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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JERRY ALLEN HERRON,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF WHITMAN COUNTY

THE HONORABLE DAVID FRAZIER

SUPPLEMENTAL BRIEF OF RESPONDENT

DENIS P. TRACY
Whitman County Prosecuting Attorney

JENNIFER P. JOSEPH
Special Deputy Prosecuting Attorney
Attorneys for Petitioner

Whitman County Prosecuting Attorney
P.O. Box 30
Colfax, Washington 99111-0030
(509) 397-6250 FAX (509) 397-5659



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A. ISSUES PRESENTED

1. Whether in a criminal prosecution in which some prospective jurors were questioned in private during jury selection at defendant's request and after a colloquy on the record, the defendant waived his personal right to a public trial under Art. I, § 22 of the Washington Constitution.

2. Whether, a defendant who has waived his personal right to a public trial under Art. I, § 22 has standing to assert the public's right to open court proceedings under Art. I, § 10 of the Washington Constitution.

B. STATEMENT OF THE CASE

In 2007, the State charged Jerry Herron with Rape in the First Degree while armed with a deadly weapon. Clerk's Papers (CP) 8-10. The State alleged that Herron raped KB at knifepoint on the side of the road after offering her a ride from Airway Heights to Pullman. CP 2. KB was 22 years old; Herron was 57. CP 2, 3.

At a pretrial readiness hearing, the trial court advised the parties that recent appellate opinions had called into question its usual practice of individually questioning prospective jurors who indicated a preference for privacy. 1RP 68.¹ The prosecutor clarified that the issue was the

¹ The verbatim report of proceedings consists of seven volumes. Volume I contains the pretrial proceedings and is separately paginated. The State refers to this volume as "1RP." The remaining volumes are consecutively paginated and numbered I-A, I-B,

defendant's right to a public trial, including jury selection. 1RP 68. The court explained that it had "always done" private voir dire in sex offense cases for fear that jurors will not disclose experience with sexual abuse "and then there's a danger of seating jurors that aren't fair and unbiased." 1RP 69. The court indicated that private voir dire was for the "protection of the defendant," but that "if there is any objection, I can't follow that procedure." 1RP 69. Defense counsel stated, "we certainly don't object to that." 1RP 69.

The prosecutor made two suggestions for balancing the defendant's right to a public trial and the need for effective voir dire. Herron could effect a "knowing and voluntary waiver of his right in this regard ... after a colloquy from the bench, acknowledge his rights and agree to a procedure of questioning individual jurors in chambers." 1RP 69. "Or, alternatively, ... the court could take individual jurors to another room, which would be open to the public[.]" 1RP 70. In either case, the prosecutor explained, "the idea ... is that the jury selection process has to be open to the public." 1RP 70.

Defense counsel responded, "if we're looking for an affirmative waiver of a public examination of these individual jurors, Mr. Herron and

II-A, II-B, III, and IV. The State refers to this material by volume and page number, e.g., "I-A RP 7."

I are present, we're certainly willing to waive that." 1RP 70. Counsel

further argued that such examination should occur in chambers:

I think that an examination in private in your chambers with Mr. Herron present and myself and the prosecutor, I think that's going to bear far more fruit than just simply a voir dire situation, trying to get individuals to talk about some of these touchy ... things.

1RP 70.

The trial court then addressed Herron directly to ensure that he understood the issue. 1RP 71. Herron asked for private voir dire in chambers. 1RP 71. The court reiterated its concern that jurors might not be as forthcoming if questioned in public, informed Herron of his right to have all voir dire occur in open court, and stated that "that's going to be pretty much up to you as to your decision how we proceed." 1RP 71-72.

One week later, the trial court addressed the voir dire issue again in open court. 1RP 103. The court reiterated that "Mr. Herron has a right to have that inquiry done in open court in a public fashion[.]" 1RP 103.

Counsel represented that he and Herron had discussed the matter and did not oppose private voir dire:

I know Mr. Herron is prepared to – I don't know if waive his right to a public inquiry is the proper term here, but certainly we've discussed it and we would have no objection if somebody answers one of these questions in a way that would merit going into chambers, or going someplace else out of the – out of the hearing of the other panel members, we don't have any objection.

