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NO. 62864-0-I

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

STATE OF WASHINGTON,

Plaintiff-Respondent,

v.

TSEGAZEAB ZERAHAIMANOT,

Defendant-Appellant.

APPELLANT'S REPLY BRIEF

Appeal from the Snohomish County Superior Court
The Hon. Michael T. Downes, Superior Court Judge
No. 07-1-03039-0

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I. ARGUMENT IN REPLY

Zerahaimanot's Right to an Open and Public Trial Was Violated When the Trial Court Sealed Juror Questionnaires Without First Conducting a *Bone-Club* Hearing.

Introduction

In its *Brief of Respondent* [hereinafter *Response*], the State concedes that (a) the requirement of a *Bone-Club*¹ hearing applies to the sealing of juror questionnaires; and (b) no *Bone-Club* hearing was held in this case. *Response*, at 7-10. In short, the State concedes error. Rather than risk losing credibility by arguing that no violation of Zerahaimanot's right to a public occurred, the State elects to wage its battle over the issue of remedy, and urges this Court to remand the case for a "retroactive"—and therefore meaningless—*Bone-Club* hearing. *Response*, at 15.

In order to make its argument the State ignores serious questions about the continued vitality of this Court's decision in

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

Coleman after *Strode* and *Momah*.² Clinging to the Court’s reasoning in *Coleman*, the State also distorts the record (and reality) by maintaining that “there was nothing that prevented the public from viewing [the questionnaires] . . . while the jury was being selected.” *Response*, at 15. Finally, recognizing that a straightforward application of *Strode* requires reversal of Zerhaimanot’s conviction, the State attempts to minimize the holding of *Strode* and its effect on the outcome of this case. *Response*, at 16-17.

The Record Supports Only One Reasonable Conclusion: the Questionnaires Were Never Available to the Public.

The trial court entered a sweeping order which sealed not only the juror questionnaires, but also jurors’ biographical forms and letters from jurors’ employers regarding hardship. CP 149. By its terms, the sealing order served but a single purpose—to protect the privacy of jurors. *Id.*, citing GR 31(j).

² *State v. Coleman*, 151 Wash. App. 614, 214 P.3d 158 (2009); *State v. Strode*, 167 Wash.2d 222, 217 P.3d 310 (2009); *State v. Momah*, 167 Wash.2d 140, 217 P.3d 321 (2009).

It defies logic to contend that the trial court would allow members of the general public to view the questionnaires, forms and letters *during* jury selection, only to seal those materials *after* jury selection in order to protect jurors' privacy. The State's suggestion that this is what occurred is both frivolous and disingenuous.

Moreover, the State's fantasy that the sealed juror materials may have been publicly available at some point during the trial is flatly contradicted by the trial court's colloquy with counsel prior to the commencement of jury selection:

[Defense counsel]: Two question [sic] I have: Am I correct in assuming that the questionnaires cannot leave the courtroom? Can we take them?

The Court: Let me think about that.

[Defense counsel]: Certainly keep them confidential.

The Court: Let me think about that. ***Certainly if I do allow you to take them from the courtroom, nobody is going to be allowed to take [sic] copies or anything***

like that, and I'm going to want them back.

I RP 4-5 (emphasis supplied). The trial court's reluctance to allow even officers of the court to remove the juror materials from the courtroom is entirely consistent with a desire to keep those materials from the view of the general public, and entirely consistent with the sealing order that was entered *immediately* upon completion of jury selection. What it is not consistent with is the State's wishful conjecture that the materials were in the public domain for some period of time, only to be sealed later to protect some already-breached privacy concerns.

Coleman's Harm and Remedy Analysis Is Not the Law.

In its response the State relies heavily on this Court's decision in *Coleman* for the dual propositions that (a) despite the failure to hold the required *Bone-Club* hearing, sealing of juror questionnaires in this case was not a structural error; and (b) the proper remedy is remand for a "retroactive" *Bone-Club* hearing. *Response*, at 11-16. Yet the State fails to respond at

all to Zerahaimanot's argument that *Coleman* was overruled *sub silentio* by *Strode* and *Momah*. See *Opening Brief*, at 32-34. The State's reliance on *Coleman* is misplaced.

