NO. 44572-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN DUNN,

Appellant.

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

The Honorable Michael H. Evans, Judge

BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorneys for Appellant

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CON'TD)

TABLE OF AUTHORITIES (CON'TD)

RULES, STATUTES AND OTHER AUTHORITIES

TABLE OF AUTHORITIES (CON'TD)

Page

FEDERAL CASES

A. ASSIGNMENTS OF ERROR

1. The State failed to prove appellant Jonathan Dunn was armed with a firearm for purposes of sentence enhancement.

2. The trial court denied Dunn's constitutional right to a public trial.

Issues Pertaining to Assignments of Error

1. Did the State present sufficient evidence showing Dunn was armed with a firearm that was found in a backpack behind the passenger's seat of a pickup truck Dunn was driving?

2. The trial court took peremptory challenges at sidebar by having the parties note on a chart which prospective juror they wanted to excuse. The court announced the names of the excused prospective jurors, but did not state which party excused them. Several hours later, the court filed the chart. Did the trial court violate Dunn's right to a public trial?

B. STATEMENT OF THE CASE

At his pre-shift meeting, Longview Police Officer Zachary Ripp learned Jonathan Dunn had a suspended driver's license. He was also told Dunn was known to drive a grey Toyota pickup truck. 3RP 30-31.[1] Ripp

[1] Dunn cites to the verbatim report as follows: 1RP – 1/8/2013 (voir dire); 2RP – 1/8/2013 (opening statements); 3RP – 1/8/2013 (trial proceedings; 4RP – 1/9/2013; 5RP -- 1/10/2013; 6RP – 2/7, 2/21/2013.

verified that Dunn's license was suspended and viewed his photograph. 3RP 32.

About 40 minutes later, Ripp observed Dunn drive by in the pickup truck. 3RP 32-34. As Dunn turned into an alley, Ripp turned on his flashing lights and followed Dunn. Dunn did not stop, so Ripp blasted his air horn. 3RP 34. As Dunn continued driving Ripp saw him reaching into the center console in front of him and fidgeting with something. 3RP 36-37. Ripp became concerned for his safety as well as that of his partner, Officer Chris Trevino. 3RP 37, 79-80. Dunn stopped behind a building that Ripp later learned was his residence. 3RP 37-38, 67.

Ripp and Trevino got out of the patrol car and immediately yelled for Dunn to put his arms out the driver's side window. Dunn continued to dig around in the console area before eventually complying. 3RP 38-40. The officers approached the truck, asked Dunn to step out of the vehicle, and arrested him for driving with a suspended license. 3RP 39-40. Ripp searched Dunn incident to the arrest and felt a large, dense object in his pocket. Ripp pulled the object out, which was a stack of bills totaling $3,940. 3RP 40-41. The officers asked Dunn whether there were drugs in the car. Dunn responded there were not, but that he had smoked marijuana

earlier that day in the truck. 3RP 46, 81-82. Dunn also said he knew he was not supposed to be driving. 3RP 81.

The officers then called for a drug-sniffing dog and the dog's handler, Kevin Sawyer. 3RP 44. Sawyer and the dog responded to the scene. 3RP 82, 114. The dog alerted on the money found in Dunn's pocket and at the truck's door seam. 3RP 115-18. The officers impounded Dunn's truck and transported it to the police station. 3RP 46-47. Ripp transported Dunn to the county jail where he was booked. 3RP 47.

Sawyer obtained a search warrant for the truck. 3RP 118. Ripp and Trevino searched the truck. 3RP 47-48, 83. Trevino found a plastic bag holding 17 pills containing diazepam and 7 pills containing alprazolam in the glove box.[2] 3RP 83-86; 4RP 57-61. Ripp observed a backpack behind the seats to the driver's right near the passenger side. 3RP 49, 73. The pack was visible and within reach from the driver's seat. 3RP 49, 73. Ripp opined Dunn would have had access to the pack from the driver's seat. 3RP 73. He opened the main area of the pack and found 38 grams of heroin, 27 grams of methamphetamine, 1.2 grams of

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[2] Diazepam, also known as Valium, is a Schedule IV drug. RCW 69.50.210(2)(b)(15); United States v. Gonzalez, 661 F.2d 488, 491 (5th Cir. 1981). Alprazolam, known as Xanax, is also a Schedule IV drug. RCW 69.50.210(2)(b)(1); State v. Zillyette, 173 Wn.2d 784, 785, 270 P.3d 589 (2012).

marijuana, and drug paraphernalia. 3RP 50-56, 4RP 41-42, 48-56. In the smaller front pouch of the pack, Ripp found a loaded .380 pistol. 3RP 58-59.

