NO. 31699-8-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JASON GILES,

Appellant.

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

APPELLANT'S REPLY BRIEF

Marla L. Zink
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Statutes

Rules

A. ARGUMENT IN REPLY

In the relevant sections below, Mr. Giles responds to the State's arguments regarding particular claims he has asserted on appeal. Preliminarily, the State's unsupported recitation of facts related to Mr. Giles's prior offenses should be ignored by this Court. Resp. Br. at 1 & n.1-3; *State v. Pruitt*, 145 Wn. App. 784, 800, 187 P.3d 326 (2008) (declining to address arguments by State that are unsupported by citation to authority). The State provides no authority for its references to facts outside the record in this appeal. *Id.*; *see* RAP 10.3(a)(6), (b) (respondent's brief must contain "argument . . . together with citations to legal authority and references to relevant parts of the record"). The mere reference to docket numbers from those prior cases provides no support for the assertions contained in the text. The State cites to no particular documents. Further, documents from the referenced cases are not of record in this appeal. Thus, there is no basis for Mr. Giles or the Court to confirm or deny the assertions.

1. **The process of exercising for-cause challenges at sidebar and peremptory challenges by secret ballot violated Mr. Giles's and the public's rights to a public trial.**

As set forth in the Opening Brief, Mr. Giles is entitled to new trials because the trial court failed to consider the factors set forth in *State v.*

Bone-Club before unilaterally closing voir dire by conducting for-cause challenges at the bench in a sidebar and conducting peremptory challenges by secret ballot. *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995); *see* Op. Br. at 14-26. The United States and Washington Supreme Courts have repeatedly held that the right to a public trial includes the right to have public access to jury selection. *E.g.*, *Presley v. Georgia*, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011); *State v. Strode*, 167 Wn.2d 222, 226-27, 217 P.3d 310 (2009). This right necessarily includes the critical stage of excusing jurors for-cause and on peremptory challenges. *See State v. Beskurt*, 176 Wn.2d 441, 447-48, 293 P.3d 1159 (2013) (challenges for cause, discussions about such challenges, and rulings were and are required to be held in open court). For-cause challenges, discussions, and rulings held at the bench and peremptory challenges exercised in writing alone unduly invades the right to openness. The only remedy is to hold new trials. *See, e.g.*, *State v. Wise*, 176 Wn.2d 1, 18, 288 P.3d 1113 (2012).

In response, the State attempts to rely on Mr. Giles's failure to object below. *See* Resp. Br. at 7, 8. But the law is clear that no contemporaneous objection is required to raise this constitutional issue on appeal. *E.g.*, *Wise*, 176 Wn.2d at 18; *State v. Sublett*, 176 Wn.2d 58, 143,

292 P.3d 715 (2012) (Stephens, J. concurring) (noting the Court has "repeatedly and conclusively rejected a contemporaneous objection rule in the context of the public trial right" and citing cases). The State provides no argument or authority to overcome this longstanding precedent. *See State v. Kipp*, __ Wn.2d __, 317 P.3d 1029, 1033 (2014) (State cannot show established rule should be abandoned unless it shows rule is both incorrect and harmful). The State's argument fails.

Next, the State argues that "the public had the ability to be present throughout . . . the announcements of the respective juries." Resp. Br. at 8. But the right to a public trial is not merely about the announcement of decisions; it is concerned with bearing witness to the process itself. *E.g.*, *Bone-Club*, 128 Wn.2d at 259 (public presence ensures fairness of process); *Wise*, 176 Wn.2d at 5. The public was excluded from witnessing the process of challenging jurors for cause—including which party challenged which jurors, the discussion that ensued, and the rulings made. Likewise, the parties and the court did not remain under the watch of the public when peremptory challenges were written on a piece of paper passed back and forth between attorneys.

Mr. Giles sharply disagrees with the State's contention that our Supreme Court has not held that "the right a public trial includes the right of public access to jury selection." Resp. Br. at 10. In fact, our Court has

explained that this holding has been clear at least since 2005. *In re Pers. Restraint of Morris*, 176 Wn.2d 157, 167, 288 P.3d 1140 (2012). In *Morris*, the Court stated that the 2005 decision in *In re Personal Restraint of Orange* "clarified, without qualification, both that *Bone-Club* applied to jury selection and that closure of voir dire to the public without the requisite analysis was a presumptively prejudicial error on direct appeal." *Morris*, 176 Wn.2d at 167 (citing *Orange*, 152 Wn.2d 795, 807-08, 100 P.3d 291 (2004)). For-cause challenges and peremptory strikes are part of jury selection; that should end the inquiry here as well.

