SUPREME COURT NO. 91055-3

NO. 44895-5-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

VANESSA WHITFORD,

Petitioner.

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

The Honorable Kathryn J. Nelson, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/DECISION BELOW

Vanessa Whitford requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Whitford, No. 44895-5-II, filed November 4, 2014. A copy of the opinion is attached as Appendix A.

B. ISSUE PRESENTED FOR REVIEW

During jury selection, the parties exercised peremptory challenges silently on paper. Because the trial court did not analyze the Bone-Club[1] factors before conducting this important portion of jury selection privately, did the court violate petitioner's constitutional right to a public trial?[2]

C. STATEMENT OF THE CASE

The Pierce County prosecutor charged appellant Vanessa Whitford with one count of first-degree robbery. CP 4. Walmart employees testified they watched on surveillance cameras as Whitford approached the "liquor wall," waited until no one was nearby, selected two bottles of tequila, walked to the baby aisle, and placed them in her purse. 1RP[3] 43, 51-52, 104-06. From there, they testified, she selected two packages of socks, placed them

[1] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

[2] Petitions for review raising this issue are currently pending before the Court in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013) (Supreme Ct. No. 89619-4), State v. Dunn, 180 Wn. App. 570, 321 P. 3d 1283 (2014) (Supreme Ct. No. 90238-1), and State v. Webb, ___ Wn. App. ___, 333 P.3d 470 (2014) (Supreme Ct. No. 90840-1).

[3] There are five volumes of Verbatim Report of Proceedings referenced as follows: 1RP – May 9, 2013, May 13, 2013, May 15, 2013, May 17, 2013; 2RP – May 9, 2013 (voir dire only).

in the purse as well, and left the store without stopping at the cash registers. 1RP 55-57. Once outside, employees testified they confronted Whitford, but she pulled out a knife. 1RP 110-11, 157. Whitford drove away and was arrested several days later. 1RP 116, 160, 173-74, 183-84.

During jury selection, the court and the attorneys for each side questioned the potential jurors in open court. 2RP 8-83. At the end of the questioning, the court announced:

> Ladies and gentlemen, at this time the two lawyers will be exercising those peremptory challenges I told you about. If you have a piece of reading material or you'd like to speak softly to your neighbor – of course, not about the case – you may do so. I do need you to stay seated and let's make sure those yellow tabs are way up high so it will be easier for the lawyers to remember. So you can read whatever you would like and/or pull out your computer, if you've got it in your lap, but you have to stay seated.

2RP 83-84. The record indicates "(attorneys picking jury)." 2RP 84. After this interlude, the court announced which jurors had been selected. 2RP 84-85. The court file contains a document entitled "Peremptory Challenges," in which each side's challenges are listed with name and juror number, in different handwriting for the plaintiff and the defendant. CP 59.

The jury found Whitford guilty, and the court imposed a standard range sentence. CP 16, 48. On appeal, Whitford argued the silent

exercise of peremptory challenges violated her right to a public trial. The Court of Appeals affirmed. Whitford asks this Court to grant review.

D. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

THIS COURT SHOULD GRANT REVIEW OF THE PUBLIC TRIAL ISSUE BECAUSE DIVISION II'S DECISION CONFLICTS WITH STATE V. STRODE AND STATE V. WISE AND INVOLVES A SIGNIFICANT QUESTION OF CONSTITIONAL LAW THAT SHOULD BE RESOLVED AS A MATTER OF SUBSTANTIAL PUBLIC INTEREST.

Selecting the jury is a critical part of the public trial right and must be open to the public. State v. Wise, 176 Wn.2d 1, 11, 288 P.3d 1113, 1118 (2012); State v. Strode, 167 Wn.2d 222, 227, 217 P.3d 310 (2009). Even if it were not already clear that the public trial right applies to prohibit closed jury selection proceedings, such proceedings also violate the public trial right under the "experience and logic" test announced in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012).

