NO. 31616-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

JESUS TORRES,

Appellant.

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

The Honorable Bruce A Spanner, Judge

REPLY BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

A. ARGUMENT IN REPLY

1. THE EVIDENCE WAS INSUFFICIENT TO PROVE TORRES KNEW THE MINI-MOTORCYCLE WAS STOLEN.

The State points to several facts that it claims give rise to an inference of knowledge. Brief of Respondent (BoR) at 4-5. First, the State argues a jury could find Torres was the one who made the alterations to the mini-motorcycle. But there was no evidence Torres had ever seen the mini-motorcycle in that original condition, let alone that he was the cause of the alterations. Torres' explanation that his friend built it from the ground up could easily be a mere misunderstanding. The mere fact of this discrepancy is not substantive evidence Torres knew otherwise. The State also argues Torres tried to ride away when he saw Campos watching him, but riding is what a person does on a mini-motorcycle. Campos' suggestion that doing so was evidence of guilt is mere speculation. Contradictions in Hendricks' testimony may reflect poorly on his own credibility, but do not provide a basis for any inference regarding Torres' knowledge.

The State's arguments rely on conjecture and speculation, which is insufficient to prove an element of the offense. State v. Golladay, 78 Wn.2d 121, 130, 470 P.2d 191 (1970), overruled on other grounds by State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976)). In the absence of any substantive evidence Torres knew the mini-motorcycle was stolen, his conviction should

be reversed. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

2. BY ELIMINATING THE POSSIBILITY OF CONTEMPORANEOUS PUBLIC OVERSIGHT, THE COURT CLOSED THE PEREMPTORY CHALLENGES PORTION OF THE PROCEEDINGS IN VIOLATION OF TORRES' RIGHT TO A PUBLIC TRIAL.

a. Regardless of Actual Location, a Courtroom Closure Occurs Whenever the Public Is Excluded.

The State argues the courtroom was not closed while the peremptory challenges were exercised silently on paper. BoR at 7. But open courts require more than lip service. The right to a public trial is the right to have a trial open to the public, so that accountability and transparency will act as a check on the judicial system and its participants. State v. Wise, 176 Wn.2d 1, 6, 288 P.3d 1113 (2012); In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). When a portion of the proceedings is completely shielded from public oversight, that portion of the proceedings has been closed.

The State greatly overstates the legal standard for closing the courtroom in its citation to State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715, 722 (2012). BoR at 7. Courtroom closures are not limited to those times when the courtroom is completely closed so that "no one may enter and no one may leave." Sublett, 176 Wn.2d at 71. Indeed, our courts have found a closure when a part of trial proceedings was held in the hallway, a place

where, presumably, any number of people can enter and leave. State v. Leyerle, 158 Wn. App. 474, 477, 483-484, 242 P.3d 921 (2010).

Open peremptory challenges are critical to guard against inappropriate discrimination. This can only be accomplished if they are made in open court in a manner allowing the public to determine whether one side or the other is targeting and eliminating jurors for impermissible reasons. See State v. Sadler, 147 Wn. App. 97, 107, 109-118, 193 P.3d 1108 (2008) (private Batson[1] hearing following State's use of peremptory challenges to remove only African-American jurors from panel denied defendant his right to public trial), review denied, 176 Wn.2d 1032 (2013), overruled on other grounds Sublett, 176 Wn.2d at 71-73.

Making the peremptory challenges part of the public record after potential jurors have been dismissed from the courtroom does not rectify the problem. Generally speaking, the availability of a record of an improperly closed voir dire fails to cure an improper closure. See State v. Paumier, 176 Wn.2d 29, 32, 37, 288 P.3d 1126 (2012) (reversing conviction due to in-chambers questioning of potential jurors despite fact that questioning was recorded and transcribed). While members of the public could discern, after the fact, which prospective jurors had been removed by whom (generously assuming they knew to look in the court file), the public could not tell, at the

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

time the challenges were made, which party had removed any particular juror, making it impossible to determine whether a particular side had improperly targeted any protected group based, for example, on gender or race. See State v. Burch, 65 Wn. App. 828, 833-834, 830 P.2d 357 (1992) (identifying both as protected classes); State v. Saintcalle, 178 Wn.2d 34, 309 P.3d 326 (2013) (lead opinion, concurrence, and dissent underscore harm resulting from improper race-based exercises of peremptory challenges and difficulty of prevention).

The mere opportunity to find out, sometime after the process, which side eliminated which jurors is not sufficient. Members of the public would have to know the sheet documenting peremptory challenges had been filed and that it was subject to public viewing. Moreover, members of the public would have to remember the identity, gender, and race of those individuals excused from jury service to determine whether protected group members had been improperly targeted. This is not realistic.

b. Our Constitution Requires that Exercise of Peremptory Challenges Be Open to the Public.

The State argues this Court should use Sublett's "experience and logic" test to establish whether the public trial right applies to this type of closure. But the experience and logic test is only necessary when it has not already been established the proceeding falls within the public trial right.

