NO. 94230-7

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON

RESPONDENT

V.

DON A. MOORE

PETITIONER,

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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A. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Should this Court accept discretionary review where no courtroom closure occurred and the record of peremptory challenges was part of the trial court record?

B. STATEMENT OF THE CASE

On April 20, 2013, the defendant murdered Bruce Molony. CP 56. The defendant was charged by information with first-degree premeditated murder RCW 9A.32.030(1)(a); and the special allegations of being armed with a deadly weapon other than a firearm, and a firearm pursuant to RCW 9.94A.825. *CP 81-83.*

On September 9, 2014, after jury questioning had concluded, and challenges for cause were made, the parties exercised peremptory challenges in open court. The parties noted their challenges on a jury-seating chart that was used as a "strike sheet". The strike sheet was made part of the record. RP 222-223. CP 215-221. See also Supplemental Clerk's Paper Index January 15, 2016 (The jury panel and strike sheets were filed 9/9/14).

The original strike sheet was continuously maintained in the clerk's file from 9/9/14. CP 204-214, 215-221; *see also* Supplemental Clerk's Papers Index dated Jan. 15, 2016 (stating jury panel and strike sheets were filed 9/9/2014). A *duplicate* jury

list was made by the clerk, indicating the challenges, and utilized by the clerk's office for processing payments. The duplicate list was kept in the clerk's box pending completion of those tasks. CP 204-214; Supplemental Clerk's Papers Index

The judge called the jurors who were not challenged, in order by juror number, to take seats in the jury box, leaving those subject to peremptory challenges seated. RP 223-225. No challenges or objections were made to either party's exercise of their peremptory challenges or the procedure used. RP 222-225.

The jury found the defendant guilty of first-degree murder and found the defendant was armed with a deadly weapon that was a knife with a blade longer than 3 inches, and a deadly weapon that was a pistol, revolver, or any other firearm. CP 55, 56.

C. ARGUMENT

1. Defendant has not established a basis for discretionary review of under RAP 13.4

RAP 13.5 states in part:

> (b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:
>
> > (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The defendant has not established any of the circumstances to accept discretionary review under RAP 13.4. The defendant's reliance upon *State v. Love*, 176 Wash. App. 911, 309 P.3d 1209 (2013), *aff'd,* 183 Wash. 2d 598, 354 P.3d 841 (2015), is misplaced. The defendant attempts to differentiate the current case from *Love*, *despite* the record, that showed the original jury strike sheets were made part of the record on the day jury selection was complete.

This Court has repeatedly refused to grant review of cases after *Love* where the same arguments were raised. *E.g., State v. Rife*, 194 Wash. App. 1016, *review denied,* 186 Wash. 2d 1027, 385 P.3d 114 (2016); *State v. Aho*, 196 Wash. App. 1036 (2016), *review denied,* No. 94023-1, 2017 WL 1190068 (Wash. Mar. 29, 2017); *State v. Effinger*, 194 Wash. App. 554, 558–59, 375 P.3d

701, 703 (2016), *review denied,* 187 Wash. 2d 1008, 386 P.3d 1098 (2017).

This Court should deny the defendant's motion for discretionary review.

2. Jury selection occurred in an open courtroom and defendant failed to show any closure.

a. *RAP 2.5(a)(3) Should Be Applied to Right to Public Trial Cases, As It Is To Other Constitutional Rights.*

Ordinarily an appellate court will consider a constitutional claim for the first time on appeal only if the alleged error is manifest and truly of constitutional dimension. *State v. McFarland*, 127 Wash. 2d 322, 332–33, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995); RAP 2.5(a)(3). Such a restriction is necessary because the failure to raise an objection in the trial court "deprives the trial court of [its] opportunity to prevent or cure the error" thereby undermining the primacy of the trial court. *State v. Kirkman*, 159 Wash. 2d 918, 926, 155 P.3d 125 (2007); *State v. Scott*, 110 Wash. 2d 682, 687, 757 P.2d 492 (1988) (the constitutional error exception in RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below). A defendant

attempting to raise a claim for the first time on appeal must show both a constitutional error and prejudice to his rights. *Kirkman*, 159 Wash. 2d at 926–27. A defendant can demonstrate actual prejudice on appeal by making a "plausible showing ... that the asserted error had practical and identifiable consequences in the trial of the case." *Kirkman*, 159 Wash. 2d at 935.

Prior to the adoption of RAP 2.5, this Court held that a closed courtroom claim could be raised on appeal even if there was no objection on this ground in the trial court. *State v. Marsh*, 126 Wash. 142, 145–46, 217, 217 P. 705 (1923) P.705 (1923).

