IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re Personal Restraint Petition of: DANIEL STOCKWELL, Petitioner.	No. 37238-0-II (Linked) PART PUBLISHED OPINION
STATE OF WASHINGTON, Respondent, v. DANIEL STOCKWELL, Appellant.	No. 37230-4-II

Armstrong, P.J. — A jury convicted Daniel Stockwell of first degree child molestation and attempted first degree molestation of his step-granddaughters, E.M. and M.S. The trial court found Stockwell was a persistent offender and sentenced him to life without the possibility of parole. On direct appeal, we and the Washington Supreme Court affirmed the convictions and sentence. In this timely personal restraint petition (PRP), Stockwell argues (1) his prior 1986 conviction for first degree statutory rape is not comparable to the current crime of first degree child rape; (2) the trial court erred by sealing jury questionnaires without weighing the five *Bone-Club*[1] factors; (3) the trial court erred when ruling on challenges to certain jurors for cause; (4) the trial court erred by sending certain exhibits to the jury room; and (5) his appellate counsel on direct appeal ineffectively represented him by failing to request voir dire transcripts and inadequately briefing the comparability analysis. Finding no unlawful restraint, we deny the

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

petition.

FACTS

In 2004, while babysitting E.M. and M.S., Stockwell touched both girls' vaginas on the outside of their clothes. E.M. was seven years old and M.S. was eight years old at the time. E.M. told Cynthia Conrad, a child interviewer, that Stockwell touched her vagina through her clothes while the two were alone in his living room watching a movie. M.S. told Conrad that she saw Stockwell touch E.M. and that Stockwell touched her in the same way. Conrad took near verbatim notes during the interviews and then transcribed them as soon as possible.

The State charged Stockwell with first degree child molestation for the incident with E.M. and attempted first degree child molestation for the incident with M.S.[2] A jury convicted Stockwell of both counts. In 1986, Stockwell had pleaded guilty to first degree statutory rape. The trial court found the 1986 first degree statutory rape statute comparable to the current first degree child rape statute and sentenced Stockwell to life without possibility of parole under the persistent offender statute, RCW 9.94A.030(36)(b).

On direct appeal, Stockwell argued that (1) the sentencing court's comparability findings violated his right to a jury trial under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) and (2) his prior conviction of first degree statutory rape was not comparable to first degree child rape. *State v. Stockwell*, 129 Wn. App. 230, 232-33, 118 P.3d 395 (2005). We affirmed. *Stockwell*, 129 Wn. App. at 235. The Supreme Court reviewed the comparability issue and held that the 1986 first degree statutory rape statute was comparable to

[2] While M.S. testified at trial that Stockwell touched her vagina, she had previously stated that he only attempted to touch her.

the current first degree rape of a child statute. *State v. Stockwell*, 159 Wn.2d 394, 395, 150 P.3d 82 (2007).

ANALYSIS

I. Standard of Review

A personal restraint petition is not a substitute for a direct appeal. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). A personal restraint petitioner must prove either a constitutional error that caused actual prejudice or a nonconstitutional error that caused a complete miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). The petitioner must state the facts on which he bases his claim of unlawful restraint and describe the evidence available to support the allegations; conclusory allegations alone are insufficient. RAP 16.7(a)(2)(i); *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988).

In evaluating personal restraint petitions, we can: (1) dismiss the petition if the petitioner fails to make a prima facie showing of constitutional or nonconstitutional error; (2) remand for a full hearing if the petitioner makes a prima facie showing but the merits of the contentions cannot be determined solely from the record; or (3) grant the personal restraint petition without further hearing if the petitioner has proven actual prejudice or a miscarriage of justice. *Cook*, 114 Wn.2d at 810-11; *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

II. Sealed Jury Questionnaires

Stockwell argues that the trial court violated his right to a public trial by sealing jury questionnaires, thereby causing a structural error requiring a new trial without a showing of

prejudice. The State argues that sealing jury questionnaires does not constitute a trial court

closure that violates the constitutional guarantee of a public trial. The State also argues that even if we decide that sealing the questionnaires violated Stockwell's public trial rights, it would create a new procedural rule applicable only to cases still on direct review.[3] Assuming, without deciding, that sealing the questionnaires has constitutional implications and that Stockwell can raise the issue in this PRP, his argument still fails on the merits.