However, relying on its decision in State v. Webb, ___ Wn. App. ___, 333 P.3d 470 (2014), as well as prior decisions in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013) and State v. Dunn, 180 Wn. App. 570, 321 P. 3d 1283 (2014), the Court of Appeals held that silent, on-paper exercise of peremptory challenges does not implicate the public trial right. Whitford asks this Court to grant review because that decision conflicts with this Court's decisions in Strode and Wise as well as Division II's decision in

State v. Wilson, 174 Wn. App. 328, 337, 298 P.3d 148 (2013). RAP 13.4(b)(1), (2). Additionally, the application of the public trial right in this instance raises significant constitutional questions of substantial public interest. RAP 13.4(b)(3), (4).

The Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington Constitution guarantee the accused a public trial by an impartial jury.[4] Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); Bone-Club, 128 Wn.2d at 261-62. Additionally, article I, section 10 of the Washington Constitution provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." This provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

While the right to a public trial is not absolute, a trial court may restrict the right only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Before a trial judge can close any part of a trial, it must first apply on the record the five factors set forth in Bone-Club. In re Pers. Restraint of Orange, 152 Wn.2d 795, 806-09, 100 P.3d 291 (2004).

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[4] The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." Article I, Section 22 provides that "[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury . . . ."

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." Id. at 804 (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). In Wise, 10 jurors were questioned privately in chambers during voir dire, and six were excused for cause. 176 Wn.2d at 7. The court held the public trial right was violated because jurors were questioned in a room not open to the public without consideration of the Bone-Club factors. Id. at 11-12. Wise does not indicate any reason to depart from this holding when the private part of voir dire is peremptory challenges.

In Strode, jurors were questioned, and for-cause challenges were conducted, in chambers. 167 Wn.2d at 224. This Court treated the for-cause challenges in the same manner as individual questioning and held their occurrence in chambers violated the public trial right. Id. at 224, 227, 231. Review is warranted because the Court of Appeals' holding that peremptory challenges may permissibly be exercised out of the public's view without consideration of the Bone-Club factors is in conflict with this Court's holdings in Wise and Strode. RAP 13.4(b)(1).

A second conflict with this Court's case law arises from the Court of Appeals' reliance on the fact that the paper on which the peremptory challenges were written was ultimately filed in the public record. Whitford,

slip op. at 3. In Wise, the private, in-chambers questioning was transcribed and also made part of the public record of the trial. 176 Wn.2d at 7-8. The court nonetheless held the proceedings were closed because they were held in a place not ordinarily accessible to the public. Id. at 11. The piece of paper filed in this case was no more accessible to the public at the time than the judge's chambers in Wise. This second conflict with this Court's precedent also warrants review. RAP 13.4(b)(1).

The Court of Appeals' opinion in this case also conflicts with Division II's case law supporting the conclusion that the public trial right attaches to peremptory challenges. In Wilson the court applied Sublett's experience and logic test to find that the administrative excusal of two jurors for sickness did not violate the defendant's public trial right. Wilson, 174 Wn. App. at 347. The court noted that historically, the public trial right has not extended to administrative hardship excusals granted by the court before voir dire begins. Id. at 342. But in doing so, the court expressly differentiated between the administrative excusal at issue and a jury selection proceeding involving the exercise of for-cause and peremptory challenges, which the court said historically, occur in open court. Id. Thus, under Wilson's application of the experience prong of the experience and logic test, for-cause and peremptory challenges historically are done in open court.

In State v. Jones, 175 Wn. App. 87, 91, 303 P.3d 1084 (2013), Division II held the public trial right was violated when, during a court recess off the record, the clerk drew names to determine which jurors would serve as alternates. The court recognized, "both the historic and current practices in Washington reveal that the procedure for selecting alternate jurors, like the selection of regular jurors, generally occurs as part of voir dire in open court." Id. at 101. Like Wilson, the Jones decision refers to the exercise of peremptory challenges as a part of jury selection that must be public. Id.

