NO. 69950-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MAURICE THROWER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA LINDE

SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Constitutional Provisions

Federal:

Washington State:

Statutes

Washington State:

Rules and Regulations

Washington State:

A. SUPPLEMENTAL ISSUE

To establish a violation of public trial rights, a defendant must show: 1) that experience and logic illustrate that the challenged event implicated the core values of the public trial right, and 2) if so, that the trial court failed to conduct a Bone-Club analysis and make findings on the record before closing the courtroom. During jury selection, both counsel wrote peremptory challenges on paper, the court then read aloud the list of challenged jurors in the jury box, filled those spots with non-challenged jurors, and dismissed the remaining in the jury venire. The list of challenges was filed with the Court. Is the public trial right satisfied when the entire jury selection process, including the exercise of peremptory challenges, occurred in open court and the peremptory challenge list was filed in the public record?

B. SUPPLEMENTAL STATEMENT OF THE CASE

During Thrower's jury selection, after each counsel had fully questioned prospective jurors in open court, the parties prepared to

exercise peremptory challenges. SRP 250.[1] The judge explained the process to the jury:

> The parties, the attorneys, are going to make their selections known to the Court here in a few minutes. I'm going to take advantage of the time while they are doing their work to instruct you on what comes next. And this is a way of using time efficiently, but it really, especially, applies to the thirteen jurors who will hear this case.

Id.

The trial court then read preliminary instructions to the jury. SRP 250-56. During this time, the prosecutor and defense counsel exercised their peremptory challenges by writing down the challenged jurors on a piece of paper. CP 95; SRP 250, 257. The trial court then read aloud on the record the list of five jury venire members in the jury box who had been excused by the parties, but did not identify who struck which prospective juror. SRP 257.

The court filled those spots with the next five jurors who had not been challenged. SRP 258-59. After thirteen non-challenged jurors were seated in the jury box, all of the remaining jury venire members were excused. SRP 259. The thirteen members of the jury were sworn in to hear Thrower's case. SRP 260. The court filed the paper on which peremptory challenges were listed. CP 95.

[1] "SRP" refers to the supplemental verbatim report of proceedings of jury selection, which occurred on January 3, 7, and 8, 2013.

C. ARGUMENT

THE TRIAL COURT'S PEREMPTORY CHALLENGE PROCESS PRESERVED THE FOUNDATIONAL PRINCIPLE OF AN OPEN JUSTICE SYSTEM

Thrower contends that the trial court violated his constitutional right to a public trial by not considering or articulating a Bone-Club[2] analysis before "conduct[ing] a portion of jury selection in private" and that, because of the manner in which peremptory challenges were made, it was not readily apparent to the jurors or the public which party made which peremptory strike. Appellant's Brief at 5. This argument should be rejected. The public trial right did not attach to the identity of the lawyer exercising any given peremptory challenge, because the identity of the challenging lawyer does not implicate the core values of the public trial right. Therefore, Thrower has not established that a closure or public trial right violation occurred. His argument should be rejected.

Whether the constitutional right to a public trial has been violated is a question of law, subject to de novo review on direct appeal. Bone-Club, 128 Wn.2d at 256. A criminal defendant's right to a public trial is found in article I, section 22 of the Washington

[2] State v. Bone-Club, 128 Wn.2d 254, 256, 906 P.2d 325 (1995).

State Constitution and the Sixth Amendment to the United States Constitution, both of which provide a criminal defendant with a "public trial by an impartial jury." Additionally, article I, section 10 of Washington's Constitution provides that "[j]ustice in all cases shall be administered openly," granting both the defendant and the public an interest in open, accessible proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). There is a strong presumption that courts are to be open at all stages of trial. State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012). The right to a public trial ensures a fair trial, reminds the prosecutor and judge of their responsibilities to the accused and the importance of their functions, encourages witnesses to come forward, and discourages perjury. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

However, the public trial right is not absolute; a trial court may close the courtroom under certain circumstances. State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009); State v. Strode, 167 Wn.2d 222, 226, 217 P.3d 310 (2009). The public trial right may be overcome to serve an overriding interest based on findings that closure is essential and narrowly tailored to preserve

higher values. Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 510, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (Press I).

