IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. EMIR BESKURT, SAMET BIDERATAN, and TURGUT TARHAN, Defendants, TANER TARHAN, Petitioner.	)	No. 85737-7 En Banc Filed January 31, 2013

C. JOHNSON, J.—This case involves whether the sealing of juror questionnaires amounts to a trial closure, implicating a defendant's federal and state constitutional rights to a public trial. In this case, questionnaires were given to and completed by prospective jurors to assist counsel in jury selection and to possibly identify who would be individually questioned outside the presence of the entire venire but in open court. Several days after the jury was selected, the trial court

sealed the questionnaires. On appeal, the Court of Appeals, primarily relying on its decision in *State v. Coleman*, 151 Wn. App. 614, 214 P.3d 158 (2009), held that Taner Tarhan's right to a public trial had not been violated. However, the court held that the trial court's failure to conduct a *Bone-Club*[1] analysis before sealing the questionnaires was inconsistent with the public's right of open access to court records and remanded the case for reconsideration of the sealing order. We affirm but hold that remand is unnecessary.

FACTS

Tarhan and three codefendants[2] were charged by information with one count of second degree rape by forcible compulsion. All four defendants were tried jointly before a jury. Prior to commencement of voir dire (jury selection), the parties and court agreed that each member of the venire would complete a questionnaire to assist in questioning of prospective jurors. The prosecutor and Tarhan's counsel submitted proposed questionnaires to the court. Both proposals included language explaining that the questionnaire was designed to obtain information concerning the person's ability to sit as a fair and impartial juror in the case; that responses to the

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

[2] Taner Tarhan's twin brother, Turgut Tarhan, who was also a defendant, is not part of this appeal.

questions would not be available to the public; and that if the person did not want to discuss personal information in open court, private questioning could be conducted.[3] This language was also included on the final questionnaire, which was largely based on the prosecutor's proposal.

After the questionnaires were completed, copies were given to each attorney. In deciding to let the attorneys take the questionnaires home overnight, the trial judge stated:

> I'm very reluctant to have [the questionnaires] leave the courtroom . . . .
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> . . . .
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> . . . . You can imagine why I'm nervous about having [the questionnaires] leave the courthouse. . . . [Y]ou are very experienced attorneys and I think you recognize what a disaster it would be if people thought that their information was going to get Xeroxed and sent around town.
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> Because you're officers of the court and I have such respect for all of you, I will let you take [the questionnaires] home tonight, and that, I think, will allow us to be more efficient tomorrow.

Verbatim Report of Proceedings (VRP) (June 23, 2008) at 118, 119.

The attorneys used the questionnaires to identify which prospective jurors would be questioned individually, outside the presence of the venire. Additional jurors were flagged for individual questioning based on their responses during the

[3] Tarhan's proposed questionnaire also included assurances that responses would be destroyed if the person was not selected or, if selected, sealed in the permanent record.

first phase of general voir dire. Voir dire occurred in open court. During individual voir dire, the attorneys asked the prospective juror questions from the questionnaire, which also prompted follow-up questions. For cause challenges to prospective jurors were based on the answers given in open court.

Several days after jury selection was completed, the trial court entered an order sealing the juror questionnaires. The court found that the sealing was supported by compelling circumstances, explaining that "[j]urors signed confidential questionnaires containing private information concerning sexual abuse with the understanding that the questionnaires would be sealed." Clerk's Papers (CP) at 74. No objections were made and no attorney signatures appear on the order. There is no indication in the record or from the briefing that the copies provided to counsel were included as part of the trial court's order.

The jury found all four defendants guilty of the lesser charge of third degree rape. Tarhan was sentenced to 10 months in jail. On appeal, the three codefendants' cases were consolidated, and Tarhan's appeal proceeded separately. In an opinion published in part, the Court of Appeals affirmed Tarhan's conviction. *State v. Beskurt*, 159 Wn. App. 819, 835, 246 P.3d 580 (2011).

We granted Tarhan's petition for review.[4] *State v. Beskurt*, 172 Wn.2d 1013,

259 P.3d 1109 (2011).

[4] Washington Association of Criminal Defense Lawyers submitted an amicus brief in support of the petitioner.

ISSUE

Did the sealing of juror questionnaires violate the defendant's public trial right?

ANALYSIS

The public trial right is protected by the federal and state constitutions. *See* U.S. Const. amend. VI; Wash. Const. art. I, §§ 22, 10. Under the language of the Washington Constitution, article I, section 22 guarantees the defendant a right to a public trial by an impartial jury, while article I, section 10 affords the public and press the right to open and accessible court proceedings. The public trial right "is designed to 'ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.'" *State v. Strode*, 167 Wn.2d 222, 226, 217 P.3d 310 (2009) (quoting *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005)). The guaranty of open proceedings extends to the process of jury selection. *Strode*, 167 Wn.2d at 226.

