NO. 44523-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DERRICK THOMAS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Kathryn J. Nelson, Judge

REPLY BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. ARGUMENT IN REPLY

1. PRIVATE EXERCISE OF PEREMPTORY CHALLENGES VIOLATES THE PUBLIC TRIAL RIGHT.

As the State correctly notes, trial proceedings must be public except in "the most unusual circumstances." Brief of Respondent (BoR) at 6 (quoting State v. Leyerle, 158 Wn. App 474, 478, 242 P.3d 921 (2010)). The exercise of peremptory challenges is hardly an unusual circumstance.

a. The Private Exercise of Peremptory Challenges Is a Courtroom Closure Because the Public Is Purposefully Excluded from Providing Oversight.

Merely filing the list of challenges after the fact is insufficient to provide the public scrutiny the public trial right requires. Generally speaking, the availability of a record of an improperly closed voir dire fails to cure the error. See State v. Paumier, 176 Wn.2d 29, 32-33, 37, 288 P.3d 1126 (2012) (voir dire in chambers violated public trial right despite availability of transcript of proceedings); see also People v. Harris, 10 Cal. App. 4th 672, 684, 12 Cal. Rptr. 2d 758 (1992) (holding, based on application of federal law,. that after-the-fact availability of transcripts of peremptory challenges conducted in chambers does not public trial violation or render those proceedings public); cf. People v. Williams, 26 Cal. App. 4th Supp. 1, 6-8, 31 Cal. Rptr. 2d 769 (1994) (peremptory challenge could be

held at sidebar if challenge and party making it was then immediately announced in open court).

The State's citation to D'Aquino v. United States, 192 F.2d 338 (1951) is inapposite. In that case, the exhibits were inaudible without headsets that were distributed to the parties, the jury, "and members of the press." 192 F.2d at 365. Thus, at least some members of the public were able to view the exhibits. The limitation on the number of headsets available is akin to having limited seating in the courtroom, a situation that, standing alone, does not implicate the public trial right. State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150 (2005) (citing United States v. Shryock, 342 F.3d 948, 974 (9th Cir. 2003)). D'Aquino is not on all fours with a scenario such as Thomas' trial, where both parties' exercise of peremptory challenges was purposefully kept out of the view of any and all members of the public.

The ability to scrutinize the list after the fact is insufficient because it does not fulfill the same function as requiring the parties to exercise their roles while in the public eye. Public scrutiny of peremptory challenges is particularly important precisely because peremptory challenges are generally outside the court's control. See State v. Saintcalle, 178 Wn.2d 34, 41-42, 60, 65, 69, 309 P.3d 326 (2013) (lead opinion, concurrence and dissent underscoring harm caused by race-based exercise of peremptory challenges and highlighting difficulty of obtaining appellate relief).

This court should also reject the State's suggestion that a party does not "exercise" a peremptory challenge until the court actually strikes the juror. BoR at 9, n. 15. It is not the court who decides which jurors to challenge, and it is not the court that must come forward with a race-neutral explanation in case of a challenge. Saintcalle, 178 Wn.2d at 42 (citing Batson v. Kentucky, 476 U.S. 79, 93-98, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)). When only the court's announcement of which jurors have been stricken is open, the public has no way to know at the time whether a given juror was excused by the State or the defense. By the time the public might access the filed peremptory challenge document, the excused jurors will almost certainly have already left, making assessment of racial bias nearly impossible.

The State also points this Court to rules of evidence governing admissibility. BoR at 11-12. If there were a rule of evidence or a court rule requiring that the peremptory challenge process be hidden from jurors and the public in order to protect the fairness of the proceeding, this might be a very different case. There is no such rule. And the fairness of the proceeding is protected by openness, not secrecy.

Thomas does not challenge the trial court's discretion to manage the proceedings. That is undisputed. But Washington case law carefully guides the court's discretion when it seeks to hold any part of a trial in private.

State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). When the court believes that part of the trial should be exempted from the public trial right, it must, on the record, consider the Bone-Club factors and explain why a legitimate state interest requires abbreviating the public trial right in a given instance. Id. This has been the law of our State since at least 1995. Id.

The State claims reversal in this case would require reversal whenever any part of the trial was imperceptible to a spectator. BoR at 10. That misconstrues Thomas' argument. Reversal is required because a significant part of the trial, with direct implications for the fairness of the proceedings, was purposefully and intentionally withheld from public view without the justification and process Bone-Club requires.

b. Peremptory Challenges Have Traditionally Been Open to the Public.

