IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KENNETH LANE SLERT, Appellant.	No. 40333-1-II PART PUBLISHED OPINION

Van Deren, J. — Kenneth Slert appeals his third conviction for second degree murder. Slert argues that the trial court (1) violated Slert's right to a public trial and his right to be present at all critical stages of trial when it held an in-chambers conference solely with counsel that resulted in the dismissal of four prospective jurors;[1] (2) violated his Fifth Amendment[2] privilege against self-incrimination when it admitted Slert's pre-*Miranda*[3] custodial statements, as well as his post-*Miranda* statements because the State did not "scrupulously honor" his invocation of his right to remain silent; and (3) refused to suppress evidence obtained when the police conducted a

[1] Because we reverse Slert's conviction and remand for a new trial on these issues, we address only the remaining issues raised by Slert that are likely to recur on remand.

[2] U.S. Const. amend V.

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

warrantless search of Slert's car and campsite and detained him for five hours at the scene of the shooting in the remote woodland area before arresting him. We remand for a new trial based on violation of the public trial right, but affirm the trial court's evidentiary rulings should those issues arise on remand.

FACTS

We have recited the facts of this case in our previous opinions,[4] thus we repeat only those facts pertinent to the issues Slert raises in this appeal. In the published portion of the opinion, the facts relate only to the dismissal of four jurors following an in-chambers conference between the trial court and counsel without Slert being present. In the unpublished portion, we relate facts pertinent to the issues as we address them.

Public Trial Right and Right to Be Present

Slert argues that the trial court violated both his and the public's right to an open and public trial by excusing four potential jurors in an in-chambers meeting with counsel but without first conducting a courtroom-closure analysis under *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).[5] The State responds that this in-chambers meeting and decisions made during it did not violate the public trial right and did not rise to the level of a courtroom closure requiring a *Bone-Club* analysis because (1) the meeting was not part of voir dire and (2) the meeting was purely ministerial and involved only legal matters and undisputed facts.

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[4] The State has tried Slert three times for the murder of John Benson, and each time a jury has convicted Slert of second degree murder. We reversed Slert's first conviction, *State v. Slert*, noted at 128 Wn. App. 1069, 2005 WL 1870661 (*Slert* I), and his second conviction, *State v. Slert*, noted at 149 Wn. App. 1043, 2009 WL 924893 (*Slert* II).

[5] The record does not indicate that the trial court held this in-chambers conference with a court reporter present.

Under the facts of this case and in the absence of any evidence about why the four jurors were dismissed in a non-public forum and outside Slert's presence, we hold that the trial court violated Slert's right to a public trial and his right to be present during critical stages of the proceedings.[6]

At a pretrial hearing on January 6, 2010, in open court and with Slert present, Slert's trial counsel (1) proposed a juror questionnaire that was designed to screen members of the jury pool who had heard about Slert's previous two trials in order to prevent "taint[ing]" the jury pool with a loose comment from a prospective juror and (2) suggested in-chambers, individual questioning of jurors identified by counsel or the trial court after review of the completed questionnaires. Report of Proceedings (RP) (Jan. 6, 2010) at 4. The trial court stated that it would have the jury pool members fill out the questionnaires on the morning of January 25. Slert did not object to the questionnaire's usage or the court's preliminary discussions about jury selection procedures.

On January 21, the trial court held another pretrial hearing in Slert's presence and in open court, during which the parties again discussed the juror questionnaire. The State asked that Slert's proposed questionnaire refer to Slert's previous trials as "proceeding[s]" rather than "trial[s]" so that the jury would not know there had been earlier verdicts in his case. RP (Jan. 21, 2010) at 3. Aside from this modification, the State accepted Slert's proposed questionnaire in its

[6] After oral argument in this case, we ordered the parties to address whether the trial court's apparent use of jury questionnaires during the in-chambers meeting, coupled with excusing four jurors and the subsequent sealing of the questionnaires, violated either Slert's or the public's right to open and public trial proceedings. Also, because the parties did not designate the questionnaire or any of the completed questionnaires as part of the record on appeal, we ordered supplementation of the record with the juror questionnaires after oral argument. In response to our order, we learned that the trial court destroyed all of them at some point, apparently without notice to counsel. We also learned that neither counsel had a copy of the questionnaire and that the only copy or draft of the questionnaire remaining was in the trial court's chambers' files.

entirety. Slert did not object to the word "proceeding[s]" or to the questionnaire's general usage. RP (Jan. 21, 2010) at 3.

On the morning of January 25, the trial court gave prospective jurors copies of the questionnaire when they arrived for jury selection. The juror questionnaire had questions specific to Slert's case and it dealt with publicity from Slert's earlier trials. The juror questionnaire informed the jurors that (1) they were "under oath," (2) their questionnaire responses were "confidential," (3) the trial court would seal the questionnaires after jury selection, and (4) the questionnaires would "not be available for public inspection or use."[7] Clerk's Papers (CP) at 360.

Apparently after the prospective jurors filled out and turned in their questionnaire answers, the trial court held a "[p]retrial conference . . . *in chambers*" with counsel[8] shortly before it went on the record on January 25. CP at 194 (emphasis added). Following the in-chambers conference, the trial court indicated on the record that it had previously conferred with both counsel and that the parties had mutually agreed to excuse four jurors from the jury venire based on their questionnaire responses. The trial court stated:

> There are a couple other things. We have . . . the questionnaires that have

[7] The record is silent regarding when the prospective jurors received the questionnaires on the morning of January 25, from whom the prospective jurors received the questionnaires, and when the trial court swore in the prospective jurors. The transcript of the proceedings states that, at 9:30 am that morning, a panel of prospective jurors was seated in the courtroom and "still going through the questionnaires." RP (Jan. 25, 2010) at 5. Because the jury selection process begins when jurors are sworn and are given questionnaires to complete, such proceedings should be conducted on the record to facilitate appellate review. *See State v. Irby*, 170 Wn.2d 874, 884, 246 P.3d 796 (2011).

[8] Reference to the trial court's pretrial conference is the first entry on the clerk's minutes on January 25. At 10:49 am, the clerk's minutes include a notation that the court was "[i]n session." CP at 194. The minutes subsequently state that (1) the trial court read Slert his rights for trial at this time; (2) Slert acknowledged his rights; (3) panel two jurors 19, 36, 49 and panel one juror 15 were excused "for cause"; and (4) the parties questioned the 15 additional jurors individually in the courtroom. CP at 194.

> been filled out. I have *already, based on the* [*questionnaire*] *answers, after consultation with counsel, excused jurors* number 19, 36, and 49 from panel two which is our primary panel and I've excused juror number 15 from panel one, the alternate panel.

RP (Jan. 25, 2010) at 5 (emphasis added). Defense counsel indicated that the four jurors had been dismissed because their questionnaire answers had "indicated knowledge of [Slert's] prior court trials." RP (Jan. 25, 2010) at 11. The record is silent about the four dismissed jurors' questionnaire responses or the specific knowledge of the four dismissed jurors. Slert was later present during general voir dire in open court after the trial court administered a verbal oath to the jurors.[9]

A. Standard of Review

Whether a violation of the public trial right exists is a question of law we review de novo. *State v. Momah*, 167 Wn.2d 140, 147, 217 P.3d 321 (2009). A criminal defendant has a right to a public trial under the federal and state constitutions. *State v. Lormor*, 172 Wn.2d 85, 90-91, 257 P.3d 624 (2011). Likewise, the public has a complementary right to open proceedings under the federal and state constitutions. *Lormor*, 172 Wn.2d at 91.

The public trial right applies to "'the process of juror selection,' which 'is itself a matter of importance, not simply to the adversaries but to the criminal justice system.'" *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (quoting *Press-Enter. Co. v. Super. Ct. of Cal., Riverside County*, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)); *see also State v. Bennett*, 168 Wn. App. 197, 204, 275 P.3d 1224 (2012) (public trial right encompasses "circumstances in which the public's mere presence *passively* contributes to

[9] The admonishment to the jurors before they filled out the questionnaire that they were "under oath" appears to indicate that this was a second oath administered before voir dire began in the open courtroom. CP at 360.

the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny").

B. In-Chambers Conference Part of Jury Selection

The State argues that the January 25 in-chambers conference, before the trial court went on the record, was not a part of jury selection. But, in *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011), our Supreme Court recently addressed what portions of the proceedings constitute jury selection.

In *Irby*, prospective jurors filled out a questionnaire that was "'designed to elicit information with respect to [their] qualifications to sit as a juror in [Irby's] case'" and that expressly reminded the jurors that "filling out the questionnaire was 'part of the jury selection process.'" 170 Wn.2d at 882 (quoting *Irby* Clerk's Papers at 1234) (emphasis omitted). In a subsequent e-mail exchange between the trial court and counsel for both parties, they discussed ten potential jurors—including four potential jurors who had indicated on their questionnaires that they had parents who had been murdered—and they agreed to dismiss seven potential jurors for cause. *Irby*, 170 Wn.2d at 878, 884.

On review, our Supreme Court stated that "'the work of empaneling the jury' began . . . when jurors were sworn and completed their questionnaires." *Irby*, 170 Wn.2d at 884 (internal quotation marks omitted) (quoting *Gomez v. United States*, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989)). The *Irby* court distinguished the e-mail exchange from other types of conferences not implicating a defendant's trial rights because the e-mail exchange "did not simply address the general qualifications of 10 potential jurors, but instead tested their fitness to serve as

jurors in [Irby's] particular case." 170 Wn.2d at 882. Accordingly, the court held that the e-mail exchange was a portion of jury selection and that this exchange violated Irby's right under the federal and state constitutions to be present at critical stages of his trial. *Irby*, 170 Wn.2d at 882, 884-85.

Here, as in *Irby*, the jurors were under oath when they completed the questionnaires and the questionnaires were specific to Slert's case and dealt with publicity from Slert's earlier trials and, thus, were "'designed to elicit information with respect to [the jurors'] qualifications to sit'" as jurors in Slert's particular case, as opposed to inquiring about the jurors' general qualifications.[10] 170 Wn.2d at 882 (quoting *Irby* Clerk's Papers at 1234). Furthermore, the questionnaires informed the jurors that (1) they were "under oath," (2) their answers to the questionnaires were "confidential," (3) the trial court would seal the questionnaires after jury selection, and (4) the questionnaires would "not be available for public inspection or use"; thus,

[10] We note that the *Irby* court decided that the questionnaires did not deal merely with the jurors' general qualifications because a defendant's right to be present under the federal constitution attaches to proceedings where the defendant's presence would not "'be useless, or the benefit but a shadow.'" 170 Wn.2d at 881 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 106-07, 54 S. Ct. 330, 78 L. Ed. 674 (1934), *overruled in part on other grounds sub nom.*, *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)). Thus, a defendant may contribute to his defense during jury selection by giving advice or suggestions to defense counsel or overruling counsel's judgment altogether. *Irby*, 170 Wn.2d at 883.

We recently observed that because the defendant's and public's right to public and open proceedings and the defendant's right to be present function differently, the public's presence may contribute to the fairness of certain proceedings where the defendant's presence may not. *Bennett*, 168 App. at 203-04. Accordingly, courts should exercise caution in applying legal doctrines addressing the public's right to be present to the defendant's public trial right, and vice versa, without regard for the underlying principles requiring the public and/or the defendant to be present during court proceedings. Because the questionnaires in this case fall squarely within *Irby*'s discussion of jury selection, a proceeding to which the defendant's right to be present and the public trial right both apply, we do not reach whether a different public trial right analysis is required.

like the *Irby* questionnaires, filling out the questionnaires in this case was part of jury selection. CP at 360; *Irby*, 170 Wn.2d at 882.

Accordingly, the record reflects that the prospective jurors filled out questionnaires designed to determine their individual fitness for serving on Slert's particular jury; the trial court then held an in-chambers and off-the-record conference with counsel for both parties; and, when the trial court subsequently went on the record in public, it announced that based on the questionnaire answers and after consulting with counsel, it had already dismissed four potential jurors. Furthermore, the trial court clerk's minutes stated that the four jurors had been dismissed for cause and defense counsel confirmed that the four jurors had been dismissed because their questionnaire answers indicated knowledge of Slert's previous trials. Because the record indicates that this in-chambers conference involved the dismissal[11] of four jurors for case-specific reasons based at least in part on the jury questionnaires, we hold that the in-chambers conference and the dismissal of the jurors were part of the jury selection process to which the public trial right applied.

