NO. 44588-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DRAKE MCDANIEL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn Nelson

No. 12-1-01632-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to show that there was a closure of the courtroom during jury selection when all jury selection proceedings occurred in an open courtroom?

2. Did the trial court properly exercise its discretion in not instructing the jury on the lesser included offense of theft in the third degree when there was insufficient evidence presented at trial to support such an instruction?

3. If the court finds the trial court erred by failing to instruct the jury on the lesser included offense of theft in the third degree, was such an error harmless?

B. STATEMENT OF THE CASE.

1. Procedure

On May 8th, 2012, the Pierce County Prosecutor's Office charged DRAKE MCDANIEL, hereinafter "defendant" with two counts of robbery in the first degree, one count of forgery and one count of unlawful possession of a firearm in the first degree. CP 1-3. On January 8th, 2013, the State filed an amended information removing the forgery count. CP 6-

8; RP[1] 3-5. The case proceeded to trial that same day in front of the Honorable Kathryn Nelson. RPVD.

During jury selection, the parties wrote peremptory challenges in a chart on a sheet of paper noting the individual they wished to excuse. RP 25; CP 112, 113-115. Once it was filled out, the peremptory challenge sheet was given to the court. RP 26-27; CP 112, 113-115. The court sat the remaining first fourteen individuals as the jury. RP 26-27; CP 109-111, 112, 113-115.

Regarding Count I of robbery in the first degree involving defendant taking Ms. Montgomery's purse, defendant requested the jury be instructed on the lesser offense of theft in the third degree. RP 696. The State opposed giving the instruction. RP 696. The State agreed that theft in the third degree satisfied the legal prong of the ***Workman***[2] test, but argued it did not meet the factual prong based on the testimony that was presented. RP 699-713. The court agreed with the State and did not include an instruction on the lesser offense of theft in the third degree for Count I. RP 713-714.

The jury found defendant guilty of robbery in the first degree under Count I, not guilty of robbery in the first degree under Count II, and guilty of unlawful possession of a firearm in the first degree under Count

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[1] The verbatim record of proceedings are paginated consecutively in multiple volumes and will be referred to as "RP," except for the voir dire proceedings which are recorded in the January 8, 2013 volume and will be referred to as "RPVD".
[2] ***State v. Workman***, 90 Wn.2d 443, 584 P.2d 382 (1978)

III. RP 862-863; CP 35, 37, 39. Defendant was sentenced to the high end of the standard ranges, 171 months on Count I and 89 months on Count III to be served concurrently. RP 877; CP 80-94.

Defendant filed a timely notice of appeal on February 21, 2013. CP 95-103.

2. Facts

Shortly after 7 p.m. on April 24, 2012, 19 year old Jazmyne Montgomery drove her boyfriend, Donteise Mosley, to the Walgreen's near Sprague and 6th Avenue. RP 60-66, 86, 216, 220. They went there to sell marijuana to a man named Budha. RP 220-221, 231. Mr. Mosley had the marijuana in a Winnie the Pooh lunchbox in the trunk of Ms. Montgomery's car. RP 236-237. Ms. Montgomery parked her vehicle next to a Cadillac Mr. Mosley recognized from previous interactions with Budha. RP 69-70, 232-233.

A man, later identified as defendant, got out of the driver's seat of the Cadillac and into the backseat of Ms. Montgomery's car. RP 69-70. Defendant smoked marijuana with Mr. Mosley who was sitting in the passenger seat. RP 69-70. Ms. Montgomery texted on her phone. RP 236-237.

Defendant said he needed to get change from the money he had and went to get out of Ms. Montgomery's car. RP 241-242. Ms. Montgomery's car had child locks so she got out and opened defendant's

door from the outside. RP 81-82, 127-128. Defendant got out of the car and as Ms. Montgomery returned to the driver's seat, defendant got back in Ms. Montgomery's car without getting change. RP 76-77, 243-245. Defendant put a silver gun to Mr. Mosley's side. RP 76-77, 243-245. Ms. Montgomery believed she got hit with the butt of a gun. RP 76-77, 243-245.

While this happened, another man, later identified as Jonathon Williams, got out of the passenger side of the Cadillac. RP 79-80, 131. He opened Ms. Montgomery's door and held what she believed was a gun to her hip. RP 79-80, 131. When Ms. Montgomery tried to look to her side to see what it was, Williams told her not to. RP 80. Mr. Mosley could see Williams had Ms. Montgomery pinned against the car frame holding her shoulder and what appeared to be a black pistol. RP 268-270, 282-283, 296. In her rearview mirror, Ms. Montgomery saw defendant had a gun against Mr. Mosley's head. RP 83, 87. Defendant held the gun to Mr. Mosley's left side and told him it was a robbery. RP 243-244, 309. Defendant took Ms. Montgomery's keys out of the ignition and took her purse from in-between the front seats. RP 80-81, 245-246.