Coleman's complete analysis of the structural error issue is as follows:

On these facts, we do not agree that structural error occurred. The questionnaires were used only for selection of the jury, which proceeded in open court. The questionnaires were not sealed until several days after the jury was seated and sworn. Unlike answers given verbally in closed courtrooms, there is nothing to indicate that the questionnaires were not available for public inspection during the jury selection process. Thus, the subsequent sealing order had no effect on *Coleman's* public trial right, and did not create defects affecting the framework within which the trial proceeds.

Coleman, 151 Wash. App. at 623-24 (quotations and footnote omitted). As noted in Zerahaimanot's *Opening Brief*, in *Coleman* the Court concluded that the questionnaires were available to the public prior to the sealing order. *Opening Brief*, at 31-32. As discussed above, however, in this case it cannot seriously be posited that the public ever had access to the sealed juror materials. See also *Opening Brief*, at 31-32.

To the extent that *Coleman* rests on any other rationale in rejecting structural error, it conflicts with *Strode*, *Momah*, and the cases which precede them. The fact that the “questionnaires were used only for selection of the jury” is of no moment. In *Strode*, the “private” questioning of jurors was likewise “used only for selection of the jury,” yet the Supreme Court held that the failure to hold a *Bone-Club* hearing prior to the closure was a structural error. See also *In Re PRP of Orange*, 152 Wash.2d 795, 100 P.3d 291 (2005) (closure of jury selection without *Bone-Club* hearing presumed prejudicial); *State v. Brightman*, 155 Wash.2d 506, 122 P.3d 150 (2005) (same).

Moreover, *Coleman*'s ordering of a “retroactive” *Bone-Club* hearing—the remedy urged here by the State—makes no sense in light of the factors which the trial court must consider. The *Bone-Club* factors require that any closure must be preceded by a finding of a “serious and imminent threat” to a “compelling interest.” *Strode*, 167 Wash.2d at 227-28, citing *Bone-Club*, 128 Wash.2d at 258-259. In other words, the threat

must be imminent at the time of the closure, not two years later.

Further, anyone present must be given an affirmative, contemporaneous opportunity to state objections to closure.

That did not happen here at the time the juror materials were sealed, and it is too late for it to occur now, after the trial has been completed.

The *Bone-Club* test also requires the court to utilize the least restrictive means to avert the “serious and imminent threat” to whatever compelling interest is at stake. *Strode*, 167 Wash.2d at 227-28, citing *Bone-Club*, 128 Wash.2d at 258-259. It is difficult to fashion a less restrictive measure now, nearly two years after all of the juror materials were sealed outright. Similarly, the order “must be no broader in its application or duration than necessary to serve its purpose.” *Strode*, 167 Wash.2d at 227-28, citing *Bone-Club*, 128 Wash.2d at 258-259. Given the time that has passed since the trial in this case, the application and duration of the order have already been to a large extent determined. And finally, the test requires the court

to weigh competing interests. Because the trial court here did not seek any contemporaneous objections, there is no way to weigh competing interests.

Retrospective explanations of why the trial court ignored the *Bone-Club* requirements is not the same as complying with those requirements at the time of the closure. To the extent that *Coleman* suggests that such a practice is permissible, it conflicts with *Bone-Club* and all of the Washington Supreme Court cases which have followed.

Both Strode and Momah Require Reversal and Remand for a New Trial.

The State—recognizing that *Strode* requires reversal here—attempts to minimize the impact of *Strode* by arguing that its holding is limited to the position taken by Justices Fairhurst and Madsen in their concurrence. *Response*, at 16. The State then proceeds to misstate what the concurrence says, reducing its message to: “a structural error necessitating reversal from a courtroom closure [is] dependent on the facts.”