The State's proposed jury questionnaire stated:

> This questionnaire is designed to elicit information about your qualifications to sit as a juror in a pending case, and to shorten the process of jury selection. Please respond to the following questions as completely as possible. The information contained in this questionnaire will become part of the court's permanent record, *although all questionnaires will be sealed and will not be available to the general public.* During the questioning by the attorneys and the Court, you will be given an opportunity to explain or expand any answers if necessary. . . .
>
> Some of these questions may call for information of a personal nature that you may not want to discuss in an open courtroom with the press and/or the public present. If you feel an answer may invade your right to privacy, you may circle the question number to the left of the question. The Court will then give you an opportunity to explain your request for confidentiality in a closed hearing. . . .
>
> YOU ARE UNDER THE COURT'S ORDER: YOU MAY NOT DISCUSS THIS QUESTIONNAIRE OR YOUR ANSWERS WITH ANYONE.

Exh. 6 at 2 (emphasis added). Stockwell stipulated to using this questionnaire. When instructing the jury, the trial court further explained:

> These questionnaires are going to be given to the court and to the attorneys. *The questionnaires*, *after voir dire proceedings are done, are returned back to the clerk of court and they are shredded. They are not seen by anybody outside of the attorneys and the court that need to have this information. The copies are shredded. The originals are filed in a sealed file with the clerk of court for the record-keeping*, so I want to let you—advise you of that as to these particular questionnaires.
>
> Also, depending on answers to the questionnaires, there's a question in there about

[3] *See State v. Evans*, 154 Wn.2d 438, 444-45, 114 P.3d 627 (2005).

> whether you would like to be examined or questioned outside the presence of other jury panel members, and be sure to consider that box there or check that if that is your request, and we will honor that request, also.

Exh. 8 at 22-23 (emphasis added). The trial court questioned several jurors individually at the jurors' request or at the attorneys' request, but it did so in open court and on the record.

Both the Sixth Amendment to the federal constitution and article I, section 22 of our state constitution guarantee a criminal defendant the right to a public trial. U.S. Const., amend. VI; Wash. Const., art. I, § 22. Additionally, article I, section 10 of our state constitution guarantees the public's right to public judicial proceedings, providing: "Justice in all cases shall be administered openly." To protect these public trial rights, a trial court must weigh the five *Bone-Club* factors and enter findings before closing a criminal hearing or trial. *State v. Brightman*, 155 Wn.2d 506, 514-15, 122 P.3d 150 (2005); *Bone-Club*, 128 Wn.2d at 258-60. Whether a defendant's right to a public trial has been violated is a question of law, which we review de novo. *Brightman*, 155 Wn.2d at 514.

Our Supreme Court recently held that a partial closure of voir dire proceedings is not necessarily structural error. *State v. Momah*, 167 Wn.2d 140, 156, 217 P.3d 321 (2009). In *Momah*, the majority stated, "[W]e have held that the remedy must be appropriate to the violation and have found a new trial required in cases where a closure rendered a trial fundamentally unfair." *Momah*, 167 Wn.2d at 150. Because Momah "affirmatively accepted the closure, argued for the expansion of it, actively participated in it, and sought benefit from it," the court held that "the closure in this case was not a structural error" and reversal was not the appropriate remedy. *Momah*, 167 Wn.2d at 156. Three dissenting justices disagreed with the majority's assertion that

Momah had requested *closed* voir dire and that he had benefitted from the closure. *Momah*, 167 Wn.2d at 157, 159-60. The dissent also expressed concern that the trial court had not considered the public trial rights of the victim and the public. *Momah*, 167 Wn.2d at 157, 164-66. The dissent concluded that the trial court's failure to conduct a *Bone-Club* analysis was reversible error. *Momah*, 167 Wn.2d at 157.

