COA NO. 45001-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JONES,

Appellant.

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

The Honorable Michael J. Sullivan, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The court erred in denying appellant's CrR 3.6 motion to suppress evidence.

2. The court violated appellant's constitutional right to a public trial during the jury selection process.

Issues Pertaining to Assignments of Error

1. Whether the court erred in failing to suppress evidence because the search warrant lacked probable cause to believe appellant and another committed the burglary and also lacked probable cause to believe contraband would be found in the location searched?

2. Whether the court violated appellant's constitutional right to a public trial when it conducted the peremptory challenge portion of the jury selection process in private without considering the requisite factors to justify closure?

B. STATEMENT OF THE CASE

The State originally charged Michael Jones with possession of methamphetamine with intent deliver, possession of marijuana, and use of drug paraphernalia. CP 3-4. These charges stemmed from evidence recovered at a residence pursuant to a search warrant. CP 1-2. Information contained in the search warrant affidavit is summarized below.

a. The Affidavit In Support Of The Search Warrant

Brian and Trish Settlemyre reported their residence was burglarized on October 18, 2012. CP 19. A number of items were taken from the bedroom and from a truck in the garage, including guns. CP 19.

Deputy Tully, the affiant, was at the residence on October 19 when Brian Settlemyre received a call from a "confidential citizen" with information on the burglary. CP 20. The caller told Brian that "they had heard Tina Falkner talking a couple weeks ago about ripping off a place near the golf course where there were a lot of guns." CP 20. The caller wanted to remain anonymous. CP 20.

Deputy Tully knew Tina Falkner from previous contacts and was aware that she was in a relationship with Mike Jones. CP 20. Brian Settlemyre told Deputy Tully that he was friends with Jones's dad and that Jones had previously been in their home. CP 20. The Settlemyres suspected the house was burglarized by someone who knew what they had and where it was since the house was not completely torn apart. CP 20.

On October 20, 2012, Deputy Tully and Sergeant Davis "made contact with the confidential citizen." CP 20. This person relayed the same information given to Brian Settlemyre. CP 20. The informant asked to remain anonymous for fear of retaliation. CP 20. The affidavit states, "He has also provided reliable information on another case." CP 20.

Jones and Tina Falkner had been staying at a residence owned by Jim and Charlotte Falkner for a couple weeks. CP 18. After meeting with the "confidential citizen," Deputy Tully and Sergeant Davis went to that residence to make contact with Tina Falkner. CP 20. Davis knocked on the door, which partially opened. CP 20. The officers could hear the TV on in the house. CP 20. Nobody came to the door after multiple knocks. CP 20.

The officers left the residence but stayed in the area. CP 20. A short time later Jones arrived in his truck. CP 20. When officers contacted him outside, Jones appeared nervous and said two people appeared to be fighting down the road. CP 20. Deputy Tully believed Jones seemed to be trying to get them to leave. CP 20.

Deputy Tully told Jones that he was trying to contact Tina Falkner but that nobody had answered the door. CP 20. Jones said he just tried to call her but no one answered, so she was not at home. CP 20. Davis asked him why he still came to the house. CP 20. Jones did not have an excuse. CP 20. Jones asked if they were doing a warrant sweep. CP 20. Davis told him that they wanted to talk with Falkner about the recent burglary. CP 20.

Jones said there was no way Falkner was involved in the burglary because they had both been at her parents' residence all day on the day of

the burglary. CP 20. Jones said Brian Settlemyre was like his uncle and he would never steal from him. CP 20. He said multiple times that he does not steal. CP 20. Jones was calling around trying to find out who committed the burglary. CP 20.

Jones also said Falkner was possibly at a residence in South Bend visiting her kids. CP 20. Jones left after speaking with the police. CP 20. Deputy Tully and Sergeant Davis stayed in the area. CP 20. A South Bend officer informed Deputy Tully that Tina Falkner was not at the South Bend residence but was probably in Old Willapa. CP 20-21.

Later that evening, Sergeant Davis contacted Tina Falkner's dad, who was camping with his wife in Winthrop. CP 21. He told Davis that Tina and Jones had permission to stay in their residence. CP 21.

On the evening of October 23, 2012, Sergeant Davis called Deputy Tully and relayed that he had gone to the Falkner residence and saw Jones's truck in the driveway. CP 21. The lights were on in the house. CP 21. All of the windows were covered with sheets, which had not been covered before. CP 21. The door to the enclosed porch now had a lock, which it had not had previously. CP 21. Davis knocked multiple times but received no answer. CP 21.

On October 24, 2012, Deputy Tully received a call from a "confidential citizen." CP 21. The affidavit states, "He has previously

provided info. to PCSO that has proved to be reliable." CP 21. The informant asked to remain anonymous for fear of retaliation. CP 21. The informant told Deputy Tully that "they heard from at least two people that Mike was going around town bragging about the burglary. Mike was telling people that he knew about the guns and other items because his family is close to Brian's. The citizen also informed me that Mike tried to sell an item to them that is similar to one stolen from the Settlemyre residence." CP 21. Later in the day on October 24, 2012, Deputy Tully drove by the Falkner residence and saw Jones's truck parked in the driveway. CP 21.

Under the heading "Affiant's Knowledge," the affidavit further states "As a result of your affiant's training and experience and the experience of other law enforcement officers involved in this case and the foregoing facts set out in this case, your affiant knows:

- Tina Falkner and Mike Jones have been staying at 5151 Hemlock St, Raymond, WA 98577.
- Mike Jones is a family friend to the Settlemyre's [sic] and has been to their residence on many occasions.
- Tina Falkner was recently observed planning a burglary near the golf course.

- Mike Jones has [sic] recently heard bragging about committing the burglary.
- Mike Jones has been trying to sell items possibly taken from the Settlemyre residence.
- Tina Falkner and Mike Jones are known drug users and known drug users are often involved in burglaries and theft.
- Tina Falkner has previously been involved in theft."

CP 21.

Based on the foregoing, Deputy Tully requested a warrant to search the Falkner residence for items taken in the Settlemyre burglary. CP 22. A magistrate signed the search warrant. CP 13.

b. CrR 3.5 Hearing and Ruling

Jones and Falkner were directed to stay in the laundry room while police executed the search warrant. 2RP[1] 6, 21, 28-29. Police found a bag on a table near the entryway to the kitchen. 2RP 9, 15, 61. There was a small propane torch next to the bag. 2RP 45. Without giving a Miranda[2] warning, Deputy Tully asked Jones and Falkner whom the bag belonged to. 2RP 9, 16. Jones responded "Yes, that's my knifer kit." 2RP 9. A "knifer

[1] The verbatim report of proceedings is referenced as follows: 1RP - 4/5/13; 2RP - 4/26/13; 3RP - 5/3/13; 4RP - 5/10/13; 5RP - 5/14/13; 6RP - 5/15/13; 7RP - 5/17/13; 8RP - 5/14/13 (voir dire).