The State charged Dunn with possession of heroin with intent to deliver within 1,000 feet of a school bus route stop while armed with a firearm, possession of methamphetamine with intent to deliver within 1,000 feet of a school bus route stop while armed with a firearm, possession of diazepam, possession of alprazolam, possession of marijuana less than 40 grams, first degree unlawful possession of a firearm, and driving with a suspended license. CP 1-4. The State dismissed the traffic charge before trial. 3RP 3.

Officer Trevino testified the amount of heroin and methamphetamine was much larger than what he had typically seen. 3RP 87-88. Officer Sawyer said the amounts found were not those of a drug user. 3RP 119-24. He estimated an ounce of either heroin or methamphetamine costs from $1,000 to $1,300. 3RP 126. Sawyer said drug dealers often arm themselves with a gun to minimize their chances of getting robbed of their drugs and money. 3RP 128-30.

Dunn's wife, Angela Hylton, and David Holmes, an acquaintance, testified on Dunn's behalf. Hylton testified Dunn did not have a bank

account and was paid in cash by two employers around the time of his arrest. 4RP 82-86.

Holmes testified Dunn agreed to give him a ride to a house near where Dunn ended up getting stopped by Ripp. 4RP 101-03. As he placed his bicycle in the truck's bed, Holmes observed a backpack in the bed and asked Dunn if he could use it "to lighten the load a little bit." 4RP 103. Holmes had been riding his bicycle with a loaded .380 in his waistband and an ounce of methamphetamine, an ounce-and-a-half of heroin, and a box containing drug paraphernalia in his pockets. 4RP 104-06; 130-42. Dunn gave permission to use the pack, and Holmes placed the gun and contents of his pockets inside. He put the pack behind the passenger's seat. 4RP 103-04.

When Dunn dropped him off at his destination, Holmes retrieved his bicycle, but left the backpack inside the truck. 4RP 107-08. After a few minutes, Holmes remembered the pack, went around to where Dunn had parked, and saw that Dunn had driven off. 4RP 108-09. Holmes planned to call Dunn later to retrieve his contraband. 4RP 109. Holmes said he had not collaborated with Dunn to concoct a story about the items in the backpack. 4RP 113-14, 119-20. He said, "I just know that I don't want someone else to go down for something that was mine." 4RP 114.

The jury apparently did not believe Holmes. It found Dunn guilty as charged. CP 54-63. The trial court imposed a sentence totaling 308 months, 192 of which were for the school zone and firearm enhancements. CP 64-79; 6RP 24-33.

C. ARGUMENT

1. THE STATE FAILED TO PROVE DUNN WAS "ARMED" WITH A FIREARM AT THE TIME HE COMMITTED THE OTHER CRIMES.

For purposes of sentence enhancement, the State must prove beyond a reasonable doubt that a defendant committed the offenses charged while armed with a firearm. State v. Williams-Walker, 167 Wn.2d 889, 898, 225 P.3d 913 (2010). A person is "armed" when he is within proximity of an easily and readily available firearm for offensive or defensive purposes and when a nexus is established between the accused, the weapon, and the crime. State v. O'Neal, 159 Wn.2d 500, 503-04, 150 P.3d 1121 (2007); State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). The State failed to show the gun inside the backpack found behind and to the right of Dunn was easily accessible and readily available. His 72-month sentencing enhancements for possessing heroin and methamphetamine with the intent to deliver must be vacated.