Defendant and Williams told Mr. Mosley to open the trunk. RP 309. Mr. Mosley pushed a button in the glove box that opened the trunk. RP 309. Defendant got out of Ms. Montgomery's car and Williams went to the trunk. RP 131-132. They took the Winnie the Pooh box containing marijuana from the trunk, got into their Cadillac and drove away. RP 92,

310. Ms. Montgomery called 911 from her phone while Mr. Mosley tried to remember the license plate of the Cadillac. RP 54-55, 92, 249-250. Ms. Montgomery told the dispatcher the license plate of the Cadillac as she cried thanking God she did not die. RP 93. Mr. Mosley also called his mother who met them at the Walgreen's. RP 133-134, 248.

Tacoma police officers responded to the scene. RP 326-329. They spoke with Ms. Montgomery who was shaken up and upset. RP 329-332. She described how she and Mr. Mosley were meeting someone to sell marijuana to when two black males with guns robbed them and stole her keys, purse, $500 cash and the marijuana. RP 332-338. Mr. Mosley was initially evasive with the officers, but eventually told them he was there to buy marijuana when he and Ms. Montgomery were robbed by two black males who pulled guns on them. RP 338-341.

Using the license plate of the Cadillac, the police were able to determine the address of the Cadillac's registered owner. RP 349, 393. Pierce County Sheriff's Deputies responded to the location and stopped the Cadillac as it was pulling into the driveway of the home. RP 393-396, 413-415. Defendant was driving, jumped out of the Cadillac and ran inside the home. RP 397-398. Deputies arrested the passenger of the vehicle, Williams, and found Ms. Montgomery's coach wallet when it fell out of Williams' pocket. RP 401-405, 416-420.

Defendant never came out of the home, but his girlfriend, Michelle Andrews did. RP 421-422, 519-520, 617. Defendant had been living with

Ms. Andrews at the home for five months. RP 421-422, 519-520, 617. Ms. Andrews was also the registered owner of the Cadillac. RP 519-522. She testified defendant frequently drove the Cadillac and on that day, he had the Cadillac while she was napping. RP 519-522. Ms. Andrews said she woke up when the police surrounded her home, but never saw defendant come inside. RP 523-525.

Ms. Montgomery was brought to the scene and identified Jonathon Williams in a field line up as the man who stood outside her door with a gun. RP 96-97, 350-352. Police found a loaded silver semiautomatic handgun underneath a jacket in the Cadillac. RP 446-448. Later, pursuant to a search warrant, police also found Ms. Montgomery's keys and purse and baggies of marijuana in the Cadillac. RP 89-95, 354-355, 364-366. Police also found an envelope addressed to defendant inside the glove box of the Cadillac. RP 363.

The next day, Ms. Montgomery went to the police station to collect her purse. RP 98-103, 141. She identified defendant as the driver of the Cadillac and the person who sat in her backseat holding a gun to Mr. Mosley. RP 98-103, 141. Ms. Montgomery testified that a few months after the robbery, she had three seizures despite having no history of them before being hit in the head during this incident. RP 170-172, 515.

During her testimony, Ms. Montgomery admitted she was reluctant to testify and had to be arrested before she would submit to a defense interview. RP 71-73. She also admitted in her original interview she told

detectives that Mr. Mosley was there to buy $10 worth of marijuana, but he was actually there to sell marijuana. RP 144-148. Her story changed after Mr. Mosley decided to tell the truth about why he was there. RP 144-148, 251.

Mr. Mosley also testified that he was reluctant to cooperate with the State and had to be arrested before he would submit to interviews. RP 251-253. He admitted he originally lied about what happened saying he was at the Walgreen's to buy marijuana. RP 253-256. The State granted Mr. Mosley immunity in the case and he again said he was at the Walgreen's to buy marijuana. RP 253-256. The week of trial however, Mr. Mosley admitted he was really at the Walgreen's to sell marijuana. RP 253-256.

Defendant chose to take the stand in his own defense. RP 618. He testified that he met Mr. Mosley through their mutual friend Budha. RP 618. Defendant said he had been meeting Mr. Mosley twice a month to buy marijuana. RP 619. Defendant testified he picked up Williams in the Cadillac and they met Mr. Mosley at the Walgreen's to buy marijuana from him. RP 624-625. Defendant got into the backseat of Ms. Montgomery's car and smoked marijuana with Mr. Mosley. RP 627. Mr. Mosley told defendant the marijuana was in the trunk and defendant in turn told Williams the marijuana was in the trunk. RP 627-630. Williams got the marijuana out of the trunk as defendant paid Mr. Mosley $800 in counterfeit bills. RP 631-633.

Defendant testified Mr. Mosley got upset about the counterfeit bills and pulled out a gun. RP 634-635. Mr. Mosley was swearing at defendant as defendant tried to pay him with real money. RP 634-635. Defendant testified he believed he and Williams were about to be shot and said Mr. Mosley threatened to kill them if defendant did not hand over real money. RP 635-639.