[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

kit" is used for smoking marijuana by heating up two butter knives, pressing the marijuana in between them, and inhaling the smoke. 2RP 10. Deputy Tully looked into the bag and found methamphetamine, burnt butter knives, and plastic tubes. 2RP 10, 47.

Jones was arrested and read his Miranda rights. 2RP 11, 17-18, 26, 35. Deputy Tully again questioned Jones about whose bag it was. 2RP 11. Jones again said it was his. 2RP 11-12. Jones also said it was his marijuana baggie but did not realize any meth or other paraphernalia were in the bag. 2RP 20, 42-43. Deputy Tully asked about Jones's drug use. 2RP 12. Jones said he used meth recently. 2RP 12.

The court ruled Jones's first statement that it was his "knifer bag" in response to Deputy Tully's question about ownership was inadmissible because it was elicited without the benefit of a Miranda warning. 3RP 7. The court further ruled Jones's post-arrest statements were admissible because he had been given the Miranda warning by that time. 3RP 7-8.

c. CrR 3.6 Argument and Ruling

Defense counsel moved to suppress evidence obtained during the search of the Falkner residence on the ground that the search warrant was unsupported by probable cause. CP 5-22. Specifically, counsel argued the

reliability prong of the Aguilar-Spinelli [3] test was unmet and the information provided in the search warrant affidavit otherwise did not show probable cause. CP 6-7; 3RP 8-16, 19-22.

The State argued Jones did not have standing to contest the search, that probable cause supported the search warrant, and the affidavit in support of the warrant showed the confidential informants to be reliable. CP 70-73; 3RP 17-19.

The court denied the suppression motion, concluding a reasonable magistrate could have found probable cause. 3RP 22. The court further stated "Now, as far as specific findings and conclusions for the most part -- I say most part because I don't remember everything in [the prosecutor's] brief and especially don't remember everything he just argued but I agree with your line of thinking." 3RP 22.

d. Amended Charges, Trial and Outcome

Following the CrR 3.5 and 3.6 rulings, the State filed an amended information which dropped the marijuana possession charge and changed the methamphetamine charge to mere possession. CP 24-25; 4RP 13-14. The State later filed a second amended information that added a count of bail jumping, alleging Jones failed to appear for a court date. CP 27-29.

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[3] Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

At trial, evidence relevant to the drug charges tracked what was presented at the CrR 3.5 hearing. 5RP 54-56, 59-60, 76, 78-79, 127. The residue contained in a plastic bag found inside the larger bag tested positive for methamphetamine. 5RP 84, 89. There was heroin residue in the tubing that was recovered from the bag. 5RP 85, 87, 94.

Evidence also showed that Jones did not come to a January 25 court hearing, which formed the basis for the bail jumping charge. 5RP 62-66, 118-19; 123-25.

Jones, testifying in his own defense, acknowledged the bag was his. 5RP 114. He put knives and pipes for smoking marijuana in it. 5RP 114. The torch was his. 5RP 116-17. He did not know there was methamphetamine in the bag. 5RP 115, 118. He further testified that he planned to come to court on January 25 but could not get there because the tires on his vehicle were slashed. 5RP 118-19.

The jury found Jones guilty of use of drug paraphernalia and bail jumping, but was unable to reach agreement on the methamphetamine possession count, resulting in a mistrial. CP 53-55; 7RP 2. The court sentenced Jones to 140 days total confinement, with a two year period of probation attached to the paraphernalia conviction. CP 58. This appeal follows. CP 68-69.

C. ARGUMENT

1. THE SEARCH WARRANT WAS UNSUPPORTED BY PROBABLE CAUSE, REQUIRING SUPPRESSION OF EVIDENCE RECOVERED FROM THE RESIDENCE.

The search warrant affidavit did not establish probable cause to search the residence. First, the reliability of the confidential informants was not established, the basis of knowledge for one of the informants was not established, and the police investigation did not otherwise corroborate the informants' tips. Second, the affidavit does not establish the requisite nexus between the burglary and the place to be searched. The warrant therefore did not satisfy the requirements of article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution. The trial court erred in failing to suppress the evidence found in the residence.

a. Standard of Review

Whether a defendant has standing to challenge the legality of a search is an issue of law reviewed de novo. State v. Link, 136 Wn. App. 685, 692, 150 P.3d 610, review denied, 160 Wn.2d 1025, 163 P.3d 794 (2007).

The issuance of a search warrant is generally reviewed for abuse of discretion. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). While deference is owed to the magistrate, that deference is not unlimited.

State v. Lyons, 174 Wn.2d 354, 362, 275 P.3d 314 (2012). No deference is given "where the affidavit does not provide a substantial basis for determining probable cause." Lyons, 174 Wn.2d at 363.

When reviewing the denial of a suppression motion, no deference is owed to the trial court where, as here, the factual record consists solely of documents. State v. Neff, 163 Wn.2d 453, 461-62, 181 P.3d 819 (2008). The trial court's conclusions of law and its application of law to the facts are reviewed de novo. State v. Meneese, 174 Wn.2d 937, 942, 282 P.3d 83 (2012); State v. Eisfeldt, 163 Wn.2d 628, 634, 185 P.3d 580 (2008). The trial court's assessment of probable cause is therefore reviewed de novo. Neth, 165 Wn.2d at 182.

b. Jones Has Standing To Challenge The Search.

The State claimed Jones had no standing to contest the validity of the warrant because he did not live in the residence. CP 72. It is unclear whether the trial court agreed. 3RP 22. But it erred if it did.

Jones has standing to challenge the validity of the warrant because he had a legitimate expectation of privacy in the Falkner residence. The affidavit in support of the search warrant recites that Jones had been staying at the residence for the last couple weeks. CP 18. Jones and Falkner had permission to stay there. CP 21. Jones's status as an overnight guest is alone sufficient to show he had an expectation of

privacy in the home that society is prepare to recognize as reasonable. Minnesota v. Olson, 495 U.S. 91, 96-97, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990). Overnight guests have standing to object to the search of a residence. Link, 136 Wn. App. at 692.

Even if Jones lacked a privacy interest in the residence, he still has automatic standing to challenge the search and seizure. In Washington, a defendant has automatic standing to challenge the legality of a search and seizure "even though he or she could not technically have a privacy interest in such property." State v. Evans, 159 Wn.2d 402, 406-07, 150 P.3d 105 (2007) (quoting State v. Simpson, 95 Wn.2d 170, 175, 622 P.2d 1199 (1980)). "To assert automatic standing a defendant (1) must be charged with an offense that involves possession as an essential element; and (2) must be in possession of the subject matter at the time of the search or seizure." State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002).

Both prongs are satisfied here. The State charged Jones with possession of methamphetamine with intent to deliver and use of drug paraphernalia. CP 3-4. The methamphetamine charge expressly contains possession as an essential element. RCW 69.50.4013(1). And a person cannot use drug paraphernalia without possessing it. RCW 69.50.412(1). Jones was in constructive possession of the meth and paraphernalia

because he identified the bag containing those things as his and the bag was located in an area of the house from which the bag could be reduced to actual possession immediately. 2RP 9, 11-12; see Jones, 146 Wn.2d at 333 (dominion and control over an object "means that the object may be reduced to actual possession immediately").