Officer Ripp testified as he followed Dunn's truck in the alley with his lights flashing, he saw Dunn reaching into the center console "fidgeting around with something[.]" 3RP 36-37. After Dunn stopped the truck, Ripp and Trevino yelled for Dunn to show his hands. Dunn did not immediately comply and continued "digging around" in the truck. 3RP 38-39. Dunn eventually put his hands at the driver's side window. The officers approached and Dunn stepped out of the truck. 3RP 39-40.

Ripp searched the truck after it was impounded. 3RP 47. He observed a backpack behind the seats to the driver's right near the passenger side. 3RP 49, 73. The pack was visible and within reach from the driver's seat. 3RP 49, 73. Ripp opined Dunn would have had access to the pack from the driver's seat. 3RP 73. He opened the main area of the pack and found drugs and paraphernalia. 3RP 50. He found the loaded pistol in the smaller front pouch of the pack. 3RP 50.

Courts are particularly careful when reviewing a challenge to a firearm enhancement because of the constitutional right to bear arms. State v. Eckenrode, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007). Whether a person is armed is a mixed question of law and fact that this Court

reviews de novo. State v. Ague-Masters, 138 Wn. App. 86, 102, 156 P.3d 265 (2007). State v. Gurske[3] is analogous.

A police officer stopped Gurske for making an illegal turn, learned his license was suspended, and arrested him for driving with a suspended license. He handcuffed Gurske, searched him, and placed him in the back of his patrol car. 155 Wn.2d at 136. A second officer arrived, and the officers conducted an inventory search before impounding Gurske's truck. One of the officers pulled the front seat forward and saw a backpack behind the driver's seat. The pack was within arm's reach of the driver's position, but removable only by either getting out of the truck or moving into the passenger seat. The officer unzipped the main portion of the backpack and saw a torch. Under the torch was a holster containing an unloaded pistol. A fully loaded magazine for the pistol was also found in the backpack. After removing the backpack from the truck, the officer found three grams of methamphetamine inside. Id.

The Court observed that use for offensive or defensive purposes could be to facilitate commission of the crime, escape, protect contraband, or prevent investigation, discovery, or apprehension by the police. 155 Wn.2d at 139. The Court found the evidence did not show whether

[3] 155 Wn.2d 134, 118 P.3d 333 (2005).

Gurske could unzip the backpack, remove the torch, and remove the pistol from the driver's seat where he was sitting at the time he was stopped by the police officer. Nor was there evidence that Gurske moved toward the backpack. Finally, there was no evidence Gurske had used or had easy access to use the weapon against another person when he acquired or was in possession of the methamphetamine. 155 Wn.2d at 143. It concluded the State failed to prove the pistol was easily accessible and readily available for use. Id.

As in Gerske, Dunn constructively possessed the gun inside a backpack found within reaching distance in the cab of a pickup truck. Other similarities are the lack of evidence indicating Dunn moved toward the pack as officers observed him or showing Dunn used or had easy access to use the gun when he acquired the drugs. 3RP 70. Although Ripp testified Dunn could reach the pack from the driver's seat, he did not say whether Dunn could have unzipped the front, smaller pouch of the pack and removed the gun from the driver's seat in the short time he had after fidgeting around in the center console in front of him and before putting his hands at the window.

The "mere presence" of a gun at the crime scene, "mere close proximity of the gun to the defendant, or constructive possession alone is

not enough to show the defendant is armed." State v. Brown, 162 Wn.2d 422, 431, 173 P.3d 245 (2007). That is all the State showed here. This is not a case where, for example, the accused could have grabbed the gun simply by reaching down to the floorboard. See State v. Sabala, 44 Wn. App. 444, 448, 723 P.2d 5 (1986) (driver was "armed" where the loaded handgun lay beneath the driver's seat with the grip easily accessible to the driver).

Additionally, Dunn had been arrested and booked into jail before the officers searched the backpack and found the gun. See State v. Ague-Masters, 138 Wn. App. 86, 104, 156 P.3d 265 (2007) (finding evidence was insufficient to show firearms in a safe were easily accessible and readily available in part because police had already arrested defendant when they found the guns and there was no evidence he attempted to use or had used one of the firearms for offensive or defensive purposes).

