NO. 45532-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM MANUS,

Appellant.

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

The Honorable James Orlando, 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

TABLE OF AUTHORITIES

Page

A. ARGUMENT IN REPLY

1. THE SILENT AND PRIVATE EXERCISE OF PEREMPTORY CHALLENGES VIOLATED MANUS' RIGHT TO A PUBLIC TRIAL.

The State analogizes this case to the history of trial courts consulting privately with counsel at sidebar, out of the earshot of those present. Brief of Respondent at 14-15 (citing State v. Holedger, 15 Wash. 443, 448, 46 Pac. 652 (1896)). But the case currently before this Court 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, 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 15-16 (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 sub-issue 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 actually supports Manus' argument that private exercise of peremptory challenges violates the public trial right by insulating the parties from accountability.

Public access plays a significant positive role in the process of choosing a jury. The public trial right discourages improper challenges by ensuring that officers of the court will exercise these choices while under public scrutiny. State v. Wise, 176 Wn.2d 1, 6, 288 P.3d 1113 (2012). The effectiveness of public scrutiny in discouraging improper conduct

requires that spectators be able to observe which party is responsible. Removing peremptory challenges from contemporaneous public view lessens the chances that a party will be called upon to explain its choice. It serves both the efficiency and the integrity of the judicial system to prioritize public scrutiny as an incentive to avoid discriminatory peremptory challenges in the first place rather than wait to try to remedy discrimination after it has occurred.

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 State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995), to make findings to that effect, consider alternatives, and give the public an opportunity to object. And the court must weigh that concern against competing concerns such as the concern for public accountability that underlies the public trial right. Id. Because the court failed to do so, Manus' conviction should be reversed for violation of his right to a public trial.

2. JUROR 11 SHOULD HAVE BEEN REMOVED BECAUSE OF HIS ONGOING ASSOCIATION WITH THE ARRESTING OFFICER.

Any doubts about a juror's ability to judge fairly and impartially must be resolved in favor of removing the juror. State v. Cho, 108 Wn. App. 315, 329-30, 30 P.3d 496, 503 (2001). Juror 11's ongoing relationship with the arresting officer while working out at the gym over a five-year period was sufficient affinity between the two that the trial court should have removed him to protect Manus' right to an impartial jury.

The State relies on State v. Tingdale, 117 Wn.2d 595, 817 P.2d 850 (1991), but that case is distinguishable. Brief of Respondent at 21-22. The potential jurors in Tingdale were removed by the clerk, without questioning by the parties or the court. 117 Wn.2d at 597-98. The degrees of association in that case were far less than in this case. Without any record of a current or ongoing personal connection, the clerk excused:

> . . . a person who had attended high school with petitioner but had seen her only once in the past 20 years; another person who was the brother of a friend of the petitioner; and the landlord of the building in which the petitioner lived and where the crime occurred.

Id. at 597. By contrast, in this case, the juror himself brought up a current and ongoing association with a state's witness, the officer who arrested Manus. 1RP 263-69.

The State also relies on Mendoza v. Gates, 19 Fed. Appx. 514 (9th Cir. 2001), in which a juror had an "infrequent, superficial, and purely telephonic business relationship" with the detective. Brief of Respondent at 22. By contrast, juror 11's relationship with Officer Meeds was face to face and he said they talk occasionally while working out together at the gym. 1RP 263-69. Based on his current and ongoing association with the arresting officer, juror 11 should have been excused for cause. Manus' conviction should be reversed for violation of his right to an impartial jury as described in State v. Rupe, 108 Wn.2d 734, 748, 743 P.2d 210 (1987), cert. denied, 486 U.S. 1061, 108 S. Ct. 2834, 100 L. Ed. 2d 934 (1988).

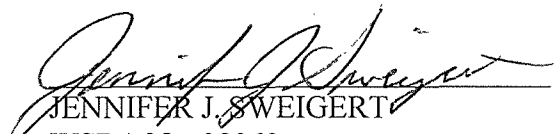
B. CONCLUSION

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

DATED this 20th day of August, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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

Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 45532-3-II
	)	
WILLIAM MANUS,	)	
	)	
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 20TH DAY OF AUGUST, 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] WILLIAM MANUS
DOC NO. 984776
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF AUGUST, 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

August 20, 2014 - 3:04 PM

Transmittal Letter

Document Uploaded: 455323-Reply Brief.pdf

Case Name: William Manus
Court of Appeals Case Number: 45532-3

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Reply__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Patrick P Mayavsky - Email: mayovskyp@nwattorney.net

A copy of this document has been emailed to the following addresses:

PCpatcecf@co.pierce.wa.us