The automatic standing doctrine applies "if the challenged police action produced the evidence sought to be used against him." Jones, 146 Wn.2d at 332. There is a direct relationship between the "fruits" of the search and the challenged action because police searched the residence, found Jones's bag, looked into the bag, and found the drug-related evidence, which comprised the fruits of the search. 2RP 9-10, 15-16, 47; see State v. Kypreos, 115 Wn. App. 207, 213, 61 P.3d 352 (2002) (defendant had automatic standing to challenge search and seizure where police entered a trailer in search of evidence, found the defendant, and further search yielded an illegal gun, which constituted the "fruits" of the first search), review denied, 149 Wn.2d 1029, 78 P.3d 657 (2003).

c. The Aguilar-Spinelli Test Is Unsatisfied.

A search warrant must not issue unless there is probable cause to conduct the search. U.S. Const. amend. IV; Wash. Const. art. I, § 7; Lyons, 174 Wn.2d at 359. "To establish probable cause, the affidavit must set forth sufficient facts to convince a reasonable person of the probability

the defendant is engaged in criminal activity and that evidence of criminal activity can be found at the place to be searched." Lyons, 174 Wn.2d at 359. In determining whether the supporting affidavit establishes probable cause, review is limited to the four corners of the affidavit. Neth, 165 Wn.2d at 182. "When adjudging the validity of a search warrant, we consider *only* the information that was brought to the attention of the issuing judge or magistrate at the time the warrant was requested." State v. Murray, 110 Wn.2d 706, 709-10, 757 P.2d 487 (1988).

When the existence of probable cause depends on an informant's tip, the affidavit in support of the warrant must establish the basis of the informant's information as well as the veracity of the informant under the Aguilar-Spinelli test. State v. Jackson, 102 Wn.2d 432, 433, 688 P.2d 136 (1984) (citing Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969)). To satisfy both parts of the Aguilar-Spinelli test, the affidavit must state circumstances from which the issuing magistrate "may draw upon to conclude the informant was credible and obtained the information in a reliable manner." State v. Vickers, 148 Wn.2d 91, 112, 59 P.3d 58 (2002).

The affidavit here did not establish the reliability of the confidential informants. State v. Woodall, 100 Wn.2d 74, 75, 666 P.2d

364 (1983) is instructive. In Woodall, affidavits stated a deputy's belief that marijuana would be found in two houses based upon the following: "A reliable informant who has proven to be reliable in the past has given information to Duane Golphenee that he/she has been in the house within the last twelve hours and has personally observed marijuana being used in the house. The informant is familiar with the appearance of marijuana." Woodall, 100 Wn.2d at 75. The Court held this recitation was insufficient to show the reliability of the informant. Id. at 77.

Similarly, the affidavit in Jones's case recites the confidential informant "provided reliable information on another case" (CP 20) and the other "has previously provided info. to PCSO that has proved to be reliable." CP 21. These are conclusions about the informants' reliability, not facts supporting reliability. This is insufficient under Woodall.

The "reliable information in the past" recital fails to disclose the basis on which that judgment was made. Woodall, 100 Wn.2d at 77 (citing 1 W. LaFave, Search and Seizure § 3.3, at 516-17 (1978)). Rather than allowing the magistrate to make an independent judicial determination of reliability, such a recital forces the magistrate to rely upon the officer's characterization that the informer is reliable without an underlying factual basis. Woodall, 100 Wn.2d at 77-78. That kind of affidavit falls short of the requirement, under the Aguilar-Spinelli standard,

that a neutral judicial officer rather than a police officer should determine probable cause. Id. at 78.

There is a critical distinction between facts and conclusions set forth in an affidavit. Conclusions without supporting facts do not support probable cause. The Court in Woodall thus distinguished its earlier decision in State v. Fisher, 96 Wn.2d 962, 965, 639 P.2d 743 (1982) on the basis that the affidavit in Fisher established a factual basis for reliability rather than a mere conclusion about reliability. Woodall, 100 Wn.2d at 76-77.

In Fisher, the affidavit stated the informant provided "true and correct" information in the past. Fisher, 96 Wn.2d at 965.[4] In contrast, use of the "reliable" descriptor in Woodall was a mere conclusion of the affiant which could mean a number of things, and which was not supported by facts. Woodall, 100 Wn.2d at 76.

Jones's case is like Woodall, not Fisher. The affidavit in Jones's case offers an officer's conclusion about the informants' reliability, rather than facts that might support a magistrate's independent determination that the informants were reliable. There is no factual basis set forth in the

[4] The affidavit further informed the magistrate that the "informant has made two controlled buys to-wit: the informant was searched, given money, observed to enter and return from a residence with controlled substances purchased from within." Id. at 964.

affidavit from which an independent magistrate could glean how the officer arrived at the conclusion that information provided in the past was reliable.

It is unclear whether the trial court denied the suppression motion on the basis that the affidavit established the informant's reliability. 3RP 22. But if it did, it erred for the reason set forth above.

The State argued the "confidential informant" was entitled to a presumption of reliability for which no scrutiny was required because police knew him. CP 72. That contention withers in light of Woodall, where the affidavit failed the reliability prong of the Aguilar-Spinelli test even though police knew the confidential informant. Woodall, 100 Wn.2d at 76-78.

Further, the knowledge prong of the Aguilar-Spinelli test is unsatisfied in regard to the informant's statement that "they heard from at least two people that Mike was going around town bragging about the burglary. Mike was telling people that he knew about the guns and other items because his family is close to Brian's. The citizen also informed me that Mike tried to sell an item to them that is similar to one stolen from the Settlemyre residence." CP 21.

To satisfy the "basis of knowledge" prong, the officer must explain how the informant claims to have come by the information given to police.

Jackson, 102 Wn.2d at 437. That is, "the informant must declare that he personally has seen the facts asserted and is passing on first-hand information." Id.

The affidavit here shows the confidential informant did not have personal knowledge that Jones was "going around town bragging about the burglary," "telling people that he knew about the guns and other items because his family is close to Brian's," and that he "tried to sell an item to them that is similar to one stolen from the Settlemyre residence." CP 21. The informant heard this information from other people, making it hearsay. CP 21.

"If the informant's information is hearsay, the basis of knowledge prong can be satisfied if there is sufficient information so that the hearsay establishes a basis of knowledge." Jackson, 102 Wn.2d at 437-38. The affidavit here establishes no basis of knowledge for the information relayed by "at least two people." CP 21. The informant's tip fails the knowledge prong of the Aguilar-Spinelli test.

d. The Informant Information Is Not Sufficiently Corroborated To Establish Probable Cause.