To diffuse the situation, Williams made a motion or gesture towards his waistband to make the impression he had a gun. RP 636. Mr. Mosley put his gun away and Williams started walking back to the Cadillac. RP 639. Defendant grabbed Ms. Montgomery's purse before getting out of the car and driving away in the Cadillac with Williams. RP 639-642. Defendant testified he grabbed the purse hoping there was money inside to make up for Mr. Mosley taking all of defendant's money. RP 640.

Defendant denied having a gun during the robbery and said he had no idea how the silver gun got into the Cadillac. RP 650. He also said he did not use any force or hit Ms. Montgomery when he took her purse. RP 650. Defendant admitted he had been convicted of a prior felony offense making him ineligible to possess a firearm. RP 654.

C. ARGUMENT.

1. AS JURY SELECTION OCCURED IN AN OPEN COURTROOM, DEFENDANT FAILS TO SHOW ANY CLOSURE OF THE COURTROOM.

a. RAP 2.5(a)(3) Should Be Applied to Right to Public Trial Cases, As It Is to Other Constitutional Rights.

Ordinarily an appellate court will consider a constitutional claim for the first time on appeal only if the alleged error is manifest and truly of constitutional dimension. ***State v. McFarland***, 127 Wn.2d 322, 332–33, 899 P.2d 1251 (1995); ***State v. Davis***, 41 Wn.2d 535, 250 P.2d 548 (1952); RAP 2.5(a)(3). Such a restriction is necessary because the failure to raise an objection in the trial court "deprives the trial court of [its] opportunity to prevent or cure the error" thereby undermining the primacy of the trial court. ***State v. Kirkman***, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); ***State v. Scott***, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (the constitutional error exception in RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below). A defendant attempting to raise a claim for the first time on appeal must show both a constitutional error and prejudice to his rights. *Id.* at 926-27. A defendant can demonstrate actual prejudice on appeal by making a "plausible showing ... that the asserted error had practical and identifiable consequences in the trial of the case." *Id.* at 935.

Prior to the adoption of RAP 2.5 the Washington Supreme Court held that a closed courtroom claim could be raised on appeal even if there was no objection on this ground in the trial court. ***State v. Marsh***, 126 Wash. 142, 145-46, 217 P. 705 (1923).

> At common law, constitutional issues not raised in the trial court were not considered on appeal, with just two exceptions. If a defendant's constitutional rights in a criminal trial were violated, such issue could be raised for the first time on appeal. Secondly, where a party raised a constitutional challenge affecting the jurisdiction of the trial court, an appellate court could also reach the issue.

State v. WWJ Corp. 138 Wn.2d 595, 601, 980 P.2d 1257, 1260 (1999) (citations omitted). These common law rules were replaced in 1976 by the adoption of the Rules of Appellate procedure, and specifically RAP 2.5(a). *Id.* at 601. As noted in a recent opinion, *see* ***State v. Beskurt***, 176 Wn.2d 441, 449-50, 293 P.3d 1159 (2013) (Madsen, J. *concurring*), when the Supreme Court decided ***State v. Bone-Club*** in 1995, it cited to the rule in ***Marsh*** without taking into consideration of the impact of RAP 2.5(a)(3). *See* ***State v. Bone-Club***, 128 Wn.2d 254, 257, 906 P.2d 325 (1995). This failure to consider the impact of RAP 2.5(a)(3) has persisted in other decisions. *See, e.g.,* ***State v. Brightman***, 155 Wn.2d 506, 514–15, 122 P.3d 150 (2005).

As three justices of the Supreme Court recently concluded, the appellate courts should refuse to apply a rule that conflicts with the Rules of Appellate Procedure and subverts the intent of RAP 2.5(a). ***State v.***

Beskurt, 176 Wn.2d 441, 449-51, 293 P.3d 1159 (2013). (Madsen, J., *concurring*). The Court in ***Bone-Club*** did not consider the change effected by RAP 2.5(a); its holding that a public trial error need not be raised in the trial court to be considered on appeal should be corrected.

Respect for *stare decisis* requires a clear showing that an established rule is incorrect and harmful before it is abandoned. ***State v. Devin***, 158 Wn.2d 157, 168, 142 P.3d 599 (2006). In this instance, the rule is incorrect because it contradicts the spirit and letter of the Rules of Appellate Procedure adopted by this Court. It is harmful in at least three respects: 1) the trial court is denied the opportunity to correct any error when no objection is required to preserve the issue for review; 2) it allows a defendant to participate in procedures and practices in the trial court that are to his benefit, yet still claim that these practices are the basis for error in the appellate court; and 3) as the ***Marsh*** rule does not require a defendant to show a manifest error or any actual prejudice before obtaining new trial, public respect for the court is diminished and judicial resources are wasted when retrial is given as a remedy when it is evident from the record that there is no prejudice to the defendant.