1RP 103-04. The court then addressed Herron directly:

Court: Mr. Herron, you understand you have a right to a public trial, where no one other than perhaps the witnesses are excluded from the courtroom, and where – when the jury questioning takes place, you have a right to have anybody that wants to be here present for that process. Do you understand that fully?

Defendant: Yes.

Court: And by the same token, if you want to waive that right so that jurors will know that if they respond positively to some of these questions about things like have they ever been accused of a sex offense or been a victim of a sex offense or an unwanted sexual touching, have a close friend or family member – we discussed last week, very often individuals are very reluctant to disclose those things, and particularly to disclose those things if they know they're going to be talked about in front of, well, for instance, 50 other jurors and other members of the public.

Defendant: Yes, sir.

1RP 104-05. The trial court reiterated that allowing jurors to speak about such matters in chambers encourages more open and honest disclosure, but that “it is totally your decision as to how that is handled.” 1RP 105.

Herron stated that he would “like it to be done that way,” by questioning individual jurors “in the judge’s chambers.” 1RP 105. He clarified that he would like to be present, and the court agreed that was necessary. 1RP 106. The court asked again whether Herron was “sure

this is how you want to proceed?" 1RP 106. Herron confirmed this was his wish. 1RP 106.

At this point, the prosecutor offered a third option:

Your Honor, the only other suggestion I have is that we present the defendant with the option of questioning potential jurors about these very intimate issue[s], not in front of the other potential jurors but not in a closed chambers situation, but rather in open court situation such as using the district court courtroom down the hall, so in an atmosphere that is open to the public, so it would comport with the defendant's right to a public trial, and yet would not cause a risk of tainting ... the potential jury pool. ... And I think as long as the defendant makes a knowing and intelligent, informed choice between all of these things, then I have no objection.

1RP 106-07. The prosecutor noted that "there would still be the risk ... of jurors not being as forthcoming about these intimate issue[s], because there might be members of the public there. But it's an option." 1RP 107.

Noting that some jurors might not be comfortable with the public's presence, the court nevertheless offered that procedure to Herron, who rejected it in favor of a completely closed proceeding:

Defendant: I'd rather have it done not in public with the jurors, your Honor.

Court: Not in public?

Defendant: Not in public –

Court: And in chambers –

Defendant: In chambers –

Court: In that fashion.

Defendant: Because I'd rather – I'd rather have people be (inaudible) not be influenced by other people, or maybe somebody they deal with down the street, or something; you know, (inaudible) being important. And I feel that it would be more appropriate (inaudible).

1RP 107-08.

The trial court found “that that’s a knowing and a voluntary decision. And I think it’s an intelligent decision on your part.” 1RP 108-09. Defense counsel responded, “And your Honor, we’d be willing to sign a written waiver to that effect as well.” 1RP 109. The trial court evidently did not require a writing, but concluded that “the waiver of the public aspect of the trial in only this limited regard is accepted.” 1RP 110.

A few days later, the trial court and parties conducted jury selection. 1RP 122; I-A RP 6. The trial court informed the venire of the option to discuss sensitive topics in a “confidential fashion.” I-A RP 6-7. Based on jurors’ responses to the questionnaires and during general voir dire in open court, the court and parties agreed to individually question 21 prospective jurors in chambers. I-A RP 61-67.

Defense counsel actively participated in the in-chambers voir dire, which was recorded. I-A RP 74-76, 78, 80-83, 88-89, 93-95, 99, 106-09; I-B RP 118-20, 124, 128-29, 146, 150, 153, 162. After Juror No. 12

explained that he still had “anger boiling up” about the rape of two friends, defense counsel thanked the juror for his candor and honesty, explaining, “That’s exactly why we’re ... going through this process.” I-A RP 92-93. During the private voir dire of Juror No. 49, defense counsel asked whether the juror’s son, a corrections officer, ever talked about people convicted of sex crimes. I-B RP 159, 162; CP 129. Following the juror’s response, the prosecutor asked the court to make a record about whether the defendant was waiving his public trial right with respect to that question, which appeared to be beyond the scope of Herron’s previous waiver. I-B RP 163. Herron had no objection, agreed it “should be handled here,” and was glad that his counsel had asked the question in chambers instead of open court. I-B RP 163-64.

