NO. 31859-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN OSTER,

Appellant.

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

The Honorable Bruce A. Spanner, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's constitutional right to a public trial by conducting peremptory challenges on paper, thereby evading public scrutiny.

2. The court erred in failing to order a definite term of community custody that does not, when combined with the term of confinement, exceed the statutory maximum for the offense.

Issues Pertaining to Assignments of Error

1. Jury selection was not open to the public because peremptory challenges were conducted silently on a piece of paper. Because the trial court did not analyze the Bone-Club[1] factors before excluding the public from this important portion of voir dire, did the trial court violate appellant's constitutional right to a public trial?

2. Under State v. Boyd,[2] when the term of community custody prescribed by statute would, in combination with the term of confinement imposed by the court, exceed the statutory maximum term for the offense, the court must reduce the term of community confinement. A notification that the combined term must not exceed the statutory maximum fails to state a determinate sentence. The court sentenced appellant to 60 months

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

[2] State v. Boyd, 174 Wn.2d 470, 472, 275 P.3d 321 (2012)

confinement followed by 12 months of community custody for a class C felony with a statutory maximum of 60 months. Did the court err in failing to reduce the term of community custody to a definite term that does not exceed the statutory maximum?

B. STATEMENT OF THE CASE

1. Procedural Facts

By amended information, the Benton County prosecutor charged appellant Steven Oster with two counts of felony violation of a no-contact order with a domestic violence designation. CP 11-13. The jury found him guilty on each count and answered yes to the domestic violence special verdicts. CP 51-54. The court imposed concurrent standard range sentences of 60 months confinement and twelve months community custody. CP 57, 60, 61. Notice of Appeal was timely filed. CP 66.

2. Substantive Facts

Oster testified he was fully aware of the order requiring him to remain at least 1,000 feet away from Trudy Freese's Tinkle Street home. 2RP 120. The court admitted exhibit one, the no-contact order, and exhibit two, a stipulation that Oster had two prior convictions for violating a no-contact order. 2RP 62-63. Oster denied violating the order on either December 31, 2012 or February 23, 2013. 2RP 121, 123-25.

a. December 31, 2012

Freese's husband testified that, on December 31, 2012, he heard a noise, looked outside, and saw the white truck from next door "burning the tires off" in front of their home. 2RP 70-71, 77. It looked like Oster driving, but he could not be certain. 2RP 72-73.

Around 11 p.m., Officer Glasgow attempted to stop a white truck for going over the lane of travel. 2RP 87-88. When he caught up to the truck, it parked in the parking lot of a hotel and the driver fled on foot. 2RP 88. He could not identify the driver, but Oster's parents are the registered owners. 2RP 89.

Freese called police the next day based on her husband's report. 2RP 66-67. Freese testified Oster often drives a white truck parked in the back yard of his parents, who live next door to Freese. 2RP 67-68.

The next day, Officer Roe called Oster. 2RP 79. She testified he told her he still owned and drove a white pickup truck. 2RP 79. However, he denied driving by Freese's home the previous evening. 2RP 80. He testified he did not drive at all because his license was suspended and the truck was at the mechanic's being fixed because it did not run. 2RP 80. He said he had been home alone that evening, although a friend stopped by around 10 p.m. 2RP 80, 81. Roe asked Oster for the mechanic's contact

information. 2RP 81. Oster said he would call back with it, but did not do so. 2RP 81.

At trial, Oster denied ever driving his parents' white truck. 2RP 123. He explained he told Roe he believed it was at the mechanic's because he hadn't seen it in a while. 2RP 122. Oster's parents testified the truck does not run well because it has trouble shifting out of second gear. 2RP 106-09. Oster's father testified he is the only person who has keys to the truck and Oster has his own vehicle, a red truck. 2RP 109. Oster's friend Cynthia Strickland confirmed he was at her apartment for a New Year's Eve party that day. 2RP 105. She testified he arrived around noon and did not leave until the next day. 2RP 105.

b. February 23, 2013

On February 23, 2013, Oster testified, he was at the home of his friend Michael Eagan. 2RP 123. Eagen confirmed Oster was at his (Eagen's) home on Totton Street playing darts at 3 a.m. 2RP 115-16. Oster also testified he was just about to leave Eagen's when Ronnie Stricklen arrived and asked to borrow his bicycle. 2RP 124. Oster agreed but asked Stricklen to hurry; as soon as Stricklen returned, Oster left. 2RP 124. Stricklen confirmed he went to Eagen's home and borrowed Oster's bicycle to go to the store around 3 a.m. 2RP 118. Oster encountered Officer Judge as he was leaving Eagen's to find a place to stay. 2RP 125.

