NO. 44919-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

DUSTIN MARKS,

Appellant.

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

The Honorable James Orlando, Judge

REPLY BRIEF OF APPELLANT

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A. ISSUE IN REPLY

Did the trial court violate the appellant's constitutional right to a public trial by taking peremptory challenges privately?

B. ARGUMENT IN REPLY

THE STATE'S BRIEF FAILS TO ACKNOWLEDGE CONTROLLING AUTHORITY AND THE IMPORTANT GOALS SERVED BY PUBLIC EXERCISE OF PEREMPTORY CHALLENGES.

The public trial right attaches to a jury selection proceeding involving "the exercise of 'peremptory' challenges and 'for cause' juror excusals." State v. Wilson, 174 Wn. App. 328, 342, 298 P.3d 148 (2013). Although Marks cited Wilson in his opening brief, the State does not acknowledge the decision. Brief of Appellant (BOA) at 4, 7, 9. Instead, the State asserts Marks must establish the public's right to see and hear the exercise of peremptory challenges with the "experience and logic" test discussed in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012). Brief of Respondent (BOR) at 15-18.

The experience and logic test only applies when it has not already been established that a proceeding falls within the public trial right. Wilson, 174 Wn. App. at 335. But even if it were appropriate to draw a line between the parties' exercise of peremptory challenges and other protected portions of jury selection, both experience and logic establish

the right that peremptory challenges be exercised openly. Under the "experience" prong of the test, the court asks "whether the place and process have historically been open to the press and general public." Sublett, 176 Wn.2d at 73. 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.

Historically, it is well established that the right to a public trial extends to "'the process of juror selection.'" In re Personal Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). "For-cause" and peremptory challenges are an integral part of this process. See State v. Strode, 167 Wn.2d 222, 230, 217 P.3d 310 (2009) (for-cause challenges of six jurors in chambers not de minimis violation of public trial right); Wilson, 174 Wn. App. at 342 (unlike potential juror excusals governed by CrR 6.3, exercise of peremptory challenges, governed by CrR 6.4, constitutes part of "voir dire," to which the public trial right attaches).

Moreover, as was argued in Marks's opening brief, openness of jury selection (including which side exercises which challenge) clearly enhances core values of the public trial right – "both the basic fairness of

the criminal trial and the appearance of fairness so essential to public confidence in the system." Sublett, 176 Wn.2d at 75; see Orange, 152 Wn.2d at 804 (the process of jury selection "is itself a matter of importance, not simply to the adversaries but to the criminal justice system").

The openness of peremptory challenges is integral to the fairness of the proceeding because it protects against inappropriate discrimination. This can only be accomplished if peremptory challenges are made in open court in a manner allowing the public to determine whether a party is targeting and eliminating jurors for impermissible reasons. BOA at 9; see also State v. Sadler, 147 Wn. App. 97, 107, 109-118, 193 P.3d 1108 (2008) (private Batson[1] hearing following State's use of peremptory challenges to remove only African-American jurors from panel denied defendant his right to public trial), review denied, 176 Wn.2d 1032, 299 P.3d 19 (2013), overruled on other grounds, Sublett, 176 Wn.2d at 71-73; see also State v. Saintcalle, 178 Wn.2d 34, 46, 88-95, 118-19, 309 P.3d 326 (2013) (opinions highlighting difficulty of obtaining appellate relief for discriminatory acts even where discriminatory exercise may have occurred).

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[1] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

The mere opportunity to find out, sometime after the process, which side eliminated which jurors cannot satisfy this right. For example, members of the public would have to know the sheet documenting peremptory challenges had been filed *and* that it was subject to public viewing. Moreover, even if members of the public could recall which juror number was associated with which individual, they also would have to recall the identity, gender, and race of those individuals to determine whether protected group members had been improperly targeted. In Marks's case, this would have required members of the public to recall the specific features of 13 individuals. See CP 80 (list of five peremptories by State and eight by defense). Contrary to the State's argument, BOR at 19, this is not realistic, and public access to a sheet of paper after the fact is simply inadequate to protect the right to a public trial.