Based on information gained in chambers, defense counsel successfully challenged Juror No. 12 for cause. I-A RP 95, 110; CP 129. Others’ candid responses led the trial court to sua sponte excuse Jurors No. 11, whose brother had been falsely accused of rape; No. 17, who said she could be “a little bit biased” because of her past work with children that had been abused; and No. 19, who said it “might be hard” for her to be fair. I-A RP 83-89, 100-01, 110, 139, 142-43; CP 128-29. Defense counsel also challenged Juror No. 26, who disclosed for the first time ever that she had been molested by an uncle. I-B RP 126-29. The trial court

overruled the challenge, but the defense later used a peremptory challenge to excuse her. I-B RP 130; CP 127. Defense counsel also challenged Juror No. 33, who stated she could be fair even though both her mother and mother-in-law had been raped at least ten years earlier. I-B RP 146-50; CP 128. The trial court overruled the objection. I-B RP 150. Though the defense had unused peremptory challenges, this juror was not excused and was seated for trial. CP 127.

Following trial, the jury found Herron guilty of Rape in the First Degree as charged; by special verdict the jury also found that Herron was armed with a deadly weapon at the time. CP 179-80. Based on an offender score of 7, the court imposed a lower-end standard range sentence of 207 months, plus the mandatory consecutive 24-month deadly weapon enhancement, for a total of 231 months. CP 208-23.

C. SUMMARY OF ARGUMENT

A majority of this Court agrees that a criminal defendant may validly waive his Art. I, § 22 right to public trial if his waiver is knowing, voluntary, and intelligent, even in the absence of a Bone-Club analysis. Herron was advised of his right to a public trial (including voir dire), the benefits of allowing prospective jurors to discuss sensitive issues related to sex offenses in private, various alternative voir dire procedures, and his right to insist that all voir dire occur in open court. After conferring with

counsel, Herron expressly chose private voir dire over open court. He then actively participated in, expanded, and benefited from the closed proceeding. This Court should give effect to Herron's constitutionally sufficient waiver by holding that he may not raise an Art. I, § 22 claim on appeal.

Neither may Herron assert a violation of the public's right to open proceedings under Art. I, § 10. To gain relief from the violation of a third party's legal right, a litigant must demonstrate that (1) he has suffered an injury in fact, (2) he has a close relationship with the third party, and (3) there is some impediment to the third party's ability to protect his or her own rights. Herron suffered no injury in fact because the proceedings were not closed to him and both he and his lawyer saw concrete advantages to questioning select jurors in private. He has no close relationship with the public because his insistence on a closed proceeding caused the public's ostensible injury and the remedy he seeks does not redress that injury. The press and members of the public can and have repeatedly asserted their Art. I, § 10 rights in other cases, and Herron identifies no impediment to their doing so in this case. Further, allowing a defendant to secure a closure for his own benefit and later seek to overturn his conviction based on the closure that he himself caused jeopardizes interests in fairness, finality, and judicial economy with no corresponding

benefit to the public. This Court should hold that one who validly waives the Art. I, § 22 right to public trial lacks standing to assert the public's right under Art. I, § 10.

Finally, even if Herron did not waive his personal right to public trial or has standing to assert the public's right, this Court should affirm because the trial court effectively performed the required analysis. A majority of this Court has held that when a trial court fails to conduct an express Bone-Club analysis, a reviewing court may examine the record to determine whether the trial court effectively weighed the defendant's public trial right against other compelling interests. Here, the trial court advised Herron and everyone else present of the right to a public trial, identified the defendant's right to an unbiased jury as the competing interest, acknowledged that the proceedings would not be closed if anyone objected, considered alternatives, and narrowly tailored a closure to accommodate only those jurors who indicated possible bias. This Court should hold that the trial court effectively considered all of the Bone-Club factors and Herron is therefore not entitled to relief.

D. HERRON VALIDLY WAIVED HIS ART. I, § 22 RIGHT TO PUBLIC TRIAL

Herron contends that the trial court did not obtain a valid waiver of his Art. I, § 22 right to a public trial because it did not first expressly

perform a Bone-Club² inquiry. A majority of this Court has rejected that argument. Additionally, while the court in this case never uttered the words “Bone-Club,” the record demonstrates that it nonetheless satisfied its requirements. This Court should hold that Herron validly waived his right to public trial and is entitled to no relief.

