

No. 59960-7-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

WILLIAM RICHARD COGGIN, Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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FILED
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON
2010 APR 27 AM 10:35

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SUPPLEMENTAL BRIEF ISSUE

The Court has requested the parties to address the application of State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009) and State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009) to this case.

A. SUMMARY ANSWER

The majority opinion in Momah clearly holds that unless a trial is rendered fundamentally unfair by a courtroom closure, automatic reversal is not required. A trial is not rendered fundamentally unfair where the courtroom closure occurred to protect the defendant's right to a fair and impartial jury and the defendant wasn't actually prejudiced by the closure. Strode, on the other hand, is a plurality opinion with two justices concurring only in the result. Post Momah petitioner still bears the burden of demonstrating actual prejudice from constitutional error. Not all Art. 1 § 22 violations are structural errors and prejudice can no longer simply be presumed in such cases: the prejudice must be sufficiently clear to require the remedy of a new trial. Assuming there was de facto closure and one which Coggin did not invite or waive¹, Coggin was not actually prejudiced

¹ The State still asserts, in accord with its response brief, that Coggin's actions in this case constitute invited error and/or that he waived any error.

by the closure where defense counsel encouraged jurors² to seek private questioning if they so desired, part of the voir dire occurred in chambers to avoid tainting the rest of the jury from jurors' prior knowledge of the case and prior experiences with sexual assault, and the process resulted in a number of jurors being excused for cause, including three based on defense motion. Where, as in Momah, defense counsel assented to and encouraged the in chambers voir dire and where Coggin suffered no prejudice and actually benefitted from it, no structural error occurred and reversal is not warranted.

B. ARGUMENT

Under the clear majority opinion in Momah no structural error occurred under the facts of this case requiring reversal. In Momah the majority emphasized that the “central aim of any criminal proceeding must be to try the accused fairly,” and that a defendant’s right to public trial does not exist, and cannot be considered, in isolation from his other constitutional rights. Momah, 167 Wn.2d at 147-48. The public trial right is not absolute, but exists so that the public may see that the defendant is dealt with fairly and that his triers are kept keenly aware of their

² The State uses the term “jurors” to refer to members of the venire panel for ease of reference, although the members had not been seated.

responsibility and the importance of their function. Id. at 148. In that case the judge and the parties used jurors' responses to a questionnaire to determine which jurors should be questioned individually. Defense counsel not only agreed to question those jurors privately in chambers, but argued for expansion of the in-chambers questioning. Id. at 145-46. Defense counsel actively participated in the private questioning and counsel exercised a number of challenges for cause as a result of that questioning. Id. at 146-47. The trial court did not conduct a Bone-Club³ analysis prior to in chambers questioning, although it did consider the defendant's public trial rights and balanced them against the defendant's right to a fair and impartial jury.

The court ultimately held that the trial court's closure did not constitute structural error and therefore automatic reversal was not appropriate. Under Momah whether a closure error constitutes structural error necessarily depends upon the nature of the violation: "If, on appeal, the court determines that the defendant's right to public trial has been violated, it devises a remedy appropriate to the violation." Id. at 149. If the error is structural, automatic reversal is warranted. Id. An error is only structural though if the error "necessarily render[s] a criminal trial

³ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” Id. (*quoting* Washington v. Recuenco, 548 U.S. 212, 218-19, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)).

The court noted that in its prior cases of State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006) and In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), new trials were required because the trials had been rendered fundamentally unfair by the closure. Id. at 150-51. In Easterling, the closure prevented the defendant from being present at a portion of his own trial, without the court ever having consulted with him. Id. at 150. In Orange, the trial was rendered fundamentally unfair because the closure excluded the defendant’s family and friends from being present during voir dire, despite the defendant’s repeated requests that they be present. Id. at 150-51. In those cases, where the prejudice was sufficiently clear, the errors were deemed to be structural. Id. at 151.

In distinguishing those prior cases where structural error was found, the Court noted that in Momah’s case, the defendant had “affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it and benefitted from it.” Id. at 151. The court presumed that the defendant made “tactical choices to achieve what he perceived as the fairest result.” Id. at 155. In

concluding that the closure in Momah was not structural error, the court noted that the closure only occurred after the trial court consulted with the defense and prosecution, and found that the record showed that the closure occurred to protect the defendant's right to an impartial jury and did not prejudice him. *Id.* at 155-56.

On the other hand, as a plurality opinion Strode provides questionable guidance in addressing the issue under the circumstances of this case. "A plurality opinion has limited precedential value and is not binding on the courts." In re Isadore, 151 Wn.2d 294, 303, 88 P.3d 390 (2004). "Where there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds." State v. Zakel, 61 Wn. App. 805, 808, 812 P.2d 512 (1991) *affirmed*, 119 Wn.2d 563, 834 P.2d 1046 (1992). The plurality in Strode found that the record did not reflect that either the closing of the courtroom was necessary to safeguard the defendant's right to a fair trial or that there was a knowing and voluntary waiver of that right. Strode, 167 Wn.2d at 234. In Strode, the plurality opinion would hold that a court must perform a Bone-Club analysis on the record prior to closing a courtroom in unexceptional circumstances, and that failure to do

so is structural error that can never be harmless. Strode, 167 Wn.2d at 223.

The concurring opinion took exception, however, to the plurality opinion's requiring an on-the-record colloquy before waiver could be found and permitting a defendant to raise the public's, and the media's, right to open proceedings in order to overturn his conviction. *Id.* at 235-36. It concurred in the result in Strode because it concluded that under the facts of the case the defendant's public trial rights had not been waived or safeguarded per Bone-Club, because the court had not weighed the defendant's right to public trial against the competing interests. *Id.* at 232, 235.