Finally, a firearm enhancement must be supported by sufficient evidence to find the firearm operable. State v. Pierce, 155 Wn. App. 701, 714, 230 P.3d 237 (2010). But see State v. Wade, 133 Wn. App. 855, 873, 138 P.3d 168 (2006) ("Operability is not required for a gun to be a 'firearm.'"), review denied, 160 Wn.2d 1002 (2007)). There was no testimony here the gun from the backpack could actually fire a round.

Under the facts at hand, the State failed to prove the pistol was easily accessible and readily available for use. This Court should so find, reverse the jury findings to the contrary, and remand the judgment and sentence with an order to vacate the firearm enhancements.

2. THE TRIAL COURT VIOLATED DUNN'S RIGHT TO A PUBLIC TRIAL BY TAKING PEREMPTORY CHALLENGES IN PRIVATE.

The trial court took peremptory challenges of prospective jurors at sidebar. Because exercising peremptory challenges is part of voir dire, and because the trial court failed to apply the Bone-Club[4] factors, the court violated Dunn's constitutional right to a public trial.

The Sixth Amendment and article I, section 22 guarantee the accused a public trial by an impartial jury. Presley v. Georgia, 558 U.S. 209, 213, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); Bone-Club, 128 Wn.2d at 261-62. There is a strong presumption courts must be open at all stages of the trial. State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

Whether a trial court has violated the defendant's public trial right violation is a question of law this Court reviews de novo. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). A trial court may

[4] State v. Bone–Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

restrict the right only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Before a court can close any part of a trial, it must first apply the five factors set forth in Bone-Club. In re Personal Restraint of Orange, 152 Wn.2d 795, 806-07, 809, 100 P.3d 291 (2004). Violation of this right is presumed prejudicial even when not preserved by objection. State v. Wise, 176 Wn.2d 1, 16, 288 P.3d 1113 (2012).

"The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (Press-Enterprise I). Washington courts have repeatedly held that jury voir dire conducted in private violates the right to public trial. See, e.g., Wise, 176 Wn.2d at 15; State v. Paumier, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012); State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009) (Alexander, C.J., lead opinion); 167 Wn.2d at 231-36 (Fairhurst, J., concurring); State v. Erickson, 146 Wn. App. 200, 211, 189 P.3d 245 (2008), review denied, 176 Wn.2d 1031 (2013).

In Dunn's case, the parties exercised peremptory challenges at sidebar in the jury's presence. 1RP 111-12. The process was not transcribed. 1RP 112. The trial court did not first consider the Bone-Club factors before deciding the live peremptory challenge process should be

shielded from public sight and hearing. Neither party objected to this portion of jury selection. After the parties exercised their challenges, the trial court named in court those prospective jurors who had been excused. 1RP 112-13. About three hours later, the court filed a chart showing which party excused which prospective juror. Supp. CP __ (sub. no. 25, Struck Juror List, filed 1/8/2013); Supp. CP __ (sub. no. 24, Jury Trial Minutes, at 2 of 3, 1/8/2013).

This Court must first determine whether a criminal defendant's public trial right applies to the exercise of peremptory challenges. To decide whether a particular process must be open, this Court uses the "experience and logic" test formulated by the United States Supreme Court in Press–Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press-Enterprise II). Sublett, 176 Wn.2d at 73.

State v. Jones[5] is illuminating in this regard. In that case, during a trial recess, the court clerk randomly pulled names of four sitting jurors from a rotating cylinder to determine which would be alternates. The court announced the names of the four alternate jurors following closing arguments and excused these jurors. Jones, 175 Wn. App. at 95. The

[5] State v. Jones 175 Wn. App. 87, 303 P.3d 1084, petition for review pending, No. 89321-7 (2013).

alternate juror drawing happened off the record and outside of the trial proceedings. Jones, 175 Wn. App. at 96.

Jones challenged this process on appeal. Following Sublett, the court concluded that the Washington experience of alternate juror selection is connected to voir dire. Alternate juror selection, the court held, must be open to the public. Jones, 175 Wn. App. at 101.