The State cites a recent case from Division Three, State v. Love, ____ Wn. App. ____, 309 P.3d 1209 (2013), to support its argument that the exercise of peremptory challenges does not implicate the public trial right under the experience and logic test from State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715, 722 (2012). BoR at 14-17. Thomas respectfully argues Love was wrongly decided. First, the Love court cited to exactly one case in its discussion of whether peremptory challenges have traditionally been open to

the public. Love, ____ Wn. App. at ____, 309 P.3d at 1213 (citing State v. Thomas, 16 Wn. App. 1, 13, 553 P.2d 1357 (1976)). But Thomas pre-dates both Bone-Club and Batson. The Thomas court discussed the fact that it saw no prejudice from holding peremptory challenges in private. 16 Wn. App. at 13. This rationale is entirely inconsistent with the recognition that closure of trial proceedings is structural error, where a showing of prejudice is not required. State v. Wise, 176 Wn.2d 1, 13-15, 288 P.3d 1113, 1118 (2012). It is also entirely inconsistent with the potential for improper bias in peremptory challenges and the detrimental effects for both the defendant and the entire judicial system. Saintcalle, 178 Wn.2d at 41-42, 60, 65, 69.

The historical aspect of the "experience and logic" analysis favors openness of peremptory challenges. "[S]ince the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." Press-Enterprise Co. v. Super. Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). Press-Enterprise does not limit the public trial right, as the State would have this court do, see BoR at 12-13, to the screening or interviewing of potential jurors. The court specifically refers to the "selection" of jurors, which occurs in large part via the exercise of peremptory challenge. Love also conflicts with this Court's assertion that peremptory challenges are "traditionally exercised during voir dire in the courtroom." State v. Wilson, 174 Wn. App.

328, 344, 298 P.3d 148 (2013). The voir dire process is undisputedly subject to the public trial right. Under Press-Enterprise and Wilson, the exercise of peremptory challenges is part of that process and must also be public. Press-Enterprise, 464 U.S. at 505; Wilson, 174 Wn. App. at 344.

c. Logic Dictates that Public Oversight of Peremptory Challenges Is Crucial to Providing a Fair Trial.

The "logic" aspect of the Sublett test also favors reversal. The Love court claims the exercise of peremptory challenges presents "no questions of public oversight." ____ Wn. App. at ____, 309 P.3d at 1214. That claim is untenable in light of recent and not-so-recent recognition of the ways racial bias can insidiously insert itself into the trial proceedings via the exercise of peremptory challenges. See Saintcalle, 178 Wn.2d at 41-42, 60, 65, 69; Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); Swain v. Alabama, 380 U.S. 202, 223–24, 85 S. Ct. 824, 13 L. Ed.2 d 759 (1965).

In its attempt to rebut the logic prong, the State also cites Cohen v. Senkowski, 290 F.3d 485 (2d Cir. 2002). That citation is of no help because Cohen is not a public trial case, but a right to presence case. Id. at 489-90. A defendant's right to presence attaches only when the defendant's presence affects his or her ability to defend against the charges. Id. at 489. The court held that the defendant had no right to be physically present at the actual

exercise of the peremptory challenges because he had been present at the examination of the venire and had also had a chance to consult his attorney regarding the challenges. Id. at 490. Thus, his participation in the process and ability to defend had already been secured. Id.

But that is not the case when the issue is the right to have the trial be open to the public. The public trial right depends on the wholesome effects of public scrutiny of decision-making, not on the ability of a defendant to contribute to his defense. See, e.g., Wise, 176 Wn.2d at 6 ("'Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges [and] lawyers . . . will perform their respective functions more responsibly in an open court than in secret proceedings.'") (quoting Waller v. Georgia, 467 U.S. 39, 46 n.4, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)).

The exercise of peremptory challenges cannot be compared to the jury inquiry at issue in Sublett because the Sublett court relied on the court rule that jury inquiries occur in writing. 176 Wn.2d at 76-77 (discussing CrR 6.15). That rule demonstrates that both logic and experience are behind the practice of responding to the jury's inquiry in the same way. Id. There is no such court rule mandating or even contemplating that peremptory challenges occur on paper.

