NO. 44895-5-II

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

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STATE OF WASHINGTON,

Respondent,

v.

VANESSA WHITFORD,

Appellant.

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

The Honorable Kathryn J. Nelson, Judge

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# REPLY BRIEF OF APPELLANT

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JENNIFER J. SWEIGERT
Attorney for Appellant

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

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## A. ARGUMENT IN REPLY

### THE SILENT AND PRIVATE EXERCISE OF PEREMPTORY CHALLENGES IN THIS CASE VIOLATED THE CONSTITUTIONAL GUARANTEE OF A PUBLIC TRIAL.

The State argues both that the peremptory challenge procedure in this case was not closed to the public and that, if it was, the exercise of peremptory challenges does not implicate the public trial right. This Court should reject each of these arguments. Concealing from potential jurors and spectators alike which party has exercised a given challenge insulates those challenges from public scrutiny. Public scrutiny serves the goals of discouraging improper behavior and holding individuals accountable. State v. Wise, 176 Wn.2d 1, 6, 288 P.3d 1113 (2012). Those goals are not served when the public cannot observe which party was responsible for challenging a given juror.

#### a. The Peremptory Challenge Process Was Closed to the Public.

The peremptory challenges in this case were closed for the same reasons the court found a closure in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). The closure there was "temporary" because it was only for the testimony of one witness and "full" because all spectators were excluded. Id. at 257. The same is true here. The closure was temporary because not all of voir dire was closed, only the exercise of peremptory challenges. It was a full closure because all spectators were excluded from that process.

The State cites In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), for the proposition that, without an order closing the courtroom, the courtroom is not closed, even when the effect of the procedure used was to exclude it from public view. Brief of Respondent at 5-6. This stretches the import of that case beyond reasonable bounds. The trial court in Orange explicitly ruled that all spectators would be excluded during voir dire. 152 Wn.2d at 807-08. There was a suggestion that the trial court may have intended that, as the number of potential jurors decreased, thereby creating more room in the courtroom, spectators would be permitted to come in. Id. at 808. The court declared that, even if this was the court's intention, that did not alter the nature of the closure originally ordered. Id. at 808. The court explained that, even if it were to consider additional information about what actually happened in addition to the presumptive effect of the court's ruling, the record still showed a temporary, full closure implicating the public trial right. Id. at 808. The court held that, even if some spectators were permitted to enter later during voir dire, the court's ruling "unequivocally excluded the defendant's friends and family from the courtroom during voir dire." Id. at 808.

The State is correct that, here, the court made no overt ruling that spectators could not observe the peremptory challenge process. It simply announced, and followed, a peremptory challenge process that, by its nature,

excluded the public. The State argues this Court should look only at the "presumptive effect of the plain language of the court's ruling" rather than its actual effect. Brief of Respondent at 5 (quoting Orange, 152 Wn.2d at 807-08). In this case, the presumptive effect and the actual effect are the same: the public was excluded. The court announced that peremptory challenges would be exercised and the jury was free to talk or read during this time. 2RP 83-84. The presumptive effect of this process was that neither potential jurors nor spectators would be able to hear or see what was going on. The transcript, which states merely "attorneys picking jury" rather than recording the words uttered by the participants, shows the actual effect was the same. 2RP 84. Nothing occurred publicly that the court reporter could transcribe.

The State argues the defendant could observe the written challenges as they were made. Brief of Respondent at 6. That argument impacts the defendant's right to be present at all critical stages of the proceeding but has no bearing on the public trial right. The State also argues the peremptory challenge sheet was subsequently filed and made available to the public as a public record. Brief of Respondent at 6. But a written record of the challenges is inadequate given the need for scrutiny in the first instance, as discussed below. And, generally speaking, the availability of a record of an improperly closed voir dire fails to cure the error. 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).

b. The Exercise of Peremptory Challenges Must Be Open to the Public Under the Experience and Logic Test from State v. Sublett.[1]

The State analogizes this case to the history of "trial courts consulting with counsel out of the earshot of those present." Brief of Respondent at 10 (citing State v. Holedger, 15 Wash. 443, 448, 46 Pac. 652 (1896)). But this case is not about trial courts consulting at sidebar with attorneys about scheduling, procedure, or purely legal questions. The exercise of peremptory challenges is an essential part of selecting which jurors will serve on the case. This would be a very different case if the court had, for example, held a sidebar to discuss with the attorneys whether the law required peremptory challenges be exercised publicly.