We also hold that this in-chambers conference and resulting dismissal of jurors violated Slert's right to be present during critical stages of the proceedings. The record indicates that only the trial judge and counsel were present when the jurors were dismissed and there is no record showing that defense counsel consulted with Slert before agreeing to the dismissals. *See Irby*,

[11] We respectfully disagree with the dissent's characterization of the facts surrounding the in-chambers' conference and the jurors' dismissal and the dissent's interpretation of the law applicable to this in-chambers conference. Additionally, the dissent argues that the actual dismissal of the jurors may have occurred during a courtroom side-bar discussion. Dissent at 46 n. 31. But if a side-bar conference was used to dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reasons and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview.

170 Wn.2d at 884 (stating "'where . . . personal presence is necessary in point of law, the record must show the fact'" (alteration in original) (quoting *Lewis v. United States*, 146 U.S. 370, 372, 13 S. Ct. 136, 36 L. Ed. 1011 (1892))).

C. *Presley*, *Paumier*, and *Leyerle*

We recognize that the public trial right is not absolute and a trial court may close the courtroom under certain circumstances. *Momah*, 167 Wn.2d at 148; *State v. Strode*, 167 Wn.2d 222, 226, 217 P.3d 310 (2009) (plurality opinion). To protect the public trial right and determine whether circumstances warrant a closure, Washington courts must apply the *Bone-Club* guidelines[12] and make specific findings on the record justifying a closure. *Momah*, 167 Wn.2d at 148-49.

The Washington Supreme Court has held that not all violations of the public trial right result in structural error requiring a new trial. *Momah*, 167 Wn.2d at 149-50. For example, it held in *Momah* that a defendant may make tactical choices to advance his own interests in a fair

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[12] These guidelines are:

> "1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a serious and imminent threat to that right.
>
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
>
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
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> 4. The court must weigh the competing interests of the proponent of closure and the public.
>
> 5. The order must be no broader in its application or duration than necessary to serve its purpose."

Bone-Club, 128 Wn.2d at 258-59 (alteration in original) (internal quotation marks omitted) (quoting *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

trial and, thus, in-chambers voir dire violating the public trial right did not require a new trial when the defendant affirmatively assented to, participated in, argued for the expansion of, and benefitted from the in-chambers voir dire. 167 Wn.2d at 153, 155-56.

But, as we have previously held, the United States Supreme Court's decision applying the federal constitution in *Presley v. Georgia*, ___ U.S. ___, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010), sub silentio overruled our state Supreme Court's decision in *Momah* and "resolve[d] any question about what a trial court must do before excluding the public from trial proceedings, including voir dire." *State v. Paumier*, 155 Wn. App. 673, 685, 230 P.3d 212, *review granted*, 169 Wn.2d 1017 (2010); *see also State v. Leyerle*, 158 Wn. App. 474, 482, 486, 242 P.3d 921 (2010) (stating the same). Under our reading of *Presley*, "where the trial court fails to sua sponte consider reasonable alternatives [to closure] and fails to make the appropriate findings, the proper remedy is reversal of the defendant's conviction." *Paumier*, 155 Wn. App. at 685 (citing *Presley*, 130 S. Ct. at 725); *see also Leyerle*, 158 Wn. App. at 481 (stating the same).

Here, the trial court excluded the public from trial proceedings by holding a portion of jury selection in chambers, not in public. Because it failed sua sponte to consider reasonable alternatives to closure and failed to make appropriate findings supporting the closure, the closure violated Slert's public trial rights and we reverse and remand for a new trial.

D. *Momah* and *Strode*

Although we adhere to our decisions in *Paumier* and *Leyerle*, in light of our Supreme Court's grant of review in *Paumier*, we also address Slert's public trial right claim under *Momah* and *Strode*, two decisions our Supreme Court issued the same day. We resolve this case on the issue of Slert's right to a public trial, not the public's right to the same. *Accord State v. Bowen*,

157 Wn. App. 821, 831, 239 P.3d 1114 (2010).

In *Momah*, our Supreme Court observed that unlike in previous public trial right cases, the trial court had, in some form, recognized and balanced Momah's right to a public trial and his right to an impartial jury. 167 Wn.2d at 151-52; *see also Strode*,[13] 167 Wn.2d at 233 (Fairhurst, J., concurring) (the record in *Momah* showed that the parties and the trial court knew that all proceedings were presumptively open and public).

The court also observed that Momah had affirmatively assented to, participated in, argued for the expansion of, and benefitted from in-chambers voir dire. *Momah*, 167 Wn.2d at 155; *see also Strode*, 167 Wn.2d at 234 (Fairhurst, J., concurring) (the record in *Momah* showed an intentional waiver by the defendant of his public trial right). Finally, the record showed that the trial court and counsel discussed possible locations for the individual juror questioning, and the jury pool's size and room availability played a part in choosing to conduct individual juror questioning in chambers. *Strode*, 167 Wn.2d at 232 (Fairhurst, J., concurring). Thus, in *Momah*, our Supreme Court held that the closure was not a structural error requiring reversal and remand for a new trial. 167 Wn.2d at 156.

In contrast, "the record in *Strode* contained no indication that the trial court held a *Bone-Club* hearing, considered the defendant's right to a public trial, or balanced this right with

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[13] As we observed in *Bowen*, 157 Wn. App. at 831 n.6:

> In *Momah*, our Supreme Court rejected the defendant's public trial right arguments that in-chambers voir dire of some jurors required reversal of his conviction and remand for a new trial. *Momah*, 167 Wn.2d at 156. In *Strode*, a plurality of the court reversed another defendant's conviction on the same in-chambers voir dire issue. 167 Wn.2d at 231. In *Strode*'s concurring opinion, two justices agreed with the plurality opinion result on different grounds. *Strode*, 167 Wn.2d at 236. In doing so, it identified additional facts in *Momah* that distinguished that case from *Strode*. *Strode*, 167 Wn.2d at 232-34 (Fairhurst, J., concurring). Thus, we cite to *Strode* for these facts in our discussion of *Momah*.

competing interests before closing the courtroom." *Bowen*, 157 Wn. App. at 832 (citing *Strode*, 167 Wn.2d at 224 (plurality opinion), 235 (Fairhurst, J., concurring)).

Applying these principles in *Bowen*, we reasoned:

> [T]he circumstances in this case are more similar to those in *Strode* than those in *Momah*. Here, the trial court, not defense counsel, proposed individual in-chambers voir dire of jury pool members. Likewise, defense counsel did not actively participate in the in-chambers voir dire; the trial court judge asked all the questions and asked the attorneys only whether they wanted to inquire further or objected to the excusal of jurors. Furthermore, the record does not indicate circumstances requiring individual questioning of jurors in chambers, as opposed to another public location. Finally, although the record shows that the trial court considered Bowen's right to an impartial jury, it contains no indication that either it or the parties considered his right to a public trial or explained that right to him. *See Momah*, 167 Wn.2d at 152 (defendant's right to impartial jury and right to public trial are distinct from each other). Therefore, we cannot conclude that the trial court adequately safeguarded his public trial right or that he made deliberate, tactical choices precluding him from relief.

157 Wn. App. 832-33. Accordingly, we held that the closure in *Bowen* constituted structural error requiring reversal and remand for a new trial. 157 Wn. App. at 833.

We conclude that the closure in this case is more similar to those in *Strode* and *Bowen* than the closure in *Momah*. Here, the record contains no indication that Slert's counsel proposed the in-chambers portion of jury selection, only that he participated in it. The record contains no indication that circumstances required that this conference occur in chambers or that the trial court considered reasonable, public alternatives. Finally, the record contains no indication that either the trial court or the parties considered Slert's public trial right or explained that right to him before agreeing to the dismissal of the four jurors. Accordingly, under *Strode* and *Bowen*, we hold that the closure in Slert's case was structural error and requires reversal and remand for a new trial.[14]

[14] Slert also argues that the trial court's sealing and subsequent destruction of the jury

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 in accordance with RCW 2.06.040, it is so ordered.

Suppression Argument

Slert argues that the trial court erred when it failed to suppress Slert's (a) initial statements to park ranger, Uwe Nehring; (b) statements to park rangers, David Langley and Richard Kirschner; (c) statements to Lewis County Sheriff John McCroskey in the patrol car when McCroskey transported Slert to jail and his recorded statements to Lewis County Detective Kurt Wetzold and Lewis County Deputy Sheriff Stacy Brown while in jail; (d) unrecorded statements to Wetzold and Brown at the jail; (e) statements during his polygraph examination; and (f) statements during telephone calls he made to Wetzold after being released from custody. We disagree.

On the evening of October 23, 2000, Slert was camping alone in a "dispersed camping" area of the Gifford Pinchot National Forest in Lewis County, Washington, when John Benson drove up to Slert's campsite. RP (Nov. 18, 2009) at 17, 58. Benson invited Slert into his truck

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questionnaires violated both his right to a public trial and the public's right to open proceedings under the state constitution. Because we reverse based on the in-chambers conference, we do not reach this issue. But, we note that the subsequent sealing of juror questionnaires used during in-chambers jury selection proceedings likely constitutes a closure implicating the defendant's public trial right and the public's right to open proceedings. *See State v. Smith*, 162 Wn. App. 833, 847-48, 262 P.3d 72 (2011) (stating that no closure requiring a *Bone-Club* analysis occurs when the defendant uses the "'content of the questionnaires' to question jurors 'in open court, where the public could observe'") (quoting *In re Pers. Restraint of Stockwell*, 160 Wn. App. 172, 183, 248 P.3d 576 (2011) (Van Deren, J., concurring), *mot. for discretionary review filed*, No. 85669-9 (Wash. Mar. 2, 2011))), *review denied*, 173 Wn.2d 1007 (2012).

More importantly, the trial court's ultimate destruction of the questionnaires eliminated our ability to ascertain their content and, thus, the nature of the matters discussed during the in-chambers conference. By far the better practice is to preserve questionnaires to facilitate potential appellate review.

cab to talk and drink whiskey, and Slert agreed. The two men talked about various subjects for 35 to 40 minutes, while sharing shots of whiskey.

At some point, the men's conversation turned to politics. Benson made several anti-government statements that offended Slert. According to law enforcement officers who later investigated the incident, Slert claimed Benson became "agitated and verbal" and his voice "changed" in an uncanny way, so Slert punched Benson in the face a few times because he thought Benson was "demon possessed." RP (Jan. 27, 2010) at 492; RP (Jan. 28, 2010) at 549. Slert then exited Benson's vehicle. Benson got out of his truck and attacked Slert, eventually "maul[ing]" him and choking him. RP (Jan. 27, 2010) at 492. Slert broke free and went to his tent to retrieve his gun. Slert feared for his life, and he shot Benson in the neck as Benson tried to enter Slert's tent. Benson fell on his back near the tent's entrance. Slert then exited the tent, stepping over Benson's body. Benson reached out and "grabbed at" Slert, so Slert shot Benson in the head a second time. RP (Jan. 27, 2010) at 513. Slert walked around the campsite for a bit and then went back to sleep in his tent.

When Slert awoke on the morning of October 24, 2000, he covered Benson's body with a blue tarp and he continued to drink more whiskey. Slert unsuccessfully attempted to call for help on Benson's cellular phone and Citizens Band radio. Slert eventually left the campsite in his car.

At approximately 10:40 am, Slert stopped Nehring in Nehring's patrol truck. Slert told Nehring that he had "shot and killed someone" who had attacked him at his campsite with a .45 caliber handgun and that he still had guns in his car. RP (Nov. 18, 2009) at 19.

Nehring told Slert to keep his hands on his steering wheel and not to move. Nehring then took a fully loaded .45 caliber Ruger handgun, a .22 caliber rifle, and a 30-30 rifle from Slert's car

and asked Slert what had happened.

Nehring called Langley and Kirschner to the scene. When Langley and Kirschner arrived 5 to 10 minutes later, Nehring took Slert into "protective custody," handcuffed him, and put him in the back of Langley's patrol car. RP (Nov. 18, 2009) at 28.