In addition to the historical experience referenced in Wilson and Jones, logic dictates that public exercise of peremptory challenges serves the values of the public trial right. The right to a public trial includes circumstances where "the public's mere presence passively contributes to 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." State v. Bennett, 168 Wn. App. 197, 204, 275 P.3d 1224 (2012) (citing State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); State v. Leyerle, 158 Wn. App. 474, 479, 242 P.3d 921 (2010).

The peremptory challenge process, an integral part of jury selection,[5] is one such proceeding: While peremptory challenges may be exercised based on subjective feelings and opinions, there are important constitutional limits on both parties' exercise of such challenges. Georgia v. McCollum, 505 U.S. 42, 49, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992); Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

Because of these crucial constitutional limitations, designed to prevent and remedy discrimination in jury selection, public scrutiny of the exercise of peremptory challenges is more than a procedural nicety; it is required by the constitution. Discrimination in jury selection casts doubt on the integrity of the judicial process and the fairness of criminal proceedings. Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991); State v. Saintcalle, 178 Wn.2d 34, 309 P.3d 326 (2013), cert. denied, 134 S. Ct. 831 (2013). Therefore, "It is crucial that we have meaningful and effective procedures for identifying racially motivated juror challenges." Id. at 41. An open peremptory process is part of that procedure. The Peremptory Challenges document lists names; it does not reveal race. CP 59. Without the ability to hear and see the selection of jurors as it occurs, the public has no ability to assess whether challenges are being handled fairly and within the confines of the law or,

[5] People v. Harris, 10 Cal.App.4th 672, 684, 12 Cal.Rptr.2d 758 (1992).

for example, in a manner that discriminates against a protected class. See Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989) (jury selection primary means to "enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice.").

Public trials are a check on the judicial system that provides for accountability and transparency. 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.'" Id. at 17 (quoting Waller v. Georgia, 467 U.S. 39, 46 n.4, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). Open exercise of peremptory challenges safeguards against discrimination by discouraging both discriminatory challenges and the subsequent discriminatory removal of jurors that have been improperly challenged. The exercise of peremptory challenges directly impacts the fairness of a trial. Both experience and logic indicate it is inappropriate to shield that process from public scrutiny.

Because Division II's decision conflicts with Strode and Wise, as well as Division II's decisions in Wilson and Jones, this Court should grant review. RAP 13.4(b)(1), (2). This Court's opinion in Saintcalle noting the importance of deterring racially motivated jury selection also demonstrates that application of the public trial right to peremptory challenges is an

important constitutional issue of substantial public interest. RAP 13.4(b)(4); Saintcalle, 178 Wn.2d at 41.

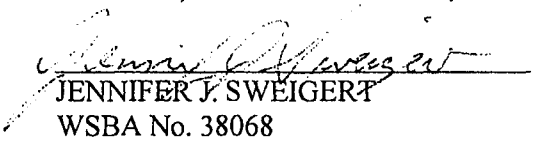
E. CONCLUSION

The Court of Appeals opinion conflicts with decisions of this Court and the Court of Appeals and presents significant questions of constitutional law and public interest. Whitford requests this Court grant review under RAP 13.4 (b)(1), (2), (3), and (4).

DATED this 24th day of November, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. VANESSA MARIE WHITFORD, Appellant.	No. 44895-5-II UNPUBLISHED OPINION

JOHANSON, C.J. — Vanessa Whitford appeals her jury trial conviction for first degree robbery. She argues that the trial court violated her public trial rights when it allowed the attorneys to exercise their peremptory challenges in writing. We hold that under *Love*,[1] *Dunn*,[2] and *Webb*,[3] the exercise of peremptory challenges in writing does not implicate Whitford's public trial rights and affirm her conviction.

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[1] *State v. Love*, 176 Wn. App. 911, 309 P.3d 1209 (2013).

[2] *State v. Dunn*, 180 Wn. App. 570, 321 P.3d 1283 (2014).