These harms can be seen in the case now before the court. The trial court had the parties indicate their peremptory challenges in writing on a paper that was passed back and forth; neither party voiced an

objection to this procedure. RP 16-17, 24; CP 112. Defendant exercised all of his peremptory challenges thereby eliminating venire persons he did not want on his jury. Had defendant objected to these procedures and argued that they constituted a violation of his right to an open courtroom, the trial court might have opted for different procedures just to eliminate a potential claim. Defendant cannot articulate any practical and identifiable negative consequences to his trial or show that he was prejudiced by the use of the written process to indicate peremptory challenges. His failure to object to what he now claims was a courtroom closure within the scope of the right to a public trial and his inability to establish resulting actual prejudice should preclude appellate review. Despite the fact that he cannot show any actual prejudice from the procedures used, defendant nevertheless, argues that he is entitled to a new trial. This is an abuse of the judicial process that should not be condoned.

This court should find that defendant's failure to object brings this issue under RAP 2.5(a)(3) and that he has failed to show an issue of truly constitutional magnitude that has caused him actual prejudice. As such this court should refuse to review the claim.

b. The Courtroom Was Open Throughout Voir Dire Proceedings.

A criminal defendant's right to a public trial is found in article I, section 22 of the Washington Constitution, and the Sixth Amendment to

the United States Constitution; both provide a criminal defendant the right to a "public trial by an impartial jury." The state constitution also provides that "[j]ustice in all cases shall be administered openly," which grants the public an interest in open, accessible proceedings, similar to rights granted in the First Amendment of the United States Constitution. Wash. Const. article I, section 10; ***State v. Lormor***, 172 Wn.2d 85, 91, 257 P.3d 624 (2011); ***Seattle Times Co. v. Ishikawa***, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); ***Press–Enterprise Co. v. Superior Court***, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). The public trial right "serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." ***State v. Sublett***, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). "There is a strong presumption that courts are to be open at all trial stages." ***Lormor***, 172 Wn.2d at 90. The right to a public trial includes voir dire. ***Presley v. Georgia***, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010).

Whether the right to a public trial has been violated is a question of law reviewed de novo. ***State v. Momah***, 167 Wn.2d 140, 147, 217 P.3d 321 (2009). The right to a public trial is violated when: 1) the public is fully excluded from proceedings within a courtroom, ***State v. Bone–Club***, 128 Wn.2d 254, 257, 906 P.2d 325 (1995) (no spectators allowed in courtroom during a suppression hearing) and ***State v. Easterling***, 157 Wn.2d 167, 172, 137 P.3d 825 (2006) (all spectators, including

codefendant and his counsel, excluded from the courtroom while codefendant plea-bargained); 2) the entire voir dire is closed to all spectators, ***State v. Brightman***, 155 Wn.2d 506, 511, 122 P.3d 150 (2005); 3) and is implicated when individual jurors are privately questioned in chambers, *see* ***State v. Momah***, 167 Wn.2d 140, 146, 217 P.3d 321 (2009) and ***State v. Strode***, 167 Wn.2d 222, 224, 217 P.3d 310 (2009) (jury selection is conducted in chambers rather than in an open courtroom without consideration of the ***Bone–Club*** factors). In contrast, conducting individual voir dire in an open courtroom without the rest of the venire present does not constitute a closure. ***State v. Erickson***, 146 Wn. App. 200, 189 P.3d 245 (2008).

When faced with a claim that a trial court has improperly closed a courtroom, the Washington Supreme Court has held that the reviewing court determines the nature of the closure by the presumptive effect of the plain language of the court's ruling, not by the ruling's actual effect. ***In re Personal Restraint of Orange***, 152 Wn.2d 795, 807-8, 100 P.3d 291 (2004).

In the case now before the Court, defendant argues that the procedure used by the court for peremptory challenges constituted a courtroom closure. The record shows that the following occurred: In an open court room with the defendant present, the trial court articulated how it wanted counsel to address peremptory challenges. *See* RP 15-16.

> COURT: ... I should have asked if there were any such questions. There's a reason why you haven't done a trial, and that was that I was out of criminal trials for four years. But I've been back a whole year now so I can tell you that I ask you to exercise your six peremptories each, and then you will come up with who is Juror Number 12.
>
> PROSECUTOR: And then come to you.
>
> COURT: And there's a -- when you see the sheet, there's a little line, so if the two of you agree on who the twelfth juror is, then you can just proceed and exercise your first peremptory for Alternate 13 and then exercise your second peremptory if you wish for Alternate 14.
>
> I will tell 13 and 14 they are alternates. I will instruct them specifically about being an alternate. And usually you get all the way through, but then you bring it to me to check before I actually seat them. So if there's any problem, we usually work it out before then.

RP 15. Neither defendant nor his attorney objected to this procedure. RP 15-16. At the close of questioning, the court instructed the jury as the parties started the peremptory challenge process and then called both counsel to a sidebar. RP 24-25. The peremptory challenge process went as follows:

> THE COURT: All right. Ladies and gentlemen of the jury, the next phase of this process is to allow the lawyers to exercise their peremptory challenges. We give them an opportunity to remove some jurors if they wish for no stated reason. And while they're doing that, it's important that you make sure your badge number is high up so that they can see it and remember the answers to the questions that they may have asked you.
>
> If you'd like to stand up and stretch, if you'd like to take out reading material or knitting or anything like that, you can speak softly to your neighbor, but please stay in

order because that will help us remember who gave which answer, okay?