Finally, the State argues peremptory challenges must be secret because they are the result of work product, confidential attorney-client communications, and the attorney's mental impressions. BoR at 17-18. By that logic, everything an attorney does at trial should be private. Exercise of peremptory challenges does not require disclosure of work product such as mental impressions because generally, no reason need be given. Saintcalle, 178 Wn.2d at 77 (González, J., concurring). The attorney's reasoning becomes an issue only when an allegation of racial bias is made. Id. at 42 (discussing Batson, 476 U.S. at 93-98). In order to determine whether insidious, and possibly unconscious, racial bias or other discriminatory practices or influences are at work, the exercise of peremptory challenges must be open to public scrutiny. See Saintcalle, 178 Wn.2d at 46-49 (discussing impact of unconscious racism in Batson framework).

2. THOMAS' STATEMENTS MUST BE SUPPRESSED BECAUSE THEY WERE THE RESULT OF CUSTODIAL INTERROGATION WITHOUT BENEFIT OF MIRANDA[1] WARNINGS.

The State argues Thomas' statements were properly admitted, despite the lack of Miranda warnings, because this was a Terry[2] stop, not a formal arrest, and because the officer was not attempting to elicit

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

[2] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

incriminating information. BoR at 20-23. These arguments should be rejected.

The stop in this case was far more akin to a formal arrest than a Terry stop for three reasons. First, it did not occur in a public place. See BoR at 20 (citing State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004)). Thomas was confined in the back of a patrol car. RP 61. Second, the stop was not brief. See BoR at 20 (citing Heritage, 152 Wn.2d at 218). He continued to be detained during the entire search of the house. RP 30-31, 67-68. And third, the atmosphere was police-dominated. See BoR at 20 (citing Heritage, 152 Wn.2d at 218). As discussed in the opening brief, at least five officers were involved. RP 54.

Thomas was in custody for purposes of Miranda because this case is more akin to State v. France, where the court noted, "France was not told that he would be free to leave as soon as police verified certain information or completed a traffic citation form. France's freedom was curtailed indefinitely "until [McGinnis decided] the matter was cleared up." State v. France, 129 Wn. App. 907, 910, 120 P.3d 654 (2005).

The scope of the interrogation was also akin to France. In that case, the court held France was subjected to police interrogation when the officer asked questions designed to elicit an admission relating to an element of the crime. Id. at 909. The officer suspected France of the crime of violation of a

no-contact order. Id. at 908. Acting out of this suspicion, he asked France whether he was allowed at the trailer where the protected party lived. Id. at 908-09. The court held the officer was trying to induce France to admit to knowledge of the no-contact order, an element of the charge. Id. at 909.

In this case, Officer Grabski suspected Thomas of unlawfully possession weapons and narcotics at the 4840 South I Street address. RP 15-16, 44-45. He then asked questions designed to get Thomas to admit he lived there, thereby establishing the essential element of constructive possession. RP 25-27. Notably, Grabski did not ask Thomas where he lived, to ascertain his address. He specifically attempted to elicit information regarding the I Street address. Id. This was custodial interrogation because Grabski's questions were designed to elicit incriminating information. France, 129 Wn. App. at 909-10. Thus, Thomas' statements should have been suppressed in the absence of Miranda warnings. Id.

3. REMAND IS NECESSARY BECAUSE THE FACTS IN THE RECORD DO NOT SUPPORT THE COURT'S LEGAL CONCLUSION THAT THOMAS WAIVED HIS MIRANDA RIGHTS.

The State argues that there is no need to remand to correct the findings and conclusions regarding Thomas' June 24 statements about his address because the factual findings need not be interpreted as establishing a chronology. BoR at 24-26. This may be correct. But it does not obviate the

problem with the court's legal conclusion. The court's legal conclusions state Thomas knowingly and voluntarily waived his Miranda rights. CP 82. This is factually incorrect based on the record. RP 214-15. He could not have waived his Miranda rights because he was not advised of those rights until after making the statements. Id. Instead, the court ruled this was a social encounter where the protections of Miranda did not apply. RP 278. That is very different from a knowing and voluntary waiver. The court's written legal conclusion should be vacated because it is unsupported by substantial evidence in the record. State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).

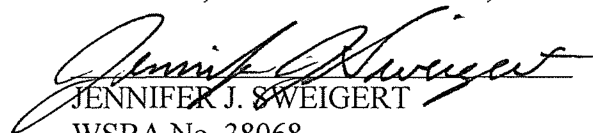
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Thomas requests this Court reverse his convictions.

DATED this 19th day of December, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT
WSBA No. 38068
Office ID No. 91051

Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 44523-9-II
	)	
DERRICK THOMAS,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19TH DAY OF DECEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DERRICK THOMAS
DOC NO. 317612
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA,WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF DECEMBER 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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