Nonetheless, the State argues this Court should subject Mr. Giles's claim to the experience and logic test applied in *Sublett*. Resp. Br. at 10-15. Even if the experience and logic test applied, the juror challenge portion of jury selection would plainly be encompassed in the right to a public trial. First, experience shows that for-cause and peremptory challenges have historically been open. Sitting pro tempore, Supreme Court Justice Wiggins wrote in *State v. Jones*, 175 Wn. App. 87, 98-99, 303 P.3d 1084 (2013), that the Laws of 1917, ch. 37, § 1 and former RCW 10.49.070 (1950), repealed by Laws of 1984, ch. 76, § 30(6), both required peremptory challenges to be held in open court. Similarly, in *Beskurt*, 176 Wn.2d at 446-48, our Supreme Court discussed the importance of public scrutiny during the challenge process. Moreover, our

system of challenging decisions made during this portion of jury selection presupposes an open proceeding. *E.g.*, *Georgia v. McCollum*, 505 U.S. 42, 47-50, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992) (discussing protection from racial discrimination in jury selection, including in exercise of peremptory challenges, and critical role of public scrutiny); *State v. Saintcalle*, 178 Wn.2d 34, 41-42, 309 P.3d 326 (2013) (discussing important public interest in proper exercise of juror challenges); *see State v. Sadler*, 147 Wn. App. 97, 193 P.3d 1108 (2008) (open trial right violated where *Batson* challenge conducted in private), *not followed on other grounds by Sublett*, 176 Wn.2d at 71; Criminal Rule 6.4.

Second, logic dictates that challenges to jurors be conducted openly. The process is essential to voir dire. *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (peremptory challenge occupies important position in trial procedures); *State v. Wilson*, 174 Wn. App. 328, 342, 298 P.3d 148 (2013) (noting peremptory and for-cause challenges are part of voir dire). The "interplay of challenges for cause and peremptory challenges" are an essential part of criminal trial proceedings. *State v. Vreen*, 99 Wn. App. 662, 668, 994 P.2d 905 (2000), *aff'd*, 143 Wn.2d 923 (2001). Public scrutiny is critical to ensure voir dire does not become a vehicle for racial discrimination. *McCollum*, 505 U.S. at 47-50; *Saintcalle*, 178 Wn.2d at 41-42 (discussing important public

interest in proper exercise of juror challenges). "Proceedings cloaked in secrecy foster mistrust and, potentially, misuse of power." *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004). Rarely could it be more important to prevent mistrust and misuse of power than in ensuring a jury selection process free from racial bias and other ills.

Finally, the State relies on the subsequent availability of a record to claim the proceedings were open. Resp. Br. at13. The State disregards that Mr. Giles already acknowledged the availability of a record of the results of the for-cause challenges and peremptory strikes. Op. Br. at 24. That record is insufficient. Our courts have made clear that "the mere existence of such recordings, and thus the public's potential ability to access those recordings through determined effort, plays no role in deciding whether a trial court has observed proper courtroom closure procedures." *State v. Leyerle*, 158 Wn. App. 474, 484 n.9, 242 P.3d 921 (2010). In fact, new trials have been required in numerous cases despite the availability of a subsequently available record. *E.g.*, *State v. Paumier*, 176 Wn.2d 29, 32-33, 288 P.3d 1126 (2012) (public trial violation even where in-chambers questioning of prospective jurors "was recorded and transcribed by the court"); *State v. Easterling*, 157 Wn.2d 167, 172 & n.1, 182, 137 P.3d 825 (2006) (reversing conviction and remanding for new trial despite availability of transcript).

Because the trial court violated Mr. Giles's and the public's rights to a public trial by conducting portions of jury selection in private, this Court should reverse the convictions and remand for new trials.

2. The State presented insufficient evidence of both intent to inflict great bodily harm and use of a deadly weapon, requiring reversal of the first-degree assault conviction and dismissal of the charge.

The State's failure to present sufficient evidence on either of the two challenged elements of the first-degree assault charge requires reversal of that conviction and dismissal of the charge. *E.g.*, *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

First, the State failed to prove Mr. Giles acted with intent to inflict great bodily harm. *See* Op. Br. at 28-32. Even in the light most favorable to the State, the evidence shows no more than that Mr. Giles removed a folding knife from his pocket, made movement with it, and an employee who was restraining Mr. Giles was hit with the handle of the knife and barely injured. These facts do not amount to intent to inflict harm equivalent to probable death, significant serious permanent disfigurement or significant permanent loss or impairment of function of any bodily part or organ. *See* RCW 9A.04.110(4)(c).