So kind of like in the military, you're at ease.

(Peremptory challenges exercised.)

THE COURT: Counsel.

(Side bar held which was not reported.)

THE COURT: Okay. Ladies and gentlemen, I am now going to seat the twelve jurors and the alternate, and what I'm going to do is I'm going to make the assignments, and I want everybody to stay right where you are. ...

RP 25-26. The court then read off the names of the jurors who would sit on the case and excused the remainder of the venire. RP 25-27.

Defendant has failed to identify any ruling of the court that closed the courtroom to any person. All jury selection was conducted in the courtroom as opposed to the judge's chambers or the jury room. Defendant can point to no Washington case that has found a courtroom closure under these circumstances. Rather, defendant argues that conducting the peremptory challenge process in writing effectively "closed" the courtroom.

The right to a public trial serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. ***Brightman***, 155 Wn.2d at 514 (*citing* ***Peterson v. Williams***, 85 F.3d 39, 43 (2d Cir. 1996)). But not every interaction

between the court, counsel, and defendants will implicate the right to a public trial. ***Sublett***, 176 Wn.2d at 71. To decide whether a particular process must be open to the press and the general public, the ***Sublett*** court adopted the "experience and logic" test formulated by the United States Supreme Court in ***Press–Enterprise Co. v. Superior Court***, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986). ***Sublett***, 176 Wn.2d at 73, 141.

> 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." The logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." If the answer to both is yes, the public trial right attaches and the Waller or Bone–Club factors must be considered before the proceeding may be closed to the public. We agree with this approach and adopt it in these circumstances.

Sublett, 176 Wn.2d at 73. Applying that test, the ***Sublett*** court held that no violation of the right to a public trial occurred when the court considered a jury question in chambers. ***Sublett***, 176 Wn.2d at 74–77. "None of the values served by the public trial right is violated under the facts of this case.... The appearance of fairness is satisfied by having the question, answer, and any objections placed on the record." ***Sublett***, 176 Wn.2d at 77.

Division III of the Court of Appeals recently addressed whether challenges for cause done in a sidebar constituted a courtroom closure under the experience and logic test in ***State v. Love***, 176 Wn. App. 911, 309 P.3d 1209 (2013). As to the experience prong the court concluded:

> The history review confirms that in over 140 years of cause and peremptory challenges in this state, there is little evidence of the public exercise of such challenges, and some evidence that they are conducted privately. Our experience does not require that the exercise of these challenges be conducted in public.

Love, 176 Wn. App. at 919. Under the logic prong, the court found that none of the purposes of the public trial right were furthered by a party's actions in making a challenge for cause or a peremptory challenge as a challenge for cause creates an issue of law for the judge to decide and a peremptory challenge "presents no questions of public oversight." *Id.* The court concluded that use of a side bar to conduct challenges for cause did not constitute a courtroom closure. *Id.* at 920.

In addition to the historical review conducted in ***Love***, there is some additional authority that the public announcement of a peremptory challenge in open court by the party exercising the challenge is not a widespread practice. When the United States Supreme Court decided that it was just as improper for a criminal defendant to excuse a potential juror for an improper reason as it was a prosecutor, the court commented that "it is common practice not to reveal the identity of the challenging party to the jurors and potential jurors[.]" ***Georgia v. McCollum***, 505 U.S. 42, 53 n.8, 112 S. Ct. 2348 (1992), *citing* Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 Colum.L.Rev. 725, 751, n. 117 (1992).

In the case now before the court, defendant does not point to any ruling of the court that excluded spectators or any other person from the courtroom during the voir dire process. The record indicates that all of voir dire and the exercise of peremptory challenges were carried out in an open courtroom. Peremptory challenges were made by the attorneys in open court, albeit by a written process. RP 25-27; CP 112. Presumably, defendant could see the peremptory sheet and discuss the process with his attorney while it was going on. The written record of the process was reviewed by the court and filed, making it available for public inspection. CP 112. None of the peremptory challenges were contested and there was no need for the court to make any decisions on the peremptory challenges. RP 148-165; CP 113-114. The record offers no basis to assume that anything occurred during this process other than the written communication, among counsel and the court, of the names of the prospective jurors each counsel had decided to excuse by the right of peremptory challenge. Anyone can look at the peremptory challenge sheet and see exactly which party exercised which peremptory against which prospective juror and in what order. CP 112.

It should be noted that under ***McCollum***, both the prosecution and defense are forbidden from removing a juror with a peremptory challenge for an improper purpose. Thus, if there was a concern that a juror was being removed for an improper reason, it is immaterial which party exercised a peremptory against that juror. Any potential juror who felt

that he or she was being improperly removed from the jury could raise his or her concern with the trial court. Under the written process used here, the court would know who had exercised its peremptory against that person and could decide whether it was necessary for that party to explain its reasons for doing so. The procedure used below protects the values of the public trial right.