Id. The State is correct only in the sense that the structural error analysis is dependent on *two very specific facts*: Did the trial court engage in a *Bone-Club* analysis or its equivalent?; and, Did the defendant knowingly and voluntarily waive his right to a public trial?

The *Strode* concurrence parts ways with the lead opinion in only two respects, neither of which is relevant to the disposition of this appeal. First, the concurrence states that the lead opinion “conflates the rights of the defendant, the media, and the public.” *Strode*, 167 Wash.2d at 232 (Fairhurst, J., concurring). And second, the concurrence disagrees with the lead opinion to the extent that “the lead opinion means that only an on-the-record colloquy showing . . . a waiver [of the public trial right] will suffice.” *Id.* at 235 (Fairhurst, J., concurring).

Notwithstanding these two minor distinctions, the concurrence joins the lead opinion in holding that “Tony L. Strode's right to a public trial has not been waived nor has it

been safeguarded as required under *State v. Bone-Club*.” *Id.* at 232 (Fairhurst, J., concurring).

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

While I agree with the lead opinion's result in this case, I do not agree with its conflation of the rights of the defendant, the media, and the public. A defendant should not be able to assert the right of the public or the press in order to overturn his conviction when his own right to a

public trial has been safeguarded as required under *Bone-Club* or has been waived.

For the foregoing reasons, I concur with the lead opinion's holding requiring *automatic reversal* and remand.

Id. at 235-36 (Fairhurst, J., concurring) (citations to dissent omitted) (italics in original) (bold italics supplied).

It is uncontested that the trial court did not hold a *Bone-Club* hearing. Nor does the State contend that Zerahaimanot knowingly and voluntarily waived his right to a public trial. Under *Strode* and *Momah* the sealing of the juror questionnaires without first conducting a *Bone-Club* hearing was structural error. Zerahaimanot is entitled to reversal and remand for a new trial.

Zerahaimanot's Confrontation Rights Were Violated By the Admission of Cell Phone Records Which Were Classic Testimonial Hearsay.

The State's Waiver Argument Must Be Rejected.

The State contends that trial counsel waived Zerahaimanot's confrontation rights by not objecting

adequately at trial. *Response*, at 17-21. Zerahaimanot disagrees (*see Opening Brief*, at 14), but even if trial counsel did not lodge an appropriately specific objection, this Court may review the error pursuant to RAP 2.5(a)(3).

The Rule provides that a party may raise an issue for the first time on appeal if it involves “a manifest error affecting a constitutional right.” The Washington Supreme Court addressed the application of RAP 2.5(a)(3) in the context of an asserted violation of the confrontation in *State v. Kronich*, 160 Wash.2d 893, 161 P.3d 982 (2007)—a case not cited by the State in its *Response*.

In *Kronich*, the appellant asserted for the first time on appeal that his confrontation rights were violated by the admission of Department of Licensing records related to his driver’s license. The Court first noted that “constitutional errors are treated specially because they often result in serious injustice to the accused.” *Kronich*, 160 Wash.2d at 899. Accordingly,

[t]he applicability of RAP 2.5(a)(3) is determined according to a two-part test: First, the court determines whether the alleged error is truly constitutional. Second, the court determines whether the alleged error is “manifest,” i.e., whether the error had practical and identifiable consequences in the trial of the case.

Id. (quotations and citations omitted). The Court found that

Kronich’s claim of error easily met this standard:

Kronich's claim regarding the admission of the DOL certification at his trial is unquestionably constitutional in nature, as it is grounded in his rights under the Confrontation Clause. His claim of error may also be deemed manifest in that, had he successfully raised his Confrontation Clause challenge at trial, the DOL certification would have been excluded.

Id. at 900. *See also State v. Fleming*, 155 Wash. App. 489, 501-02, 228 P.3d 804 (2010) (citing Kronich in reaching merits of confrontation claim raised for the first time on appeal).