If an informant's tip fails under either or both parts of the Aguilar-Spinelli test, "probable cause may yet be established by independent police investigatory work that corroborates the tip to such an extent that it

supports the missing elements of the Aguilar-Spinelli test." Jackson, 102 Wn.2d at 438. "The independent police investigations should point to suspicious activity, '*probative indications of criminal activity* along the lines suggested by the informant.'" Id. at 438 (quoting United States v. Canieso, 470 F.2d 1224, 1231 (2d Cir. 1972)).

Here, the State argued in part that the requisite corroboration was provided by police observations that, upon returning to the residence, the windows were covered and a lock had been placed on the porch door. 3RP 19.

These are innocuous facts that do not cure the Aguilar-Spinelli deficiency. "It is not illegal to secure one's premises, even if it impedes official investigations." State v. Rakosky, 79 Wn. App. 229, 240, 901 P.2d 364 (1995) (warrant to search for marijuana grow operation on property failed for lack of probable cause where innocuous facts did not point to criminal activity, including fact that property was secured by electrified fence and guard dogs).

Innocuous facts susceptible to innocent explanation do not support probable cause. See, e.g., State v. Huft, 106 Wn.2d 206, 211, 720 P.2d 838 (1986) (increased electrical consumption and bright light emitting from basement window insufficient to corroborate tipster information; probable cause did not support search warrant for marijuana grow

operation in basement of home); State v. Young, 123 Wn.2d 173, 195-96, 867 P.2d 593 (1994) (abnormally high electrical consumption and fact that basement windows were always covered does not support a finding of probable cause to search a residence for marijuana grow operation). Covering windows and locking a door are insufficiently probative to show involvement in a burglary.

Facts consistent with both lawful and unlawful conduct do not constitute probable cause to search. Neth, 165 Wn.2d at 185. Jones has the constitutional right to privacy under article I, section 7 of the Washington Constitution and the Fourth Amendment of the United States Constitution. State v. Arreola, 176 Wn.2d 284, 291, 290 P.3d 983 (2012); State v. Grande, 164 Wn.2d 135, 141, 187 P.3d 248 (2008). The acts of covering the windows and putting a lock on the door are not probative of criminal activity because they constitute the lawful exercise of the constitutional right to privacy. See State v. Cardenas, 146 Wn.2d 400, 409, 47 P.3d 127 (2002) ("courts have overwhelmingly found that an attempt to block a view through a window shows a reasonable expectation of privacy."); Simpson, 95 Wn.2d at 187 (locking door showed reasonable expectation of privacy).

The exercise of a person's constitutional right to privacy does not give the officer probable cause to search on the grounds that the object of

suspicion might be hiding something. That would make the exercise of the right meaningless. The exercise of a constitutional right may not be used to establish probable cause. See Whitehead v. State, 116 Md. App. 497, 504, 698 A.2d 1115 (Md. Ct. App. 1997) (exercise of a constitutional right can never be considered as a legitimate basis to infer probable cause), cert. denied, 348 Md. 207, 703 A.2d 148 (1997); Gasho v. United States, 39 F.3d 1420, 1431-32 (9th Cir. 1994) (refusal of consent to warrantless search and seizure could not be used to support probable cause); State v. Frankel, 179 N.J. 586, 610-11, 847 A.2d 561 (N.J. 2004) (same), cert. denied, 543 U.S. 876, 125 S. Ct. 108, 160 L. Ed. 2d 128 (2004), overruled in part on other grounds by State v. Edmonds, 211 N.J. 117, 131–32, 47 A.3d 737 (2012).

The State also pointed to the Settlemyres' suspicion that "the house was burglarized by someone who knew what they had and where it was since the house was not completely torn apart." 3RP 17; CP 20, 73. According to the affidavit, Jones had been in their house in the past and was in a relationship with Tina Falkner. CP 20. This information does not establish probable cause. Common sense dictates any number of people would have been in the Settlemyres' residence at some point in the past. That Jones was among them hardly winnows the suspect pool down to any meaningful degree. Further, the affidavit nowhere states that Jones, when he was in the house, was in an area of the house where he would have

observed the things that were later stolen. The stolen items came from the bedroom, the garage and the truck in the garage. CP 19. There is no information in the affidavit showing Jones had ever been in the bedroom or the garage or the truck. The factual basis for the inference that Jones burgled the residence because he knew the location of valuable items is missing from the affidavit.

The State further contended Jones was "dishonest" to police during the police investigation, an apparent reference to Jones telling the police that he had spoken to Tina Falkner and she was not at home. CP 71, 73. Nothing in the affidavit shows Falkner was actually in the residence so there was nothing dishonest about Jones's answer in that regard. The affidavit does recite that Jones had no "excuse" for why he came to the house knowing Tina Falkner was not at home. CP 20. The failure to provide an excuse for being there is too ambiguous to support probable cause. Jones did not want to tell the police he was staying at the residence. That does not meaningfully contribute to the probable cause determination.

Even if Jones's response could fairly be described as dishonest, nervousness and a dishonest response to police questioning do not rise above the level of innocuous facts absent other probative evidence. See Neth, 165 Wn.2d at 185 ("absent some other evidence of illicit activity, the mere possession of a few empty, unused plastic baggies in a coat

pocket does not constitute probable cause to search an automobile, even when combined with nervousness, inconsistent statements, and a large sum of money in the car."); United States v. $49,576.00 U.S. Currency, 116 F.3d 425, 428 (9th Cir. 1997) (person's use of fake driver's license, his evasive and dishonest answers to questions, and his general nervous behavior when questioned were indicative of some illegal activity, but not necessarily indicative of drug trafficking; probable cause not established to believe that money in claimant's bag was involved in drug transaction); State v. Rodriguez, 32 Wn. App. 758, 761-62, 650 P.2d 225 (assertions that defendant met an undefined "drug courier profile," observations of defendant on the telephone, and defendant's nervous appearance did not establish probable cause), review denied, 98 Wn.2d 1005 (1982).

Information gleaned from the investigation does not sufficiently corroborate the informants' tips to establish probable cause to believe Jones and Falkner burglarized the Settlemyre residence. Search warrant affidavits should not be read in a hypertechnical manner, but "establishing probable cause is not hypertechnical; it is a fundamental constitutional requirement." Lyons, 174 Wn.2d at 362. If the trial court relied on the informants' tips to establish probable cause that Jones committed the burglary, it erred for the reasons set forth above.

e. The Search Warrant Also Fails For Lack Of Nexus Between The Criminal Activity And The Place To Be Searched: There Was No Probable Cause To Believe Evidence Of The Burglary Would Be Found In The Falkner Residence.

Even if the affidavit established probable cause to believe Jones and Falkner committed the burglary, the search warrant still fails for lack of a nexus between the crime and the Falkner residence. Again, search warrants are valid only if supported by probable cause. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause to search "requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." Thein, 138 Wn.2d at 140 (quoting State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)). The affidavit in support of the warrant must set forth facts and circumstances sufficient to establish a reasonable inference that evidence of the crime can be found at the place to be searched. Thein, 138 Wn.2d at 140.