Slert then "volunteered" to take Langley and Kirchner to his campsite to confirm Benson's death. RP (Jan. 26, 2010) at 225-226. Along the way, Langley and Kirschner stopped their car and read Slert his *Miranda* rights. Slert acknowledged his *Miranda* rights and said that he understood them and was willing to waive them. According to Kirschner, Slert talked about the incident "pretty much the whole way" to the campsite, both before and after Langley and Kirschner read him his *Miranda* rights, but Langley and Kirschner did not expressly question Slert about what happened. RP (Nov. 20, 2009) at 14. The trip to the campsite lasted "maybe 15, maybe 20 minutes." RP (Nov. 20, 2009) at 15. When an ambulance arrived at the campsite, Langley accompanied the paramedics to Benson's body to confirm Benson's death.

Approximately 30 to 45 minutes later, Lewis County Deputy Sheriff Susan Shannon arrived and assumed control over the investigation. Shannon read Slert his *Miranda* rights again. According to Shannon, Slert said he understood his rights and, in response to her asking where Benson's body was, he "just [went] right into [his] story" about the incident. RP (Nov. 18, 2009) at 228. Slert was so forthcoming that Shannon asked him to stop talking to her and to wait for detectives from the sheriff's office to arrive.

Wetzold and Brown soon arrived at the campsite. Wetzold read Slert his *Miranda* rights a third time; Slert said he had no questions about his rights and told Wetzold his version of events. Wetzold asked Slert to give a recorded statement and Slert agreed. Wetzold began the tape

recorder and read Slert his *Miranda* rights a fourth time.

Before the recorded interview began, Slert asked Wetzold, "'Would I be better saying nothing as opposed to telling what I just told you?'" RP (Nov. 18, 2009) at 200. Wetzold told Slert that he could not give him legal advice. Slert responded, "Why don't we just leave it at that and then . . . I won't say any more." RP (Nov. 18, 2009) at 200. Wetzold stopped questioning Slert and went to investigate the scene with Brown.

Physical evidence at the scene conflicted with Slert's version of events. For example, officers found four shell casings from Slert's gun, but Slert said he had only fired two shots at Benson. Later, the autopsy of Benson's body revealed that Slert's first shot hit Benson in the neck at a downward angle and from only a few inches away, not the two to three feet away from the ground that Slert had initially claimed. The shot would also have paralyzed Benson from the armpits down within a minute or two. And the second shot from Slert's gun was fired at close range, likely with the barrel touching Benson's head.

While Wetzold was still at the scene, after Slert had invoked his right to remain silent, Wetzold told Slert that he had found physical evidence that was inconsistent with Slert's story. Wetzold did not read Slert his *Miranda* rights again before they had this conversation. According to Wetzold, Slert responded, "'The story I told you is the one I'm going to stick with. I'm not going to change it.'" RP (Nov. 18, 2009) at 205 (internal quotation marks omitted). Brown and Wetzold continued to ask Slert questions about items that they found at the campsite while they processed the scene. Wetzold could not recall whether he had told Brown and other law enforcement officers that Slert invoked his *Miranda* rights after he declined to give a recorded statement.

At approximately 3:28 pm, McCroskey transported Slert from the campsite to the county jail. According to McCroskey, he and Slert discussed a wide range of topics during the trip, including "[McCroskey's] job [and] fishing and hunting and things of th[at] nature." RP (Nov. 18, 2009) at 107. Slert also occasionally made unsolicited comments about shooting Benson during the trip. Slert claimed that Benson had a demonic voice, Benson had choked him, and that Slert had acted in self-defense. Slert also told McCroskey that he had contemplated killing himself or fleeing the scene before he encountered Nehring. McCroskey said that he may have asked Slert some follow-up questions in response to Slert's statements.

Later that evening, Brown and Wetzold met with Slert in jail. According to Brown, Wetzold reminded Slert that his constitutional rights were "still in effect," but he did not administer new *Miranda* warnings. RP (Nov. 20, 2009) at 49. Brown and Wetzold questioned Slert in an unrecorded interview. Then Slert agreed to give a recorded statement and Brown read Slert his *Miranda* rights for the fifth time on the recording before he took Slert's taped statement. Brown and Wetzold then booked Slert into jail. On October 24, Slert agreed to a polygraph examination. Brown read Slert his *Miranda* rights for the sixth time before the polygraph examination. The police eventually released Slert without charging him in connection to the shooting.

After his release, Slert periodically contacted Wetzold by telephone to inquire about his car, which the police still held in impound, and to ask about the case. On October 27, 2000, Slert initiated a conversation about some of the "inconsistencies" between Slert's version of events and the physical evidence at the scene. RP (Nov. 18, 2009) at 179. On October 30, Slert called Wetzold again to discuss why police found bloodstains inside Slert's tent. Slert told him,

"[T]here was a possibility that Mr. Benson must have been closer inside the tent than [Slert] had initially said." RP (Jan. 27, 2010) at 518.

On October 31, Slert called Wetzold and told him that his brother, a paralegal, had advised him not to talk with police without an attorney present, and that he wanted to know Wetzold's opinion. Wetzold responded that he could not offer legal advice. Slert asked to speak with an attorney, but Wetzold told him that the court could not appoint an attorney for him because the State had not charged him with a crime.

On May 29, 2001, Wetzold called Slert and asked to set up a meeting to discuss the case. Slert responded that he would attend the meeting only if he had an attorney present; Wetzold reiterated that the court would not appoint an attorney for him, but Slert could hire an attorney on his own. The State did not meet with Slert after that conversation before his arrest.

Almost three years after the last conversation in May, 2001, the State charged Slert with first degree murder and second degree murder, both with firearm enhancements. At Slert's first trial, the trial court suppressed Slert's statements at the campsite after Slert refused to give a recorded statement to Wetzold, but the court did not suppress Slert's statements made to McCroskey on the way to the jailhouse or the recorded statement that Slert gave to Brown and Wetzold at the jail. *State v. Slert*, noted at 128 Wn. App. 1069, 2005 WL 1870661, *1-2, 5-6 (*Slert* I). The jury convicted Slert of second degree murder with a firearm enhancement. *Slert* I, 2005 WL 1870661, at 2. We affirmed the trial court's evidentiary rulings on appeal but reversed Slert's conviction because the trial court erroneously rejected Slert's proposed jury instruction on justifiable homicide in resistance of a felony and because Slert had ineffective counsel. *Slert* I, 2005 WL 1870661, at *4-6.

The State retried Slert, and a second jury convicted him of second degree murder. We reversed Slert's second conviction and remanded for another trial. *State v. Slert*, noted at 149 Wn. App. 1043, 2009 WL 924893, at *1 (*Slert* II). The present appeal arises following the third trial that again resulted in conviction of second degree murder with a firearm.

Before Slert's third trial, Slert moved to suppress his statements to McCroskey, Brown, and Wetzold, arguing in part that law enforcement did not "scrupulously guard[ ]" his invocation of *Miranda* rights. RP (Nov. 18, 2009) at 10. The trial court held CrR 3.5 and CrR 3.6 suppression hearings on November 18 and November 20, 2009, to address the admissibility of this evidence.

The trial court admitted the statements that Slert made to McCroskey in the car.[15] The

[15] The trial court made the following findings regarding undisputed facts:

> 1.A.1. On October 24, 2000, at about 10[:]40 A.M., Kenneth Slert drove down [United States Forest Service] road 5230, in Lewis County, Washington, and contacted Ranger Nehring. Slert informed Nehring that he had shot and killed a man at his campsite the night before.
>
> 1.A.2. Mr. Slert was placed in custody and his weapons were confiscated. Law enforcement was called. Mr. Slert proceeded to tell Ranger Nehring what happened.
>
> 1.A.3. Ranger Kirshner and Ranger Langley arrived on the scene and went with Mr. Slert and [emergency medical technicians] to the campsite to check on the victim. On the way to the scene, Ranger Langley stopped the vehicle and read Mr. Slert his [*Miranda* w]arnings.
>
> 1.A.4. Deputy Shannon arrived at the camp and contacted Mr. Slert. Deputy Shannon, at the camp, read Mr. Slert his [*Miranda* w]arnings. Mr. Slert stated that he understood his rights and agreed to speak with the deputy.
>
> 1.A.5. Mr. Slert then began to tell Deputy Shannon generally what happened, however, at some point Deputy Shannon advised him to wait to tell the detective of all the details.
>
> 1.A.6. Detectives Wetzold and Brown arrived on the scene at approximately 13:36 hours. Detective Wetzold then contacted Mr. Slert after looking at the scene and, again, read Slert his [*Miranda* w]arnings.
>
> 1.A.7. Mr. Slert stated he understood his rights and agreed to speak with the detective.
>
> 1.A.8. Mr. Slert gave a statement to Detective Wetzold.

1.A.9. Mr. Slert then was asked to give a taped statement, at which point Mr. Slert asserted that he didn't want to talk anymore.

. . . .

1.A.16. Mr. Slert was transported to the jail by Sheriff McCroskey at approximately 3:28 [p.m.] in the afternoon of October 24, 2000.

1.A.17. During the two hour ride to the jail, . . . Sheriff McCroskey had a casual conversation with Mr. Slert about various things. Mr. Slert brought up the shooting and made several unsolicited statements regarding the incident, although McCroskey did ask some general followup questions.

. . . .

1.C.1. Mr. Slert was booked into the Lewis County Jail.

1.C.2. Approximately six hours after Mr. Slert told the detectives he did not want to say anything further at the campsite, Detectives Wetzold and Brown contacted Mr. Slert at the jail and asked if he wanted to provide a taped statement.

1.C.3. Mr. Slert was again read his [*Miranda* w]arnings. He said he understood his rights and agreed to provide a tape recorded statement.

1.C.4. On the next day, October 25, Mr. Slert agreed to take a polygraph examination. He was again read his [*Miranda* w]arnings by Detective Brown prior to taking that test.

1.C.5. Deputy Brown told Mr. Slert that everything . . . he would tell the polygraph examiner could be used against him in court.

1.C.6. Mr. Slert stated that he understood and agreed to talk to . . . the polygraph examiner and Detective Brown. Mr. Slert also signed a polygraph waiver.

1.C.7. Mr. Slert was not charged with a crime at that time and was at some point subsequently released pending further investigation.

1.C.8. Mr. Slert and Detective Wetzold had several calls on the telephone. At least two of the calls were initiated by Mr. Slert, however, he only left messages and Detective Wetzold returned those calls. The call on May 29, 2001 was initiated by Detective Wetzold. During the October 31, 2000 call, Mr. Slert indicated his brother was a paralegal and he shouldn't talk without a lawyer. The call ended.

CP at 351-55.

The trial court made the following findings regarding disputed facts:

1.B.1. The defense alleged that Sheriff McCroskey tape recorded the conversation between him and Mr. Slert during the ride to the jail in the patrol car. In support of this assertion, the defense called former Chief Criminal Deputy Prosecutor David Arcuri. The State called former elected prosecutor Jeremy Randalph, and former Sheriff John McCroskey. The assertion that there was such a tape recording comes solely from the testimony of Mr. Acuri [sic].

1.B.2. The court finds that there was no tape recording of Mr. Slert by Sheriff McCroskey during the car ride to the jail.

1.B.3. The court finds there was no corroborating evidence of Mr. Arcuri's accusation.

trial court also admitted Slert's statements to Brown and Wetzold at the jail and during Slert's polygraph examination. The trial court, however, suppressed the statements that Slert made immediately after he refused to give a recorded statement to Wetzold at the campsite, as well as the portions of Slert's out-of-custody telephone conversations with Wetzold after Slert's May 29,

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> 1.B.4. The technology of the tape recorders at the time would have made such a recording of the conversation, in the patrol car, difficult, if not impossible had the recording device been on the front seat of the patrol car.
>
> 1.B.5. Had there been such a tape, it would likely have been logged into evidence.
>
> 1.B.6. There is no tape of a recorded conversation between Sheriff McCroskey and Kenneth Slert in evidence.
>
> 1.B.7. Had there been such a tape, it would likely have been transcribed.
>
> 1.B.8. No tape of a recorded conversation between Sheriff McCroskey and Kenneth Slert exists on the evidence logs, and no transcript of such a recording exists.
>
> 1.B.9. Sheriff McCroskey's role was very limited under the circumstances of this investigation. He would not have been involved in the investigation or in questioning witnesses.
>
> 1.B.10. Sheriff McCroskey's report does not mention a tape recording of the defendant.
>
> 1.B.11. The conversation between Slert and McCroskey in the car was initiated by Mr. Slert, although Sheriff McCroskey did ask questions from time to time.