1. DEFENDANTS MAY VALIDLY WAIVE ART. I, § 22 RIGHTS WITHOUT A BONE-CLUB ANALYSIS.

While this Court has consistently treated the Art. I, § 22 right as waivable, there has been disagreement about how such a waiver can be made. See, e.g., State v. Frawley, 181 Wn.2d 452, 334 P.3d 1022 (2014); In re Pers. Restraint of Morris, 176 Wn.2d 157, 167, 288 P.3d 1140 (2012); State v. Strode, 167 Wn.2d 222, 229 n.3, 217 P.3d 310 (2009); State v. Easterling, 157 Wn.2d 167, 176 n.8, 137 P.3d 825 (2006); State v. Brightman, 155 Wn.2d 506, 514-15, 122 P.3d 150 (2005). In State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012), and State v. Paumier, 176 Wn.2d 29, 288 P.3d 1126 (2012), a narrow majority suggested that there can be no valid waiver in the absence of a Bone-Club inquiry. The two-justice lead opinion in Frawley adhered to that view, but all seven concurring and dissenting justices rejected it. Instead, as with any other constitutional right, a waiver of the right to public trial is valid when it is

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

knowing, voluntary, and intelligent.³ 181 Wn.2d at 467 (Stephens, J., concurring, with J. Fairhurst), 470-76 (Gordon McCloud, J., concurring and dissenting, with JJ. J. Johnson and Gonzalez), 477 (Wiggins, J., dissenting, with C.J. Madsen).

2. HERRON'S WAIVER WAS KNOWING, VOLUNTARY, AND INTELLIGENT.

A majority of this Court having recognized that a defendant is entitled to waive his public trial right and may do so in the absence of a Bone-Club inquiry, the question is whether Herron waived his right in this case. The record plainly demonstrates a knowing, voluntary, and intelligent waiver.

Herron was repeatedly advised of his right to a public trial and, specifically, his right to have all voir dire occur in open court. 1RP 68, 70, 72, 103, 104. He was also repeatedly advised that his ability to discover juror bias – and thus his ability to receive a fair trial – might be

³ The lead opinion in Frawley analogized to the right to a jury trial and acknowledged that waiver of a jury trial “does not require a colloquy or on-the-record advice as to the consequences of a waiver, but it does require an affirmative and unequivocal personal expression of waiver from the defendant.” 181 Wn.2d at 461-62. Noting that court rules require a jury trial waiver to be in writing, the lead opinion reasoned that “a knowing, voluntary, and intelligent waiver of the public trial right would require, at the very least, a written waiver signed by the defendant expressly acknowledging and waiving the right.” Id. at 462. But as Justice Gordon McCloud pointed out in her concurrence/dissent, this Court has upheld the waiver of a 12-person jury without a written waiver in State v. Stegall, 124 Wn.2d 719, 729, 881 P.2d 979 (1994). Moreover, in concluding that neither Frawley nor Applegate validly waived their right to public trial, the lead opinion did not rely upon or even reference the absence of a writing. See 181 Wn.2d at 462-63 (instead relying on trial court’s failure to advise defendants of their right to a public trial or the consequences of waiving that right).

compromised if potential jurors were unable to convey their experience with sex crimes in private. 1RP 69, 71-72, 104-05, 107-08, 109-10. Herron several times over a period of days discussed the matter with his attorney. 1RP 72, 103, 106. He was given a number of options, including having no private voir dire at all, examining potential jurors about sensitive matters in open court without the remainder of the venire present, and examining potential jurors about sensitive matters in closed chambers; he was told the decision was his. 1RP 69-70, 72, 104-05, 106-08.

Herron expressed his belief that private voir dire in chambers would better ensure that the prospective jurors would “not be influenced by other people” and was “more appropriate.” 1RP 108. His counsel agreed that “an examination in private in your chambers” would “bear far more fruit than just simply a voir dire situation[.]” 1RP 70. Both personally and through counsel, Herron repeatedly and clearly stated his preference to waive his right to public trial in order to examine the prospective jurors about sensitive matters in chambers. 1RP 69, 70, 103-04, 105, 106, 108-09. Herron was “willing to sign a written waiver to that effect as well.” 1RP 109.

