NO. 44588-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

DRAKE MCDANIEL,

Appellant.

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

The Honorable Kathryn J. Nelson, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

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

The trial court took peremptory challenges by having the parties note on a chart which prospective juror they wanted to excuse off the record and outside the hearing of those in the courtroom an. RP 24-26. McDaniel contends, for reasons set forth more fully in the supplemental opening brief, that because exercising peremptory challenges is part of voir dire, and because the trial court failed to apply the Bone-Club[1] factors, the court violated McDaniel's constitutional right to a public trial. Supplemental Brief of Appellant (SBOA) at 3-14. The State maintains the trial court did not violate McDaniel's right to a public trial. Brief of Respondent (BOR) at 9-22. For the following reasons, McDaniel asks this Court to reject the State's arguments.

a. The Violation of McDaniel's Right to a Public Trial May be Challenged on Appeal

Citing a three-judge concurrence in State v. Beskurt, 176 Wn.2d 441, 449-456, 293 P.3d 1159 (2013), the State first argues violations of the public trial right should be ignored on appeal absent an objection below. BOR at 10-12. This argument is without merit. Currently, a majority of

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

the Supreme Court holds these violations can be raised for the first time on appeal. See, e.g., State v. Wise, 176 Wn.2d 1, 13 n.6, 288 P.3d 1113 (2012); State v. Strode, 167 Wn.2d 222, 229, 217 P.3d 310 (2009). Any change in this approach must come from the Supreme Court. Unless that happens, McDaniel's public trial claim is properly before this Court.

b. The Peremptory Challenge Process Was Closed to the Public.

The State next argues there was no public trial violation because the courtroom remained open at all times to members of the public. BOR at 12-22. As discussed in McDaniel's supplemental opening brief, however, it was the trial judge's method of jury selection (exercising peremptory challenges outside of the jury's hearing and off the record) that effectively closed the proceedings to the public. SBOA at 9-14. An otherwise open courtroom does not guarantee a public trial. Constitutional rights are violated when the methods employed deny the public an opportunity to scrutinize events. See SBOA, at 2, 10-14 (citing State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011); State v. Leyerle, 158 Wn. App. 474, 483, 242 P.3d 921 (2010)).

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." 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.

Although McDaniel cited Wilson and Slert in his supplemental brief, the State does not acknowledge these decisions. See SBOA at 7, 10. Instead, the State cites In re Pers. Restraint of Orange, 152 Wn.2d 795, 807-08, 100 P.3d 291 (2004), for the proposition the Court should look only at the "presumptive effect of the plain language of the court's ruling" rather than its actual effect. BOR at 14 (quoting Orange, 152 Wn.2d at 807-08). The State then goes on to suggest 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. BOR at 14-16, 19. This stretches the import of Orange 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. But, the presumptive effect and the actual effect are the same: the public was excluded.

The State also argues the defendant could observe the written challenges as they were made. BOR at 19. 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.

Similarly, the State relies on the fact the trial court filed a written sheet documenting peremptory challenges *after they had already been made*. See CP 109-112; BOR at 19-20, 22. The mere opportunity to find out, sometime after the process, which side eliminated which jurors is not sufficient. 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). 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 even vaguely recall which juror number was associated with which individual, they also would have to remember the identity, gender, and race of those individuals to determine whether protected group members had been improperly targeted. This is not realistic. See SBOA at 12-13.

Moreover, logically, openness in the process of excluding jurors 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." State v. Sublett, 176 Wn.2d 58, 75, 292 P.3d 715 (2012); see also Orange, 152 Wn.2d at 804 (the process of jury selection "is itself a matter of importance, not simply to the adversaries but to the criminal justice system").

Without the ability to hear the arguments and discussions of counsel and the court as they occur, the public has no ability to assess whether "for cause" challenges are being handled fairly and within the confines of the law or, for example, in a manner that discriminates against a protected class. See Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989) (jury selection primary means to

"enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice.").

Similarly, 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 SBOA at 8-9; see also State v. Sadler, 147 Wn. App. 97, 107, 109-118, 193 P.3d 1108 (2008) (private Batson[2] hearing following State's use of peremptory challenges to remove only African-American jurors from panel denied defendant his right to public trial), rev. denied, 176 Wn.2d 1032, 299 P.3d 19 (2013), overruled on other grounds Sublett, 176 Wn.2d at 71-73.

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. Wise, 176 Wn.2d at 6. Those goals are not served when the public cannot observe which party was responsible for challenging a given juror.

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

c. The Exercise of Peremptory Challenges Must Be Open to the Public Under the Experience and Logic Test.

Finally, the State suggests McDaniel must establish the public's right to see and hear the exercise of peremptory challenges with the "experience and logic" test discussed in Sublett, 176 Wn.2d at 73. BOR at 17-18 (citing State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), petition for review pending, No. 89619-4 (2013)

As discussed fully in the supplemental opening brief, even under the "experience and logic" test, the secret ballot method of exercising peremptory jurors in McDaniel's case implicated his right to a public trial and constituted an unlawful closure. SBOA at 10-13. There, McDaniel distinguished Love, on several bases, including that State v. Thomas,[3] upon which Love relied, predated Bone-Club. SBOA at 10-12.