CP at 353-56.

The trial court made the following relevant conclusions of law:

> 2.5 The Defendant was read his Miranda [w]arnings at least five times throughout the time he was initially contacted, arrested, questioned at the jail, and then released.

CP at 356.

Slert assigns error to findings of fact 1.A.17, 1.B.2, and 1.C.3, and conclusion of law 2.5. But he fails to support his assignments of error to the findings with specific argument. "A party abandons assignments of error to findings of fact if it fails to argue them in its brief." *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 630, 733 P.2d 182 (1987); *State v. Wood*, 89 Wn.2d 97, 99, 569 P.2d 1148 (1977). And unchallenged findings of fact are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Accordingly, to the extent the findings are factual, we consider them verities on appeal. Nonetheless, a review of the record demonstrates that substantial evidence supports the challenged findings and that trial court's findings support the challenged conclusions of law, which we review de novo. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

2001, request for an attorney.

At trial, the State called Kirschner to testify about Slert's statements on the way to the campsite; McCroskey to testify about Slert's statements on the way to the jailhouse; and Wetzold and Brown to testify about their interactions with Slert at the campsite and the jail. In addition, the State introduced the recorded statement that Slert gave at the jail.

A. Statements to Nehring

Slert argues, for the first time on appeal, that the trial court erred when it admitted his statements to Nehring because Nehring did not apprise him of his *Miranda* rights before questioning him. The State argues that Slert's initial statements to Nehring did not amount to custodial interrogation because Nehring did not take Slert into custody for *Miranda* purposes at the time.

RAP 2.5(a) generally does not allow parties to raise claims for the first time on appeal. But RAP 2.5(a)(3) allows appellants to raise claims for the first time on appeal if such claims constitute manifest error affecting a constitutional right. To determine whether an error is truly of constitutional dimension, appellate courts first look to the asserted claim and assess whether, if the claim is correct, it implicates a constitutional interest as compared to another form of trial error. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

To establish manifest error allowing appellate review, appellants must demonstrate actual prejudice resulting from the error, i.e., that the error had "'practical and identifiable consequences'" at trial. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (internal quotation marks omitted) (quoting *O'Hara*, 167 Wn.2d at 99). An appellant demonstrates actual prejudice when he establishes from an adequate record that the trial court likely would have

granted a suppression motion. *State v. Contreras*, 92 Wn. App. 307, 312, 966 P.2d 915 (1998). If the asserted error is both of constitutional magnitude and manifest, we determine whether the State has shown that the error is harmless beyond a reasonable doubt. *Gordon*, 172 Wn.2d at 676.

The Fifth Amendment protects a suspect from forced self-incrimination. Here, Slert's claim, if correct, would implicate his constitutional rights under the Fifth Amendment. Accordingly, we turn to whether he demonstrates a manifest error. We review constitutional issues de novo. *State v. Robinson*, 171 Wn.2d 292, 301, 253 P.3d 84 (2011).

State agents must give *Miranda* warnings when a suspect is subject to custodial interrogation. *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). We review whether a defendant was in custody for *Miranda* purposes de novo. *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). In determining this, we apply an objective test—whether a reasonable person in the suspect's position would have felt that state agents curtailed his or her freedom to the degree associated with a formal arrest. *Heritage*, 152 Wn.2d at 218.

It is irrelevant to this inquiry whether the police had probable cause to arrest a suspect. *Lorenz*, 152 Wn.2d at 37. Moreover, investigative detentions[16] are not custodial for *Miranda* purposes because they are brief, occur in public, and are less police dominated. *Heritage*, 152 Wn.2d at 218. Thus, although a reasonable person might not feel free to leave, a law enforcement officer may ask a moderate number of questions during an investigative detention to determine the suspect's identity and confirm or dispel the officer's suspicions without reading *Miranda* warnings

[16] Courts commonly refer to investigative detentions as "*Terry* stops." *See generally Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *see also State v. Harrington*, 167 Wn.2d 656, 664, 222 P.3d 92 (2009).

to the person. *Heritage*, 152 Wn.2d at 218.

After Slert stopped Nehring and told Nehring that he had shot someone, Nehring told Slert to keep his hands on his steering wheel and "not to move," confiscated Slert's guns, and asked Slert to exit his car. RP (Jan.26, 2010) at 178. We regard Nehring, a park ranger, as a state agent for *Miranda* purposes. *See Heritage*, 152 Wn.2d at 214-17 (holding park officers were state agents). Even so, at this point in their encounter, Nehring's detention of Slert amounted to no more than a lawful investigative detention. *S*ee Part E at pp. 41-43. It was only after Langley and Kirschner arrived that Nehring placed Slert into "protective custody," handcuffed him, and placed him into the back of Langley's patrol car. RP (Nov. 18, 2009) at 33. Accordingly, Slert's initial detention by Nehring did not constitute custody for *Miranda* purposes and Slert fails to demonstrate a manifest error. This claim fails.

B. Statements to Langley and Kirschner

Slert also argues for the first time on appeal that the trial court erred when it admitted his statements to Langley and Kirschner because they did not apprise him of his *Miranda* rights before they questioned him. The State argues that Slert made these statements "spontaneous[ly]"—without encouragement and provocation—and, thus, the rangers did not interrogate Slert for *Miranda* purposes. Br. of Resp't at 44-45. As we discuss below, Slert was subject to a lawful investigative detention—which did not constitute custody for *Miranda* purposes—throughout his car ride to the campsite with Langley and Kirschner and his subsequent detention there. *S*ee Part E at pp. 43-44. Furthermore, even if Slert were in custody for *Miranda* purposes, his statements were not the product of interrogation. Accordingly, we agree with the State and hold that Slert fails to demonstrate a manifest error affecting his constitutional rights.

When police officers administer *Miranda* warnings, a suspect may waive his right to remain silent if he does so "knowingly, voluntarily, and intelligently." 384 U.S. at 444. A suspect need not explicitly waive his *Miranda* rights in writing. *State v. Terrovona*, 105 Wn.2d 632, 646, 716 P.2d 295 (1986). A court may find an implied waiver where the record demonstrates that "a defendant understood his rights and volunteered information after reaching such understanding" or that "a defendant's answers were freely and voluntarily made without duress, promise or threat and with a full understanding of his constitutional rights." *Terrovona*, 105 Wn.2d at 646-47.

Langley and Kirschner read Slert his *Miranda* rights, Slert acknowledged his rights, appeared to understand them, but did not invoke them. Slert then continued discussing the shooting with Langley and Kirschner during the car ride. Under these facts, it appears that Slert knowingly, voluntarily, and intelligently waived his right to silence when he continued the conversation.

Moreover, "interrogation" in the *Miranda* context involves express questioning and its functional equivalent, which the United States Supreme Court has defined as "any words or actions . . . that the police should know are reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 297 (1980). As a corollary, a defendant's "voluntary, spontaneous, and unsolicited" statements are not the product of "interrogation" for *Miranda* purposes. *State v. Miner*, 22 Wn. App. 480, 483, 591 P.2d 812 (1979). Here, Slert's statements were not the product of interrogation.

We hold that Slert fails to demonstrate a manifest error affecting his constitutional rights. Slert fails to identify any statements that he made to Langley and Kirschner before they read him *Miranda* rights that should have been suppressed; instead, he argues that the trial court should

have suppressed the entire conversation. But the record indicates that Slert began discussing the shooting freely and without solicitation and that he continued discussing what happened after Langley and Kirschner gave him his *Miranda* rights. Accordingly, these statements were not the product of interrogation and were made knowingly, voluntarily, and intelligently after he was advised of his right to remain silent and were admissible.

C. Statements to McCroskey and Taped Statements to Wetzold and Brown

Slert further argues that Wetzold wrongfully continued to interrogate him at the campsite after he invoked his right to silence and, thus, failed to scrupulously honor his invocation. He asserts that the trial court erred in admitting his statements to McCroskey in the car while being transported to jail, his unrecorded statements to Wetzold at the jail, and his recorded statement to Wetzold and Brown. The State argues that Slert's statements to police officers at the scene, his conversation with McCroskey while driving to jail, and his statements to Wetzold and Brown at jail fall within the law of the case doctrine, and Slert may not re-litigate these issues on appeal. Slert responds that we may consider Slert's arguments during this appeal because the law of the case doctrine is discretionary, and there has been a "substantial change in evidence" since Slert's two earlier appeals because the trial court allowed the parties to conduct a "full-blown" CrR 3.5 hearing on this issue. Reply Br. of Appellant at 37 & n. 24. We hold that each is partially correct.

Under RAP 2.5(c)(2), we may review the propriety of our earlier decision in the same case and, where justice would best be served, decide the case on the basis of our opinion of the law at the time of later review. Although the doctrine is discretionary, we usually only reconsider a decision where (1) the decision is "clearly erroneous" and would work a "manifest injustice" to

one party if the decision were not set aside or (2) where there has been an "intervening change in controlling precedent" between the time of trial and appeal. *Roberson v. Perez*, 156 Wn.2d 33, 42, 123 P.3d 844 (2005); *State v. Worl*, 129 Wn.2d 416, 425, 918 P.2d 905 (1996).

In *Slert* I, we addressed the same arguments regarding the admissibility of (1) Slert's statements to McCroskey when McCroskey transported Slert to jail and (2) the tape-recorded statement that Slert gave Wetzold and Brown at the jail. We held that the trial court did not err when admitting these statements. *Slert* I, 2005 WL 1870661 at *5-6. Slert has not demonstrated that our earlier decision was "clearly erroneous" or that there has been an "intervening change in precedent" to call into question those decisions. Therefore, we hold that the law of the case doctrine prevents Slert from relitigating the admissibility of his statements to McCroskey and his recorded statements to Wetzold and Brown on appeal.

D. Unrecorded Statements to Wetzold and Brown

Slert also argues that the trial court should have suppressed his statements to Wetzold and Brown at jail because they failed to scrupulously honor his invocation of his right to silence at his campsite. The State argues that Slert voluntarily made these statements. We agree with the State.

A person may be found to have waived a previously asserted right to silence if he or she "freely and selectively responds to police questioning after initially asserting *Miranda* rights." *State v. Wheeler*, 108 Wn.2d 230, 238, 737 P.2d 1005 (1987). We determine the voluntariness of a defendant's statement under a totality of the circumstances standard. *State v. Aten*, 130 Wn.2d 640, 663-64, 927 P.2d 210 (1996).

Here, Wetzold reminded Slert that his *Miranda* rights were "still in effect" before

beginning the unrecorded portion of the interview at the jail. RP (Nov. 20, 2009) at 49. By this point, law enforcement officers had read the *Miranda* rights read to Slert four times, and Slert had twice indicated he understood them. Despite this, he freely chose to participate in the interview with Wetzold and Brown. Accordingly, the totality of the circumstances indicates that Slert's unrecorded statements to them at the jail were voluntary. The trial court did not err in admitting these statements and Slert's claim fails.

E. Statements during Polygraph Examination

Slert also argues that the trial court's admission, if any, of Slert's statements during his polygraph examination was error. But Brown read Slert his *Miranda* rights for the sixth time before beginning the examination. Because these statements followed the proper administration of *Miranda* rights, the trial court did not err in admitting them.

F. Statements during Telephone Calls to Wetzold

Slert also argues that the trial court erred when it did not suppress all of Slert's statements during his telephone calls to Wetzold. But Slert had been released from custody when he made these calls and statements to Wetzold and, thus, they do not implicate *Miranda*. His claim fails.

Search and Seizure

Slert raises numerous issues relating to the search of his vehicle and the campsite where Benson died. We find no merit in his claims but address the issues because they may arise on remand.

Before his third trial, Slert moved to suppress physical evidence obtained from the warrantless search of his tent and its alleged curtilage, including evidence of Benson's body. Among other witnesses at the suppression hearing, United States Forest Service Officer Robert

Tokach testified about the camping policies at Gifford Pinchot National Forest. Tokach testified that the campsite operated under a "dispersed camping" system, which meant the park did not designate campsites or provide utilities. RP (Nov. 18, 2009) at 58. Because of the public nature of the campsite grounds, neither Slert nor Tokach could exclude anyone from the campsites.