A warrant to search for evidence in a particular place must be based on more than generalized belief of the supposed practices of the type of criminal involved. Id. at 147-48. Rather, the warrant must contain specific facts tying the place to be searched to the crime. Id. "Absent a sufficient basis in fact from which to conclude evidence of illegal activity

will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law." Id. at 147.

The warrant to search the Falkner residence fails for lack of nexus. The affidavit did not establish probable cause that evidence of the burglary was at the Falkner residence. The residence at issue here was not Jones residence nor was it Tina Falkner's residence. The house belonged to Tina Falkner's parents. CP 20. Jones and Tina Falkner were guests at the house, but they did not live there. CP 20. Police did not attempt to search the actual residences of Jones and Tina Falkner or otherwise investigate whether the stolen items were there.

Even if the place searched is treated as the equivalent of Jones's or Tina Falkner's residence for purposes of determining probable cause, the nexus is still missing. The standard is whether there is probable cause to believe contraband will be found in the specific place to be searched. Thein, 138 Wn.2d at 140. "The affidavit in support of the search warrant must be based on more than suspicion or mere personal belief that evidence of the crime will be found on the premises searched." Vickers, 148 Wn.2d at 108. "Probable cause to believe that a suspect has committed a crime is not by itself adequate to secure a search warrant for the suspect's home." United States v. Ramos, 923 F.2d 1346, 1351 (9th

Cir. 1991), overruled on other grounds by United States v. Ruiz, 257 F.3d 1030 (9th Cir. 2001).

In Thein, for example, the Washington Supreme Court held there was insufficient nexus between evidence that a person engaged in drug dealing and the fact that the person resided in the place searched. Thein, 138 Wn.2d at 150. The affidavit in that case contained specific information tying the presence of narcotics activity to a certain residence, but not the address to be searched pursuant to the warrant. Id. at 136-138, 150. The affidavit also contained generalized statements of belief, based on officer training and experience, about drug dealers' common habits, particularly that they kept evidence of drug dealing in their residences. Id. at 138-39. The affidavit expressed the belief that such evidence would be found at the suspect's residence. Id. at 139. The Court held such generalizations do not establish probable cause to support a search warrant for a drug dealer's residence because probable cause must be grounded in fact. Id. at 146-47.

In State v. McReynolds, the Court of Appeals found probable cause lacking to search the defendants' home when the police caught the defendants at the scene of the burglary. State v. McReynolds, 104 Wn. App. 560, 570, 17 P.3d 608 (2000), review denied, 144 Wn.2d 1003, 29 P.3d 719 (2001). The question was whether there was a basis for inferring

evidence of other crimes would be at the defendants' residence. McReynolds, 104 Wn. App. at 570. A pry bar stolen along with a large quantity of other tools several weeks earlier was found at the scene near one of the suspects. Id. at 566, 570. Yet the affidavit failed to establish a nexus between any criminal act and the defendants' residence. Id. There was no reasonable inference grounded in specific fact that the defendants' residence would contain evidence of a prior crime, even though the defendants were connected with a large amount of property stolen several weeks earlier. Id.

In McReynolds, the defendants' involvement in a burglary was not enough to establish probable cause to believe evidence of that burglary would be found in the defendants' residence. In Thein, a generalized belief that criminal keep evidence of their crimes at their residence was not enough to establish probable cause to search the residence in the absence of particular facts.

Similar considerations guide the analysis here. The affidavit contains no observation that Jones or Falkner transported the stolen items to or from the Falkner residence. Nothing in the affidavit shows anyone, including the confidential informants, observed any of the stolen property in the Falkner residence.

What remains to possibly show a nexus between the burglary and the place to be searched is the fact that Jones and Falkner had been staying at the residence for two weeks, Jones's behavior when questioned by police outside the home, and the acts of covering the windows and placing a lock on the porch door. As set forth in section C. 1. d., supra, exercising the constitutional right to privacy by covering the windows and locking the door is not a factor that can be taken into account to support probable cause. Jones's interaction with police, meanwhile, is too ambiguous to establish probable cause that evidence of the burglary would be found in the residence.

A person's return to a home after purportedly engaging in illegal activity does not, by itself, mean that evidence of that illegal activity will be found in that person's home. See State v. Dalton, 73 Wn. App. 132, 140, 868 P.2d 873 (1994) ("'Probable cause to believe a man has committed a crime on the street does not necessarily give rise to the probable cause to search his home.'") (quoting Commonwealth v. Kline, 234 Pa. Super. 12, 17, 335 A.2d 361 (Pa. 1975)). Facts, not generalized beliefs about the habits of criminals, are needed to show the nexus between criminal activity and a home. Thein, 138 Wn.2d at 150.

The facts in the affidavit do not establish that Jones kept the stolen items in the Falkner residence rather than in a different place. See Goble,

88 Wn. App. at 512 (defendant's picking up package containing narcotics at post office box did not support search warrant for his residence because there was no evidence that he would take the package back to his residence rather than to another location; search warrant of residence not supported simply because suspect might take package containing narcotics from post office back to residence). The affidavit fails to make the necessary connection between the burglary and the Falkner residence.

Information insufficiently grounded on fact to ensure reliability will not suffice to establish a nexus between the place to be searched and suspected illegal activity. Thein, 138 Wn.2d at 147. Specific facts in the supporting affidavit must establish the nexus between the item to be seized and the place to be searched. Id. at 145. The affidavit here lacks specific facts tying the residence to the crime.

e. Argument Not Raised Below May Be Raised For The First Time On Appeal.

Jones did not raise the nexus argument set forth in section C. 1. d., supra before the trial court, nor did he raise the specific argument that the knowledge prong under the Aguilar-Spinelli test was unsatisfied as to one of the informants, as set forth in section C. 1. c., supra. Manifest errors affecting a constitutional right, however, may be raised for the first time on appeal under RAP 2.5(a)(3).

Search and seizure challenges fall under the rubric of the rule. State v. Jones, 163 Wn. App. 354, 359-60, 266 P.3d 886 (2011). Jones's claims of error under the Fourth Amendment of the United States Constitution and article 1, section 7 of the Washington Constitution constitute issues of "constitutional magnitude." Jones, 163 Wn. App. at 360.

An error is manifest if it has practical and identifiable consequences or causes actual prejudice to the defendant. State v. WWJ Corp., 138 Wn.2d 595, 602-03, 980 P.2d 1257 (1999). The practical and identifiable consequence, and the actual prejudice to Jones, is that he could not have been convicted of possession of drug paraphernalia if the paraphernalia evidence had been suppressed based on the nexus and knowledge prong arguments. See section C. 1., f. infra.

"If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). But here, all the facts necessary to adjudicate the claimed error are in the record because review is limited to the affidavit in support of the search warrant. Neth, 165 Wn.2d at 182; Murray, 110 Wn.2d at 709-10. The affidavit in support of the search warrant is in the record. The record in support of the nexus and knowledge prong issues is complete. These

arguments can be raised for the first time on appeal because they are manifest errors of constitutional magnitude under RAP 2.5(a)(3).

f. The Evidence Must Be Suppressed.