Defendant has failed to identify any closure of the courtroom during voir dire and fails to show how the procedures used in an open court undermined the purposes of the public trial right. Anyone sitting in the court room would know which jurors were excused for cause and why. RPVD 29, 51; CP 109-111, 113-115. The parties carefully recorded the names of the prospective jurors who were removed by peremptory challenge, as well as the order in which each challenge was made and the party who made it. CP 112. This document is easily understood, and it was made part of the open court record, available for public scrutiny. These procedures satisfied the court's obligation to ensure the open administration of justice.

The only thing that did not occur was the vocal announcement of each peremptory challenge as it was made. There is no indication that our constitution requires that everything and anything that is done in the course of a public trial be announced in open court. For example, seven years after statehood, the Washington Supreme Court issued its opinion in ***State v. Holedger***, 15 Wash. 443, 448, 46 Pac. 652 (1896). Holedger

complained that he was prejudiced when the court asked his attorney in front of the jury panel whether there was any objection to the jury being allowed to separate. The Supreme Court did not find any evidence that Holedger was prejudiced by this action, but did indicate that the better practice would be for the court to ask this question in a sidebar so as to avoid incurring the displeasure of juror who might be upset if there was an objection.

The decision in ***Holedger*** was authored by Justice Dunbar and concurred in by Chief Justice Hoyt. Chief Justice Hoyt was the president of the 1889 constitutional convention, and Justice Dunbar was a delegate to the constitutional convention. *See* B. Rosenow, The Journal of the Washington State Constitutional Convention, at 468 (1889; B. Rosenow ed. 1962); C. Sheldon, The Washington High Bench: A Biographical History of the State Supreme Court, 1889-1991, at 134-37 (1992). Thus, at least two of the justices signing this opinion had considerable expertise in the protections given under the state constitution, yet neither found certain trial functions being handled in a manner that precluded the entire courtroom from hearing what was being said to be inconsistent with the public's right to open proceedings. In 1904, the Court upheld the actions of trial court that utilized the "best-practice" recommended in ***Holedger***. *See* ***State v. Stockhammer***, 34 Wash. 262, 264, 75 P. 810 (1904) (noting that consent for the jury to separate was given by defense counsel at the bench out of the hearing of the defendant and the jury).

Defendant has failed to show that any of the values served by the public trial right were violated by use of the written peremptory challenge procedure during the voir dire process when the written document created in the peremptory process is later filed, making it a public record. In defendant's case, a public spectator could watch the attorneys writing down their peremptory challenge on a piece of paper and later see which venire persons had been subjected to a peremptory challenge by the fact that they were not called to sit in the jury box. If that spectator were curious as to which attorney had removed a particular venire person, he could ascertain that by examining the written public record.

As defendant has failed to show that any improper closure of the courtroom occurred this issue is without merit.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO INSTRUCT THE JURY ON THEFT IN THE THIRD DEGREE.

In general, the crimes charged in an information are the only crimes of which a defendant may be convicted and on which a jury may be instructed. ***State v. McJimpson***, 79 Wn. App. 164, 171, 901 P.2d 354, *review denied*, 129 Wn.2d 1013, 917 P.2d 576 (1996). Nevertheless, a defendant may be convicted of, and a jury instructed on, a crime that is a lesser offense necessarily included in the offense charged. ***State v. Berlin***, 133 Wn.2d 541, 544-545, 947 P.2d 700 (1997). The right to present a lesser included offense to the jury is a statutory right. RCW 10.61.006.

Either the defense or the prosecution may request a lesser included offense instruction. ***State v. Tamalini***, 134 Wn.2d 725, 728, 953 P.2d 450 (1998).

The standard for review applied to a trial court's failure to give jury instructions depends on whether the trial court's refusal to grant the jury instructions was based upon a matter of law or of fact. ***State v. Walker***, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. ***State v. Lucky***, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by*, ***State v. Berlin***, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). The trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo. *Id.*

The law concerning the giving of jury instructions may be summarized as:

> We review the trial court's jury instructions under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law.

State v. Fernandez-Medina, 94 Wn. App. 263, 266, 971 P.2d 521, *review granted*, 137 Wn.2d 1032, 980 P.2d 1285 (1999), *citing* ***Herring v. Department of Social and Health Servs.***, 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. ***State v. Staley***, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

In ***State v. Workman***, 90 Wn.2d 443, 584 P.2d. 382 (1978), the Supreme Court formulated the test for when a party is entitled to a lesser included offense instruction. A defendant is entitled to a lesser included offense instruction if (1) each element of the lesser offense is a necessary element of the charged offense (the legal test), and (2) the evidence supports an inference that defendant committed the lesser offense (the factual test). ***State v. Pastrana***, 94 Wn. App. 463, 972 P.2d 557, 561, (1999), (*citing* ***Workman***, 90 Wn.2d at 447-448).

