NO. 44652-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

LELDON PITTMAN,

Appellant.

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

The Honorable Jerry T. Costello, Judge

BRIEF OF APPELLANT

JENNIFER M. WINKLER
Attorney for Appellant

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

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A. ASSIGNMENTS OF ERROR

1. The trial court violated the constitutional right to a public trial by taking peremptory challenges privately.

2. The information omitted an essential element of the crime of attempting to elude a pursuing police vehicle, in violation of the appellant's right to due process.

Issues Pertaining to Assignments of Error

1. During jury selection, the parties made peremptory challenges privately by quietly passing a piece of paper back and forth. Because the trial court did not analyze the Bone-Club[1] factors before conducting this important portion of voir dire in a private proceeding, did the trial court violate appellant's constitutional right to a public trial?

2. Where the information omitted an essential element of the crime of attempting to elude a pursuing police vehicle, is reversal and dismissal of that charge required?

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

B. STATEMENT OF THE CASE[2]

The State charged Leldon Pittman with attempting to elude a pursuing police vehicle, driving under the influence (DUI), failure to remain at an injury accident, and obstructing a law enforcement officer. CP 12-13. The State also made a special allegation as to the attempt to elude that "one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm." CP 12; RCW 9.94A.834.

Jury selection occurred on February 6, 2013. Supp. RP. After the parties finished asking potential jurors questions, the court announced the attorneys would "pass a sheet back and forth . . . quietly between themselves" to exercise peremptory challenges.[3] Supp. RP 78. Afterward, the court called the names of the remaining jurors and their seat assignments. Supp. RP 78-79.

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[2] This brief refers to the verbatim report as follows: 1RP – 6/11/12; 2RP – 7/26/12; 3RP – 2/5 and 2/6/13; 4RP – 2/7/13; 5RP – 2/11/13; 6RP – 2/12/13; 7RP – 2/13, 2/14, 3/1, 3/18/13; and Supp. RP – 2/6/13 (jury selection).

[3] In contrast, the court directed that any challenges for cause be made in front of the jury panel. 3RP 16; Supp. RP 41, 44.

The jury found Pittman guilty of attempt to elude and DUI. CP 54, 56. The jury found the special allegation applied to the attempt to elude but acquitted Pittman of the remaining counts. CP 55, 57-58.

The court denied Pittman's request for an exceptional sentence downward and sentenced him within the standard range on attempt to elude. CP 65-91, 99; 7RP 509. The court also sentenced Pittman to a concurrent sentence of 364 days on the DUI, a gross misdemeanor. CP 106-07.

Pittman timely appeals. CP 116.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED THE APPELLANT'S RIGHT TO A PUBLIC TRIAL BY HAVING THE ATTORNEYS EXERCISE PEREMPTORY CHALLENGES PRIVATELY.

a. Introduction to applicable law

The Sixth Amendment and article I, section 22 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); State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 629 (1995). Additionally, article I,

[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 in part that "[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury . . . ."

section 10 provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." This latter 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 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 Personal Restraint of Orange, 152 Wn.2d 795, 806-07, 809, 100 P.3d 291 (2004). A violation of the right to a public trial is presumed prejudicial and is not subject to harmless error analysis. State v. Wise, 176 Wn.2d 1, 16-19, 288 P.3d 1113 (2012); State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006); Orange, 152 Wn.2d at 814.

b. Peremptory challenges are considered part of "voir dire," which must be conducted openly.

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)). The exercise of peremptory challenges, governed by CrR 6.4,

constitutes a part of "voir dire," to which the public trial right attaches. State v. Wilson, 174 Wn. App. 328, 342-43, 298 P.3d 148 (2013); see also People v. Harris, 10 Cal.App.4th 672, 684, 12 Cal.Rptr.2d 758 (1992) (state and federal authority support conclusion that "peremptory challenge process is a part of the 'trial' to which a criminal defendant's constitutional right to a public trial extends"); accord, Hollis v. State, 221 Miss. 677, 74 So.2d 747 (1954) (to comply with state constitutional mandate of a public trial, peremptory challenges must be exercised at the bar, in open court, not at a private conference); cf. State v. Sublett, 176 Wn.2d 58, 70-71, 77, 292 P.3d 715 (2012) (consistent with CrR 6.15, in-chambers discussion of jury's question posed during deliberations did not implicate public trial right); but see State v. Love, ___ Wn. App. ___, ___ P.3d ___, 2013 WL 5406434 (Sept. 24, 2013) (Division Three case rejecting argument that public trial cases involving jury selection controlled the issue, and holding "experience and logic" test did not require open exercise of peremptory challenges).