On the same day it filed *Momah*, the court filed *State v. Strode*, 167 Wn.2d 222, 223, 217 P.3d 310 (2009), in which it reversed Strode's conviction with the plurality reasoning that the trial court's closure of voir dire violated the defendant's public trial rights, the error was structural, and reversal was appropriate. Two of the justices from the majority in *Momah* concurred in the result, explaining that the record showed that Strode had not actively participated in the closure to the same extent that Momah had. *Strode*, 167 Wn.2d at 231-36. The lead opinion also expressed concern for the public's right to "open" justice. *Strode*, 167 Wn.2d at 229-31. The concurring justices did not share this concern, explaining that "the lead opinion conflates the rights of the defendant, the media, and the public" and concluding that "[a] defendant should not be able to assert the right of the public . . . to overturn his conviction when his own right to a public trial has been safeguarded." *Strode*, 167 Wn.2d at 232, 236.[4]

[4] As the concurrence notes, two different panels of this court have concluded that *Momah* and *Strode* are no longer controlling authority in light of *Presley v. Georgia*, __ U.S. __, 130 S. Ct. 721, ___ L. Ed. 2d ___ (2010). *See State v. Leyerle*, 158 Wn. App. 474, 481, 242 P.3d 921 (2010); *State v. Paumier*, 155 Wn. App. 673, 685, 230 P.3d 212, *review granted*, 169 Wn.2d 1017 (2010). We disagree. In *Presley*, the trial court closed the courtroom during voir dire, excluding the defendant's uncle from the courtroom, and the defendant objected. *Presley*, 130 S. Ct. at 722. The Georgia Supreme Court held that "trial courts need not consider alternatives to closure absent an opposing party's proffer of some alternatives" and the Supreme Court reversed, holding "trial courts are required to consider alternatives to closure even when they are not offered by the parties." *Presley*, 130 S. Ct. at 724-25. *Presley* did not consider whether an erroneous court closure necessarily results in structural error, particularly where, as here, the

Stockwell likens his case to *Strode* because the trial court engaged in a "'knee jerk'" closure without weighing any *Bone-Club* factors. Supp. Br. of Petitioner at 18. He argues that unlike *Momah*, the trial court never weighed competing constitutional interests on the record and he did not request the closure.

While the State proposed the questionnaires, Stockwell stipulated to their use and did not object to their sealing. He also actively participated in voir dire and used the questionnaires to identify jurors who wanted to be questioned individually. We are satisfied that the questionnaire's promise of confidentiality made it more likely jurors would candidly reveal incidents of sexual assault or abuse, providing critical information for Stockwell to use in challenging a juror for cause. Thus, Stockwell benefitted from sealing the questionnaires.

An error is structural when it renders a criminal trial "'fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" *Momah*, 167 Wn.2d at 149 (quoting *Washington v. Recuenco*, 548 U.S. 212, 218-19, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)). As discussed above, Stockwell used the questionnaires and benefitted from their sealing. Moreover, the closure here was partial and, at most, affected only the public's right to "open" justice. Stockwell had full access to the questionnaires and the parties questioned the jurors in open court. As the various opinions and shifting alignments in *Momah* and *Strode* demonstrate, a majority of our Supreme Court is apparently unwilling at this time to allow a defendant to assert the public's "open" justice rights. Because the error here, if any, was not structural, affected only the public's

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defendant did not object to the alleged closure, participated in it, and now seeks to use the alleged closure to collaterally attack his conviction. *See also State v. Bowen*, 157 Wn. App. 821, 828-29, 239 P.3d 1114 (2010). Accordingly, we apply *Momah* and *Strode* to consider whether the alleged error here warrants reversal.

right to "open" justice, and because Stockwell does not argue that he was actually prejudiced, his argument that the trial court violated his public trial rights by sealing the juror questionnaires fails. *See In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990) (holding a petitioner alleging constitutional error must show actual prejudice to prevail on a PRP); *see also State v. Coleman*, 151 Wn. App. 614, 617, 623-24, 214 P.3d 158 (2009) (holding a trial court erred by sealing jury questionnaires without conducting a *Bone-Club* analysis, but that the error was not structural).