> At common law, constitutional issues not raised in the trial court were not considered on appeal, with just two exceptions. If a defendant's constitutional rights in a criminal trial were violated, such issue could be raised for the first time on appeal. Secondly, where a party raised a constitutional challenge affecting the jurisdiction of the trial court, an appellate court could also reach the issue.

State v. WWJ Corp., 138 Wash. 2d 595, 601, 980 P.2d 1257, 1260 (1999) (citations omitted). These common law rules were replaced in 1976 by the adoption of the Rules of Appellate procedure, and specifically RAP 2.5(a). *WWJ Corp.*, 138 Wash. 2d at 601. As noted in a recent opinion, see *State v. Beskurt*, 176 Wash. 2d 441, 449–50, 293 P.3d 1159 (2013) (Madsen, J., concurring), when this Court decided *State v. Bone-Club*, 128 Wash. 2d 254, 906 P.2d

325 (1995) in 1995, it cited to the rule in *Marsh*, 126 Wash. 142 without taking into consideration of the impact of RAP 2.5(a)(3). See *Bone-Club*, 128 Wash. 2d at 257. This failure to consider the impact of RAP 2.5(a)(3) has persisted in other decisions. *See, e.g., State v. Brightman*, 155 Wash. 2d 506, 514–15, 122 P.3d 150 (2005).

As three justices concluded, the appellate courts should refuse to apply a rule that conflicts with the Rules of Appellate Procedure and subverts the intent of RAP 2.5(a). *Beskurt*, 176 Wash. 2d at 449–51 (Madsen, J., concurring). This Court in *Bone-Club*, 128 Wash. 2d 254 did not consider the change effected by RAP 2.5(a); its holding that a public trial error need not be raised in the trial court to be considered on appeal should be corrected.

Respect for stare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned. *State v. Devin*, 158 Wash. 2d 157, 168, 142 P.3d 599 (2006). In this instance, the rule is incorrect because it contradicts the spirit and letter of the Rules of Appellate Procedure. It is harmful in at least three respects: 1) the trial court is denied the opportunity to correct any error when no objection is required to preserve the

issue for review; 2) it allows a defendant to participate in procedures and practices in the trial court that are to his benefit, yet still claim that these practices are the basis for error in the appellate court; and 3) as the *Marsh* rule does not require a defendant to show a manifest error or any actual prejudice before obtaining new trial, public respect for the court is diminished and judicial resources are wasted when retrial is given as a remedy when it is evident from the record that there is no prejudice to the defendant.

These harms can be seen in the case now before the court. The trial court had the parties indicate their peremptory challenges in writing on a paper that was passed back and forth; neither party voiced an objection to this procedure. The defendant exercised his peremptory challenges thereby eliminating venire persons he did not want on his jury. Had the defendant objected to this procedure and argued it constituted a violation of his right to an open courtroom, the trial court might have opted for different procedure just to eliminate a potential claim. Defendant cannot articulate any practical and identifiable negative consequences to his trial or show that he was prejudiced by the use of the written process to indicate peremptory challenges. His failure to object to what he now claims

was a courtroom closure and a denial of his right to a public trial, coupled with his inability to establish resulting actual prejudice, should preclude review. Despite the fact that he cannot show any actual prejudice from the procedures used, defendant nevertheless, argues that he is entitled to a new trial. This is an abuse of the judicial process that should not be condoned.

This Court should find that defendant's failure to object brings this issue under RAP 2.5(a)(3) and that he has failed to show an issue of truly constitutional magnitude that has caused him actual prejudice. As such, this Court should refuse to review the claim.

b. The Courtroom Was Open Throughout Voir Dire Proceedings.

A criminal defendant's right to a public trial is found in Wash. Const. art. I, § 22, and the Sixth Amendment to the United States Constitution; both provide a criminal defendant the right to a "public trial by an impartial jury". The state constitution also provides that "[j]ustice in all cases shall be administered openly," which grants the public an interest in open, accessible proceedings, similar to rights granted in the First Amendment of the federal constitution. Wash. Const. art. I, § 10; *State v. Lormor*, 172 Wash. 2d 85, 91,

257 P.3d 624 (2011); *Seattle Times Co. v. Ishikawa*, 97 Wash. 2d 30, 36, 640 P.2d 716 (1982); *Press-Enter. Co. v. Superior Court of California, Riverside Cty.*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). The public trial right "serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." *State v. Sublett*, 176 Wash. 2d 58, 72, 292 P.3d 715 (2012). "There is a strong presumption that courts are to be open at all trial stages." *Lormor*, 172 Wash. 2d at 90. The right to a public trial includes voir dire. *Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010).