The first step in determining whether a defendant's constitutional right to a public trial was violated is to determine whether a closure occurred. Sublett, 176 Wn.2d at 71. A closure of a trial "occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave"; however, not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if the courtroom is closed to the public during the interaction. Id. (citing State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011)).

If, in experience and logic, the core values of the public trial right are implicated by a particular proceeding, then the public trial right attaches to that proceeding. Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1, 8-10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press II). The first part of the test, the experience prong, asks "whether the place and process have historically been open to the press and general public." Id. at 8. The second part of the test, the logic prong, asks "whether public access plays a significant

positive role in the functioning of the particular process in question." Id. If the answer to both is yes, the public trial right attaches. Id. at 7-8.

If the public trial right attaches, the trial court, before closing the proceeding to the public, is required to weigh five criteria and enter specific findings on the record: (1) the proponent of closure must show a compelling interest, and if based on anything other than defendant's right to a fair trial, must show serious and imminent threat to that right; (2) anyone present when the closure motion is made must be given opportunity to object; (3) the least restrictive means available for protecting the threatened interests must be used; (4) the court must weigh the competing interests of the proponent of the closure and the public; and (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.

If it is determined upon appeal that a closure that triggered the public trial right occurred at trial, the court then looks to whether the trial court properly conducted a Bone-Club analysis before closing the courtroom. If the trial court failed to do so, then a per se prejudicial public trial violation has occurred, even where the

defendant failed to object at trial. State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006); In re Pers. Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

The jury selection process is presumptively open to the public because, "'[T]he process of juror selection...is itself a matter of importance, not simply to the adversaries, but to the criminal justice system.'" In re Orange, 152 Wn.2d at 804 (quoting Press-Enterprise Co., 464 U.S. at 505). The Washington Supreme Court has stressed the necessity of public voir dire. Indeed, in State v. Momah, the court noted that voir dire is a significant aspect of trial because it allows parties to secure their article I, section 22 right to a fair and impartial jury through juror *questioning*. 167 Wn.2d at 152 (emphasis added).

In State v. Irby, the Court held that an email exchange between the trial court and counsel where they discussed jury questionnaire responses and dismissed seven potential jurors for cause implicated the defendant's trial rights because the email 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 874, 882, 246 P.3d 796 (2011). Accordingly, the Court held that the email exchange was a portion

of jury selection and that the email exchange violated Irby's right under the federal and state constitutions to be present at critical stages of his trial. Id. at 882.

The purpose and general process of jury selection in criminal trials, including voir dire examination as well as for cause and peremptory challenges, is governed by superior court criminal rule 6.4. With respect to how peremptory challenges are taken, this rule provides:

> After prospective jurors have been passed for cause, peremptory challenges shall be exercised alternately first by the prosecution then by each defendant until the peremptory challenges are exhausted or the jury accepted. Acceptance of the jury as presently constituted shall not waive any remaining peremptory challenges to jurors subsequently called.

CrR 6.4(e)(2). The rule does not require that the jury and public must be informed as to which party struck which prospective juror. However, in this case, this information *was* open to the public because, as noted, the court filed the paper on which peremptory challenges were listed. CP 95.

There is nothing in experience which would require public awareness as to the identity of the lawyer challenging any given juror. Thrower has cited no case, rule, or practice aid that requires

exercise of peremptory challenges in open court. Thus, history does not compel the process he argues for.

Under the logic prong, a trial or reviewing court must consider whether openness will "enhance both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Id. at 508. Relevant to the logic inquiry are the overarching policy objectives of having an open trial such as fairness to the accused ensured by permitting public scrutiny of proceedings. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980).

As it pertains to this case, the logic prong of the test is whether disclosing to jurors and any spectators which lawyer excused which prospective juror increases the fairness of the jury selection process. The fairness of this process would not be enhanced by telling the jury and any spectators which lawyer struck which jurors.[3] There is no logical purpose of telling jurors and any spectators which party excused which jurors, nor any perceivable benefit related to the public trial right that would flow from it. There

[3] However, it is possible that fairness may be enhanced by *not* sharing this information with the jurors. A party's decision about how to exercise their peremptory challenges is a subjective determination made at the party's discretion without on-the-record discussion about the excused jurors' qualifications to serve impartially. Some judges feel this process protects lawyers from ill-will that may be engendered by their challenges.

is no reason whatsoever to believe that the process used in selecting peremptory challenges diminished the prosecutor's or judge's understanding of their responsibility to the accused and the importance of their functions.