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

I. Comparability Analysis

Stockwell asks us to reconsider the comparability of his 1986 first degree statutory rape conviction, arguing that our Supreme Court incorrectly decided the issue when it rejected his arguments on direct appeal. He also argues that his counsel on direct appeal ineffectively briefed the issue, thereby denying the court the opportunity to correctly decide it. But we are bound by decisions of our Supreme Court. *State v. Hairston*, 133 Wn.2d 534, 540, 946 P.2d 397 (1997); *State v. Gore*, 101 Wn.2d 481, 486-87, 681 P.2d 277 (1984). And a petitioner cannot create different grounds for relief merely by "'alleging different facts, asserting different legal theories, or couching his argument in different language.'" *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 329, 868 P.2d 835 (1994) (quoting *Campbell v. Blodgett*, 982 F.2d 1321, 1326 (9th Cir. 1992)). Here, Stockwell attempts to revise his previously rejected legal arguments by couching the same

arguments in different language.[5] Accordingly, we decline Stockwell's invitation to reconsider an issue that our Supreme Court has already resolved on direct review.

II. Juror Challenges

Next, Stockwell argues that the trial court employed different standards in ruling on state and defense juror challenges for cause. He argues that the trial court granted the State's motion to dismiss juror 56, who embraced the presumption of innocence, but denied his motions to dismiss jurors 2 and 39, who reported concerns about being fair to him. We review a trial court's rulings on juror challenges for cause for a manifest abuse of discretion. *State v. Noltie*, 116 Wn.2d 831, 838, 809 P.2d 190 (1991).

A. No Abuse of Discretion or Biased Jury

Juror 2 expressed concern about serving as a juror because a relative had been convicted of a crime that involved sexual motivation and because she had a weak stomach and might faint if presented with graphic evidence. But juror 2 also agreed that she could "probably be fair, because everyone's lives are at stake here and everyone . . . deserves the same chance to have a good life." Ex. 8 at 36-37, 39. Juror 2 also stated that if she had a bias it would be "on behalf of a child, because they are a child and I am a woman." Ex. 8 at 39. But she also believed that it was an adult's job to "filter" what a child says to find the truth and that she would weigh all the evidence to figure out what was going on. Ex. 8 at 43.

[5] On direct appeal, Stockwell argued that first degree statutory rape and first degree child rape are not legally comparable because the modern statute has an additional element of nonmarriage. *Stockwell*, 159 Wn.2d at 397-98. The Supreme Court rejected this argument. *Stockwell*, 159 Wn.2d at 399. Here, Stockwell again argues that the two crimes are not comparable because one has an additional element of nonmarriage. He also argues the two crimes are not comparable because they have different age requirements for the victim and perpetrator and different defenses.

Juror 39's daughter was raped 18 years earlier and he wrote on his questionnaire that this experience could cause him to be unfair. He admitted that child molestation was a hard topic for him and that "[i]nasmuch as [he would] like to be fair to [Stockwell]," he was not sure whether he could. Ex. 9 at 191. But juror 39 acknowledged that Stockwell was presumed innocent and that he could compartmentalize his feelings for this trial. Juror 39 also stated that hearing testimony from a child would not interfere with his ability to be fair and impartial: "As I said, I can . . . presume that the accused is not guilty." Ex. 9 at 198-99.

Juror 56's cousin had been wrongly accused of molesting the cousin's stepdaughter. When asked if this experience would interfere with his ability to be fair, juror 56 said that he would side more with the defense. When asked how his family experiences would impact his ability to judge the victim's testimony, juror 56 stated, "I think I might be a little more biased, you know, thinking maybe they would be untrue or not saying the whole truth." Ex. 9 at 229-30. When asked if he could judge the children's testimony without making a presumption in advance, juror 56 did not know:

> I would have a hard time not listening to their testimony with a tainted ear thinking, maybe, you know, they are not telling the truth, maybe they are bringing up false charges. . . . Even though the evidence and everything, I still think that [I] would be back there because of the situation with my cousin . . . I would always have that doubt, you know, are they being truthful, even with the evidence.