The trial court found[17] that Slert did not have a legitimate expectation of privacy in the

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[17] The trial court made the following relevant findings of fact:

> 1.A.10. The detectives entered the campsite of Mr. Slert and noticed his "tent." Mr. Slert's tent consisted of a tarp that was propped up at the center by a straight thin piece of wood, similar to a small sapling shaft. The tarp was spread out at the bottom to a width of about 5-6 feet.
>
> 1.A.11. One of the openings of the "tent" sat next to some trees and on that side a blue tarp covered that end. On the end facing the camp, nearest the victim, the "tent" was open, such that a person standing outside the tent, in the clearing and looking at the opening straight on, could easily see inside.
>
> 1.A.12. The tent was located in a clearing, designated by the [United States] Forest Service as "dispersed site camping."
>
> 1.A.13. The location of the tent was not in a designated campsite such as one would find in a public camp ground. No reservations can be made for dispersed site camping, in contrast to a public camp ground where individual, numbered, campsites may be reserved and paid for in advance.
>
> 1.A.14. The area outside the tent was a public area and the officers had a right to be in that area.
>
> 1.A.15. Mr. Slert had no right to exclude others from the clearing where he had erected his tent.

CP at 352-53.

The trial court made the following relevant conclusions of law:

> 2.1 The court has already suppressed the evidence from inside the tent. That decision was made by [the trial court] at the first trial. That Decision was upheld by the Division II Court of Appeals.
>
> 2.2 For the purposes of this issue, and consistent with the Court of Appeals decisions in this case, the court finds the tent was a "dwelling".
>
> 2.3 Everything outside the tent was not part of any "curtilage".
>
> 2.4 The Defendant had no legitimate expectation of privacy in any area outside of his tent.

CP at 355-56. Slert assigns error to findings of fact 1.A.11, 1.A.14, and 1.A.15 and conclusions of law 2.3 and 2.4. But he fails to support his assignments of error to the findings with specific argument. "A party abandons assignments of error to findings of fact if it fails to argue them in its brief." *Valley View*, 107 Wn.2d at 630; *Wood*, 89 Wn.2d at 99. And unchallenged findings of fact are verities on appeal. *Hill*, 123 Wn.2d at 644. Accordingly, to the extent the findings are

area around his tent, and the trial court refused to suppress such evidence. The trial court did suppress evidence that police officers seized from inside Slert's tent, but the trial court allowed the officers to testify about what they saw when they looked in the tent from the area outside it.

Slert now argues that the State violated his rights under the federal and state constitutions when police officers conducted a warrantless search of his car and campsite grounds and detained him for approximately five hours without arresting him. Slert argues that the trial court should have suppressed evidence seized from Slert's car, evidence seized from the curtilage around Slert's tent, testimonial evidence about what officers saw inside Slert's tent when they stood on public land outside the tent, and incriminating statements that Slert made when the officers detained him for five hours without formally arresting him. We disagree.

A. Standard of Review

We review constitutional issues and conclusions of law from a trial court's suppression hearing de novo. *Robinson*, 171 Wn.2d at 301; *State v. Carter*, 151 Wn.2d 118, 125, 85 P.3d 887 (2004). On June 8, 2010, the trial court issued a written order following the CrR 3.5 and CrR 3.6 suppression hearings. The order concluded, as a matter of law, that (1) Slert's tent was a "'dwelling,'" (2) everything outside [Slert's] tent was not "'curtilage,'" and (3) Slert "'had no legitimate expectation of privacy in the area outside his tent.'" CP at 356.

Both the Fourth Amendment to the federal constitution and article I, section 7 of our state constitution prohibit warrantless searches unless one of the narrow exceptions to the warrant requirement applies. *State v. Buelna Valdez*, 167 Wn.2d 761, 768, 771-72, 224 P.3d 751 (2009).

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factual, we consider them verities on appeal. Nonetheless, a review of the record demonstrates that substantial evidence supports the challenged findings. We also hold that trial court's findings support the challenged conclusions of law.

An unlawful search occurs when the State unreasonably intrudes into a person's private affairs. *Carter*, 151 Wn.2d at 125.

Article I, section 7 provides more extensive privacy protections than the Fourth Amendment and creates "'an almost absolute bar to warrantless arrests, searches, and seizures.'" *Valdez*, 167 Wn.2d at 772 (quoting *State v. Ringer*, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983)). Accordingly, the inquiry under the state constitution focuses on "'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.'" *State v. Cheatam*, 150 Wn.2d 626, 642, 81 P.3d 830 (2003) (internal quotation marks omitted) (quoting *State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994)).

RAP 2.5(a) generally does not allow parties to raise claims for the first time on appeal. But RAP 2.5(a)(3) allows appellants to raise claims for the first time on appeal if the appellant demonstrates an error that affects a constitutional right and is manifest. *O'Hara*, 167 Wn.2d at 98-99.

B. Nehring's Search

At trial, Nehring testified that (1) Slert voluntarily contacted Nehring on October 24, 2000, and explained the shooting incident to him; (2) Slert told Nehring that he had guns in his car; (3) Nehring confiscated Slert's guns; (4) after Langley and Kirchner arrived where Nehring had encountered Slert, Slert gave Nehring permission to search his car; (5) Nehring found alcohol, antidepressant medication, and ammunition—including the .45 caliber ammunition—in the car; and (6) Slert "appeared to be hung over, if not under the influence of alcohol" during their conversation. RP (Jan. 26, 2010) at 181. Slert did not object to this testimony at trial. On cross-examination during trial, Slert's counsel highlighted Slert's cooperative demeanor during his

interactions with Nehring.

Slert argues, for the first time on appeal, that Nehring's warrantless search of Slert's car violated Slert's rights under the Fourth Amendment and article I, section 7 of the Washington State Constitution because Slert's consent to the search was neither "free" nor "voluntary." Br. of Appellant at 32.

But, even assuming that Slert's alleged constitutional error is manifest and, thus may be raised for the first time on appeal under RAP 2.5(a)(3), any error was invited. Under the invited error doctrine, a criminal defendant may not set up error at trial and then complain of it on appeal. *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 723, 10 P.3d 380 (2000). For the invited error doctrine to apply, the defendant must materially contribute to the error challenged on appeal by engaging in some type of affirmative action through which he knowingly and voluntarily sets up the error. *In re Pers. Restraint of Call*, 144 Wn.2d 315, 328, 28 P.3d 709 (2001).

Here, Slert did not move at trial to suppress testimony relating to the alcohol, antidepressant medication, and ammunition seized from his car. Moreover, Slert's cross-examination of Nehring and his closing argument emphasized his consent to Nehring's search and other cooperation with law enforcement, apparently in an attempt to bolster Slert's self-defense theory by showing that he didn't have anything to hide. *See* RP (Jan. 26, 2010) at 182 (regarding Nehring's request for permission); RP (Jan. 26, 2012) at 196-98 (discussing on cross-examination how Slert cooperated, did not try to hide anything, and allowed Nehring to search his vehicle); RP (Feb. 2, 2010) at 961 (closing argument claiming Slert cooperated completely with police and had nothing to hide). Accordingly, Slert affirmatively chose not to move to suppress the evidence from his car search in order to argue and to utilize his alleged consent as a favorable element of

his overall defense. Having set up the error, if any, at trial; Slert invited it and may not now complain of it on appeal. His claim fails.

C. Campsite Search

Slert also argues that the trial court erred when it did not suppress evidence obtained from the warrantless search of the curtilage surrounding Slert's tent. The State responds that Slert's argument fails because (1) he did not have a reasonable expectation of privacy in the area surrounding his tent because he had camped on public land and, thus, no curtilage existed; and (2) the law of the case doctrine bars re-litigation of this issue on appeal. We agree with the State.

At the campsite, law enforcement officers searched the area around Slert's tent without obtaining a search warrant. They discovered Benson's body covered with a blue tarp six to eight inches from the entrance to Slert's tent. The officers seized various items from the campsite grounds, as well as some items from inside Slert's tent.

Washington courts have recognized a legitimate expectation of privacy in a dwelling's curtilage and have defined the term "curtilage" as an area "'so intimately tied to the home itself that it should be placed under the home's umbrella of Fourth Amendment protection.'" *State v. Ridgway*, 57 Wn. App. 915, 918, 790 P.2d 1263 (1990) (internal quotation marks omitted) (quoting *United States v. Dunn*, 480 U.S. 294, 301, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987)). A court determines the scope of curtilage by reference to facts regarding "'proximity, use and expectation of privacy.'" *Ridgway*, 57 Wn. App at 918 (quoting *State v. Niedergang*, 43 Wn. App. 656, 660, 719 P.2d 576 (1986)).

An officer's presence within a dwelling's curtilage does not automatically amount to an unconstitutional invasion of privacy. *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981). Although residents maintain an expectation of privacy in their dwelling's curtilage, a police officer on legitimate business may enter areas of curtilage that are impliedly open to the public, such as

driveways, walkways, or access routes leading to the residence. *Seagull*, 95 Wn.2d at 902; *State v. Hoke*, 72 Wn. App. 869, 874, 866 P.2d 670 (1994). In doing so, the officer may keep his eyes open. *Seagull*, 95 Wn.2d at 902. Whether an officer has unconstitutionally invaded curtilage depends on the facts of the case. *Seagull*, 95 Wn.2d at 902.

Slert argues that his tent constituted a dwelling for Fourth Amendment and article I, section 7 purposes, and cites a number of federal cases that have held that a person may have a legitimate expectation of privacy in the area inside his tent. Furthermore, Slert argues that, because his tent constituted a dwelling for constitutional purposes, the trial court should have concluded that this also meant he had protected curtilage[18] around the tent.

The State does not dispute the trial court's conclusion of law 2.2., that Slert's tent was a dwelling. But even assuming without deciding that Slert's tent constituted a dwelling, the Ninth Circuit Court of Appeals recently held in *United States v. Basher*, 629 F.3d 1161, 1163, 1169 (9th Cir. 2011) that a camper did not have a reasonable expectation of privacy in a "dispersed" campsite on national forest service land in Yakima County and, thus, the area outside the camper's tent did not constitute curtilage.

The *Basher* court reasoned that it was "problematic" to classify the area outside a tent in a

[18] Slert also argues that the trial court erred because it did not apply a specific set of factors for determining the extent of constitutionally-protected curtilage that the United States Supreme Court enumerated in *Dunn*. 480 U.S. at 301. But nothing in *Dunn* mandates that a lower court must apply the factors in determining whether curtilage exists. 480 U.S. at 301 ("We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a 'correct' answer to all extent-of-curtilage questions. Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon . . . whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection."); *see also U.S. v. Basher*, 629 F.3d 1161, 1169 (2011) (rejecting the *Dunn* factors in the public parks context and stating that although the *Dunn* factors may be employed "with reasonable certainty in the urban residential environment, the analysis does not necessarily carry over to most camping contexts").

national park or national forest campsite as curtilage because, although "[a] tent is comparable to a house, apartment, or hotel room because it is a private area where people sleep and change clothing," "campsites, such as the dispersed, ill-defined site here, are open to the public and exposed." *Basher*, 629 F.3d at 1169. It observed that Basher was staying in "a dispersed . . . or undeveloped camping area . . . visible from . . . where the [law enforcement] officers had stayed the previous night." *Basher*, 629 F.3d at 1169. Accordingly, the *Basher* court held that under the facts of that case, Brasher had no expectation of privacy in his campsite, the area outside of his tent was not cartilage, and, thus, the police officers did not violate the Fourth Amendment when they searched the campsite. 629 F.3d at 1169.

We find *Basher* instructive. Here, Tokach testified at the suppression hearing that neither he nor Slert could exclude anyone from the dispersed area campsites. Accordingly, the trial court correctly concluded that Slert's tent had no curtilage because it was located in a dispersed camping area that was open to the public. Slert's claim fails.

D. Testimony about Tent's Contents

The door to Slert's tent was open on one side, and Brown reported that she and other officers could see items inside the tent when standing on public land outside it. Slert argues that the trial court erred when it allowed law enforcement officers to testify about what they saw when they peered inside Slert's open tent when standing on public land outside the tent. The State responds that this testimony was admissible under the open view doctrine. We agree with the State.

Under the open view doctrine, a law enforcement officer's observation takes place from a vantage point not intruding into an area protected by a reasonable expectation of privacy and the

officer observes an object knowingly exposed to the public. *Seagull*, 95 Wn.2d at 902. The object under observation does not fall within the scope of the constitution because it is not subject to a reasonable expectation of privacy. *Seagull*, 95 Wn.2d at 902.