[3] *State v. Webb*, ___ Wn. App. ___, 333 P.3d 470 (2014).

FACTS

In August 2012, Whitford attempted to steal property from a store and, in the process, brandished a knife. The State charged Whitford with first degree robbery.[4]

The trial court conducted voir dire of the potential jurors in open court. After Whitford and the State questioned the prospective jurors and exercised their for-cause challenges, the trial court addressed the venire and stated,

> Ladies and Gentlemen, at this time the two lawyers will be exercising those peremptory challenges I told you about. If you have a piece of reading material or you'd like to speak softly to your neighbor -- of course, not about the case -- you may do so. I do need you to stay seated and let's make sure those yellow tabs are way up high so it will be easier for the lawyers to remember. So you can read whatever you would like and/or pull out your computer, if you've got it in your lap, but you have to stay seated.

Report of Proceedings (RP) (May 9, 2013, Jury Voir Dire) at 83-84. The State and Whitford then exercised their peremptory challenges on a written form that the court later filed with the court clerk.[5] Based on the completed form, the trial court announced which jurors had been selected, seated them for trial, and excused the others. The court did not announce which party had excused which juror but the completed form shows who challenged which juror. The jury convicted Whitford on one count of first degree robbery. She appeals her conviction.

ANALYSIS

Whitford argues that the trial court violated her public trial rights when it allowed counsel to exercise peremptory challenges in writing. We disagree. *Love*, *Dunn*, and *Webb* control the

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[4] RCW 9A.56.200.

[5] This process appears in the record as "(Attorneys picking jury.)" RP (May 9, 2013, Jury Voir Dire) at 84.

result in this case and, accordingly, we hold that the trial court did not violate Whitford's public trial rights.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee a defendant's right to a public trial. *State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). We review alleged violations of a defendant's public trial rights de novo. *State v. Smith*, ___ Wn.2d ___, 334 P.3d 1049, 1052 (2014) (citing *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005)). The first step when addressing an alleged violation of the public trial right is to determine whether the proceeding at issue implicates the right in the first place. *Smith*, 334 P.3d at 1052 (citing *State v. Sublett*, 176 Wn.2d 58, 92, 292 P.3d 715 (2012) (Madsen, C.J., concurring)). In *State v. Love*, Division Three of this court held that peremptory challenges do not implicate a defendant's public trial rights. 176 Wn. App. 911, 920, 309 P.3d 1209 (2013). We adopted Division Three's holding in *State v. Dunn*, 180 Wn. App. 570, 575, 321 P.3d 1283 (2014).

In *State v. Webb* we held that a peremptory challenge process that required counsel to exercise their peremptory challenges in writing in the jury's presence did not implicate the defendant's public trial rights. ___ Wn. App. ___, 333 P.3d 470, 472-73 (2014). The process in *Webb* is identical to the peremptory challenge process at issue in this case. As in *Webb*, at trial here, counsel exercised their peremptory challenges by marking them on a written form. The trial court announced which jurors were selected and which were excused and filed the completed form in the public record.

Following *Love*, *Dunn*, and *Webb*, we hold that Whitford's public trial right was not implicated in this case and her appeal fails at the first step in the public trial right analysis. Accordingly, we affirm Whitford's conviction for first degree robbery.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, C.J.
JOHANSON, C.J.

We concur:

Bjorgen, J.
BJORGEN, J.

Melnick J.
MELNICK, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	SUPREME COURT NO. _____
vs.	)	COA NO. 44895-5-II
	)	
VANESSA WHITFORD,	)	
	)	
Petitioner.	)	

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 24TH DAY OF NOVEMBER, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] VANESSA WHITFORD
DOC NO. 786241
WASHINGTON CORRECTIONS CENTER FOR WOMEN
9601 BUJACICH ROAD NW
GIG HARBOR, WA 98332

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF NOVEMBER, 2014.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

November 24, 2014 - 2:51 PM

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