Exh. 9 at 231-32. He also admitted that he probably could not give the State a fair trial.

The trial court denied Stockwell's challenges for cause to jurors 2 and 39 because each had stated that he or she could be fair and set aside his or her personal experiences. The trial court excused juror 56 on the State's challenge for cause because he could not keep an open mind

and would start with the presumption that the State's witnesses were lying.

Equivocal answers alone do not require that a juror be removed when challenged for cause. *State v. Rupe*, 108 Wn.2d 734, 749, 743 P.2d 210 (1987). The question is whether a juror with preconceived ideas can set them aside. *Rupe*, 108 Wn.2d at 749. The trial court is best situated to determine a juror's competency to serve impartially. *Rupe*, 108 Wn.2d at 749. Here, jurors 2 and 39 each committed to keeping an open mind. In contrast, juror 56 was unequivocal in his contention that he was partial to the defendant and would assume the children were lying. Contrary to Stockwell's argument, presuming that the State's witnesses are lying is not a proper articulation of the presumption of innocence. The State is also entitled to an impartial jury. *See State v. Elmore*, 155 Wn.2d 758, 773, 123 P.3d 72 (2005). The trial court did not abuse its discretion in ruling on these challenges.

Moreover, Stockwell used two peremptory challenges to dismiss jurors 2 and 39, and he does not argue that any biased juror sat on his jury. Criminal defendants have a constitutional right to an impartial jury. Wash. Const. art. I, § 22. As long as the selected jury is impartial, the fact that Stockwell had to use a peremptory challenge to ensure that result does not violate his right to an impartial jury. *State v. Fire*, 145 Wn.2d 152, 162, 34 P.3d 1218 (2001).

B. No Material Departure from Statutory Framework

Stockwell also contends that the trial court failed to follow the statutory procedures governing juror challenges, that this was a material departure from the statutory framework, and that we must presume prejudice. We review the trial court's rulings excusing venire members for abuse of discretion. *State v. Tingdale*, 117 Wn.2d 595, 599-600, 817 P.2d 850 (1991).

Stockwell bears the burden of showing how the error, if any, prejudiced his case. *Tingdale*, 117 Wn.2d at 600. If the trial court materially departed from the jury selection statutes, we presume prejudice. *Tingdale*, 117 Wn.2d at 600.

Stockwell argues that the trial court departed from the requirements of RCW 4.44.170(2)[6] when it granted the State's challenge to juror 56. But as we have explained, the trial court did not abuse its discretion in granting the State's challenge. The trial court did not materially depart from RCW 4.44.170(2).

Stockwell also asserts that the trial court materially departed from the mandates of CrR 6.4(d). Specifically, he reasons that the trial court erred by failing to hold a trial on juror challenges for cause before ruling on the challenges. We disagree.

When a party challenges a juror for cause, CrR 6.4(d) provides:

> (1) Determination. The challenge may be excepted to by the adverse party for insufficiency and, if so, the court shall determine the sufficiency thereof, assuming the facts alleged therein to be true. The challenge may be denied by the adverse party and, if so, the court shall try the issue and determine the law and the facts.
> (2) Trial of Challenge. Upon trial of a challenge, the Rules of Evidence applicable to testimony offered upon the trial of an ordinary issue of fact shall govern. The juror challenged, or any other person otherwise competent, may be examined as a witness by either party. . . .
> If a challenge be determined to be sufficient . . . it shall be allowed . . . if not . . . it shall be disallowed.