Here, the area outside of Slert's tent did not include constitutionally-protected cartilage. Accordingly, the officers stood lawfully outside the Slert's tent and they testified only about what was visible to them from the outside. Therefore, the open view doctrine permitted the officers to testify about what they saw and the trial court did not err by admitting their statements. This claim also fails.

E. Lawful Detention

Slert also argues, for the first time on appeal, that Wetzold and Brown violated his rights under article I, section 7 of the state constitution by detaining him for nearly five hours without arrest. He argues that this detention also mandates that the trial court should have suppressed all physical evidence obtained from the campsite, Slert's incriminating statements made during this time period, and his subsequent statements. We disagree.

Here, Slert's claim that incriminating statements he made when the officers detained him for five hours without formally arresting him should have been suppressed, if correct, would implicate his constitutional rights under the Fourth Amendment and article I, section 7. Accordingly, we turn to whether he demonstrates a manifest error.

Seizures are constitutional if they are "reasonable" under the Fourth Amendment and if they are undertaken with "authority of law" under article I, section 7 of the state constitution. Both constitutions permit a warrantless investigative detention whenever a law enforcement officer has a reasonable suspicion, based on specific and articulable facts, that the stopped person

has been or is about to be involved in a crime. *State v. Snapp*, 174 Wn.2d 177, 197-98, 275 P.3d 289 (2012) (applying state constitution); *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003) (applying federal constitution).

In evaluating the reasonableness of an investigative detention, such as what occurred here, we consider "the totality of the circumstances, including the officer's training and experience, the location of the stop, and the conduct of the person detained." *Acrey*, 148 Wn.2d at 747 (footnote omitted). We may also consider "'the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect [was] detained.'" *Acrey*, 148 Wn.2d at 747 (quoting *State v. Williams*, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984)). A lawful investigatory detention's scope and duration are limited to fulfilling the investigative purpose of the stop. *Acrey*, 148 Wn.2d at 747. "If the results of the initial stop dispel an officer's suspicions, then the officer must end the investigative stop. If, however, the officer's initial suspicions are confirmed or are further aroused, the scope of the stop may be extended and its duration may be prolonged." *Acrey*, 148 Wn.2d at 747. The degree of law enforcement's intrusion must also be appropriate to the type of crime under investigation and to the probable dangerousness of the suspect. *See Williams*, 102 Wn.2d at 740.

Here, the record reflects that Nehring had reasonable suspicion to detain Slert when Slert told Nehring that he had shot Benson with a gun that was in his car, when Nehring observed that Slert smelled of intoxicants, and when Slert admitted that he waited until morning to report the previous night's shooting. When Slert encountered Nehring and Nehring heard Slert's recitation of the prior night's events, Nehring had specific and articulable facts to suspect Slert of unlawful homicide and he reasonably extended his encounter with Slert to investigate Slert's story.

Likewise, Langley and Kirchner's subsequent detention and transport of Slert to Slert's campsite was reasonable based on Slert volunteering to take them to the campsite and their need to confirm Benson's death. *See Wheeler*, 108 Wn.2d at 235-37 (handcuffing defendant for transport to crime scene was within investigative detention's scope when crime was reported and defendant was suspected of crime).

After Slert volunteered to take Langley and Kirchner to his campsite to confirm Benson's death, Langley and Kirchner confirmed Benson's death. Then, given Slert's admission that he shot Benson with a .45 caliber handgun, Slert's overnight delay in reporting the homicide, the smell of intoxicants on Slert, and Nehring's discovery of a loaded .45 caliber handgun and .45 caliber ammunition in Slert's car, Langley and Kirchner could reasonably justify his subsequent detention for further investigation. Moreover, Slert indicated that he had acted in self-defense and investigation of the scene and his continued presence were essential for the officers mindful of his asserted defense.[19] And here, no intervening events occurred that vitiated the need for further investigation into Slert's role in the circumstances leading to Benson's death in the remote wooded area, justifying Slert's subsequent, extended detention by Wetzold and Brown when they arrived at the site.

During that detention and investigation, Slert continued to make statements about what had occurred between him and Benson and Wetzold discovered evidence at the scene that

[19] Self-defense is an affirmative defense determined at trial by a judge or jury, not by arresting officers at a suspected crime scene; thus, a potential self-defense claim does not vitiate otherwise-established probable cause for arrest. *State v. Fry*, 168 Wn.2d 1, 8, 228 P.3d 1 (2010) (plurality opinion). Although the lead opinion in *Fry* was a plurality, a majority of our Supreme Court did not disagree on this point of law. Necessarily, if a potential self-defense claim does not vitiate probable cause for arrest, it also does not vitiate the lower standard of proof required for an investigative detention. *See State v. Doughty*, 170 Wn.2d 57, 67, 239 P.3d 573 (2010).

conflicted with Slert's account of Benson's shooting and bolstered the reasonableness of Slert's continued detention at the site. The officers' initial suspicions were partially confirmed or were further aroused as the investigation at the scene in the woods proceeded, thus, the scope of the stop and Slert's detention could be extended and its duration prolonged without running afoul of Slert's rights under article I, section 7. *Acrey*, 148 Wn.2d at 747. Accordingly, we hold that the trial court likely would not have granted a suppression motion on Slert's asserted grounds and, thus, he fails to demonstrate a manifest error affecting his constitutional rights, and we do not reach the merits of this claim.

We remand for a new trial based on violation of the public trial right, but affirm the trial court's evidentiary rulings should those issues arise on remand.

Van Deren, J.

I concur:

Johanson, J.

Hunt, J. – I respectfully dissent from the majority's reversal of Slert's conviction and its remand for a fourth trial, which, in my view, the record before us does not support. More specifically, I disagree with the majority's (1) assumption that the trial court's pretrial consultation with counsel in chambers produced its later excusal of four jurors on the record, (2) holding that such consultation constituted "part of the jury selection process to which the public trial right applied,"[20] and (3) conclusion that the trial court's putting four jurors' excusals on the record in open court in Slert's presence did not preserve Slert's public trial right.

I would hold that (1) the trial court's pre-voir dire excusal of four jurors was purely "administrative" or "ministerial," not part of "voir dire" required to be conducted in open court; or, (2) alternatively, even if the four jurors' excusals were part of the jury selection process required to be conducted in open court, the excusals were sufficiently announced in open court in Slert's presence and they were not structural error warranting reversal and retrial. I would affirm.

FACTS

I. Pretrial Components of Jury Selection Process

A. Pretrial Hearings in Open Court, January 6 and 21

As the majority notes, on January 6 and 21, 2010, the trial court conducted pretrial hearings in Slert's presence in open court, during which the parties discussed the nature and content of the jury questionnaires and general voir dire procedures for Slert's trial. Slert drafted and proposed a jury questionnaire designed to identify venire members who had heard about his highly publicized previous trials, both of which had resulted in convictions for the same crime for which he was again being retried. The State agreed to Slert's jury questionnaire, with one

[20] Majority at 8.

proposed edit: The State asked the trial court to refer to Slert's prior trials as "proceedings" so the prospective jurors would not know that Slert had been previously convicted. Verbatim Report of Proceedings (VRP) (Jan. 21, 2010) at 4.

To avoid "taint[ing]"[21] the rest of the jury pool, Slert suggested conducting in-chambers voir dire of individuals whose juror questionnaire responses indicated knowledge about Slert's prior convictions; the trial court neither granted nor denied Slert's request at this time.[22] Slert, represented by counsel, was present for both pretrial hearings and voiced no objections.

B. Pretrial Conference in Chambers and in Open Court, January 25

A few days after the January 21 pretrial hearing, the trial court apparently held a pretrial conference in chambers. The trial court's clerk's minute entry for January 25 states: "Pretrial conference was held in chambers." Clerk's Papers (CP) at 194. This minute entry does *not*, however, note what was discussed during this pretrial conference. Nor, contrary to the majority's assumption, do these minute entries say that this pretrial conference in chambers resulted in the excusal of the four jurors based on their answers to the questionnaires.

The next minute entries, apparently reflecting proceedings in open court when court was "[i]n session," state: (1) "Witnesses excluded except for the chief investigating officer"; (2) "[c]ourt gave the defendant his rights for trial"; and (3) "[t]he defendant acknowledged understanding his rights." CP at 194. These minute entries parallel the verbatim report of proceedings recounting of the sequence of events; and both indicate that Slert was present throughout. Similarly, these minute entries do not mention that four jurors were excused during

[21] VRP (Jan. 6, 2010) at 4.

[22] Instead, the trial court stated that the jurors would receive and complete their questionnaires the first day of trial, set for January 25.

the earlier pretrial conference in chambers.

C. Pre-Voir Dire Administrative Excusal of Four Jurors, January 25

Slert remained present in open court, when, before the venire was brought into the courtroom,[23] the trial court announced on the record that, "after consultation with counsel" and as "agreed by counsel," it had "excused" four jurors "for cause" "based on [their] answers" to the questionnaires, three from the "primary panel" and one from the "alternate panel." VRP (Jan. 25, 2010) at 5; CP at 194. Again, Slert voiced no objection.

Neither the clerk's minute entries nor the verbatim report of proceedings state where or when this "consultation with counsel"[24] had taken place, whether it had involved any interactive juror questioning, or whether Slert had or had not been present or had offered personal input in addition to his counsel's participation. Yet the majority *assumes* (1) as a matter of law, that the trial court's earlier in-chambers conference, noted in the clerk's minute entry as having occurred before court was "[i]n session,"[25] was "part of the jury selection process to which the public trial right applied"[26]; and (2) as a matter of fact, that the trial court excused the four jurors in chambers rather than in open court. The record does not support this latter factual assumption; therefore, the former legal assumption is not supportable. *State v. Madarash*, 116 Wn. App. 500, 509, 66

[23] The following parts of the record suggest that the jury was not yet in the courtroom: (1) the trial court's statement before these pretrial discussions, "[W]hen the jury panel comes in . . . ," and (2) Slert's counsel's later suggestion that the trial court "bring the panel in." VRP (Jan. 25, 2010) at 4, 11.

[24] VRP (Jan. 25, 2010) at 5.

[25] CP at 194.

[26] Majority at 8.

P.3d 682 (2003).

As I describe later, the right to a public trial has generally encompassed only "voir dire" and other interactive and adversarial aspects of jury selection. Here, however, the record does not reflect that any individual juror questioning occurred in chambers, despite Slert's request for such procedure; on the contrary, the record strongly suggests that *no individual juror questioning occurred in chambers*. First, as I previously noted, the verbatim report of proceedings does not mention any in-chambers jury voir dire; and the clerk's minute entry mentions only a "[p]retrial *conference* . . . in chambers," with no corresponding mention of the subject discussed or action taken. CP at 194 (emphasis added). More specifically, this minute entry says nothing about jurors in general or excusing four jurors in particular during this in-chambers conference.

Second, both the verbatim report of proceedings and the minute entries reflect only that, *after* court was in open public session, the trial court stated on the record that, with both counsel's agreement, it had excused four jurors based on their questionnaire responses; neither the verbatim report of proceedings nor the minute entries recite a location where this agreement

between the trial court and counsel had occurred.[27] Furthermore, neither the clerk's minute entries nor the verbatim report of proceedings link this excusal of four jurors with the "[p]retrial conference in chambers"[28] or even hint that the excusal of the four jurors was the product of interactive voir dire questioning. On the contrary, the record strongly suggests that these four jurors' excusals were based solely on their passive responses to the questionnaire that Slert had designed to identify potential jurors tainted by pretrial publicity.

That neither the trial court nor counsel had yet questioned any prospective jurors about their questionnaire responses is also a reasonable inference from Slert's counsel's later comments on the record and the trial court's response. After the trial court announced on the record that it had excused the four jurors after consulting with counsel, Slert reiterated his pretrial suggestion

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[27] Although the trial court clerk's minute entry states that the four jurors were excused "for cause" and the verbatim reports of proceedings suggests that the excusals were based on the jurors' questionnaire responses, neither the minute entry nor the related verbatim reports of proceedings explains what type of "cause" these excusals entailed. CP at 194. Excusal could have been for reasons unrelated to the specifics of Slert's trial because, when the court session began shortly thereafter, (1) Slert reminded the trial court that they had not yet dealt with 15 potential jurors whose questionnaires indicated knowledge about pretrial publicity covering his case; and (2) the trial court unequivocally vetoed Slert's suggestion that they voir dire these 15 jurors individually in chambers. This colloquy strongly suggests that (1) the trial court did not and would not engage in voir dire in chambers; and (2) the trial court's previous "consultation with counsel," after which with their consent it had "excused" four jurors, had *not* involved such objectionable off-the-record in-chambers voir dire. VRP (Jan. 25, 2010) at 5.