As for the logic prong, the court wrote, "The issue is not that the drawing in this case was a result of manipulation or chicanery on the part of the court staff member who performed the task, but that the drawing could have been." Jones, 175 Wn. App. at 102. The court found that two of the purposes for the public trial right -- basic fairness to the defendant and reminding the trial court of the importance of its functions – were implicated. Id. The court held the secret random drawing raised important questions about "the overall fairness of the trial, and indicates that court personnel should be reminded of the importance of their duties." Id. The court therefore concluded that under the experience and logic test, a closure occurred. Id.

Finally, the court held that because the trial court did not apply the Bone-Club factors, it violated Jones' public trial right. Because such error is presumed prejudicial, a new trial was required. Id. at 1192-93.

Applying the Jones reasoning to Dunn's case dictates the same result. Under the "experience" prong, the court asks whether the process has historically been open to the press and general public. Sublett, 176 Wn.2d at 73. Washington's experience of providing for and exercising peremptory challenges is one "connected to the voir dire process for jury selection." See White v. Territory, 3 Wash. Terr. 397, 406, 19 P. 37 (1888) ("Our system provides for examination of persons called into the jury-box as to their qualifications to serve as such. The evidence is heard by the court, and the question of fact is decided by the court."); State v. Rutten, 13 Wash. 203, 204, 43 P. 30 (1895) (discussing remedy if trial court wrongfully compelled accused to exhaust peremptory challenges on prospective jurors who should have been dismissed for cause); State v. Rivera, 108 Wn. App. 645, 649-50, 32 P.3d 292 (2001) ("[P]eremptory challenge is a part of our common law heritage, and one that was already venerable in Blackstone's time."), review denied, 146 Wn.2d 1006 (2002), overruled on other grounds, Sublett, 176 Wn.2d at 71-72.

The exercise of peremptory challenges, like "for cause" challenges, is a traditional component of voir dire to which public trial rights attach. Wise, 176 Wn.2d at 11; State v. Wilson, 174 Wn. App. 328, 342-343, 298 P.3d 148 (2013).

Under the logic prong, courts consider the values served by open court proceedings, and ask "'whether public access plays a significant positive role in the functioning of the particular process in question.'" Sublett, 176 Wn.2d at 73 (quoting Press–Enterprise, 478 U.S. at 8). Open proceedings serve to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the defendant and the importance of their duties, to encourage witnesses to come forward, and to discourage perjury. Brightman, 155 Wn.2d at 514.

Just as did the secret random alternate juror selection in Jones, the secret peremptory challenge process used at Dunn's trial involved the first two purposes. The public lacked the assurance that Dunn and the excused prospective jurors were treated fairly. As well, requiring the parties to voice their peremptory challenges in public at the time they are made reminds them of the importance of the process and its effect on the panel chosen to sit in judgment.

Peremptory challenges permit the parties to strike prospective jurors "who are not challengeable for cause but in whom the parties may perceive bias or hostility-thereby eliminating extremes of partiality on both sides-and to assure the parties that the jury will decide on the basis of the evidence at trial and not otherwise." Rivera, 108 Wn. App. at 649-50

(citing United States v. Annigoni, 96 F.3d 1132, 1137 (9th Cir. 1996), overruled on other grounds, Rivera v. Illinois, 556 U.S. 148, 161-62, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009)). Regardless whether there are objections that require making a record, a transparent peremptory challenge process guards against arbitrary use of challenges for nefarious reasons that are not necessarily race- or gender-based, such as age or educational level.

The public nature of trials is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Wise, 176 Wn.2d at 6. "'Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges [and] lawyers . . . will perform their respective functions more responsibly in an open court than in secret proceedings.'" Id. at 17 (quoting Waller v. Georgia, 467 U.S. 39, 46 n.4, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). The peremptory challenge process squarely implicates those values.

Under the "experience and logic" test, therefore, the secret ballot method of exercising peremptory jurors in Dunn's case implicated his right to a public trial and constituted an unlawful closure.

Dunn anticipates the State may assert the proceeding was not closed because it occurred in the open courtroom. This reasoning ignores the purposes of the public trial right.

Though the courtroom itself remained open, the proceedings were not. Jurors were allowed to remain in the courtroom while the peremptory challenges were exercised, which demonstrates they were done in a way that those present would not be able to overhear. A proceeding the public can see but not hear adds nothing to its fairness. If the participants can communicate in code, by whispering, or under the cone of silence, the "public" nature of the proceeding is rendered a farce.