Judge testified he noticed a bicyclist on Tinkle Street about 3 a.m. about 200 feet from the Freese residence. 2RP[3] 38-39, 47. A few blocks later, he noticed a bicyclist on Totten Street, stopped, facing the opposite direction, and apparently tinkering with something at his waist. 2RP 40, 50. Judge stopped, asked the bicyclist's name, and offered to assist by shining his flashlight on the bag. 2RP 40-41. Oster gave his correct name and driver's license, and accepted the officer's assistance. 2RP 41. Judge testified Oster was cooperative and friendly and did not seem to be hiding anything. 2RP 58.

Judge testified he was certain Oster was the same cyclist he had seen earlier on Tinkle Street, although he could not identify the person he saw on Tinkle because the cyclist's hood was drawn tightly against the cold. 2RP 38-39, 49. He testified it appeared to be the same bicycle with the same flashing strobe light pattern and the cyclist was about the same size. 2RP 50-51. Judge testified he asked Oster what he was doing, and Oster said he was coming from his home on Tinkle and heading to a friend's. 2RP 42. Oster denied telling Judge he was coming from Tinkle Street, but his driver's license, which he handed to Judge, lists his parents' address next door to Freese on Tinkle Street. 2RP 41, 125-26. Officer Judge went back to his patrol car, ran Oster's name, and learned of the no-contact order between

[3] There are three volumes of Verbatim Report of Proceedings referenced as follows: 1RP – June 5, 2013; 2RP – June 17, 2013; 3RP – June 17, 2013 (Jury voir dire).

Oster and Freese and learned Freese lived on Tinkle, next door to the address Oster had given. 2RP 45-46.

c. Jury Selection

After questioning by both parties, it appears peremptory challenges were exercised silently on paper. 3RP 64-65. The trial minutes state only, "11:00AM Peremptory challenges begin. Sidebar with Court Reporter. Peremptory Challenges resume. Remaining jurors are thanked for their service and excused." RP 73. The verbatim report of proceedings is no more informative. The court stated, "Now it's time for peremptory challenges. Go ahead." 3RP 64. The next notation in the transcript states simply, "(Whereupon preemptory [sic] challenges were taken.)." 3RP 65. At a sidebar reported on the record, the court pointed out one of the State's peremptory challenges was procedurally inappropriate, and was stricken. 3RP 65. Then, the court announced, "All right. That concludes preemptory [sic] challenges." 3RP 65. The attorneys apparently challenged potential jurors by writing the potential juror's name and number on a sheet of paper that was passed back and forth between them. CP 68. The resulting list of the names of potential jurors challenged by each side was filed in the court record. CP 68.

C. ARGUMENT

1. THE COURT VIOLATED OSTER'S RIGHT TO A PUBLIC TRIAL WHEN IT CONDUCTED PEREMPTORY CHALLENGES IN SUCH A WAY AS TO EVADE PUBLIC SCRUTINY.

a. Peremptory Challenges Are an Essential Part of Jury Selection and Must Therefore Be Open to the Public.

Under both the Washington and United States Constitutions, a defendant has a constitutional right to a speedy and public trial. Const. art. 1, § 22; U.S. Const. amend. VI. Additionally, article I, section 10 guarantees open court proceedings with respect to the public and press. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). The First Amendment implicitly protects the same right. Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). The open and public judicial process helps assure fair trials, deters perjury and other misconduct by participants, and tempers biases and undue partiality. State v. Wise, 176 Wn.2d 1, 6, 288 P.3d 1113 (2012). It is a check on the judicial system, providing accountability and transparency and assuring that what occurs in court will not be secret or unscrutinized. Id.

The public trial requirement also is for the benefit of the accused: "that the public may see he is fairly dealt with and not unjustly condemned,

and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (quoting In re Oliver, 333 U.S. 257, 270 n. 25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)). The public trial guarantee thus represents a core safeguard in our system of justice and an. Id. at 5; see also Bone-Club, 128 Wn.2d at 259 (public trial right is an "essential cog in the constitutional design of fair trial safeguards.")

Therefore, court proceedings may not be closed to public view without consideration, on the record, of the factors discussed in Bone-Club. 128 Wn.2d at 258-59. Under the Bone-Club test, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. Id. at 258-260; Wise, 176 Wn.2d at 12.

When the court fails to abide by this procedure, trial closure is structural error. Wise, 176 Wn.2d at 13-15. It is presumed prejudicial and

not subject to harmless error analysis. Id.; State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); Easterling, 157 Wn.2d at 181; Orange, 152 Wn.2d at 814. Moreover, the error can be raised for the first time on appeal. Wise, 176 Wn.2d at 13 n.6; Strode, 167 Wn.2d at 229; Orange, 152 Wn.2d at 801-02; State v. Brightman, 155 Wn.2d 506, 517-18, 122 P.3d 150 (2005).