As the trial court expressly found, 1RP 108-09, this record indisputably shows that Herron gave a knowing, intelligent, and voluntary waiver of his right to a public trial in order to better protect his right to a

fair trial by an unbiased jury. This Court should give effect to that waiver by holding that Herron may not raise an Art. I, § 22 claim on appeal.

E. HERRON LACKS STANDING TO ASSERT THE PUBLIC'S ART. I, § 10 RIGHT TO OPEN PROCEEDINGS

Having effectively waived his personal right to public trial under Art. I, § 22, Herron contends that the limited closure he orchestrated violated the public's right under Art. I, § 10. This Court should hold that a criminal defendant who waives his own right to public trial lacks standing to assert the public's interest.

At the outset, it is important to note that Herron does not assert *his own* § 10 right, as a member of the public, to the open administration of justice. Such a claim would be futile, as the Court of Appeals correctly held, because § 10 guarantees to Herron the very same right he affirmatively waived. State v. Herron, 177 Wn. App. 96, 106-07, 318 P.3d 281 (2013). "The waiver of one right was the waiver of the other." Id. at 107. Herron does not seek review of that conclusion. Rather, he attempts to challenge the purported violation "of *the public's open trial rights* under Section 10[.]" Petition for Review at 9.

In general, "a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." Powers v. Ohio, 499 U.S. 400, 410, 111 S. Ct. 1364, 113 L.

Ed. 2d 411 (1991). An exception is made only if the litigant satisfies three criteria: "(1) the litigant has suffered an injury-in-fact, which gives him or her a sufficiently concrete interest in the outcome of the issue in dispute; (2) the litigant has a close relation to the third party; and (3) there exists some hindrance to the third party's ability to protect his or her own interests." State v. Burch, 65 Wn. App. 818, 837, 830 P.2d 357 (1992) (citing Powers, 499 U.S. at 411) (internal quotation marks omitted).

Herron satisfies none of these criteria.

First, Herron cannot show an "injury in fact." The ostensible injury was exclusion from a portion of voir dire. Herron was not excluded from voir dire; nor is there any indication in the record that any member of the public who wished to observe voir dire was in fact excluded. At best, Herron can show a theoretical injury in that the public was not present to help "ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury" -- the purposes of the public trial right. Brightman, 155 Wn.2d at 514. But Herron chose a closed proceeding specifically to ensure a fair trial by encouraging candid and truthful responses. He suffered no injury from the implementation of his choice.

Second, Herron has no closer relationship to the general public than anyone else. In Powers, the Supreme Court observed that a defendant

and a juror excluded on the basis of race have a close relationship because “the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom.” 499 U.S. at 413. In this situation, however, Herron’s interest was in obtaining a closed proceeding so that he could effectively discover and remove biased jurors from his trial. If the public was interested in open proceedings, its interests were diametrically opposed to Herron’s.

That Herron cannot effectively raise the public’s right is also clear from the remedy he seeks. Violation of the public’s right, if any, came from examining certain jurors in chambers where the public could not hear what was said. The logical remedy for such a violation is to produce a transcript of what occurred in the private proceeding. But that is not the remedy Herron seeks; he wants a new trial. Nothing about a new trial serves to reveal what was hidden in the first trial. Because Herron’s and the public’s interests differ, there is no “congruence of interests” that make it “necessary and appropriate for the defendant to raise the rights” of the public. See Powers, 499 U.S. at 414.

Third, Herron has shown no impediment to the public’s ability to protect its own interests. The press has regularly asserted its right to the open administration of justice. See, e.g., Seattle Times v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982) (press challenged closure of pretrial

motion and sealing of transcript); Fed. Publications, Inc. v. Kurtz, 94 Wn.2d 51, 615 P.2d 440 (1980) (press challenged order barring press and public from pretrial suppression hearing); State ex rel. Snohomish County Sup. Court v. Sperry, 79 Wn.2d 69, 483 P.2d 608 (1971) (press challenged ruling holding reporters in contempt for reporting results of suppression hearing). Individual members of the public have also asserted § 10 rights. See State v. Richardson, 177 Wn.2d 351, 302 P.3d 156 (2013) (intervenor challenged order denying motion to unseal criminal records); Bennett v. Smith Bundy Berman Britton, PS, 176 Wn.2d 303, 291 P.3d 886 (2013) (intervenor challenged order sealing documents).