Furthermore, a closure occurs even when the courtroom is not physically closed if the proceeding at issue takes place in a manner that renders it inaccessible to public scrutiny. See State v. Slert, 169 Wn. App. 766, 774 n.11, 282 P.3d 101 (2012) ("if a side-bar conference was used to dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reasons and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview."), review granted, 176 Wn.2d 1031 (2013); State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011) (closure occurs when a juror is privately questioned in an inaccessible location); State v. Leyerle, 158 Wn. App. 474, 483, 242 P.3d

921 (2010) (moving questioning of juror to public hallway outside courtroom a closure even though courtroom remained open to public). Members of the public are no more able to approach the bench and listen to an intentionally private jury selection process than they are able to enter a locked courtroom, access the judge's chambers, or participate in a private hearing in a hallway. The practical effect is the same — the public is denied the opportunity to scrutinize events.

The State will also likely argue this Court should follow State v. Love,[6] which held exercising peremptory challenges outside the public view does not violate the right to public trial. This decision is poorly reasoned.

With respect to the experience prong, the Love court noted the absence of evidence that peremptory challenges were historically 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, before Bone-Club, there were likely many

[6] __ Wn. App. __, 309 P.3d 1209, 1214, petition for review pending, No. 89619-4 (2013).

common, but unconstitutional, practices that ended with issuance of that decision.

The Love court cites to one case, State v. Thomas,[7] 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 peremptory challenges violated the defendant's right to a 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. Until Love, Thomas had never been cited in a published Washington opinion for its holding regarding the secret exercise of peremptory challenges. Calling Thomas "strong evidence" is a misleading overstatement.

Regarding logic, the Love court could think of no way in which exercising peremptory challenges in public furthered the right to fair trial, concluding instead 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.

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[7] 16 Wn. App. 1, 553 P.2d 1357 (1976).

The court also held the written record protected the public's interest in peremptory challenges. Love, 309 Wn. App. at 1214. It appears from the court's description the parties used a chart similar to the one filed in Dunn's trial. Love, 309 Wn. App. at 1211 n.1.

But the later 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 State v. Sadler, 147 Wn. App. 97, 116, 193 P.3d 1108 (2008) ("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."), review denied, 176 Wn.2d 1032 (2013), overruled on other grounds, Sublett, 176 Wn.2d at 71-73.

While members of the public could discern after the fact which prospective jurors had been removed and by whom (assuming they knew to look in the court file), the public could not tell at the 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. See State v. Burch, 65 Wn. App. 828, 833-834, 830 P.2d 357 (1992) (identifying race and gender as protected classes); see also State v. Saintcalle, 178 Wn.2d 34, 41-42, 69, 85-88, 118-19, 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 cannot satisfy the right to a public trial. Members of the public would have to know the chart 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. This is not realistic.

The trial court did not consider the Bone-Club factors before conducting the private jury selection process at issue here. A trial court errs when it fails to conduct the Bone-Club test before closing a court proceeding to the public. Wise, 176 Wn.2d at 5, 12. The error violated Dunn's public trial right, which requires automatic reversal because it affects the framework within which the trial proceeds. Id. at 6, 13-14.

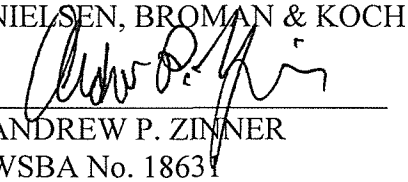
D. CONCLUSION

For the above reasons, this Court should reverse Dunn's convictions and remand for a new trial. Alternatively, this Court should reverse the firearm sentencing enhancement and remand for resentencing without the enhancement.

DATED this 18 day of December, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ANDREW P. ZINNER
WSBA No. 18631
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 44572-7-II
	)	
JONATHAN DUNN,	)	
	)	
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 18TH DAY OF DECEMBER, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JONATHAN DUNN
DOC NO. 876623
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF DECEMBER, 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

December 18, 2013 - 2:44 PM

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