Kronich compels the rejection of the State’s waiver argument. Zerahaimanot’s Sixth Amendment claim is by definition a claim of constitutional error. And if that claim had been successfully raised at trial, none of the phone records used to corroborate Leroy Holt’s testimony, to support the State’s

version of events, and to implicate Zerahaimanot in the shooting would have been admitted as evidence. In short, Zerahaimanot's confrontation claim is clearly a claim of manifest error affecting a constitutional right.

The Affidavits Created for the Sole Purpose of Admitting Phone Records at Zerahaimanot's Criminal Trial Were Testimonial Under Melendez-Diaz.

Relying on cases from Maine and from the Eastern District of Virginia, the State attempts to distinguish *Melendez-Diaz* and contends that the affidavits at issue in this case are not testimonial for confrontation purposes. *Response*, at 25-27; *but cf. United States v. Martinez-Rios*, 595 F.3d 581 (5th Cir. 2010) (admission of document certifying the non-existence of a record and produced for use at trial violated defendant's right to confrontation). The State is incorrect.

The State argues that admission of the affidavits did not violate Zerahaimanot's confrontation rights because "cross-examination [of the affiants] would add little to the

determination of the case.” Response, at 27. But the Supreme Court rejected a similar argument in *Melendez-Diaz*:

[R]espondent and the dissent argue that confrontation of forensic analysts would be of little value because one would not reasonably expect a laboratory professional to feel quite differently about the results of his scientific test by having to look at the defendant.

This argument is little more than an invitation to return to our overruled decision in [*Ohio v.*] *Roberts*, 448 U.S. 56 [(1980)], which held that evidence with “particularized guarantees of trustworthiness” was admissible notwithstanding the Confrontation Clause. What we said in *Crawford* in response to that argument remains true:

“To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. ... ***Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.*** This is not what the Sixth Amendment prescribes.” [*Crawford v. Washington*, 541 U.S. 36, 61-62 (2004)].

Respondent and the dissent may be right that there are other ways-and in some cases better ways-to challenge or verify the results of a forensic test. But the Constitution guarantees one way: confrontation. We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available.

Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S.Ct. 2527, 2536 (2009) (emphasis supplied).

The State also contends that Zerhaimanot was not entitled to cross-examine the affiants because they were merely certifying the authenticity of the phone records. But the State ignores a key fact—that the affidavits were produced specifically for use in Zerhaimanot’s criminal trial, thus placing them squarely in the “core class of testimonial statements.” *Melendez-Diaz*, 129 S.Ct. at 2532.

[T]he affidavits do not qualify as traditional official or business records, and *even if they did, their authors would be subject to confrontation nonetheless.* Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. *But that is not the case if the regularly conducted business activity is the production of evidence for use at trial.*

Id. at 2538 (quotations omitted) (emphasis supplied).

Key evidence against Zerhaimanot was admitted through affidavits not subject to cross-examination. This violated Zerhaimanot’s constitutional right to confrontation.

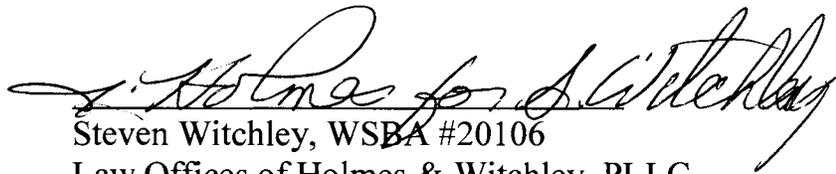
For the reasons set forth in *Zerahaimanot's Opening Brief*, this error was not harmless beyond a reasonable doubt. This Court should reverse and remand for a new trial.

II. CONCLUSION

For the foregoing reasons, as well as those set forth in *Zerahaimanot's Opening Brief*, this Court should reverse *Zerahaimanot's* convictions and remand for a new trial.

DATED this 28th day of July, 2010.

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I, Steven Witchley, hereby certify that on July 28, 2010, I served a copy of the attached brief on counsel for the State of Washington and on counsel for Steven Lee by causing the same to be mailed, first-class postage prepaid, to:

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