In this case, the arguments focus on whether restriction of public access to the juror questionnaires results in a closure under article I, section 22. Tarhan contends it does, arguing that what occurred amounted to structural error requiring reversal of his conviction and remand for a new trial. The Court of Appeals agreed with Tarhan

that the trial court erred by failing to conduct a *Bone-Club* analysis but held the proper remedy was remand to the trial court to conduct such a hearing, in order to justify the sealing, but no new trial was required. The court relied primarily on its previous decision in *Coleman*. There, the trial court similarly sealed juror questionnaires. On review, the Court of Appeals held that the sealing order violated the public's right to open courts under article I, section 10 but not the defendant's right to a public trial under article I, section 22. Because this was not structural error, it concluded the proper remedy was remand to the trial court to reconsider the sealing order by conducting the required hearing. In determining that the error was not structural, the Court of Appeals noted that the questionnaires were used as part of jury selection, which occurred in open court; that the questionnaires were not sealed until several days after the jury was seated and sworn; and that there was nothing in the record indicating the questionnaires were unavailable for public inspection during the selection process. The Court of Appeals here found Tarhan's case factually indistinguishable from *Coleman*.

Tarhan contends *Coleman* must be overruled in light of our *Strode* decision, where the lead opinion indicated that a violation of the defendant's right to a public trial constitutes structural error for which automatic reversal for a new trial is

required. Tarhan, however, conflates his section 22 and the public's section 10 rights by assuming that a section 10 violation, which the Court of Appeals found in *Coleman* and here, necessarily violates section 22. But, though related and often overlapping, a defendant's and the public's rights are separate. Whenever a defendant raises a public trial right issue, the inquiry is whether his section 22 rights were violated. If there is no section 22 violation, then the new trial remedy in *Strode* does not apply.[5] Still, we find discussing both the defendant's and public's rights is needed because Tarhan relies on both to claim a public trial violation and because the Court of Appeals found a violation of one but not the other.

Before we determine whether either an article I, section 10 or article I, section 22 violation occurred, we must first determine whether there was a closure implicating those rights. Despite having a copy of and actively using the questionnaires during open voir dire, Tarhan nevertheless attempts to establish that the restriction on public access to the questionnaires constituted a closure. He contends the record supports this because (1) the trial court was reluctant to have the questionnaires removed from the courthouse over concern that they could be

[5] In *Strode*, the trial court conducted a portion of individual voir dire in chambers during which for cause challenges were registered in chambers and were granted or denied in chambers. The court concurred that the in chambers voir dire amounted to a courtroom closure violating the defendant's section 22 rights and reversed the conviction.

"Xeroxed and sent around town" and (2) the questionnaire itself provided that the "responses on the questionnaire will not be available to the public and will eliminate having to ask these questions in open court." VRP (June 23, 2008) at 119; CP at 1372. We disagree. Under the facts here, this was not a closure that affected Tarhan's public trial right or the public's rights. The questionnaires were completed prior to voir dire and utilized by the attorneys as a "screening tool." This facilitated the process by helping the attorneys identify which venire members would be questioned individually in open court and what questions to ask, if any. During general and individual voir dire, the judge, prosecutor, and defense attorneys, including Tarhan's counsel, questioned venire members in order to determine their ability to sit as an impartial juror. At most, the questionnaires provided the attorneys and court with a framework for that questioning. In some instances, the court began by reiterating a prospective juror's questionnaire response and then asked that person to elaborate in open court. And in other instances, some jurors were not questioned at all from their written responses. Nothing suggests the questionnaires substituted actual oral voir dire. Rather, the answers provided during oral questioning prompted, if at all, the attorneys' for cause challenges, and the trial judge's decisions on those challenges all occurred in open court. The public had the

opportunity to observe this dialogue. The sealing had absolutely no effect on this process. The order was entered after the fact and after voir dire occurred; it did not in any way turn an open proceeding into a closed one.[6] Importantly, everything that was required to be done in open court was done. Therefore, we hold that no closure implicating Tarhan's public trial rights occurred.

We now turn to the Court of Appeals' conclusion that the trial court's sealing order violated the public's right under article I, section 10 and remand for a hearing and findings to justify the sealing.[7] Public access to court records is governed by General Rule (GR) 31. The rule seeks to balance our state's constitutional rights to judicial openness under article I, section 10 with individual privacy under article I, section 7. GR 31(a). To the extent juror questionnaires are within scope of the rule,[8] "[i]ndividual juror information, other than name, is presumed to be private." GR

[6] Moreover, only one copy of the documents was sealed. No order requiring counsel return their copies was produced, and the record is unclear as to what happened to those copies.

[7] Tarhan has not argued for remand for a new hearing but, rather, seeks a new trial.

[8] Not every document in a court's possession is a court record subject to the rule. As utilized in this case, the completed questionnaires seem more administrative. Unlike the proposed questionnaires that were attached to the trial briefs submitted to the court, the completed ones were never filed with the court or part of the court's decision-making process. They were used as preparation only for in-court voir dire, which, as mentioned, was open. We doubt the completed questionnaires in this case qualify as court or trial records. Unless someone expressed an interest in the completed questionnaires or a party attached a questionnaire to a motion, for example, challenging the court's decision to seat a juror, the trial court could have discarded the questionnaires following trial.

31(j). Anyone seeking to access this information petitions the trial court for access and must make a showing of good cause. GR 31(j). The privacy presumption of individual juror information exists until GR 31(j) procedures are triggered and requirements are met, none of which occurred here. Because we find no article I, section 10 issue to review, remand is unnecessary.

CONCLUSION

For the reasons outlined above, we affirm Tarhan's conviction but reverse the decision to remand.

AUTHOR:
Justice Charles W. Johnson

WE CONCUR:

Justice Susan Owens

Jill M. Johanson, Justice Pro Tem.

Justice James M. Johnson