The State's arguments in response are comprised of misstatements and unsupported, incorrect assertions. Contrary to the State's contention,

Mr. Giles did not rely on his own testimony for this argument. *Compare* Resp. Br. at 16 *with* Op. Br. at 28-32. The State also claims Mr. Giles ignores evidence that was directly cited in the Opening Brief. Op. Br. at 29 (reciting testimony of Humphrey that Giles produced a knife) *with* Resp. Br. at 17 (claiming Giles "left out some key aspects" to include this evidence). Moreover, the State relies on no evidence or inference for the bare assertion that "It was merely fortuitous that Mr. Wear was struck with the blunt end of the weapon." Resp. Br. at 18. Likewise, the State's claim, without citation, that Mr. Giles "swung his arm" is not supported by the record. *Id.* In fact, the bystander Thomas Walters testified only that Mr. Giles "tried to swing at one of the guys." RP 558 (emphasis added).

The State cannot rely merely on the purported fact that "defendant was armed with a knife that had its blade locked open" to show intent to inflict great bodily harm, the crime as charged. *See* Resp. Br. at 18-19. The cases relied on in the Opening Brief plainly show that more is required to sustain this element of first-degree assault, particularly as distinguished from lesser degrees of the offense. Op. Br. at 29-30; *cf. State v. Garcia*, __ Wn.2d __, 318 P.3d 266, 272-73 (2014) (graduated scheme demonstrates Legislature's intent to require distinct conduct to satisfy each degree of offense, with greater degree requiring more specific intent than lesser).

Second, the State failed to prove beyond a reasonable doubt that the knife "under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." RCW 9A.36.110(6); CP 94 (definitional instruction); *see In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364-65, 256 P.3d 277 (2011) (explaining distinction between deadly weapon per se and other weapons, such as a knife, upon which the circumstances of use must be regarded). The State proved only that Mr. Giles's actual use of the folding knife was limited to possible waving and releasing it unwillingly while being restrained on the ground by three employees. *E.g.*, RP 471-75, 487-89, 491-92, 558. Mr. Giles was held to the ground by the body weight of the other employees and both his arms were being held. RP 491-92, 500-02, 506, 515, 518; *see* RP 535 (describing "a pile-up of Costco employees on top of a young man"). In its Response Brief, the State fails to respond to this insufficiency. The issue is therefore conceded. *State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) (issue conceded where no argument set forth in response).

Critically, at trial, the State presented no evidence that Mr. Giles aimed the knife at any particular person or body part or that he could have reached such person or body part while restrained. Moreover, no witness testified that the manner in which Mr. Giles held the knife indicated it was

readily capable of substantial disfigurement, substantial loss or impairment of the function of an organ, or a fracture. In fact, Virgil Wear received only a bruised knee and only the handle of the knife came in contact with him. In short, the State failed to prove the deadly weapon element of assault as charged beyond a reasonable doubt.

3. Insufficient evidence also supports the first-degree robbery conviction because the State failed to prove that the taking was by the use or threatened use of force and that Mr. Giles used actual force or fear to obtain or retain possession of the shoes, as required by the law of the case.

The State does not contest that the jury instructions established the law of the case that the State was required to prove in this case. *See generally* Resp. Br. at 19-21. The parties agree, therefore, that the State was required beyond a reasonable doubt that Mr. Giles used or threatened to use immediate force, violence or fear of injury in the taking of the shoes from Champs.

The taking in this case was complete when Mr. Giles left the store. Exhibit 6 (part one) (surveillance video showing Giles exiting store); RP 122, 139, 148, 157-58, 164; *State v. Johnson*, 155 Wn.2d 609, 610, 121 P.3d 91 (2005) (taking complete when defendant removed property from store). The evidence as to what occurred thereafter is irrelevant under the law of the case—the State assumed the burden of showing force or threats

of force was used in the taking. Once the taking was complete, any subsequent use of force or threats of force are not part of the taking. Notably, the State fails to counter this point with either argument or evidence. The conviction must be reversed and the charge dismissed.