Jury selection is a critical part of the trial that must be open to the public. Wise, 176 Wn.2d at 11 (citing Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010)). Before a trial judge can close any part of voir dire, it must analyze the five factors identified in Bone-Club. Orange, 152 Wn.2d at 806-07, 809; see also Brightman, 155 Wn.2d at 515-16 (public trial violated if court orders courtroom closed during jury selection but fails to engage in Bone-Club analysis). Peremptory challenges are an integral part of selecting a jury. See State v. Saintcalle, 178 Wn.2d 34, 52, 309 P.3d 326 (2013) (peremptory challenges established by Washington's first territorial legislature over 150 years ago). Therefore, peremptory challenges implicate the public trial right and may not be closed to the public without consideration on the record of the Bone-Club factors.

The State will argue in this case that the peremptory challenges, exercised by silently passing a piece of paper back and forth, were not a closed proceeding. But the effect of this procedure was to avoid the public scrutiny that the public trial right is designed to ensure. Courts may not

exempt a proceeding from public view by closing the courtroom without first considering the Bone-Club factors. Nor may they achieve the same effect by conducting proceedings silently on paper. Oster's conviction must be reversed because the private exercise of peremptory challenges violated his constitutional right to a public trial.

b. Under Sublett's Experience and Logic Test, the Public Trial Right Is Implicated When Peremptory Challenges Are Conducted Outside the Public's View.

As State v. Wilson, 174 Wn. App. 328, 342, 298 P.3d 148 (2013), indicates, the public trial right attaches to "the exercise of 'peremptory' challenges and 'for cause' juror excusals." Moreover, under State v. Slert, 169 Wn. App. 766, 744 n.11, 282 P.3d 101 (2012), review granted in part, 176 Wn.2d 1031, 299 P.3d 20 (2013), dismissing jurors at side bar violates the public trial guarantee. Despite this clear precedent, Oster anticipates the State will argue he must first establish that the public trial right applies using the "experience and logic" test discussed in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012). This Court should reject this argument because the experience and logic test only applies when it has not already been established the proceeding falls within the public trial right. Wilson, 174 Wn. App. at 335.

However, even if it had not already been established that the exercise of challenges falls within the public trial right, both experience and logic support this conclusion as well. 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 jury selection. See, e.g., Sublett, 176 Wn.2d at 71; Strode, 167 Wn.2d at 226-227; Orange, 152 Wn.2d at 804 (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. Strode, 167 Wn.2d at 230 (for-cause challenges of six jurors in chambers not de minimus 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, logically, openness in the process of excluding jurors 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 also 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"). Without the ability to hear the arguments and discussions of counsel and the court as they occur, the public has no ability to assess whether challenges are being handled fairly and within the confines of the law or, 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.").

Similarly, open peremptory challenges are critical to guard against inappropriate discrimination. This can only be accomplished if they are made in open court in a manner allowing the public to determine whether one side or the other is targeting and eliminating jurors for impermissible reasons. See State v. Sadler, 147 Wn. App. 97, 107, 109-118, 193 P.3d 1108 (2008) (private Batson[4] 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.

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

Making the peremptory challenges sheet part of the public record after potential jurors have been dismissed from the courtroom does not rectify the error. 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, 37, 288 P.3d 1126 (2012) (reversing conviction due to in-chambers questioning of potential jurors despite fact that questioning was recorded and transcribed). While members of the public could discern, after the fact, which prospective jurors had been removed by whom (generously assuming they knew to look in the court file), the public could not tell, at the time the challenges were made, which party had removed any particular juror, making it impossible to determine whether a particular side had improperly targeted any protected group based, for example, on gender or race. See State v. Burch, 65 Wn. App. 828, 833-834, 830 P.2d 357 (1992) (identifying both as protected classes); see also Saintcalle, 178 Wn.2d 34 (lead opinion, concurrence, and dissent underscore harm resulting from improper race-based exercises of peremptory challenges and difficulty of prevention).

The mere opportunity to find out, sometime after the process, which side eliminated which jurors is not sufficient. 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, members of the public

would have to remember the identity, gender, and race of those individuals excused from jury service to determine whether protected group members had been improperly targeted. This is not realistic.

The State may also cite State v Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), where a panel of this Court recently held, under the experience and logic test, that exercising "for cause" and peremptory challenges outside the public view does not violate the right to public trial. Oster respectfully argues this decision is poorly reasoned.

Regarding experience, the Love court noted the absence of evidence that, historically, these challenges were made in open court. Love, 176 Wn. App. at 918-919. But history would not necessarily reveal common practice unless the parties made an issue of the practice. History does not tell us these challenges were commonly done in private, either. Moreover, prior to Bone-Club, there were likely many common, but unconstitutional, practices that ceased with issuance of that decision.