Here, Stockwell challenged jurors 2 and 39 for cause and the State objected. The trial court listened to the parties' arguments in each instance and ruled on the facts and law. Stockwell argues that the trial court had a duty to bring the challenged jurors back into the court for a formal examination subject to the rules of evidence and to call other witnesses before ruling on

[6] RCW 4.44.170(2) permits challenges for cause when the juror cannot try the issue impartially and without prejudice to the substantial rights of the challenging party.

the challenge. But the trial court is not required to "try the issue and determine the law and facts" unless the adverse party *denies* the challenges. CrR 6.4(d)(1). Here, neither party denied a challenge for cause or asked the court to resolve a factual dispute concerning the jurors' answers. Thus, the trial court was simply required to "determine the sufficiency [of the challenges], assuming the facts alleged therein to be true." CrR 6.4(d)(1). The trial court satisfied this rule by considering the parties' arguments and applying the law to the jurors' answers, assuming the answers to be true. The trial court did not materially depart from the statutory procedures governing juror challenges.

III. Child Interview Transcripts

Stockwell next argues that the trial court erred by admitting the child interview transcripts, exhibits 1 and 2, as substantive evidence. At the close of the State's evidence, Stockwell sought to admit exhibit 5, the prior testimony of M.S., from an earlier child hearsay hearing in which M.S. denied any improper touching by Stockwell. He argued that the statements were admissible under ER 801(d)(1). The State did not object to admitting the transcript under ER 801(d)(1), but argued that it was entitled to the admission of the child interview transcripts for substantive purposes under ER 106 and ER 801(d)(1)(ii). Stockwell objected because the statements made during the interview were not given under oath and the interview transcripts were not actually transcripts but the interviewer's report of the interview. The trial court ruled that under ER 801(d)(1)(ii), the consistent statements did not need to be under oath and the fact that the transcripts were not verbatim went to weight, not admissibility. The trial court admitted exhibits 1 and 2 into evidence.

Stockwell now argues that the trial court erred in admitting exhibits 1 and 2 because (1) they included Conrad's statements and he never claimed that Conrad had recently fabricated her testimony; (2) the State had already introduced the contents of the transcript when the prosecutor read the transcript into the record; and (3) they were testimonial. Stockwell also contends the court erred in admitting E.M.'s interview transcript because he did not claim that E.M. had recently fabricated her testimony. A party can challenge a trial court's evidentiary rulings only on the specific grounds argued at trial. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985); *State v. Avendano-Lopez*, 79 Wn. App. 706, 710, 904 P.2d 324 (1995). Because Stockwell did not make the arguments he offers to us at trial, we decline to consider them.

IV. Ineffective Assistance of Appellate Counsel

Finally, Stockwell argues that his appellate counsel ineffectively represented him by (1) failing to order voir dire transcripts and raise the jury selection issues on direct appeal and (2) not properly briefing the comparability claims on direct appeal. To show that counsel was ineffective, Stockwell must show both (1) deficient performance, i.e., performance that fell below an objective standard of reasonableness and (2) prejudice, i.e., but for the deficient performance, the trial result would have differed. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). We presume that counsel effectively represented her client. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). If Stockwell fails to establish one element, we need not address the other. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

Stockwell cannot show that counsel's failure to order the voir dire transcripts prejudiced

him. As we have discussed, the trial court did not err in conducting voir dire or ruling on challenges. Thus, Stockwell cannot show that the outcome of his appeal would have differed had counsel ordered the voir dire transcript and made the arguments he now makes. *McFarland*, 127 Wn.2d at 334-35. Nor has Stockwell shown that he was prejudiced by his first appellate counsel's briefing on the comparability analysis. Although Stockwell's current attorney has argued legal theories not argued by his former counsel, he cannot demonstrate that the Supreme Court would likely have reached a different result had the new legal theories been raised. Accordingly, Stockwell has not shown that he was denied effective representation by appellate counsel. *Davis*, 152 Wn.2d at 673.

Finding no unlawful restraint, we deny the petition.

Armstrong, P.J.

I concur:

Hunt, J.

Van Deren, J. (concurring) — I concur in the majority's result. I write separately, agreeing with the majority that Stockwell's public trial right has not been violated, but for different reasons.