A search conducted pursuant to a warrant unsupported by probable cause violates article I, section 7 and the Fourth Amendment. Lyons, 174 Wn.2d at 357, 359. The exclusionary rule mandates suppression of evidence obtained as a result of an unlawful search. State v. Garvin, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009); State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). Evidence of the methamphetamine and drug paraphernalia obtained from the search must be therefore be suppressed.

Without the evidence obtained from the search, there is no basis to sustain the drug paraphernalia conviction. Nor is there any basis to sustain the charge for the crime of methamphetamine possession. The jury hung on the methamphetamine charge, but suppression of that evidence will prevent a retrial on that charge. The proper remedy is reversal of the paraphernalia conviction and dismissal of both drug charges. See State v. Kinzy, 141 Wn.2d 373, 393-94, 396, 5 P.3d 668 (2000) (no basis remained for conviction where motion to suppress evidence should have been granted); State v. Boethin, 126 Wn. App. 695, 700, 109 P.3d 461 (2005) (dismissing charges where evidence suppressed).

2. THE COURT VIOLATED JONES'S RIGHT TO A PUBLIC TRIAL WHEN IT CONDUCTED A PORTION OF THE JURY SELECTION PROCESS IN PRIVATE.

Peremptory challenges were exercised on a piece of paper in a manner that did not allow for public scrutiny. The court erred in conducting this portion of the jury selection process in private without justifying the closure under the standard established by Washington Supreme Court and United States Supreme Court precedent. This structural error requires reversal of the convictions.

a. Peremptory Challenges Were Exercised On Paper With No Contemporaneous Announcement Of Those Challenges In Open Court.

Jury selection took place on May 14, 2013. 8RP. The venire panel was questioned on the record in the courtroom. 8RP 12-78. At the close of questioning, the court announced, "Members of the jury, at this time what happens in this courtroom, -- they're fairly similar around the state but there's little nuances here and there -- we're going to go over to the left here to what's called the Bailiff table, and Mr. Karlsvik also can bring his client to that Bailiff table if he wishes, and the attorneys are going to just make their peremptory challenges, if they have any, and it won't probably take that long so please just be patient. And at the end of that process, a jury will have been selected, a jury of 12 plus one alternate. So thank you

for your patience. Counsel, and of course, Mr. Karlsvik, your client may come with you if you wish." 8RP 78-79.

The transcript reflects that at 11:36 a.m. "counsel exercised their peremptory challenges off the record and outside the hearing of the prospective jurors[.]" 8RP 79. When the process was finished, the court announced on the record who would serve as jurors for the trial and excused the rest. 8RP 79-81. At no time did the court announce in open court which party had removed which potential jurors. A document containing this information was filed. CP 70. But the public was never told in open court that such a document had been filed.

b. The Public Trial Right Attaches To The Peremptory Challenge Process Because It Is An Integral Part Of Jury Selection.

The federal and state constitutions guarantee the right to a public trial to every defendant. U.S. Const. amend VI; Wash. Const. art I, § 22. Additionally, article I, section 10 expressly guarantees to the public and press the right to open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). Whether a trial court has violated the defendant's right to a public trial is a question of law reviewed de novo. Easterling, 157 Wn.2d at 173-74.

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). This is a core safeguard in our system of justice. State v. Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). The open and public judicial process helps assure fair trials, deters misconduct by participants, and tempers biases and undue partiality. Wise, 176 Wn.2d at 5-6.

Furthermore, "[t]he requirement of a public trial 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 trial court violated Jones's right to a public trial in holding peremptory challenges in private. The right to a public trial encompasses jury selection. Presley v. Georgia, 558 U.S. 209, 723-24, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); Wise, 288 P.3d at 1118 (citing State v. Brightman, 155 Wn.2d 506, 515, 122 P.3d 150 (2005)). "The peremptory challenge process, precisely because it is an integral part of the voir dire/jury impanelment process, is a part of the 'trial' to which a criminal defendant's constitutional right to a public trial extends." People v. Harris, 10 Cal. App.4th 672, 684, 12 Cal. Rptr. 2d 758 (Cal. Ct. App. 1992) (peremptory challenges conducted in chambers violate public trial right,

even where such proceedings are reported), review denied, (Feb 02, 1993). This Court recognizes the right to a public trial attaches to the portion of jury selection involving peremptory challenges. State v. Wilson, 174 Wn. App. 328, 342-43, 346, 298 P.3d 148 (2013); State v. Jones, 175 Wn. App. 87, 97-101, 303 P.3d 1084 (2013).

In Wilson, this Court held the public trial right was not implicated when the bailiff excused the two jurors solely for illness-related reasons before voir dire began. Wilson, 174 Wn. App. at 347. In reaching that holding, the court distinguished the administrative removal of jurors before the voir dire process began to later portions of the jury selection process that implicated the public trial right, including the peremptory challenge process. Id. at 342-43.

This Court recognized "both the Legislature and our Supreme Court have acknowledged that a trial court has discretion to excuse jurors outside the public courtroom for statutorily-defined reasons, *provided such juror excusals do not amount to* for-cause excusals or *peremptory challenges traditionally exercised during voir dire in the courtroom.*" Id. at 344 (emphasis added). A trial court is allowed "to delegate hardship and other administrative juror excusals to clerks and other court agents, *provided that the excusals are not the equivalent of peremptory or for cause juror challenges.*" Id. (emphasis added). Wilson's public trial

argument failed because he could not show "the public trial right attaches to any component of jury selection that does not involve 'voir dire' or a similar jury selection proceeding involving the exercise of 'peremptory' challenges and 'for cause' juror excusals." Id. at 342.

In Jones, this Court held the trial court violated the right to public trial when, during a court recess off the record, the trial court clerk drew four juror names to determine which jurors would serve as alternates. Jones, 175 Wn. App. at 91. It recognized "both the historic and current practices in Washington reveal that the procedure for selecting alternate jurors, like the selection of regular jurors, generally occurs as part of voir dire in open court." Id. at 101. This Court likened the selection of alternate jurors to the phases of jury selection involving for cause *and peremptory challenges*. Id. at 98 ("Washington's first enactment regarding alternate jurors not only specified a particular procedure for the alternate juror selection, but it specifically instructed that alternate jurors be called in the same manner as deliberating jurors and subject to for-cause and peremptory challenges in open court.").

Both Jones and Wilson applied the experience and logic test set forth in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012). Jones, 175 Wn. App. at 96-102; Wilson, 174 Wn. App. at 335-47. In Jones, there was a public trial violation because alternate juror selection was akin to the

jury selection process involving regular jurors, including the peremptory challenge process. In Wilson, there was no public trial violation because the administrative removal of jurors for hardship was not akin to other portions of the jury selection process, including the peremptory challenge process. Both cases support Jones's argument that the public trial right attaches to the peremptory challenge process because it is an integral part of the jury selection process.