The Love court 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 atypical even at the time.[5] Labeling Thomas "strong evidence" is a vast overstatement.[6]

Regarding logic, the Love court could think of no way that exercising "for cause" and peremptory challenges in public furthered the right to fair trial, concluding instead that a written record of the challenges sufficed. Love, 176 Wn. App. at 919-920. But the court failed to consider that an after-the-fact record removes the public's ability to scrutinize what is occurring at a time when error can still be avoided. The court also failed to mention or consider the increased risk of discrimination against protected classes of jurors resulting from late disclosure. As discussed above, the subsequent filing of documents from which the source of a challenge might be deciphered is not an adequate substitute for simultaneous public oversight. See also 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.").

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[5] 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. Even ignoring the questionable methodology of what appears to be some type of informal poll, that only "several counties" had used the method certainly leaves open the possibility that a majority of Washington's 39 counties did not.

[6] The State may argue the challenging party often is not revealed to prospective jurors. There is much that is not revealed to prospective jurors at trial. This is irrelevant, however, to whether the public must see and hear what is happening.

There is no indication the court considered the Bone-Club factors before conducting the private peremptory challenges in this case. Appellate courts do not comb through the record or attempt to deduce whether the trial court applied the Bone-Club factors when it is not apparent in the record. Wise, 176 Wn.2d at 12-13. Because peremptory challenges were not exercised openly and in public, Oster's state and federal constitutional rights to a public trial were violated and his convictions must be reversed.

2. THE COURT ERRED IN IMPOSING CONFINEMENT AND COMMUNITY CUSTODY IN EXCESS OF THE STATUTORY MAXIMUM FOR THE OFFENSE.

The sentencing court must reduce the term of community custody whenever the community custody, when added to the sentence, would exceed the statutory maximum for the offense. RCW 9.94A.701(9); State v. Boyd, 174 Wn.2d 470, 472, 275 P.3d 321 (2012). Merely specifying on the judgment and sentence that the total combined length may not exceed the statutory maximum is insufficient. Boyd, 174 Wn.2d at 472 (citing State v. Franklin, 172 Wn.2d 831, 263 P.3d 585 (2011)). The community custody term must be determinate, rather than contingent upon the amount of early release time earned. Franklin, 172 Wn.2d at 836. The court must specify the precise length of community custody at the time of sentencing. Id.; RCW 9.94A.701. For anyone sentenced after the effective date of RCW

9.94.701(9) on July 26, 2009, the responsibility for reducing the length of the community custody lies solely with the sentencing court. Boyd, 174 Wn.2d at 473.

Boyd was sentenced to 54 months confinement and 12 months of community custody. Id. at 472. The sentencing court noted on the judgment and sentence that the combined sentence and community custody could not exceed the statutory maximum of 60 months. Id. The court held that the trial court erred in imposing the sentence and remanded for resentencing consistent with RCW 9.94A.701(9). Boyd, 174 Wn.2d at 473.

Boyd dictates the outcome of this case. Oster was convicted of two counts of felony violation of a no-contact order, a class C felony with a statutory maximum sentence of five years. CP 51, 52, 55; RCW 9A.20.020; RCW 26.50.110. The court imposed 60 months confinement. CP 60. Although the sentence already reaches the statutory maximum, the court also ordered twelve months of community custody. When added together, the confinement and community custody exceed the statutory maximum by twelve months. The judgment and sentence includes a notation that "Combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum." CP 61. The judgment and sentence further directs, "If the term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime,

the term of community custody shall be reduced so that the defendant shall not serve more than the maximum sentence for the crime." CP 61.

This notation is insufficient under Boyd. 174 Wn.2d at 472-73. As in Boyd, the trial court erred in failing to set a determinate term of community custody within the statutory maximum. Id. Even if this Court does not reverse Oster's convictions, it should remand to reduce the community custody term to zero to avoid exceeding the statutory maximum. Id.

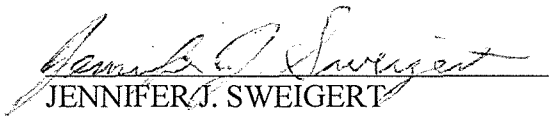
D. CONCLUSION

The violation of his public trial right requires reversal of Oster's convictions. Additionally, the term of community custody must be stricken because it exceeds the statutory maximum penalty.

DATED this 31st day of March, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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State v. Steven Oster

No. 31859-1-III

Certificate of Service by email

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 31st day of March, 2014, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 31st day of March, 2014.

x Patrick Mayovsky