I agree with the majority that counsel and the trial court *likely* excused the four jurors for cause because, according to Slert's counsel's comments on the record, their juror questionnaire answers had "indicated knowledge of [Slert's] prior court trials." VRP (Jan. 25, 2010) at 11. But I disagree with the majority's transforming this likelihood into a certainty on the silent record before us. Despite this *hint*, the record does not definitively show the actual cause for excusing these four jurors; nor does the record clearly show that these four excusals were the result of out-of-court voir dire. In short, this incomplete record on appeal does not justify reversal and retrial based on speculation that the steps counsel and the trial court took to provide Slert with a fair and impartial jury *might* have violated his rights.

[28] CP at 194.

that the parties question 15 venire members away from the other jurors, "in chambers,"[29] because they might have known something about Slert's case. Despite the 15 jurors' questionnaires apparently having indicated knowledge of Slert's pretrial publicity, the trial court flatly refused individual juror in-chambers questioning and clearly explained that individual questioning of these jurors would occur in open court.[30]

II. Voir Dire in Open Court

Before voir dire began, the trial court took special care to be sure that Slert, who used a hearing assistance device, could hear the juror questioning. The trial court also inquired to ascertain whether the guards' inadvertent bringing Slert into an unused courtroom where the alternate jurors had been filling out their questionnaires had adversely influenced them.

Having refused Slert's request for in-chambers voir dire, the trial brought the 15 potentially tainted venire members into the courtroom individually, swore them in, and allowed

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[29] VRP (Jan. 25, 2010) at 11.

[30] VRP (Jan. 25, 2010) at 10-12 reflects the following colloquoy:

> [SLERT:] [*W*]*e still haven't dealt with the responses to the questionnaire*.
>
> And what I would like to do, I've got a list of *15 jurors* that responded that they knew something about the case based on publicity. . . . *I would want to have those 15 interviewed in chambers individually*.
>
> . . .
>
> And I would—because of the situation we're in now, I would suggest we . . . bring the panel in, start with number three and start calling them in [for questioning]. We can probably do it in here [in the court] rather than doing it in chambers.
>
> [COURT:] Yeah. *We're not doing it in chambers*.
>
> . . .
>
> [COURT:] [W]e'll go through this process where we will bring the jurors in [to the court] individually and ask them some follow-up questions about the questionnaire [responses].

(Emphasis added).

counsel to conduct voir dire in Slert's presence on the record in open court. This voir dire consumed much of the day and filled 55 pages of the verbatim report of proceedings. Later, the trial court brought the remaining venire of some 40 jurors into court, swore them under oath, and began general voir dire, again in Slert's presence in open court. At no time did Slert or anyone else object to this process.

ANALYSIS

I. Voir Dire, Part of, not Coextensive with, Jury Selection

A. *Irby*

Relying on *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011), the majority summarily concludes: "*[T]he in-chambers conference* and the dismissal of the jurors were part of the jury selection process to which the public trial right applied." Majority at 8 (emphasis added). With all due respect, the record does not support (1) that the ambiguous "in-chambers conference" was "part of the jury selection process to which the public trial right applied"; or (2) that the trial court's "consultation with counsel," which the majority concludes precipitated the four jurors' excusal, occurred in chambers.[31] VRP (Jan. 25, 2010) at 5. Regardless of where this consultation occurred, the salient point is that the trial court put the excusal of the four jurors on the record in open court in Slert's presence; and Slert neither objected nor asked for details.

In contrast with the majority's assumption, a reasonable inference drawn from the trial court's adamant refusal of Slert's express request to question individual jurors in chambers is that the earlier "in-chambers conference"[32] did not involve juror "voir dire." Therefore, this "in-

[31] Nor does the record explain whether this consultation was a side-bar conference in open court or at some other location.

[32] Majority at 8.

chambers conference," which did not clearly involve juror questioning or the eventual excusal based on the four jurors' answers to the questionnaires, was *not* part of the jury selection process to which the public trial right applied.[33]

B. "Voir Dire" Not Coextensive with "Jury Selection"

Some cases use the terms "jury selection" and "voir dire" interchangeably when addressing the parts of the process that must occur in open court. But there are significant differences between the entire "jury selection" process from beginning to end, which includes administrative processes and the critical "voir dire" *component*, which focuses on seeking information from individual jurors as part of the adversarial process.

Dissenting in *Irby*, Chief Justice Madsen explains the early administrative stages of jury selection as follows:

> In our state, as in other jurisdictions, jury selection begins with a general screening process that eliminates from jury service those who do not meet statutory qualifications. RCW 2.36.070 sets forth basic jury qualifications, which include that the individual is at least 18 years old, a citizen of the United States, a resident of the county in which he or she is to serve, able to communicate in English, and the individual has not been convicted of a felony or not had civil rights restored. Other reasons for excusal are within the trial court's discretion.

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[33] I agree with the majority's admonition about refraining from conflating a defendant's right to be present and his and the public's rights to a public trial. Nevertheless, *Irby*'s actual holding does not apply here. Irby argued in Division One of our court that the trial court's email exchange with counsel about juror selection and questionnaires violated his right to be present *and* his right to a public trial under the state and federal constitutions; but Division One of our court based reversal of his conviction on only one of these two arguments, namely violation of only his right to be present at that stage of the proceedings in that case. *Irby*, 170 Wn.2d at 879. Thus, Irby's earlier asserted public-trial-right argument was not before the Supreme Court.

Although *Irby* discusses the use of juror questionnaires and the portion of jury selection for which a defendant has a due process right to be present, *Irby* does not involve *any* discussion about a defendant's right to a public trial. *See Irby*, 170 Wn.2d at 880-84. Furthermore, unlike the known facts here, the record in *Irby* more clearly showed that Irby had not been present for or privy to counsel's and the court's email exchange about juror selection and questionnaires.

Irby, 170 Wn.2d at 889-890 (Madsen, C. J., dissenting). Similarly, RCW 2.36.100(1), (3) gives the trial court authority to excuse potential jurors for "undue hardship, extreme inconvenience, public necessity, prior jury service at least twice in the preceding twelve months," or for "'*any reason* deemed sufficient by the court.'" *See Irby*, 170 Wn.2d at 890 (second emphasis omitted) (quoting RCW 2.36.100(1), (3)). As Chief Justice Madsen further notes:

> This law . . . "vests . . . a *wide discretion* to be exercised in the matter of excusing persons summoned for jury service from the performance of that duty." *State v. Ingels*, 4 Wn.2d 676, 682–83, 104 P.2d 944 (1940) (emphasis added); *accord State v. Rice*, 120 Wn.2d 549, 562, 844 P.2d 416 (1993); *see State v. Roberts*, 142 Wn.2d 471, 518–19, 14 P.3d 713 (2000) (a trial court's decision to excuse members of the jury venire is reviewed under an abuse of discretion standard).

Irby, 170 Wn.2d at 890 (alteration in original).

The reasons for which a trial court may excuse potential jurors administratively are generally non-debatable reasons that bear no relationship to the defendant's case and, therefore, do not generally warrant an adversarial setting in open court. *See Irby*, 170 Wn.2d at 887-88, 890. Thus, a defendant's right to a public trial does not extend to "purely *ministerial* or *legal issues* that do not require the resolution of disputed facts." *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008) (emphasis added). In contrast to pretrial administrative excusals at the trial court's discretion, the "voir dire" portion of the jury selection process is a distinctly adversarial process in which both counsel and the trial court may *actively question* prospective jurors, elicit direct responses, and "scrutinize not only [the jurors'] spoken words but also [their] gestures and attitudes" to ensure that the defendant receives an impartial jury. *Gomez v. United States*, 490 U.S. 858, 875, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989).

C. Other Case Law on Public Trial Rights; Inadequate Record Here

Washington courts have repeatedly recognized that a defendant's "public trial right applies to the evidentiary phases of the trial, *and to other 'adversary proceedings,'*" including voir dire. *State v. Rivera*, 108 Wn. App. 645, 652–53, 32 P.3d 292 (2001) (emphasis added) (quoting *Ayala v. Speckard*, 131 F.3d 62, 69 (2d Cir.1997)). Thus, most Washington cases finding violations of a defendant's public trial right in relation to jury selection have involved clear public exclusion from actual juror questioning.[34]

Slert's inconclusive record suggests that the trial court may have administratively excused four jurors based *solely* on their passive written responses to juror questionnaires, not in response to interactive juror voir dire questioning. There is no clear indication in the record (1) that any "adversary proceedings"[35] occurred during either the pretrial conference "in chambers"[36] or the trial court's "consultation with counsel"[37] during which counsel agreed to excuse the four

[34] *See e.g.*, *State v. Leyerle*, 158 Wn. App. 474, 242 P.3d 921 (2010) (voir dire of juror in court hallway violated public trial right); *State v. Paumier*, 155 Wn. App. 673, 230 P.3d 212 (individual voir dire of jurors in chambers violated public trial right), *review granted*, 169 Wn.2d 1017 (2010); *State v. Bowen*, 157 Wn. App. 821, 239 P.3d 1114 (2010) (same); *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009) (same); *State v. Erickson*, 146 Wn. App. 200, 189 P.3d 245 (2008) (individual voir dire of jurors in jury room violated public trial right); *State v. Duckett*, 141 Wn. App. 797, 173 P.3d 948 (2007) (same); *State v. Brightman*, 155 Wn.2d 506, 122 P.3d 150 (2005) (public trial right violated when entire voir dire closed to all spectators); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004) (same). *But see State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009) (individual voir dire in chambers was not "structural error" and did not violate public trial right), *cert. denied*, 131 S. Ct. 160 (2010).

In addition, the United States Supreme Court considered only whether the defendant's Sixth Amendment right to a public trial applied to "the *voir dire* of prospective jurors." *Presley v. Georgia*, 130 S. Ct. 721, 723, 175 L. Ed. 2d 675 (2010).

[35] *Rivera*, 108 Wn. App. at 653 (quoting *Ayala*, 131 F.3d at 69).

[36] CP at 194.

[37] VRP (Jan. 25, 2010) at 5.

prospective jurors; or (2) that the trial court and counsel conducted any voir dire of these four jurors before excusing them (highly unlikely in light of the trial court's flat refusal of Slert's request to voir dire individually in chambers 15 jurors whose questionnaires indicated knowledge of pretrial publicity).

In *Bennett*, we declined to find a violation of the defendant's public trial rights based on an inadequate record.[38] The record reflected that the parties had an "in-chambers conference about jury instructions"; but it did not elaborate beyond the trial court's later on-the-record statement that the court and counsel "'had an opportunity to go over the instructions' and that the instructions had 'been copied and collated.'" *Bennett*, 168 Wn. App. at 205. Based on this record, which, I note was more specific than the one we have here, we surmised that the "in-chambers conference" could have involved "purely ministerial or administrative matters" or it could have involved discussions about evidence or disputed facts related to the jury instructions; nevertheless, we rejected Bennett's suggestion that we *infer* that non-ministerial matters were discussed. *Bennett*, 168 Wn. App. at 206. Although *Bennett* did not involve excusal of potential jurors, the rationale pertains here, namely, that (1) we cannot base appellate decisions on conjecture about what may have occurred during discussions for which we have no clear record; and (2) we should not infer that non-ministerial matters were discussed where the record does not clearly show this happened.

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[38] As we noted in *State v. Bennett*, 168 Wn. App. 197, 206, 275 P.3d 1224 (2012):

> In order to obtain effective review of an in-chambers conference, the parties should make an adequate record in the trial court about what transpired during any conference so we can determine whether the conference dealt with purely ministerial issues or involved discussion or resolution of disputed facts or legal issues.