In determining whether there is sufficient evidence to support the instruction, the evidence is viewed in the light most favorable to the party requesting the instruction. ***State v. Fernandez-Medina***, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). The factual prong requires affirmative evidence that defendant committed the lesser and only the lesser crime. ***State v. Brown***, 127 Wn.2d 749, 755, 903 P.2d 459 (1995). It is not enough that a jury might simply disbelieve the State's evidence. Instead, some evidence must be presented which affirmatively establishes defendant's theory on the lesser included offense before an instruction will be given. ***State v. Fowler***, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), *overruled on other grounds by* ***State v. Blair***, 117 Wn.2d 479, 816 P.2d 718 (1991). Specifically, a lesser included offense instruction should be given only "[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." ***Fernandez-Medina***,

141 Wn.2d at 456, (*quoting* ***State v. Warden*** 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

In the present case, defendant was charged in Count I of the amended information with first degree robbery. CP 6-8. Defendant asked that the jury be instructed on the lesser included offense of theft in the third degree. RP 530. The State conceded the legal prong of ***Workman*** was met, but objected to giving the lesser included offense instruction arguing the factual prong was not met by the evidence that was presented. RP 532. Thus, the issue before the court is whether the trial court properly exercised its discretion when it found the factual prong of the ***Workman*** test was not met and declined to give the lesser included instruction of theft in the third degree.

The court's instructions to the jury defined robbery in the first degree as follows:

> A person commits the crime of robbery when he or she unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial. The taking constitutes robbery whenever it appears that although the taking was fully completed without the knowledge of the person from whom

> it was taken, such knowledge was prevented by the use of force or fear.

CP 48-79, Instruction No. 8. The WPIC definition of theft is:

> to wrongfully obtain or exert unauthorized control over the property and services of another, or the value thereof, with intent to deprive that person of such property or services or
>
> by color or aid of deception, to obtain control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services or
>
> to appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive that person of such property or services.

WPIC 79.01.

The primary difference between the two instructions is whether force or a display of force is used in the commission of the crime. Defendant's theory of the case was that defendant used no force when he took Ms. Montgomery's purse and therefore committed only theft in the third degree. Defense counsel argued "if, at the moment he grabbed the gun -- excuse me, grabbed the purse, no gun is being displayed, no force is being used, as he described, then that is theft and only theft." RP 699.

However, a review of defendant's own testimony reveals that it was the fear inflicted upon Ms. Montgomery by the actions of Williams that allowed defendant to steal her purse. Defendant testified Mr. Mosley pulled out a handgun after becoming upset that defendant tried to pay him with counterfeit money. RP 634-635. In response, Williams made a

motion or gesture towards his hoodie pocket about which defendant testified "I believed that either he had a gun or he was trying to make the impression that he had a gun to maybe diffuse the situation." RP 636. According to defendant, it was this gesture that caused Mr. Mosley to put his gun away all the while Williams "kept his hand in that motion." RP 638-639. Williams started walking away and defendant "snatched" the purse. RP 639.

Even viewing the evidence in the light most favorable to defendant, it is evident that it was Williams' show of force that allowed defendant to steal Ms. Montgomery's purse. When Williams displays what appears to be a gun, he takes control of the situation. Mr. Mosley retreats and puts his gun away in apprehension of harm as a result of a display of force by Williams. It is this control over the situation and fear inflicted as a result of Williams' actions that allows defendant to steal Ms. Montgomery's purse.

Defendant cannot separate his taking of the purse from the display of force that was used by Williams. It was the display of force that allowed him to take the purse. Defendant cannot argue that he committed theft in the third degree instead and to the exclusion of robbery when the evidence shows his actions are intertwined and a direct result of William's display of force. The prosecutor summarized this saying:

> Under the ***Workman*** test, again, the Court has to find that only the lesser -- in this case, theft third degree -- was committed to the exclusion of the robbery. And you cannot

> do away with the defendant's testimony that he saw Mr. Williams display a gun and that effect of that gun on the two individuals who we've named as the victims. Thus, he then takes the purse after the force is applied.

RP 708.

Defendant's arguments that there was no tug of war for the purse and Ms. Montgomery may not have even known he took her purse are irrelevant. Robbery does not require actual force, only that the property was taken "by the use or *threatened* use of immediate force, violence, or fear of injury." CP 48-79, Instruction No. 8. (Emphasis added). Similarly, knowledge is subject to the display of force; "the taking constitutes robbery whenever it appears that although the taking was fully completed without the knowledge of the person from whom it was taken, *such knowledge was prevented by the use of force or fear.*" *Id.* (Emphasis added).

Ms. Montgomery's testimony established that she knew her purse, keys and wallet were all taken from right next to her. RP 80-82, 87-88. Her testimony was that she was hit with the butt of a gun and Williams put a gun next to her side. RP 76-80. When she tried to look down, Williams told her not to so she stared straight ahead. RP 80. Ms. Montogmery's actions and behavior was limited and controlled by fear of being harmed. Similarly, her knowledge about defendant taking her purse was limited by the fear of harm she was constrained by in the situation.