The right to a public trial is concerned with "circumstances in which 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)). Although 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). Based on these constitutional limitations, public scrutiny of the exercise of peremptory challenges is essential. The procedure in this case thus violated the right to a public trial.

c. The procedure in this case was, in fact, closed to the public.

Even if the procedure occurred in an otherwise open courtroom, any assertion that the procedure was, in fact, public, should be rejected. The procedure was essentially a sidebar, which occurs outside of the public's scrutiny, and thus violates the appellant's right to a fair and public trial. State v. Slert, 169 Wn. App. 766, 774 n. 11, 282 P.3d 101 (2012) (rejecting argument that no violation occurred if jurors were actually dismissed not in chambers but at a sidebar and stating "if a side-bar conference was used to dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reasons and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview"),

review granted, 176 Wn.2d 1031 (2013); see also Harris, 10 Cal.App.4th at 684 (exercise of peremptory challenges in chambers violates defendant's right to a public trial). The procedure the court utilized was as closed to the public as if it had taken place in chambers.

d. A record made after-the-fact record does not cure the error.

Despite an after-the-fact record, the trial court violated the right to a public trial in the first instance by taking peremptory challenges by quietly passing a sheet of paper back and forth.

First, generally speaking, the availability of a record of an improperly closed voir dire fails to cure the error. State v. Paumier, 176 Wn.2d 29, 32, 37, 288 P.3d 1126 (2012); see also Harris, 10 Cal.App.4th at 684 (holding, based on application of federal law, that after-the-fact availability of transcripts of peremptory challenges conducted in chambers does not public trial violation or render those proceedings "public); cf. People v. Williams, 26 Cal.App.4th Supp. 1, 6-8, 31 Cal.Rptr.2d 769 (1994) (peremptory challenge could be held at sidebar if challenge and party making it was then *immediately* announced in open court).

Second, while parties need give no rationale for such challenges, their open exercise is essential considering the important limits on such

challenges, which may be triggered solely by a juror's appearance. While in most cases peremptory challenges are not subject to a ruling by the trial court, it is the very lack of court control that makes it crucial they be open to public scrutiny in all cases. See State v. Saintcalle, ___ Wn.2d ___, 309 P.3d 326, 335, 357-60, 370-72 (2013) (notwithstanding majority of justices' affirmance of denial of Batson challenge, lead opinion, concurrence and dissent underscoring harm resulting from improper race-based exercise of peremptory challenges and highlighting difficulty of obtaining appellate relief even where discriminatory exercise may have occurred). Saintcalle highlights the need for public scrutiny, which encourages parties to police themselves and enhance the fairness of the trial process. Thus, an after-the-fact written record of such challenges is inadequate, given the need for scrutiny in the first instance.

In summary, peremptory challenges are part of voir dire, to which the public trial right applies. Wilson, 174 Wn. App. at 342-43. The multitude of cases prohibiting closed voir dire controls the result here. Because the error is structural, prejudice is presumed, and reversal of both the attempt to elude and DUI convictions is required. Wise, 176 Wn.2d at 16-19.