Furthermore, there are numerous considerations that make the peremptory challenge process used in this trial just as fair as in a case where the prosecutor and defense counsel state their challenges aloud on the record. The trial court explained on the record to the jury its reason for using the process that it chose to use. SRP 250. Any members of the jury, the press, or the public who may have been present when the court explained its procedures with respect to this portion of the jury selection process could see that Thrower was being treated in an open and fair manner.

Additionally, since the parties were both aware of which jurors were being stricken by the other party, each still had the opportunity to object to any perceived discriminatory motive behind exercised peremptory challenges. RCW 2.36.080; Batson v. Kentucky, 476 U.S. 79, 96-98, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); State v. Burch, 65 Wn. App. 828, 834, 830 P.2d 357 (1992). Not having jurors or spectators know which party challenged which

jurors did not compromise either party's ability to make a Batson challenge, another factor protecting the fairness of the proceedings.

Because Thrower has not shown that which party challenged which prospective juror is information that has historically been open to the press and general public, nor any showing that the peremptory challenge selections of the lawyers would play any "significant positive role" in the jury selection process, this court should find that there was no courtroom closure that implicated Thrower's public trial rights. Since a closure that triggered the public trial right did not occur, the public trial right does not attach to the particular procedure used for exercising peremptory challenges and the Bone-Club factors did not have to be considered by the court.

Thrower fails to analyze the peremptory challenge process under the experience and logic test, and he also provides no authority for his assumption that a closure occurred. Instead, Thrower cites State v. Slert, 169 Wn. App. 766, 774 n.11, 282 P.3d 101 (2012), review granted in part, 176 Wn.2d 1031 (2013), for the legal concept that, "to dismiss jurors during a private conference is to hold a portion of jury selection outside the public's view." Appellant's Supplemental Brief at 5. Slert is easily distinguished.

In Slert, the Court of Appeals (Division II) reversed Slert's conviction, holding that an in-chambers conference during which the court and counsel discussed jury questionnaires specific to the case and the court dismissed four jurors off the record violated Slert's right to a public trial. 169 Wn. App. at 778-79. The court found that, as in Irby, the questionnaires were part of jury selection because they 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. 170 Wn.2d at 882 (quoting Irby Clerk's Papers at 1234). Because the record indicated that the in-chambers conference involved the dismissal of four jurors for case-specific reasons based at least in part on the jury questionnaires, the court held that the conference and dismissals were part of the jury selection process to which the public trial right applied. Id. at 774.

The court added that, "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." Id. at n.11. Thus, in Slert, as in Irby, the Court held a violation of

the public trial right occurred when there was discussion regarding the juror's qualifications to sit on the specific case at hand that the defendant and public was not privy to. Id., Irby, 170 Wn.2d at 882.

The present case is entirely distinguishable from both Slert and Irby. Here, the peremptory challenge procedure used occurred in open court and involved no discussion whatsoever, let alone any discussion designed to determine jurors' individual fitness for serving on Thrower's particular jury. The defendant, jury, and any spectators were present during the process. The challenged jurors were dismissed on the record and anyone who wanted to know which party struck which juror could access this information through the public record.

The trial court in Thrower's case did not violate his public trial rights because, under considerations of experience and logic, those rights were not implicated by the peremptory challenge process used. The court was not required to conduct a Bone-Club analysis because no closure existed at any point of the jury selection process. Therefore, the trial court protected the foundational principle of an open justice system.

D. CONCLUSION

For the reasons stated above, the Court should find that the trial court preserved Thrower's right to a public trial and thus affirm Thrower's convictions.

DATED this 29th day of October, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Bruce Koch, the attorney for the appellant, at Nielsen, Broman, & Koch, 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the SUPPLEMENTAL BRIEF OF RESPONDENT, in STATE V. MAURICE THROWER, Cause No. 69950-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 29 day of October, 2013

Name Bora Ly
Done in Seattle, Washington