For the trial court to instruct the jury on the lesser included offense of theft in the third degree, evidence had to be presented which established defendant committed theft in the third degree and only theft in the third degree. Defendant's testimony that Williams displayed what appeared to be a firearm created an apprehension of fear in the victims and allowed defendant the opportunity to take the purse. As a result, based on the evidence that was presented, the trial court did not abuse its discretion by declining to instruct the jury on the lesser included offense of theft in the third degree.

3. EVEN IF THE COURT FINDS THE TRIAL COURT ABUSED ITS DISCRETION BY NOT INSTRUCTING THE JURY ON THEFT IN THE THIRD DEGREE, THE ERROR WAS HARMLESS.

The failure of the trial court to properly instruct the jury is prejudicial, unless the error affirmatively appears harmless. ***State v. Southerland,*** 109 Wn.2d 389, 390, 745 P.2d 33 (1987). The right to a lesser included offense instruction derives from a statute, RCW 10.61.006. *Id.* at 391 (*citing* ***State v. Parker***, 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984)). Thus, the "error is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *Id.* at 391 (*quoting* ***State v. Cunningham***, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)).

Despite the court not giving a lesser included offense instruction to the jury, defendant still argued his theory of the case that he was only guilty of theft in the third degree. Had the jury found defendant's version credible and believed he was only guilty of theft in the third degree, they would have acquitted him. In essence, regardless of whether the jury was instructed on the lesser included offense of theft in the third degree, defendant's closing argument remained the same. Defense counsel argued defendant was guilty of theft in the third degree, but the State incorrectly charged him so all that the jury could do was acquit.

Defense counsel's outlined this theory in her opening argument saying:

> Ladies and gentlemen, there are crimes that Mr. McDaniel is guilty of. He's guilty of theft. ... But ladies and gentlemen of the jury, the State did not charge him for the crimes that he is guilty of. The State charged him for crimes that he did not commit, he is not guilty of and that the State cannot prove. Instead of charging him for the crimes that he is guilty of, they charged him for robbing Jazmyne's purse.

RP 756. A significant amount of time in defense counsel's closing argument focused on the inconsistencies and differences between Ms. Montgomery's and Mr. Mosley's testimonies arguing that they were not credible. *See* RP 757-777. Defense counsel also pointed out that based on the evidence that was presented, the jury should acquit defendant of robbery because the State had failed to prove not one, but two essential elements of the crime. *See* RP 787-791.

Defense counsel clearly articulated defendant's theory of the case further when she argued:

> The passenger's threat of gun was not used to obtain or retain the purse, only to get [Mr. Mosley] to put away his gun. [William]'s gun or the threat of gun in no way facilitated, caused, prompted McDaniel to steal the purse. Mr. McDaniel -- and there's no testimony, no evidence to say he did. He didn't take the purse because he thought [Williams] was ready and willing and able at that moment to pull his gun out and shoot Jazmyne Montgomery. [William]'s gun did not aid or assist McDaniel's theft of the purse. And ladies and gentlemen, not only Mr. McDaniel's word, it's Jazmyne's word. No testimony that she saw the [William]'s gun when McDaniel grabbed her purse. No testimony she let him take the purse because of [William]'s threat of gun. No testimony whatsoever about [William]'s gun causing the theft of purse.

RP 791.

Defense counsel concluded her closing argument saying:

> Analyze the evidence, please, because that's your job. The State failed to do so, but that's your job. And if you do so, you cannot -- and ladies and gentlemen, the fact that he wasn't charged for these crimes that he did commit, not on him. Not his fault. You cannot hold that against him. He had no control over that. The State decided to charge based on the word of these two people who were not credible and were not believable. Do not hold it against him for the State failing to charge him for the crimes he did commit, charging him for crimes that they cannot prove and that he did not commit.

RP 798-799.

The jury did not find defendant's version of events credible. Had they believed defendant, they would have acquitted him based on the

argument of defense counsel. The fact that the jury was not instructed on theft in the third degree does not change any evidence that was presented at the trial. It also does not change the argument defense counsel made. Instructing the jury on the lesser included offense would not have materially altered the outcome of the case. Defendant was not hindered by the court not including the instruction. The only difference is defense counsel was able to argue for an acquittal on Count I, rather than to find him guilty of theft in the third degree.

Defendant was able to argue his theory of the case that he was only guilty of theft in the third degree. Instructing the jury on the lesser included offense would not have changed his theory of the case, nor would it have altered any of the evidence that was presented. As a result, the failure to instruct the jury on the lesser included offense was harmless.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's conviction.

DATED: March 12, 2014.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

CHELSEY MILLER
Deputy Prosecuting Attorney
WSB # 42892

Certificate of Service.
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/12/14 [signature]
Date Signature

PIERCE COUNTY PROSECUTOR

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