Coggin has asserted that he is entitled to assert a violation of the public's right to open proceedings under Article 1 §10 of the Washington Constitution. However, only the plurality opinion in Strode would permit Coggin to assert someone else's right in order obtain a new trial. The concurrence in Strode specifically rejected the plurality's merging of the public's right to open proceedings under Article 1 §10 and the defendant's right to a public trial under Article 1 §22. *See, Strode*, 167 Wn.2d at 232, 236 (J. Fairhurst concurring); *see also*, RCW 7.36.130(1). In Momah, the majority only addressed whether there was a violation of and structural

error regarding a violation of the defendant's right to public trial under Art. 1 §22. *See, Momah*, 167 Wn.2d at 147 . While the opinion does reference Art. 1 §10, it does so only in the context of the development of the Bone-Club factors test, which was borrowed from civil cases addressing allegations of Art. 1 §10 violations. *Id.* at 147-48.

Even if Coggin's conduct does not rise to the level of invited error, his actions should be taken into consideration, just as the defendant's were in Momah, in determining what, if any, remedy is appropriate. Here, the record demonstrates that the defense counsel and the prosecutor agreed on the specific questionnaire that advised the jurors to request to speak in a "closed hearing" if they had concerns about answering certain questions in public. VDRP 34; State's Response Brief, Appendix C at 1; Appendix B at 1. It was the prosecutor's understanding from defense counsel that defense wanted to have jurors interviewed privately in chambers because of the publicity surrounding and the sexual nature of the case, to avoid tainting the rest of the panel. State's Response Brief, Appendix B at 2. Twice during general voir dire defense counsel encouraged the jurors to seek private questioning in chambers if they felt uncomfortable about

anything. VDRP 92, 119-20.⁴ Defense counsel also expanded the questioning that occurred in chambers beyond that related to the questionnaire answers. VDRP 36-37, 41.

Defense counsel made a tactical choice to agree to in chambers questioning of jurors who had concerns about the case and their ability to be fair. In addition to not objecting to the process and actively participating in it, Coggin's counsel agreed to the process and encouraged it. Presumably he did so for the same reason in Momah, as a tactical decision to achieve the fairest trial for Coggin.

Coggin also benefitted from the in chambers process. A number of jurors were excused for cause, and three based on defense motion. VDRP 60-63. The purpose of the in chambers process was clearly aimed at ensuring that the jury was fair and impartial. Individual voir dire occurred to allow jurors to give candid responses to questions regarding sensitive

⁴ Mr. Stearns: ... "It's probably even not that much personal but if you do feel there is something I ask you about, or Mr. McEachran when he later speaks to you again, that you feel uncomfortable speaking about, please let us know and *please ask to have that heard in chambers* because, like I say, the goal here is to find people who feel this is the right case for them." VDRP 92 (emphasis added)

Mr. Stearns: ... "And I counsel you once more that if there is something we have brought up that made you think about your ability to be fair, or something we haven't brought up and you now say I thought about this case and I thought about a home invasion sexual assault and I know those are facts I can't sit on, *I'd encourage you again to let the judge know and we can go back into chambers and speak to the court again.*" VDRP 119-20 (emphasis added).

issues regarding their experience with sexual assault, and to voice any preconceived notions they might have about the case given pretrial publicity and their backgrounds. State's Response Brief, Appendix C. This case had received a fair bit of press including a story the morning of voir dire mentioning that Coggin was a convicted felon. VDRP 38-40, 46, 49-50, 55-57, 59. Conducting individual jury voir dire in chambers safeguarded Coggin's right to a fair and impartial jury and did not prejudice him.⁵

Although there was no discussion regarding the defendant's right to a public trial here like there was in Momah, defense counsel did not simply fail to object to the in chambers process, he agreed to it, encouraged it and Coggin benefitted from it. The process itself safeguarded Coggin's right to an impartial jury. There is no showing of prejudice to the defendant as there was in Orange and Easterling. As such, no structural error occurred. As the court summarized in Momah:

... courts grant automatic reversal and remand for a new trial only when errors are structural in nature. An error is structural when it necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. In each case, the remedy must be appropriate to the violation.

⁵ See, Commonwealth v. Horton, 753 N.E.2d 119, 128 (Mass. 2001) ("In light of the defendant's consent to the procedure, his presence throughout the voir dire, and the fact that the less public setting for the voir dire in all likelihood helped rather than harmed the defendant, we find no prejudice to the defendant from the setting in which this voir dire was conducted.")

217 P.3d at 155-56. A new trial would not be an appropriate remedy in this case because the closure here did not render Coggin's trial fundamentally unfair.

C. CONCLUSION

Under Momah, not all closures, or in chambers questioning of jurors, results in structural error requiring reversal. Only where the prejudice is "sufficiently clear" should a new trial be ordered. *See, Momah*, 167 Wn.2d at 151. The in chambers voir dire that safeguarded Coggin's right to an impartial jury did not result in any prejudice to Coggin and did not render his trial fundamentally unfair. Coggin cannot meet his burden to demonstrate actual prejudice and his petition should be dismissed.

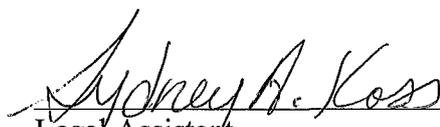
Respectfully submitted this 23rd day of April, 2010.


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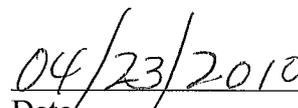
CERTIFICATE

I certify that on this date I placed in the mail with proper U.S. postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, Jennifer Winkler, addressed as follows:

Nielsen, Broman & Koch, PLLC
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Legal Assistant



Date