criminal trial.² This requirement applies to the closure of jury selection. Orange, 152 Wn.2d at 807-14. Here, the record reflects that the court conducted questioning in chambers to

¹ Additionally, article I, section 10 of the Washington State Constitution provides, "Justice in all cases shall be administered openly, and without unnecessary delay." This provision secures the public's right to open and accessible proceedings.

² 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 (alteration in original) (quoting Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

protect the privacy of prospective jurors without first undertaking the required Bone-Club analysis.

The State contends that, notwithstanding this error, Shearer is not entitled to appellate relief. As in State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), cert. denied, 131 S. Ct. 160 (2010), the State argues the error was not a structural one and that it caused no prejudice and thus does not require reversal. The State points out that Shearer did not object to the procedure, participated in it, and that the procedure ensured jury impartiality.

On the other hand, Shearer contends that this case is not like Momah but is instead controlled by Strode and State v. Bowen, 157 Wn. App. 821, 239 P.3d 1114 (2010). Under Strode, the failure to conduct a Bone-Club analysis before conducting voir dire in chambers requires automatic reversal and remand for a new trial. Strode, 167 Wn.2d 222. Shearer is correct.

Momah involved unusual circumstances. The media had heavily publicized Momah's case, which raised concerns about juror impartiality. Momah, 167 Wn.2d at 145. As a result, the court and counsel conducted individual voir dire of those potential jurors who indicated that they had prior knowledge of the case, asked for private questioning, or stated they could not be fair. Momah, 167 Wn.2d at 145-46. Although the trial court did not explicitly apply the Bone-Club factors before closing the courtroom, our Supreme Court affirmed Momah's conviction. Momah, 167 Wn.2d at 145, 156. The court observed that the trial court and counsel recognized and "carefully considered" Momah's competing article I, section 22 rights. Momah, 167 Wn.2d at 156. And "Momah affirmatively assented to the closure, argued for its expansion, had the

opportunity to object but did not, actively participated in it, and benefited from it.”

Momah, 167 Wn.2d at 151. The court concluded that Momah’s conduct was indicative of deliberate tactical choices to protect his right to an impartial jury. Momah, 167 Wn.2d at 155; see also Strode, 167 Wn.2d at 234 (Fairhurst, J., concurring) (“The record shows [Momah] intentionally relinquished a known right.”). The court found these circumstances distinguished Momah from the court’s previous public trial cases. Momah, 167 Wn.2d at 151.

Strode, in contrast, presented an “unexceptional” set of facts. Strode, 167 Wn.2d at 223. The trial court and counsel, out of concern for juror privacy, individually questioned in chambers potential jurors who had been victims of a sexual offense or accused of committing a sexual offense. Strode, 167 Wn.2d at 224. The court did not conduct any Bone-Club analysis, and “the record [was] devoid of any showing that the trial court engaged in the detailed review that is required in order to protect the public trial right.” Strode, 167 Wn.2d at 228. Nor did Strode engage in behavior that indicated a deliberate, tactical choice or a waiver of his public trial right. Strode, 167 Wn.2d at 231-32 (Fairhurst, J., concurring). The court therefore reversed Strode’s conviction and remanded for a new trial. Strode, 167 Wn.2d at 231.

The State maintains that any violation of the public trial right resulting from the brief in-chambers voir dire of a single prospective juror was de minimis and caused no prejudice. The State argues that given the nature of this particular violation, reversal is an inappropriate remedy. We reject this argument. Under Momah and Strode, in all but the most exceptional circumstances, closing voir dire without employing the Bone-Club analysis is reversible error for which prejudice is presumed. Strode, 167 Wn.2d at 231

(citing Orange, 152 Wn.2d at 814). And although federal courts have adopted a de minimis trial closure standard,³ Washington courts have “never found a public trial right violation to be . . . de minimis.” Strode, 167 Wn.2d at 230 (quoting Easterling, 157 Wn.2d at 180)).

