69950-4

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NO. 69950-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

MAURICE THROWER,

Appellant.

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

The Honorable Barbara Linde, Judge

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

As State v. Wilson, 174 Wn. App. 328, 342, 298 P.3d 148 (2013), indicates, the public trial right attaches to a jury selection proceeding involving "the exercise of 'peremptory' challenges and 'for cause' juror excusals." Although Thrower cited Wilson in his supplemental brief, the State does not acknowledge the decision. Instead, the State argues Thrower must establish the public's right to see and hear the exercise of peremptory challenges with the "experience and logic" test discussed in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012). SBOR, at 5-6, 8-11.

The experience and logic test only applies, however, when it has not already been established the proceeding falls within the public trial right. Wilson, 174 Wn. App. at 335. The State seems to concede as established that peremptory challenges must be public. It seeks to avoid reversal in Thrower's case, however, by arguing that keeping secret from the public the identity of the lawyer exercising peremptory challenges falls outside this right. SBOR, at 3. The State is mistaken.

Even were it appropriate to isolate this critical aspect of the peremptory challenge process, i.e., assume it has not already been established that the identity of the challenging party falls within the

public trial right, both experience and logic establish the right. Under the "experience" prong of the test, the court asks "whether the place and process have historically been open to the press and general public." Sublett, 176 Wn.2d at 73. The "logic" prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." Id. If the answer to both is "yes," the public trial right attaches. Id.

Historically, it is well established that the right to a public trial extends to jury selection. See, e.g., Sublett, 176 Wn.2d at 71; State v. Strode, 167 Wn.2d 222, 226-227, 217 P.3d 310 (2009). This includes "'the process of juror selection.'" In re Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). "For-cause" and peremptory challenges are an integral part of this process. Strode, 167 Wn.2d at 230 (for-cause challenges of six jurors in chambers not de minimus violation of public trial right); Wilson, 174 Wn. App. at 342 (unlike potential juror excusals governed by CrR 6.3, exercise of peremptory challenges, governed by CrR 6.4, constitutes part of "voir dire," to which the public trial right attaches). There is nothing to indicate, and the State cites nothing to indicate, the identity of the attorneys

exercising peremptory challenges has historically been excluded from this right.[1]

Moreover, logically, openness of jury selection (including which side exercises which challenge) clearly enhances core values of the public trial right – "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Sublett, 176 Wn.2d at 75; see also In re Personal Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (the process of jury selection "is itself a matter of importance, not simply to the adversaries but to the criminal justice system").

Indeed, as discussed in Thrower's supplemental brief, the openness of peremptory challenges is particularly integral to the fairness of the proceeding to protect against inappropriate discrimination. This can only be accomplished if peremptory challenges are made in open court in a manner allowing the public to determine whether one side or the other is targeting and

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[1] The State argues there is nothing in CrR 6.4(e)(2) requiring that the public be informed of which party is striking which jurors. SBOR, at 8. On the flip side, the rule does not indicate that it is permissible to hide this information from the public, either. There is a strong presumption that courts are to be open at all stages of trial. Sublett, 176 Wn.2d at 70. Thus, the default is openness.

eliminating jurors for impermissible reasons.[2] See Supplemental Brief, at 6-7; see also State v. Sadler, 147 Wn. App. 97, 107, 109-118, 193 P.3d 1108 (2008) (private Batson[3] hearing following State's use of peremptory challenges to remove only African-American jurors from panel denied defendant his right to public trial), review denied, 176 Wn.2d 1032, 299 P.3d 19 (2013), overruled on other grounds Sublett, 176 Wn.2d at 71-73. The mere opportunity to find out, sometime after the process, which side eliminated which jurors cannot satisfy this right.[4]

In nonetheless defending the private process employed at Thrower's trial, the State argues the fairness of the proceedings may have actually been enhanced. Specifically, citing "some

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[2] The trial judge in Thrower's case recognized that if any party were going to dismiss a prospective juror for improper reasons, the issue would arise during peremptory challenges. See RP 42-44.

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

[4] 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, even if members of the public could recall which juror number was associated with which individual, they also would have to recall the identity, gender, and race of those individuals to determine whether protected group members had been improperly targeted. In Thrower's case, this would have required members of the public to recall the specific features of 14 individuals. See CP 95. This is not realistic.

judges," the State argues a closed process "protects lawyers from ill-will that may be engendered by their challenges." SBOR, at 9, n.3. This reasoning seems suspect, but if a trial judge truly believes this portion of jury selection should be conducted outside public scrutiny, it can simply assess the five factors set forth in State v. Bone-Club, 128 Wn.2d 254, 258-259, 906 P.2d 325 (1995), to determine whether privacy is truly warranted and permitted. No such analysis was done in this case.

The State also suggests that, because *the attorneys* know which side is exercising which challenge and can object where there is discriminatory motive, trial fairness and the appearance of fairness are adequately protected. SBOR, at 10-11. If the test were whether the lawyers knew what was happening, the right to public trial would be hollow indeed. Attorneys are not surrogates for the public, and whether a trial is public does not turn on their participation.

Although not discussed in the State's Supplemental Brief, in State v Love, ___ Wn. App. ___, 309 P.3d 1209 (2013), a panel of Division Three judges recently held, under the experience and logic test, that exercising peremptory challenges outside the public view

does not violate the right to public trial. This decision is poorly reasoned.[5]

Regarding experience, the Love court noted the absence of evidence that, historically, peremptory challenges were made in open court. Love, 309 P.3d at 1213. But history would not necessarily reveal common practice unless the parties made an issue of the employed practice. History does not tell us these challenges were commonly done in private, either. Moreover, prior to Bone-Club, there were likely many common, but unconstitutional, practices that ceased with issuance of that decision.

The Love court cites to one case – State v. Thomas, 16 Wn. App. 1, 553 P.2d 1357 (1976) – as "strong evidence that peremptory challenges can be conducted in private." Love, 309 P.3d at 1213. 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

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[5] A petition for review is pending in Love and set to be considered in March 2014. See State v. Unters Love, Case No. 89619-4.

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

Regarding logic, the Love court could think of no manner in which exercising peremptory challenges in public furthered the right to fair trial, concluding instead that a written record of the challenges sufficed. Love, 309 P.3d at 1214. The court failed, however, to mention or consider the increased risk of discrimination against protected classes of jurors resulting from non-disclosure. As discussed above, the subsequent filing of a written document from which the source of peremptory challenges might be deciphered is not an adequate substitute for simultaneous public oversight. See also Sadler, 147 Wn. App. at 116 ("Few aspects of a trial can be more important . . . than whether the prosecutor has excused jurors because of their race, an issue in which the public has a vital interest.").

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[6] 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 a majority of Washington's 39 counties did not even before Bone-Club and subsequent cases requiring an open process.

B. CONCLUSION

As a critical part of jury selection, peremptory challenges (including disclosure of the challenging party) must be made in open court. This also is true under the experience and logic test. The procedures used to select Thrower's jury violated his right to public trial. His convictions must be reversed and the case remanded for a new trial.

DATED this 12th day of December, 2013.

Respectfully Submitted,

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v.	)	COA NO. 69950-4-I
	)	
MAURICE THROWER,	)	
	)	
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 12TH DAY OF DECEMBER, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MAURICE THROWER
DOC NO. 709523
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF DECEMBER, 2013.

x Patrick Mayovsky