The "experience" component of the Sublett test is satisfied here. Historical evidence reveals "since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). The criminal rules of procedure show our courts have historically treated the peremptory challenge process as part of voir dire on par with for cause challenges. Wilson, 174 Wn. App. at 342. CrR 6.4(b) contemplates juror voir dire as involving peremptory and for cause juror challenges. Id. CrR 6.4(b) describes "voir dire" as a process where the trial court and counsel ask prospective jurors questions to assess their ability to serve on the defendant's particular case and to enable counsel to exercise intelligent "for cause" and "peremptory" juror challenges. Id. at 343.

This stands in sharp contrast with CrR 6.3, which contemplates administrative excusal of some jurors appearing for service before voir dire begins in the public courtroom. Id. at 342-43. In further contrast, a trial court has discretion to excuse jurors outside the public courtroom under RCW 2.36.100(1), but only so long as "such juror excusals do not amount to for-cause excusals or *peremptory challenges* traditionally exercised during voir dire in the courtroom." Id. at 344 (emphasis added).

The "logic" component of the Sublett test is satisfied as well. "Our system of voir dire and juror challenges, including causal challenges and peremptory challenges, is intended to secure impartial jurors who will perform their duties fully and fairly." State v. Saintcalle, 178 Wn.2d 34, 74, 309 P.3d 326 (2013) (Gonzalez, J., concurring). "The peremptory challenge is an important 'state-created means to the constitutional end of an impartial jury and a fair trial.'" Saintcalle, 178 Wn.2d at 62 (Madsen, C.J., concurring) (quoting Georgia v. McCollum, 505 U.S. 42, 59, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992)).

While peremptory challenges may be exercised based on subjective feelings and opinions, there are important constitutional limits on both parties' exercise of such challenges. McCollum, 505 U.S. at 48-50. A prosecutor is forbidden from using peremptory challenges based on race, ethnicity, or gender. Batson v. Kentucky, 476 U.S. 79, 86, 106 S. Ct. 1712,

90 L. Ed. 2d 69 (1986); Rivera v. Illinois, 556 U.S. 148, 153, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009); State v. Burch, 65 Wn. App. 828, 836, 830 P.2d 357 (1992).

The peremptory challenge component of jury selection matters. It is not so inconsequential to the fairness of the trial that it is appropriate to shield it from public scrutiny. Discrimination in the selection of jurors places the integrity of the judicial process and fairness of a criminal proceeding in doubt. Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).

The public trial right encompasses 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. Brightman, 155 Wn.2d at 514; State v. Leyerle, 158 Wn. App. 474, 479, 242 P.3d 921 (2010). An open peremptory process of jury selection acts as a safeguard against discriminatory removal of jurors. Public scrutiny discourages discriminatory removal from taking place in the first instance and, if such a peremptory challenge is exercised, increases the likelihood that the challenge will be denied by the trial judge.

The Supreme Court recently issued an opinion that was fractured on how to deal with the persistence of racial discrimination in the peremptory challenge process, but all nine justices united in the recognition that the problem exists. See Saintcalle, 178 Wn.2d at 49, 60 (Wiggins, J., lead opinion), at 65 (Madsen, C.J., concurring), at 69 (Stephens, J., concurring), at 118 (Gonzalez, J., concurring), at 118-19 (Chambers, J., dissenting).

Justice Wiggins bemoaned the fact that in 42 cases decided since Batson, Washington appellate courts never reversed a conviction based on a trial court's erroneous denial of a Batson challenge. Saintcalle, 178 Wn.2d at 45-46. If discrimination during the peremptory process is not prevented at the trial level, the error will rarely be remedied on appeal. That is what history has taught us.

In light of these justified concerns, it cannot be plausibly maintained that the peremptory challenge process, as it unfolds in real time at the trial level, gains nothing from being open to the public. The public nature of trials is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Wise, 176 Wn.2d at 6. "'Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges [and] lawyers . . . will perform their

respective functions more responsibly in an open court than in secret proceedings.'" Id. at 17 (quoting Waller v. Georgia, 467 U.S. 39, 46 n.4, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). The peremptory challenge process squarely implicates those values.

Division Three of the Court of Appeals recently held no public trail violation occurred during the peremptory challenge phase because the record did not show peremptory challenges were actually exercised at sidebar instead of in open court. State v. Love, 176 Wn. App. 911, 915-16, 309 P.3d 1209 (2013).[5] In extended dicta, Division Three opined that, even if the record showed peremptory challenges were exercised at sidebar, the peremptory challenge process did not need to be open to the public under the "experience and logic" test. Love, 176 Wn. App. at 916-20. That discussion was dicta because it was unnecessary to resolve the issue. See In re Marriage of Roth, 72 Wn. App. 566, 570, 865 P.2d 43 (1994) ("Dicta is language not necessary to the decision in a particular case."). Dicta lack precedential value. Campbell v. Reed, 134 Wn. App. 349, 359, 139 P.3d 419 (2006). Moreover, dicta are often ill-considered and should not be transformed into a rule of law. State v. Shove, 113 Wn.2d 83, 88, 776 P.2d 132 (1989); State ex rel. Hoppe v. Meyers, 58 Wn.2d 320, 329, 363 P.2d 121 (1961).

[5] A petition for review has been filed in Love.

Division Three's dicta in Love is ill-considered and should not be followed for the reasons already articulated in this brief. The experience prong of the "experience and logic" test is met because the relevant court rule envisions both for cause and peremptory challenges taking place in open court. Wilson, 174 Wn. App. at 342-44; Jones, 175 Wn. App. at 98, 101. Division Three ignored what Jones and Wilson have to say on the issue.

Its reliance on State v. Thomas, 16 Wn. App. 1, 13, 553 P.2d 1357 (1976) as a basis to conclude peremptory challenges do not meet the "experience" prong of the "experience and logic" test is misplaced. 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. Thomas, however, predates Bone-Club by nearly 20 years. Much has changed in public trial jurisprudence since then and Jones cites authority to back up his argument.

Moreover, Thomas noted in 1976 that secret peremptories were used "in several counties" according to a Bar Association directory. Thomas, 16 Wn. App. at 13 & n.2. There are 39 counties in Washington. The implication, then, is that only several of the 39 counties used secret

peremptories as of 1976.[6] That hardly shows an established historical practice of secret peremptory challenges in this state. It shows the opposite.

Turning to the "logic" prong, Division Three's bald assertion that the exercise of peremptory challenges "presents no questions of public oversight" is simply wrong. Love, 176 Wn. App. at 919-20. The reasons why it is wrong, including the benefit of public oversight to deter discriminatory removal of jurors during the peremptory process, have already been set forth in this brief.

c. The Private Peremptory Challenge Proceeding Constitutes A Closure For Public Trial Purposes.

One type of "closure" is "when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). Physical closure of the courtroom, however, is not the only situation that violates the public trial right. Another type of closure occurs where a proceeding takes place in a location inaccessible to the public, such as a judge's chambers or hallway. Lormor, 172 Wn.2d at 93 (chambers); Leyerle, 158 Wn. App. at 477, 483, 484 n.9 (moving questioning of juror to hallway outside courtroom was a closure).