2. THE INFORMATION OMITTED AN ESSENTIAL ELEMENT OF THE CRIME OF ATTEMPT TO ELUDE A PURSUING POLICE VEHICLE.

Even under a liberal reading, the charging document failed to notify Pittman that an attempt to elude a pursuing police vehicle required that the police signal to stop be made by "hand, voice, emergency light, or siren." Because the information omitted an essential element of the crime, this Court should reverse and dismiss the charge.

a. Applicable law

A charging document must include all essential elements of a crime. U.S. Const. amend. VI; Const. art. I, § 22 (amend. 10);[5] State v. Kjorsvik, 117 Wn.2d 93, 108, 812 P.2d 86 (1991). An "essential element is one whose specification is necessary to establish the very illegality of the behavior[.]" State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992) (citing United States v. Cina, 699 F.2d 853, 859 (7th Cir.), cert. denied, 64 U.S. 991 (1983)). Essential elements may derive from statutes, common law, or the constitution. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). Citation to the correct statute, even if the statute contains each

[5] U.S. Const. amend. VI provides, "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . . ." Const. art. I, § 22 provides in part, "In criminal prosecutions, the accused shall have the right to . . . demand the nature and cause of the accusation."

element, is insufficient. State v. Naillieux, 158 Wn. App. 630, 645, 241 P.3d 1280 (2010).

Where, as here, the adequacy of an information is challenged for the first time on appeal, this Court engages in a two-pronged inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). If the necessary elements are neither found nor fairly implied in the charging document, this Court presumes prejudice and reverses without further inquiry. McCarty, 140 Wn.2d at 425.

b. The charging document failed to notify Pittman of an essential element of the crime.

RCW 46.61.024(1) criminalizes an attempt to elude a pursuing police vehicle. That statute provides in part that:

> Any driver of a motor vehicle who wilfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

That the driver be signaled to stop by a uniformed police officer using "hand, voice, emergency light, or siren" is an element of the crime. Id.; see also 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 94.02, at 332 (3rd ed. 2008).

Here, count two of the amended information alleged

> That . . . [Pittman], on or about the 22nd day of January, 2012, did unlawfully, feloniously, and wilfully fail to or refuse to immediately bring his vehicle to a stop and drive his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, *after being given a visual or audible signal to bring his vehicle to a stop* by a uniformed police officer in a vehicle equipped with lights and sirens, contrary to RCW 46.61.024(1). . . .

CP 12 (emphasis added).

The information therefore omitted the requirement the signal to stop be accomplished by "hand, voice, emergency light, or siren." This provision clearly limits what "visual or audible signal" an officer may use. For example, blowing a whistle would not suffice for purposes of this statute. But nothing about the information informed Pittman of that limitation.

In Naillieux, for example, the Court held the requirement that the pursuing police vehicle be equipped with "lights and sirens" could not be inferred from the charging document, even though it included a requirement that the vehicle be "appropriately marked showing it to be an

official police vehicle."[6] 158 Wn. App. at 645. The deficiency here is similar in that it involves substitution of a general term for the very specific requirements of the statute. As in Naillieux, reversal is required. Id.

The State is required to provide notice of the elements of the crime so an accused can properly prepare his case. Kjorsvik, 117 Wn.2d at 101-02. Because the missing element cannot be fairly implied from the language in the information, a showing of prejudice is not required. Such constitutionally inadequate notice requires reversal and dismissal without prejudice. McCarty, 140 Wn.2d at 425-26, 428.

[6] This language was from the pre-2003 version of the attempt to elude statute. Former RCW 46.61.024 (1982); Laws of 2003, ch. 101, §1.

D. CONCLUSION

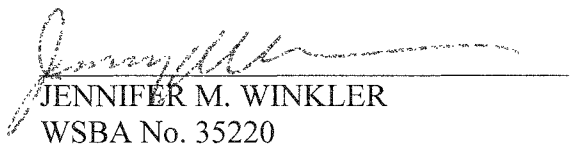
The trial court violated Mr. Pittman's right to a public trial by taking peremptory challenges by quietly passing a sheet of paper back and forth. This Court should reverse his convictions.

In any event, this Court should reverse and dismiss the attempt to elude charge because the information omitted an essential element of the offense.

DATED this 23rd day of October, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER M. WINKLER
WSBA No. 35220
Office ID No. 91051

Attorneys for Appellant

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DIVISION TWO

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 44652-9-II
	)	
LELDON PITTMAN,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

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

THAT ON THE 23RD DAY OF OCTOBER, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LELDON PITTMAN
68949 EAST GRANDVIEW
TACOMA, WA 98404

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF OCTOBER, 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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