Alternatively, the conviction must be reversed on the independent ground that the State failed to prove Mr. Giles used actual force or actual fear to obtain or retain possession of the shoes. Again, the law of the case required the State to prove "That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking." CP 28 (instruction #7). The State does not argue otherwise. *See* Resp. Br. at 19-21. Nonetheless, the State presented no evidence that Mr. Giles used actual force or that the store clerk, Christian Riding, was placed in actual fear. *See* RP 122, 126-28, 139, 141-42, 148, 153, 157-58, 164; Exhibit 6 (part one). The clerk testified that Mr. Giles made no gesture or movement toward him when he pulled out a knife and threatened to gut him. RP 126-28, 141-42. Mr. Riding did not continue to pursue Mr. Giles and Mr. Giles did not exert any force against him. Further, Mr. Riding testified only that he was "concerned" when Mr. Giles brandished the knife, not that he was fearful. RP 130. Similarly, fellow employees testified that Mr. Riding appeared nervous, panicked, and "kind of shocked" when he returned to the store; they did not describe him as

fearful. RP 150, 165; *accord* RP 187 (testimony of police that clerk was "a little bit winded and, you know, kind of adrenaline pumping, kind of seemed like"). Even in its Response Brief, the State presents no argument that it proved actual fear or actual force. On this independent ground, the first-degree robbery conviction should be reversed and the charge dismissed.

4. The State also failed to prove that force, fear or violence was used or threatened in the taking of items from Costco, necessitating reversal of the second-degree robbery conviction.

The same instruction was used in the trial related to the Costco second-degree robbery charge. Thus, on this count as well, the State was required to prove that Mr. Giles used or threatened to use immediate force, violence or fear of injury in the taking of the security system, game and gloves from Costco. Again, in its single page response to this issue the State does not argue otherwise. *See* Resp. Br. at 21-22.

Even in the light most favorable to the State, the evidence plainly showed Mr. Giles did not use or threaten to use force, fear or violence at any time prior to passing the cash registers without paying at Costco. RP 452-53, 455-59, 462, 463, 485-86 (Humphrey observed Giles for approximately 25 minutes while he secreted items and instructed colleague to detain him only once he crossed through to exit). By all

accounts, the violence or force occurred in the immediate vicinity of the exit after Mr. Giles passed through the payment area without stopping. RP 464, 488-89, 499-501, 515, 523-24, 537; Exhibit 2 (photograph of entrance/exit area). This was after the taking was complete. *State v. Jones*, 63 Wn. App. 703, 704, 707, 821 P.2d 543 (1992) (taking complete where defendant moved within 10 feet of exit to store with shopping cart full of concealed cartons of cigarettes and immediately attempted to exit store when stopped by employees); *State v. Manchester*, 57 Wn. App. 765, 766, 768-70, 790 P.2d 217 (1990) (taking complete when defendant exited store without paying for property); *State v. Britten*, 46 Wn. App. 571, 572-74, 731 P.2d 508 (1986) (theft complete when, in dressing room, defendant removed price tags from jeans and concealed them under his clothes). Consequently, the State presented no evidence to support the element that the taking was completed by the use or threatened use of immediate force, violence or fear of injury.

In response, the State argues Costco's policy is to allow "the customer every opportunity to pay for the merchandise prior to leaving the store" and "will not confront them until they try to exit the building without paying." Resp. Br. at 21. In fact, that is precisely what happened here. It was as soon as Mr. Giles tried to exit the building that the

employees sought to seize him. The taking at this point was already complete.

Under the State's own argument, Mr. Giles could not be liable for robbery because he never completed a taking of the property. *See* Resp. Br. at 20-21; RCW 9A.56.190 (robbery requires completed taking). On either basis, the conviction should be reversed and the charge dismissed.

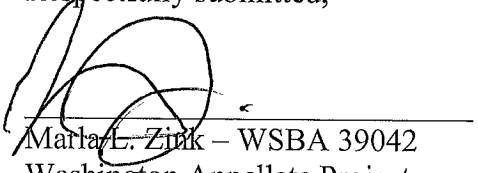
B. CONCLUSION

For the reasons set forth here and in Mr. Giles's Opening Brief, the assault in the first degree, robbery in the first degree and robbery in the second degree convictions should be reversed and the charges dismissed with prejudice because the State failed to present sufficient evidence of one or more elements supporting each offense. Additionally, the third-degree assault conviction should be remanded for a new trial because the public was excluded from portions of jury selection.

Alternatively, this Court should vacate the life without parole sentence and imposition of discretionary costs.

DATED this 7th day of April, 2014.

Respectfully submitted,



Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 31699-8-III
	)	
JASON GILES,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF APRIL, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MARK LINDSEY KATHLEEN OWENS [kowens@spokanecounty.org] SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL
[X] JASON GILES 793670 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF APRIL, 2014.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710