But the State argues, “Shearer’s constitutional right to a public trial was not implicated here where . . . no one, including the defense, objected to the closure and the juror was excused for cause.” Resp’t’s Br. at 7. But in Bowen, Division Two followed Strode despite the fact that the defendant did not object to in chambers voir dire. There, during jury selection, the trial court asked, “Does either party have an objection to allowing jurors to take up sensitive issues, sensitive questions, in chambers if they feel that that would be beneficial to them?” Bowen, 157 Wn. App. at 826. “Both the prosecuting attorney and defense counsel stated they had no objections.” Bowen, 157 Wn. App. at 826. Nevertheless, the court held, “[W]e cannot conclude that the trial court adequately safeguarded [the defendant’s] public trial right or that [the defendant] made deliberate, tactical choices precluding him from relief. Accordingly, we hold that this closure constituted structural error. We reverse his conviction and remand for a new trial.” Bowen, 157 Wn. App. at 833.

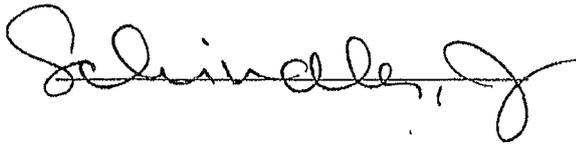
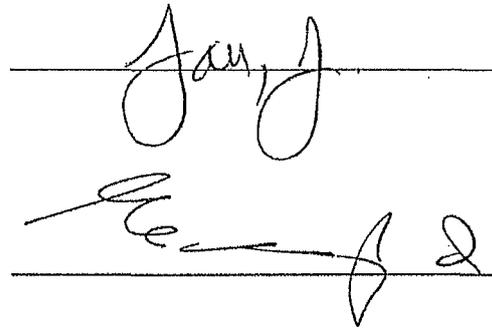
Pursuant to Strode, in all but the most exceptional circumstances, closing voir dire without employing the Bone-Club analysis constitutes error for which prejudice is presumed and remand for a new trial is required. Strode, 167 Wn.2d at 231 (citing Orange, 152 Wn.2d at 814). Here, as in Strode, the record does not indicate that the

³ See Easterling, 157 Wn.2d at 183 (Madsen, J., concurring) (citing numerous federal cases in support of a de minimis trial closure standard).

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trial court considered Shearer's public trial right in light of competing interests. Nor does the record establish that Shearer's conduct amounted to a knowing or tactical waiver of the right to a public trial. Accordingly, because the court improperly excluded the public from a portion of jury selection without applying the Bone-Club analysis, Strode requires that we reverse Shearer's conviction and remand for new trial.⁴

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Schindler", written over a horizontal line.Two handwritten signatures in cursive script, one above the other, each written over a horizontal line.

⁴ Given our resolution here, we decline to address Shearer's additional contentions or his statement of additional grounds.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Petitioner,)	
)	
v.)	NO. 86216-8
)	
GREGORY SHEARER,)	
)	
Respondent.)	

DECLARATION OF SERVICE

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

THAT ON THE 26TH DAY OF JUNE, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE SUPPLEMENTAL BRIEF OF RESPONDENT TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GREGORY SHEARER
P.O. BOX 241
MAPLE FALLS, WA 98266

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF JUNE, 2013.

x Patrick Mayovsky

OFFICE RECEPTIONIST, CLERK

To: Patrick Mayovsky
Cc: SHopkins@co.whatcom.wa.us; hthomas@co.whatcom.wa.us
Subject: RE: State v. Gregory Shearer, No. 86216-8 / Supplemental Brief of Respondent

Received 6-26-2013

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Patrick Mayovsky [<mailto:MayovskyP@nwattorney.net>]
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Cc: SHopkins@co.whatcom.wa.us; hthomas@co.whatcom.wa.us
Subject: State v. Gregory Shearer, No. 86216-8 / Supplemental Brief of Respondent

Attached for filing today is the supplemental brief of respondent for the case referenced below.

State v. Gregory Shearer

No. 86216-8

Supplemental Brief of Respondent

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