The State points to the comment in Holedger that whether the jury should be permitted to separate could be discussed at sidebar and that hearing objections out of the presence of the jury would be a better practice. Holedger, 15 Wash. at 448. The State does not explain how the practice of allowing the jury to separate implicates the same concerns for racial fairness and equity that arise during selection of individual jurors. Moreover,

[1] State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012).

Holedger is about private discussion of what trial procedure would be used, not the actual conduct of that procedure.

The State cites Georgia v. McCollum for the proposition that concealing which party exercised a given peremptory challenge is common practice. Brief of Respondent at 11 (citing Georgia v. McCollum, 505 U.S. 42, 49, 112 S. Ct. 2348, 120 L. Ed.2 d 33 (1992). In discussing whether a criminal defendant was permitted to discriminate on the basis of race in exercising peremptory challenges, the McCollum court cited a law review article on the same topic. McCollum, 505 U.S. at 53, n. 8 (citing Barbara Underwood, Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?, 92 Colum. L. Rev. 725, 751, n. 117 (1992)). One of the sub-issues was whether the defendant's exercise of peremptory challenges constituted state action. Both the McCollum court and the law review cited the practice of concealing the source of a peremptory challenge as adding to the perception that it is the court, not the parties, that choose the jury. Id. This discussion only further demonstrates that private exercise of peremptory challenges violates the public trial right by insulating the parties from accountability.

It may be that the State has identified an interest in keeping jurors from knowing which attorney has challenged which juror, to prevent prejudice to either side based on the exercise of peremptory challenges. But

in the case of such an interest, the court has a duty under Bone-Club to make findings to that effect, consider alternatives, and give the public an opportunity to object. 128 Wn.2d at 258-59. And the court must weigh that concern against competing concerns such as the concern for public accountability that underlies the public trial right. Id.

The State points out that, "the harm is the same" regardless of which party excludes a juror on the basis of race. Brief of Respondent at 12; McCollum, 505 U.S. at 49. But one of the ways the public trial right seeks to prevent this harm is through personal accountability. The public trial right discourages improper challenges by ensuring that officers of the court will exercise these choices while under public scrutiny. The effectiveness of public scrutiny in discouraging improper conduct requires that spectators be able to observe which party is responsible. Additionally, removing peremptory challenges from contemporaneous public view lessens the chances that a party will be called upon to explain its choice.

To quote the Sublett test, "public access plays a significant positive role in the functioning" of choosing a jury. 176 Wn.2d at 73. It is true there are other concerns, such as the potential for jurors being angry at a party for excusing a certain juror. But it serves both the efficiency and the integrity of the judicial system to prioritize incentives to avoid discriminatory

peremptory challenges in the first place over attempts to remedy discrimination after it has occurred.

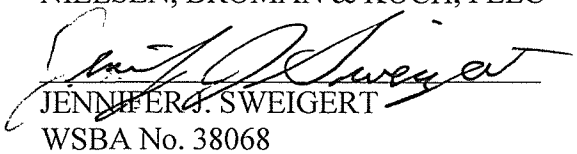
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Whitford requests this Court reverse her conviction.

DATED this 27th day of February, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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

Attorney for Appellant

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| Appellant. | ) | |

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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 FEBRUARY, 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 AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] VANESSA WHITFORD
DOC NO. 786241
WASHINGTON CORRECTIONS CENTER FOR WOMEN
9601 BUJACICH ROAD NW
GIG HARBOR, WA 98332

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

X Patrick Mayovsky

# NIELSEN, BROMAN & KOCH, PLLC

# February 27, 2014 - 2:47 PM

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