Herron suggests that the public was unable to assert its rights because it was given no notice of the impending closure. He is mistaken. As noted above, the trial court and parties discussed in open court on two separate days the public trial right as it applied to voir dire, the concerns that prompted the court to consider closure, and various alternatives. The court indicated that it could not conduct private voir dire if there was “any objection.” From this, any interested member of the public had notice sufficient to allow it to assert the right to open administration of justice.

Finally, permitting Herron to assert the public’s right to open administration of justice after causing the very violation of which he now complains is inconsistent with public policies favoring fairness, finality,

and judicial economy. To recognize such a right “essentially gives the litigant the ability to try the case in his preferred manner (without public scrutiny) but obtain a new trial if things do not go in his favor.” In re Det. of Reyes, 176 Wn. App. 821, 847, 315 P.3d 532 (2013), rev. granted, 182 Wn.2d 1001 (2015). This is an unjust and unreasonable result, which this Court should avoid.

F. HERRON’S CASE IS “MORE MOMAH-LIKE THAN MOMAH ITSELF”

Even if this Court concludes that Herron could not waive his rights in the absence of a Bone-Club inquiry, and that he has standing to raise the public’s right to open proceedings, he is not entitled to relief under State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009). Momah involved a highly publicized rape prosecution. Id. at 145. Due to concerns over jurors’ exposure to media coverage, the trial court and parties decided to question a number of prospective jurors in private. Id. at 146. Momah’s counsel argued for an expansion of the in-chambers questioning, actively participated in the questioning, and benefited from it by exercising challenges for cause. Id. at 146-47. Although the trial court did not explicitly consider the Bone-Club factors before conducting voir dire in chambers, this Court held that there was no structural error entitling Momah to automatic reversal. Id. at 155-56.

This Court has emphasized that Momah presented unique facts unlikely to be repeated, but has never overruled the decision. Indeed, in State v. Smith, 181 Wn.2d 508, 334 P.3d 1049 (2014), this Court recently relied on Momah to conclude, “When a court fails to conduct an express Bone-Club analysis a reviewing court may examine the record to determine if the trial court effectively weighed the defendant’s public trial right against other compelling interests.” 181 Wn.2d at 520. The Court of Appeals aptly observed that this case is “more Momah-like than Momah itself.” Herron, 177 Wn. App. at 110. Because this case is not distinguishable from Momah, this Court should affirm.

This Court has identified two principal distinctions between Momah and other public trial violation cases that justified denying Momah relief. First, “more than failing to object, the defense affirmatively assented to the closure of voir dire and actively participated in designing the trial closure[.]” Wise, 176 Wn.2d at 14. While this did not amount to “classic invited error,” the degree to which Momah participated in designing the closure demonstrated a deliberate choice that did not warrant reversal. Id. at 154-56. Second, “though it was not explicit, the trial court in Momah effectively considered the Bone-Club factors.” Id. Momah was unique because “although the court erred in failing to comply with Bone-Club, the record made clear—without the need for a post hoc

rationalization—that the defendant and public were aware of the rights at stake and that the court weighed those rights, with input from the defense, when considering the closure.” Id. at 15. The same is true here.

As in Momah, defense counsel, the prosecution, and the judge discussed various proposals concerning juror selection before the in-chambers voir dire began. See Momah, 167 Wn.2d at 155. Indeed, the discussions in this case included the defendant himself. In Momah, the defendant was provided the opportunity to object and did not. 167 Wn.2d at 155. Here, Herron was not only provided an opportunity to object, the matter was left entirely up to him. In Momah, defense counsel “affirmatively assented to, participated in, and even argued for the expansion of in-chambers questioning.” 167 Wn.2d at 155. Likewise, Herron and his counsel affirmatively explicitly chose and participated in the private voir dire, and effectively expanded the closure by asking one potential juror about a matter that was not among the intimate topics for which the closure was initially sought. I-B RP 162-64. And, just as in Momah, the private voir dire allowed the defendant and trial court to identify and remove biased jurors. 167 Wn.2d at 155.