The State also suggests that the right to a fair trial is protected because the court would have the ability to find out which party exercised the challenge. BOR at 18-19. It should go without saying that the fact that court has access to information regarding the proceedings occurring in its own courtroom is irrelevant to the question of whether the proceedings are public.

The State also cites State v Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), for the proposition that under the experience and logic test,

exercising peremptory challenges outside the public view does not violate the right to public trial. BOR at 16. The Love decision, however, is poorly reasoned.[2]

Regarding the experience prong, the Court noted the absence of evidence that, historically, peremptory challenges were made in open court. Love, 176 Wn. App. at 917-18. But history would not necessarily reveal common practice unless the parties made an issue of the employed practice. History does not tell us these challenges were commonly done in private, either. Moreover, before State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995), there were likely many common, but unconstitutional, practices that ceased with issuance of that decision.

Love cites to one case, State v. Thomas, 16 Wn. App. 1, 553 P.2d 1357 (1976), as "strong evidence that peremptory challenges can be conducted in private." Love, 176 Wn. App. at 918. Thomas rejected the argument that "Kitsap County's use of secret – written – peremptory jury challenges" violated the defendant's right to a fair and public trial where the defendant had failed to cite to any supporting authority. Thomas, 16 Wn. App. at 13. Notably, Thomas predates Bone-Club by nearly 20 years. Moreover, the fact Thomas challenged the practice suggests it was

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[2] A petition for review is pending in Love and set to be considered in April of 2014. State v. Unters Love, Case No. 89619-4.

atypical even at the time.[3] Labeling Thomas "strong evidence" is an overstatement.

Regarding logic, the Court could think of no manner in which exercising peremptory challenges in public furthered the right to fair trial, concluding instead that a written record of the challenges sufficed. Love, 176 Wn.2d at 919-20. But the Court fails to mention or consider the increased risk of discrimination against protected classes of jurors resulting from private exercise of peremptory challenges. As discussed above, the later filing of a written document from which the source of peremptory challenges might be deciphered is not an adequate substitute for simultaneous public oversight. See Sadler, 147 Wn. App. at 116 ("Few aspects of a trial can be more important . . . than whether the prosecutor has excused jurors because of their race, an issue in which the public has a vital interest.").

In defending the private process employed at Marks's trial, the State also suggests fairness of the proceedings may have actually been enhanced because the process avoided angering jurors. The State cites a

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[3] Citing to a Bar Association directory, the Thomas court noted that "several counties" had employed Kitsap County's practice. Thomas, 16 Wn. App. at 13 n.2. Ignoring the questionable methodology of what appears to an informal poll, that only "several counties" had used the method certainly leaves open the possibility a majority of Washington's 39 counties did not use it, even before Bone-Club and later cases requiring an open process.

case suggesting, in dicta, that certain trial matters affecting the jury may be handled at a sidebar. BOR at 20 (citing State v. Holedger, 15 Wash. 443, 448, 46 Pac. 652 (1896)). Putting aside the issue of Holedger's dubious relevance, if a trial judge believes this portion of jury selection should be conducted outside public scrutiny, it can simply assess the five factors set forth in Bone-Club, 128 Wn.2d at 258-59, to determine whether privacy is warranted and permitted. No such analysis occurred here

C. CONCLUSION

As a critical part of jury selection, peremptory challenges must occur openly. This also is true under the experience and logic test. The procedures used to select Marks's jury violated his right to a public trial. His convictions should be reversed and the case remanded for a new trial. For the reasons stated above and in Marks's opening brief, this Court should grant the requested relief.

DATED this 11th day of March, 2014.

Respectfully submitted,

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	)	
Appellant.	)	

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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 11TH DAY OF MARCH, 2014, 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] DUSTIN MARKS
DOC NO. 815196
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF MARCH, 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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