In turn, in State v. Dunn, __ Wn. App. __, 321 P.3d 1283 (2014), this Court recently relied upon the reasoning of Love to find that experience and logic test does not suggest that exercising peremptory challenges at the clerk's station implicates the right to public trial. 321 P.3d at 1285. The same reasons that distinguish Love from the present situation likewise distinguish Dunn.

[3] 16 Wn. App. 1, 553 P.2d 1357 (1976).

Nonetheless, the State analogizes this case to State v. Holedger, 15 Wash. 443, 448, 46 Pac. 652 (1896)), for the proposition that "there is no indication our constitution requires that everything and anything that is done in the course of a public trial be announce in public court." BOR at 20. 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. BOR at 20-21 (citing Holedger, 15 Wash. at 448).

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. 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, Holedger is about private discussion of what trial procedure would be used, not the actual conduct of that procedure. This case would be a very different 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 also cites Georgia v. McCollum[4] for the proposition that concealing which party exercised a given peremptory challenge is common practice. BOR at 18-19. 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

[4] 505 U.S. 42, 49, 112 S. Ct. 2348, 120 L. Ed.2 d 33 (1992).

concern against competing concerns such as the concern for public accountability that underlies the public trial right. Id.

The State suggests the harm is the same regardless of which party excludes a juror for an improper purpose, such as on the basis of race. BOR at 19-20; 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 Sublett, "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.

The trial court did not consider the Bone-Club factors before conducting the private jury selection process at issue here. The error

violated McDaniel's public trial right, which requires automatic reversal because it affects the framework within which the trial proceeds. Wise, 176 Wn.2d at 6.

2. MCDANIEL WAS PREJUDICED BY THE TRIAL COURT'S FAILURE TO GIVE A LESSER INCLUDED OFFENSE INSTRUCTION OF THIRD DEGREE THEFT.

The trial court denied McDaniel's request for a lesser included jury instruction on third degree theft. RP 713-14. McDaniel contends, for reasons set forth more fully in the opening brief, that based on the evidence presented at trial, the jury could have agreed that McDaniel used no force in taking Jazmyne Montgomery's purse and that any threat of force ceased when Jonathan Williams went back inside McDaniel's car. Brief of Appellant (BOA) at 9-15.

The State maintains that even if the trial court erred in not instructing the jury on third degree theft, such error was harmless. BOR at 29-32. Washington's Supreme Court has recognized however, that failure to give a lesser included instruction when one should have been given can never be harmless. See State v. Parker, 102 Wn.2d 161, 163-64, 683 P.2d 189 (1984) (quoting State v. Young, 22 Wash. 273, 60 P. 650 (1900)). Well-established law therefore precludes harmless error analysis in this case.

The State does not acknowledge the holdings of Parker and Young. Rather, the State argues McDaniel was not prejudiced because he was still able to argue his theory of the case, with the only difference being "counsel was able to argue for an acquittal on Count I [Robbery], rather than the find him guilty of theft in the third degree." BOR at 29-30, 32. But this is precisely the choice sought to be avoided with lesser-included offenses. As the United State Supreme Court has recognized, when faced with only one charge, jurors are more likely to convict than acquit even though the elements of the charged offense have not been proved beyond a reasonable doubt. Beck v. Alabama, 447 U.S. 625, 634, 100 S. Ct. 2382, 65 L. Ed. 392 (1980). There is a reasonable probability that jurors would have acquitted McDaniel on the greater and convicted on a lesser if given that opportunity. But this was not an option.

The trial court's failure to give McDaniel's requested instruction on third degree theft as a lesser included offense to first degree robbery was prejudicial error. Remand for a new trial is required.

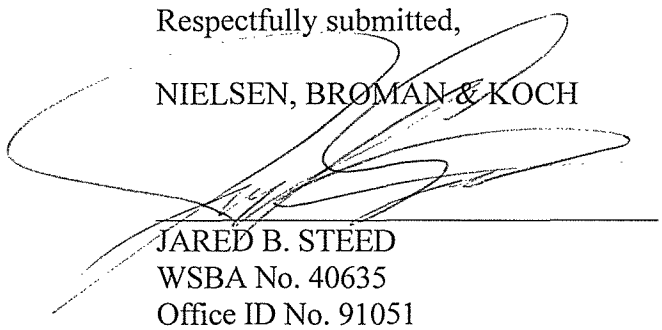
B. CONCLUSION

For the foregoing reasons, and those reasons stated in the opening and supplemental briefs of appellant, McDaniel requests this Court reverse her conviction.

DATED this 12th day of June, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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	)	
DRAKE MCDANIEL,	)	
	)	
Appellant.	)	

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CONNELL, WA 99326

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X Patrick Mayovsky

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