Here, the record before us does not show whether the trial court's "in-chambers conference" involved "purely ministerial or administrative matters," any juror excusals at all (whether under RCW 2.36.100(1) or for other reasons) or discussions about disputed facts related to the four later-announced excused jurors' fitness to serve that should have occurred during in-court voir dire.[39] *See Bennett*, 168 Wn. App at 206. As in *Bennett*, the non-specific clerk's minute entries for Slert's trial do not justify surmising that *any* matters implicating Slert's public trial right, including voir dire, occurred during the pretrial conference in chambers. On the contrary, as previously noted, the Slert trial court's unequivocal refusal to question any individual jurors in chambers justifies our surmising instead that the pretrial conference in chambers did not include "any [such] issues, factual or legal." *Bennett*, 168 Wn. App at 206.[40]

[39] As previously explained, the clerk's minute entries comprised only two short, but separate and unrelated, notations, the first reporting that the trial court held a "[p]retrial conference . . . in chambers" and the second (following several lines describing advising Slert about his trial rights) reporting that four jurors "were excused for cause and agreed by counsel." CP at 194. This second entry however, did not mention where or when this juror excusal occurred; more importantly, it does *not* state that the excusal occurred during the earlier reported "conference . . . in chambers." CP at 194.

[40] The majority notes that the record does not show whether Slert was present during the in-chambers conference or that his counsel had consulted with him before later agreeing with the trial court to excuse the four jurors. The majority here asserts, "'[W]here . . . personal presence is necessary in point of law, *the record must show the fact*'" to support its conclusion that the "in-chambers conference and resulting dismissal of jurors violated Slert's right to be present during critical stages of the proceedings." Majority at 8-9 (emphasis added) (alteration in original) (internal quotation marks omitted) (quoting *Irby*, 170 Wn.2d at 884 (quoting *Lewis v. United States*, 146 U.S. 370, 372, 13 S. Ct. 136, 36 L. Ed. 1011 (1892)). This conclusion is at odds with our holding in *Bennett* that we will not infer from an inadequate record that a defendant's rights were violated, 168 Wn. App. at 206-207.

II. No Reversal Required Under *Momah*[41] or *Paumier*[42]

Even if the trial court's pretrial excusal of four jurors constituted a courtroom closure that denied Slert's right to a public trial, I disagree with the majority that the closure was a "structural error" requiring reversal of Slert's conviction. Majority at 12. Article I, section 22 of the state constitution guarantees a criminal defendant a "'*public* trial by an *impartial* jury.'" *Momah*, 167 Wn.2d at 152 (first emphasis added) (quoting Wash. Const. art. I, § 22). The right to public trial and the right to an impartial jury are interrelated but distinct. *Momah*, 167 Wn.2d at 152. If these two rights come into conflict, we must "harmonize" them and construe them "in light of the central aim of a criminal proceeding: *to try the accused fairly*." *Momah*, 167 Wn.2d at 152-53 (emphasis added).

A defendant is entitled to a fair, not a perfect, trial. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984). And because the public trial right is "primarily for the benefit of the accused," we "permit the accused to make tactical choices to advance his own interests" and to achieve what *he perceives* as the fairest result for his trial. *Momah*, 167 Wn.2d at 148, 153. Some early public-trial case law broadly stated that "[p]rejudice is presumed" and that an appellate court must automatically "remand for a new trial"[43] anytime a trial court fails to apply the *Bone-Club* factors before closing the courtroom. *State v. Bone-Club*, 128 Wn.2d 254, 261-62, 906 P.2d 325 (1995) (citing *State v. Marsh*, 126 Wash. 142, 146-47, 217 P. 705 (1923)). But this bright line rule calling for automatic

[41] *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009), *cert. denied*, 131 S. Ct. 160 (2010).

[42] *State v. Paumier*, 155 Wn. App. 673, 230 P.3d 212, *review granted*, 169 Wn.2d 1017 (2010).

[43] *Orange*, 152 Wn.2d at 814.

reversal no longer applies.

A. *Momah*

Three years ago, a majority of our Supreme Court recognized that not all courtroom closures are "fundamentally unfair," that automatic reversal of a conviction is not required unless the courtroom closure was a "structural" error, and that the appellate court should "devise[] a remedy appropriate to [the] violation" for non-structural errors. *Momah*, 167 Wn.2d at 149. An error is "structural" when it "'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" *Momah*, 167 Wn.2d at 149 (alteration in original) (internal quotation marks omitted) (quoting *Washington v. Recuenco*, 548 U.S. 212, 218-19, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)). Conversely, then, an error would not be structural, warranting reversal and a new trial, if it did *not* "'necessarily render[ ] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" *Ibid*. Our Supreme Court held that conducting individual juror voir dire in chambers did not constitute structural error where the defendant had "affirmatively accepted the closure, argued for the expansion of it, actively participated in it, and sought [the] benefit from it." *Momah*, 167 Wn.2d at 156.

I strongly disagree with the majority's conclusion that *Momah* does not control any courtroom closure that they surmise might have occurred here; and their reliance on the plurality

decision in *Strode*[44] is misplaced.[45] On the contrary, even if the *Strode* facts aligned with Slert's, the *Strode* plurality decision would provide no precedent controlling our decision here.[46] Instead, we are bound by the majority decision in *Momah*, which, as noted above, requires a "remedy appropriate to [the violation],"[47] not automatic reversal. Following *Momah*, I fail to see how the process that the trial court followed below denied Slert a fair trial or prejudiced him in any way. On the contrary, the record clearly shows that all parties involved undertook extra cautionary measures to assure that Slert had an impartial jury and a fair trial, following Slert's "tactical choices to advance his own interests" and to achieve what *he perceived* as the fairest result for his trial.[48] *Momah*, 167 Wn.2d at 148, 153. I would hold that Slert's case falls within the parameters

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[44] *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009) (plurality opinion).

[45] Our Supreme Court reached a different result in *Strode*, a plurality opinion issued the same day as *Momah*. In *Strode*, the trial court and counsel had conducted individual voir dire of 11 prospective jurors in chambers to ensure "confidentiality" and that the jurors' responses to a juror questionnaire (asking intimate details about the jurors' exposure to sexual abuse) would not be "'broadcast'" in front of the whole jury panel. *Strode*, 167 Wn.2d at 224. Under those facts, the plurality concluded that conducting voir dire in chambers was (1) a courtroom closure that violated Strode's right to a public trial, and (2) structural error, because "the record [did] not show that the court considered the [defendant's] right to a public trial" or that it balanced this public trial right "in light of [Strode's] competing interests" in having an impartial jury. *Strode*, 167 Wn.2d 235 (Fairhurst, J., concurring).

I respectfully disagree with the majority's conclusion that Slert's facts are more similar to the *plurality* decision in *Strode* than to the *majority* decision in *Momah*. Strode's record was "devoid" of any showing that the trial court had considered *his* public trial interests—as opposed the *jurors'* confidentiality interests—before it conducted voir dire in chambers. *Strode*, 167 Wn.2d at 228. Here, in contrast, the record indicates that the trial court *did* consider Slert's public trial right when it flatly refused his request to voir dire in chambers 15 potentially prejudiced jurors.

[46] *See State v. Zakel*, 61 Wn. App. 805, 808-09, 812 P.2d 512 (1991), *aff'd*, 119 Wn.2d 563, 834 P.2d 1046 (1992); *see also Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977).

[47] *Momah*, 167 Wn.2d at 149.

[48] Here, as in *Momah*, the trial court and both counsel exhibited a common concern for balancing

of *Momah* and that any courtroom closure that may have occurred was not structural and, thus, does not require reversal of his conviction and another retrial.

B. *Paumier*

I also cannot agree with the majority's reliance on our split panel's conclusion in *Paumier* that the United States Supreme Court's decision in *Presley v. Georgia*, ___ U.S. ___, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010), "sub silentio" overruled our State Supreme Court's decision in *Momah* such that automatic reversal is required whenever a "'trial court fails to sua sponte consider reasonable alternatives [to closure] and fails to make the appropriate findings.'" Majority at 10 (quoting *Paumier*, 155 Wn. App. at 685 (citing *Presley*, 130 S. Ct. at 725)). As

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and safeguarding Slert's right to a public trial and his right to an impartial jury. Slert's counsel originally proposed a juror questionnaire designed to reveal jurors who knew information about Slert's previous trials to avoid "taint[ing]" the rest of the jury pool; the State assented without protest, suggesting one small edit in the questionnaire wording to further this goal. VRP (Jan. 6, 2010) at 4.

The record does not show who proposed the pretrial in-chambers conference or that the excusal of four jurors resulted from this in-chambers conference. But assuming, without agreeing as the majority asserts, that it was this pretrial conference that resulted in excusing the four jurors, the record shows that Slert's counsel "actively participated," based on the trial court's later statement on the record that it had excused four jurors "after consultation *with counsel*." VRP (Jan. 25, 2010) at 5 (emphasis added). The record also shows that Slert was present when the trial court made this announcement on the record in open court and that he did not object, thus, tacitly, at least, approving these juror excusals.

Further assuming, without agreeing with the majority, that the trial court's "consultation with counsel" was a courtroom closure, Slert twice advocated an even more "expansive" "courtroom closure" when he asked the trial court to conduct individual voir dire in chambers of 15 prospective jurors with knowledge of his prior trials to keep them from tainting the rest of the venire. *See* VRP (Jan. 6, 2010) at 3-4; VRP (Jan. 25, 2010) at 11. The trial court promptly rejected this latter proposal, stating, "[W]e're *not* doing [voir dire] in chambers." VRP (Jan. 25, 2010) at 12 (emphasis added). Again, this unequivocal refusal to allow juror voir dire in chambers, despite its potential efficacy for avoiding tainting the venire, is strong evidence that the trial court did not allow any in-chambers voir dire in Slert's trial, that it excused the four jurors for administrative or ministerial reasons pretrial and pre-voir dire, and that the trial court fully recognized and balanced Slert's public trial rights with his right to an impartial jury.

both Judge Quinn-Brintnall and I have previously noted in dissents, *Presley* did not have such a far-reaching holding. *Paumier*, 155 Wn. App. at 688-90 (Quinn-Brintnall, J., dissenting); *State v. Leyerle*, 158 Wn. App. 474, 490, 242 P.3d 921 (2010) (Hunt, J., dissenting). The trial court excluded Presley's uncle from voir dire over Presley's express objection and his uncle's request for "'some accommodation.'" *Presley*, 130 S. Ct. at 722 (internal quotation marks omitted). The Supreme Court concluded that excluding Presley's uncle from voir dire was a courtroom closure that violated Presley's Sixth Amendment[49] right to a public trial. *Presley*, 130 S. Ct. at 725.

The issue before the Supreme Court was whether Presley's Sixth Amendment right to a public trial extended to voir dire and whether a trial court must consider alternatives to a courtroom closure when a defendant proffers no alternatives for the court to consider. *Presley*, 130 S. Ct. at 723-24. The Supreme Court did not, however, issue a bright line rule about the appropriate *remedy* for *all* courtroom closures, as the majority here implies. Nor did *Presley* expressly or impliedly overrule the Court's previous holding in *Waller v. Georgia*, 467 U.S. 39, 50, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984), in which it had adopted an approach similar to that in *Momah* and had required a "remedy . . . appropriate to the violation" for courtroom closure cases. Therefore, under both *Presley* and *Momah*, a "remedy . . . appropriate to the violation" for courtroom closure cases, not automatic reversal, is still the standard and all that is required under federal and state law.

Furthermore, the United States Supreme Court has frequently admonished both (1) that lower courts should not speculate or conclude that its "more recent cases have, *by implication, overruled an earlier precedent*" and (2) that we should follow the case that directly controls,

[49] U.S. Const. amend. VI.

leaving to the Supreme Court the prerogative of overruling its own decisions. *Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (emphasis added). Far from overruling the approach that our Washington Supreme Court took in *Momah*, *Presley* further supports the "remedy appropriate to the violation" standard, not automatic reversal. Accordingly, I respectfully disagree with the majority's conclusion that *Presley* "sub silentio"[50] overruled *Momah* or that its holding requires the remedy that the majority chooses here.

More importantly, as we recently held in *Bennett*, we should not reverse and remand for a new trial where, as here, the record does not clearly show a violation of Slert's rights. In my view, nothing in the record or the law warrants reversal and remand for a fourth trial 12 years after Slert's original conviction. I would affirm.

Hunt, J.

[50] Majority at 10.