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[6] The source of the court's information is actually dated 1968. Thomas, 16 Wn. App. at 13 n.2.

Here, the peremptory challenge portion of the jury selection process was conducted in private. Peremptory challenges were exercised off the record at the bailiff's table, making the process inaccessible to public oversight. 8RP 78-79. The procedure in this case violated the right to a public trial to the same extent as any in-chambers conference or other courtroom closure would have. Though the courtroom itself remained open to the public, the proceedings were not.

Whether a closure — and hence a violation of the right to public trial — has occurred does not turn only on whether the courtroom has been physically closed. A closure occurs even when the courtroom is not physically closed if the proceeding at issue takes place in a manner that renders it inaccessible to public scrutiny. See State v. Slert, 169 Wn. App. 766, 774 n.11, 282 P.3d 101 (2012) ("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, 299 P.3d 20 (2013). Members of the public are no more able to approach the bench or bailiff's' table and observe an intentionally private jury selection process than they are able to enter a locked courtroom, access the judge's chambers, or participate in a private hearing

in a hallway. The practical impact is the same — the public is denied the opportunity to scrutinize events.

Perhaps the public could see the attorneys doing something at the bailiff's table, but the public could not *hear* or otherwise meaningfully observe what was happening as it was taking place. The public could not hear which jurors were peremptorily struck, who struck them, and in what order they were struck before the final jury was seated. See People v. Williams, 52 A.D.3d 94, 98, 858 N.Y.S.2d 147 (N.Y. App. Div. 2008) (sidebar conferences, by their very nature, are intended to be held in hushed tones).

When jury selection occurs in this manner, the public is unable to observe what is taking place in any meaningful manner because the public cannot hear what is going on. There is no functional difference between conducting this aspect of the jury selection process at a private conference in the courtroom and doing the same in chambers or in a physically closed courtroom. In each instance, the proceeding takes place in a location inaccessible to the public. As a practical matter, the judge might as well have conducted the peremptory challenge processes in chambers or dismissed the public from the courtroom altogether because the public was not privy to what occurred.

What took place in private should have taken place in open court so that the public could observe the peremptory challenge process as it was taking place. The ultimate composition of the jury was announced in open court. 8RP 79-80. But the selection process was actually closed to the public because which party exercised which peremptory challenge and the order in which the peremptory challenges were made were not subject to contemporaneous public scrutiny. The sequence of events through which the eventual constituency of the jury "unfolded" was kept private. Harris, 10 Cal. App.4th at 683 n.6.

The State may claim there was no closure and thus no public trial violation because the peremptory challenge sheet was filed. CP 70. That claim fails because the Supreme Court has repeatedly found a violation of the public trial right where the record showed what happened in private. See, e.g., State v. Paumier, 176 Wn.2d 29, 32-33, 288 P.3d 1126 (2012) (public trial violation where in-chambers questioning of prospective jurors "was recorded and transcribed by the court"); Wise, 176 Wn.2d at 7-8 (public trial violation where prospective jurors questioned in chambers where "[t]he questioning in chambers was recorded and transcribed just like the portion of voir dire done in the open courtroom.").

Contemporaneous public observation of this critical moment in a criminal trial fosters public trust in the process and holds both the judge

and the attorneys accountable at a time when it matters most — before the jury is seated. Once the jury is seated, the damage is done. It is unrealistic to expect that any post hoc concerns voiced by the public about a peremptory challenge will result in any action being taken after the trial is under way with a sworn jury. Attorneys and trial judges know this. Any improper challenges are effectively insulated from remedial oversight. The deterrent effect of public scrutiny is undermined when all the public is left with is an after-the-fact record of what happened.

Moreover, even to voice a concern, members of the public would need to know the sheet documenting peremptory challenges had been filed and that it was subject to public viewing. The court here made no such announcement. Further, members of the public would have to recall the identity and race of challenged prospective jurors to determine whether they had been improperly targeted — a herculean task when it must be done after jury selection has already taken place and prospective jurors excused.

The bottom line is that the Bone-Club factors must be considered *before* the closure takes place. Wise, 176 Wn.2d at 12. A proposed rule that a *later* recitation of what occurred in private suffices to protect the public trial right would eviscerate the requirement that a Bone-Club analysis take place *before* a closure occurs.

d. The Convictions Must Be Reversed Because The Court Did Not Justify The Closure Under The Bone-Club Factors.

Before a trial court closes the jury selection process off from the public, it must consider the five factors identified in Bone-Club on the record. Wise, 176 Wn.2d at 12. 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; (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-60; Wise, 176 Wn.2d at 10.[7]

[7] The Bone-Club components are comparable to the requirements set forth by the United States Supreme Court in Waller. Orange, 152 Wn.2d at 806; see Waller, 467 U.S. at 48 ("[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."); Presley, 558 U.S. at 214 ("trial courts are required to consider alternatives to closure even when they are not offered by the parties.").

There is no indication the court considered the Bone-Club factors before the peremptory challenge process took place in private. 8RP 151-54. The trial court errs when it fails to conduct the Bone-Club test before closing a court proceeding to the public. Wise, 176 Wn.2d at 5, 12. The court here erred in failing to articulate a compelling interest to be served by the closure, give those present an opportunity to object, weigh alternatives to the proposed closure, narrowly tailor the closure order to protect the identified threatened interest, and enter findings that specifically supported the closure. Orange, 152 Wn.2d at 812, 821-22. Appellate courts do not comb through the record or attempt to infer the trial court's balancing of competing interests where it is not apparent in the record. Wise, 176 Wn.2d at 12-13.

The violation of the public trial right is structural error requiring automatic reversal because it affects the framework within which the trial proceeds. Id. at 6, 13-14. "Violation of the public trial right, even when not preserved by objection, is presumed prejudicial to the defendant on direct appeal." Id. at 16. Jones's convictions must be reversed due to the public trial violation. Id. at 19.

The State may try to argue the issue is waived because defense counsel did not object to conducting the peremptory challenge process in private. That argument fails. A defendant does not waive his right to

challenge an improper closure by failing to object to it. Id. at 15. The issue may be raised for the first time on appeal. Id. at 9. Indeed, a defendant must have knowledge of the public trial right before it can be waived. In re Pers. Restraint of Morris, 176 Wn.2d 157, 167, 288 P.3d 1140 (2012). Here, there was no discussion of Jones's public trial right before the peremptory challenges were exercised at sidebar. There is no waiver.

D. CONCLUSION

For the reasons set forth, Jones requests that this Court reverse the convictions and dismiss counts I and II.

DATED this 27th day of March 2014

Respectfully Submitted,

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Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 45001-1-II
	)	
MICHAEL JONES,	)	
	)	
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 27TH 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 DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL JONES
1110 LARCH STREET
RAYMOND, WA 98577

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF MARCH 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

March 27, 2014 - 3:25 PM

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