Further, as in Momah, the record establishes that the trial court effectively considered the Bone-Club factors before closing the proceeding. Bone-Club first requires the proponent of closure to show a

compelling interest to be protected by closing the proceedings. 128 Wn.2d at 258. Here, the trial court identified the need to overcome jurors' reluctance to discuss sex-related issues in public and obviate "the danger of seating jurors that aren't fair and unbiased."⁴ 1RP 69.

Bone-Club also requires the trial court to give anyone present the opportunity to object. 128 Wn.2d at 158-59. The Court of Appeals believed that the trial court "missed" this requirement, Herron, 177 Wn. App. at 108, but the record does not compel that conclusion. Rather, the court addressed the issue in two different hearings in open court, made clear that the right to public trial applies to jury selection, explained why private voir dire may produce a fairer result, and stated that "if there is *any* objection I can't follow that procedure." 1RP 68, 69, 103-05 (emphasis added). The record does not disclose whether any member of the public was present at either of these hearings, but the court's remarks accurately conveyed that anyone had the right to object.

Third, the closure must be the least restrictive means available for protecting the threatened interest in a fair trial, and the court must consider alternatives to closure. Bone-Club, 128 Wn.2d at 158-59; Presley v. Georgia, 558 U.S. 209, 214-15, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010).

⁴ Because the competing interest is the accused's right to a fair trial, the court need only identify a "likelihood of jeopardy" rather than a "serious and imminent threat" to some other right. Id.; Ishikawa, 97 Wn.2d at 37.

Here, the trial court closed a portion of voir dire for only those jurors who expressed reluctance to speak about their experience with sex crimes, and the closed proceedings were recorded and transcribed. The court and parties considered alternatives to closure, which Herron rejected as insufficiently protective of his right to an impartial jury.

Fourth, the court must weigh the competing interests of the proponent of closure and the public. Bone-Club, 128 Wn.2d at 158-59. Here, the trial court clearly and repeatedly articulated why it considered the limited closure necessary to protect the defendant's right to a fair trial. Finally, the closure must be no broader in application or duration than necessary to serve its purpose. Again, the closure in this case was narrowly tailored to accommodate only those jurors who indicated experiences that bore on their ability to be impartial and who were unwilling to freely discuss sensitive information in a public setting.

Thus, as in Momah, the record demonstrates that the defendant and spectators "were aware of the rights at stake and that the court weighed those rights, with input from the defense, when considering the closure." Wise, 176 Wn.2d at 14-15. Because the trial court effectively considered the Bone-Club factors, albeit not by name, this Court should conclude that Herron has not established a violation justifying automatic reversal. Momah, 167 Wn.2d at 155-56; Smith, 181 Wn.2d at 520.

G. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Herron's conviction for Rape in the First Degree.

DATED this 25th day of March, 2015.

Respectfully submitted,

DENIS P. TRACY
Whitman County Prosecuting Attorney

By: Jennifer P. Joseph
JENNIFER P. JOSEPH, WSBA #35042
Special Deputy Prosecuting Attorney
Attorneys for Respondent

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jeffrey Finer (jeffry@finer-bering.com), containing a copy of the SUPPLEMENTAL BRIEF OF RESPONDENT, in STATE V. JERRY HERRON, Cause No. 89571-6, in the Supreme Court, 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.

Dated this 25th day of March, 2015



Name

Done in Seattle, Washington

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Cc: Joseph, Jennifer; jeffry@finer-bering.com; denist@co.whitman.wa.us
Subject: State v. Jerry Allen Herron, Supreme Court No. 89571-6

Please accept for filing the attached documents (Motion to File Overlength Brief and Supplemental Brief of Respondent) in State of Washington v. Jerry Allen Herron, No. 89571-6.

Thank you.

Jennifer P. Joseph
Deputy Prosecuting Attorney
WSBA #35042
King County Prosecutor's Office
W554 King County Courthouse
Seattle, WA 98104
206-477-9530
E-mail: jennifer.joseph@kingcounty.gov
E-mail: PAOAppellateUnitMail@kingcounty.gov
WSBA #91002

This e-mail has been sent by Wynne Brame, paralegal (phone: 206-477-9497), at Jennifer Joseph's direction.

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