First, the majority's analysis draws on *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009), *cert. denied*, 131 S. Ct. 160 (2010), *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009), and *State v. Coleman*, 151 Wn. App. 614, 214 P.3d 158 (2009). But two different panels of this court have held that the subsequent United States Supreme Court decision in *Presley v. Georgia*, __ U.S. __, 130 S. Ct. 721, 723, 175 L. Ed. 2d 675 (2010) provides the appropriate analysis when considering courtroom closure issues. *State v. Leyerle*, __ Wn. App. __, 242 P.3d 921, 925 (2010) (noting that *Presley* has "eclipsed" *Momah* and *Strode*); *State v. Paumier*, 155 Wn. App. 673, 685, 230 P.3d 212, *review granted*, 169 Wn.2d 1017 (2010) (same).

As the *Leyerle* majority observed:

> *Presley* speaks in broad terms, drawing on the Supreme Court's First and Sixth Amendment precedent to hold that when a trial court closes voir dire it *must* first apply *Waller's* closure criteria and the failure to do so requires reversal. *See Presley*, 130 S. Ct. at 724-25 (applying [*Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)] and [*Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)]).[7]

242 P.3d at 928 n.10. *Presley* reiterated that, "'[a]bsent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire*.'" *Presley*, 130 S. Ct. at 724 (quoting

[7] The *Leyerle* court also noted that the "[*State v.*]*Bone-Club*[, 128 Wn.2d 254, 906 P.2d 325 (1995)] 'five-step closure test' is essentially a restatement and adoption of the federal closure criteria expressed in *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 31 (1984)." 242 P.3d at 924 (citing *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 805-07, 100 P.3d 291 (2004) and *State v. Brightman*, 155 Wn.2d 506, 515 n.5, 122 P.3d 150 (2005)).

Press-Enter., 464 U.S. at 511). *See also Leyerle*, 242 P.3d at 925 (so noting). Accordingly, we held in *Leyerle* and *Paumier* that "'*Presley*, applying the federal constitution, resolves any question about what a trial court must do before excluding the public from trial proceedings, including voir dire.'" *Leyerle*, 242 P.3d at 925 (quoting *Paumier*, 155 Wn. App. at 685).[8]

Thus, under *Presley*, *Paumier* and *Leyerle*, the relevant inquiry for present purposes is (1) was there a courtroom closure and (2) if so, was the closure preceded by the requisite *Bone-Club/Waller* analysis? *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995); Waller, 467 U.S. at 48. I would hold that under the particular facts of this case, there does not appear to be any closure during voir dire triggering the requisite *Bone-Club/Waller* analysis.

As the majority observed, the questionnaires advised that the documents themselves "*will be sealed* and will not be available to the general public." Ex. 6 at 2 (emphasis added). When instructing the jury, the trial court further explained that the completed questionnaires would be provided to the court and the attorneys, and that "*after* voir dire proceedings are done," the questionnaires would then be returned to the court clerk where copies would be shredded and the original questionnaires would be filed in a sealed file with the clerk of the court for record keeping purposes. Ex. 8 at 22 (emphasis added). As the majority observed, while several jurors were questioned individually as a result of their answers on the questionnaires, such questioning occurred on the record in open court.

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[8] In *Leyerle*, we also observed that the effect of *Presley* was to refocus the courtroom closure inquiry by reiterating the coextensive right of the public to be present. "'The public has a right to be present whether or not any party has asserted the right,' thus trial courts are required to consider alternatives to closure even when the parties do not offer such alternatives." *Leyerle*, 242 P.3d at 926 (quoting *Presley*, 130 S. Ct. at 724-25).

Here, the trial court specifically explained to the jury pool that the documents would be placed in a sealed file *after* completion of voir dire. The court never entered an order sealing the questionnaires. The documents apparently were placed in a sealed file by the court clerk in due course after voir dire because that was the routine practice to preserve jurors' privacy when the parties agreed that, after use of the information, the documents would be kept out of the public court file and, thus, accessible after such filing only by way of a subsequent court order. The dispositive point, however, is that the content of the questionnaires was used in open court, where the public could observe. Accordingly, no part of voir dire was closed to the public. Under these circumstances, I do not believe there is a closure triggering the requirement of a *Bone-Club*/*Waller* analysis.

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Van Deren, J.