State v. Wilson, 174 Wn. App. 328, 335, 298 P.3d 148 (2013). As Wilson, indicates, the public trial right attaches to "the exercise of 'peremptory' challenges and 'for cause' juror excusals." Id. at 342. Moreover, under State v. Slert, 169 Wn. App. 766, 744 n.11, 282 P.3d 101 (2012), review granted in part, 176 Wn.2d 1031, 299 P.3d 20 (2013) (dismissing jurors at side bar violates the public trial guarantee. However, even if it had not already been established that the exercise of challenges falls within the public trial right, both experience and logic support this conclusion as well.

c. Both Experience and Logic Require Contemporaneous Public Oversight of Peremptory Challenges.

The State cites State v Love, 176 Wn. App. 911, 309 P.3d 1209 (2013),[2] where a panel of this Court recently held, under the experience and logic test, that exercising "for cause" and peremptory challenges outside the public view does not violate the right to public trial. Torres respectfully argues this decision is poorly reasoned.

Regarding experience, the Love court relied in part on the absence of evidence that, historically, these challenges were made in open court. Id. at 918-919. But history would not necessarily reveal common practice unless the parties made it an issue. History does not tell us these challenges were

[2] Division Two of this Court recently agreed with the Love court's analysis in State v. Dunn, ____ Wn. App. ____, ____ P.3d ____, 2014 WL 1379172 (no. 43855-1-II, filed Apr. 8, 2014).

commonly done in private, either. Moreover, prior to Bone-Club,[3] there were likely many common, but unconstitutional, practices that ceased with issuance of that decision.

The Love court cites to one case – State v. Thomas, 16 Wn. App. 1, 553 P.2d 1357 (1976) – as "strong evidence that peremptory challenges can be conducted in private." Love, 176 Wn. App. at 918. Thomas rejected the argument that "Kitsap County's use of secret – written – peremptory jury challenges" violated the defendant's right to a fair and public trial where the defendant had failed to cite to any supporting authority. Thomas, 16 Wn. App. at 13. Notably, Thomas predates Bone-Club by nearly 20 years. Moreover, the fact Thomas challenged the practice suggests it was atypical even at the time.[4] Labeling Thomas "strong evidence" is a vast overstatement.[5]

Regarding logic, the Love court could think of no way that public exercise of "for cause" and peremptory challenges furthered the right to a fair trial, concluding instead that a written record of the challenges sufficed.

---

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

[4] Citing to a Bar Association directory, the Thomas court noted that "several counties" had employed Kitsap County's practice. Thomas, 16 Wn. App. at 13 n.2. Even ignoring the questionable methodology of what appears to be some type of informal poll, that only "several counties" had used the method certainly leaves open the possibility that a majority of Washington's 39 counties did not.

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

Love, 176 Wn. App. at 919-920. But the court failed to consider that an after-the-fact record removes the public's ability to scrutinize what is occurring at a time when error can still be avoided. The court also failed to mention or consider the increased risk of discrimination against protected classes of jurors resulting from late disclosure. While the State is correct that there is no right to peremptory challenges, the potential for discriminatory exercise of those challenges presents serious questions requiring public oversight. Cf., Saintcalle, 178 Wn.2d 34 (discussing whether peremptory challenges should be abolished entirely due to the danger of discriminatory application). As discussed above, the subsequent filing of documents from which the source of a challenge might be deciphered is not an adequate substitute for simultaneous public oversight. See also Sadler, 147 Wn. App. at 116 ("Few aspects of a trial can be more important . . . than whether the prosecutor has excused jurors because of their race, an issue in which the public has a vital interest.").

3. THE STATE FAILED TO ESTABLISH FACTS SUPPORTING THE RESTITUTION ORDER.

The State argues Torres may not challenge the restitution order for the first time on appeal under RAP 2.5. This argument should be rejected because the failure to establish facts upon which relief may be granted is one of the listed exceptions to RAP 2.5. By failing to present evidence

supporting the restitution award, the State failed to present establish facts upon which relief could be granted. The State has cited no case in which a restitution award with no factual basis in the record was upheld on appeal.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Torres' conviction for possession of a stolen vehicle must be reversed and dismissed for insufficient evidence. Both his convictions must be reversed because the private exercise of peremptory challenges violated his right to a public trial. Additionally, the restitution order must be reversed for insufficient evidence in the record.

DATED this 23rd day of April, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

JENNIFER J. SWEIGERT
WSBA No. 38068
Office ID No. 91051

Attorney for Appellant

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.
1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. LIND
JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT

OF COUNSEL
K. CAROLYN RAMAMURTI
JARED B. STEED

State v. Jesus Torres

No. 31616-5-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 23rd day of April, 2014, I caused a true and correct copy of the **Reply Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Terry Bloor
Benton County Prosecuting Attorney
prosecuting@co.benton.wa.us

Jesus Torres
DOC No. 825222
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

Signed in Seattle, Washington this 23rd day of April, 2014.

x Patrick Mayovsky