Whether the right to a public trial has been violated is a question of law reviewed de novo. *State v. Momah*, 167 Wash. 2d 140, 147, 217 P.3d 321 (2009). The right to a public trial is violated when: 1) the public is fully excluded from proceedings within a courtroom, *Bone-Club*, 128 Wash. 2d at 257 (no spectators allowed in courtroom during a suppression hearing) and *State v. Easterling*, 157 Wash. 2d 167, 172, 137 P.3d 825 (2006) (all spectators, including co-defendant and his counsel, excluded from the courtroom while co-defendant plea-bargained); 2) the entire voir

dire is closed to all spectators, *Brightman*, 155 Wash. 2d at 511; 3) and is implicated when individual jurors are privately questioned in chambers, see *Momah*, 167 Wash. 2d at 146 and *State v. Strode*, 167 Wash. 2d 222, 224, 217 P.3d 310 (2009) (jury selection is conducted in chambers rather than in an open courtroom without consideration of the *Bone-Club* factors).

When faced with a claim that a trial court has improperly closed a courtroom, the Washington Supreme Court has held that the reviewing court determines the nature of the closure by the presumptive effect of the plain language of the court's ruling, not by the ruling's actual effect. *In re Orange*, 152 Wash. 2d 795, 807–8, 100 P.3d 291 (2004), *as amended on denial of reconsideration* (Jan. 20, 2005), *as amended on denial of reconsideration* (Jan. 20, 2005).

In the case now before the Court, defendant argues that the procedure used by the court for exercising peremptory challenges constituted a courtroom closure. The record shows the following occurred: At the close of questioning, the attorneys started the peremptory challenge process. Next, the court read off the names of the venire persons who would sit as jurors on the case. The

written sheet indicating the peremptory challenges used by each side was filed in the clerk's file, thereby making it a public document. No objections were raised regarding either party's use of peremptory challenges.

Defendant has failed to identify any ruling of the court that closed the courtroom to any person. All jury selection was conducted in the courtroom as opposed to the judge's chambers or the jury room. Defendant can point to no Washington case that has found a courtroom closure under these circumstances. Rather, defendant argues that conducting the peremptory challenge process in writing effectively "closed" the courtroom. [1]

To decide whether a particular process must be open to the press and the general public, the court in *Sublett*, 176 Wash. 2d 58 adopted the "experience and logic" test formulated by the United States Supreme Court in *Press-Enter. Co. v. Superior Court of California for Riverside Cty.*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986). *Sublett*, 176 Wash. 2d at 73, 141.

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[1] The right to a public trial serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. *Brightman*, 155 Wash. 2d at 514 (citing *Peterson v. Williams*, 85 F.3d 39, 43 (2d Cir. 1996)). But not every interaction between the court, counsel, and defendants will implicate the right to a public trial. *Sublett*, 176 Wash. 2d at 71.

> The first part of the test, the experience prong, asks, "whether the place and process have historically been open to the press and general public". The logic prong asks, "whether public access plays a significant positive role in the functioning of the particular process in question". If the answer to both is yes, the public trial right attaches, and the *Waller* or *Bone-Club* factors must be considered before the proceeding may be closed to the public. We agree with this approach and adopt it in these circumstances.

Sublett, 176 Wash. 2d at 73. Applying that test, the court held that no violation of Sublett's right to a public trial occurred when the court considered a jury question in chambers. *Sublett*, 176 Wash. 2d at 74–77. "None of the values served by the public trial right is violated under the facts of this case... The appearance of fairness is satisfied by having the question, answer, and any objections placed on the record." *Sublett*, 176 Wash. 2d at 77.

Division III of the Court of Appeals addressed whether challenges for cause done in a sidebar constituted a courtroom closure under the experience and logic test in *Love*, 176 Wash. App. 911. As to the experience prong, the court concluded:

> The history review confirms that in over 140 years of cause and peremptory challenges in this state, there is little evidence of the public exercise of such challenges, and some evidence that they are conducted privately. Our experience does not require that the exercise of these challenges be conducted in public.

Love, 176 Wash. App. at 919. Under the logic prong, the court found that none of the purposes of the public trial right were furthered by a party's actions is making a challenge for cause or a peremptory challenge as a challenge for cause creates an issue of law for the judge to decide and a peremptory challenge "presents no questions of public oversight." *Love*, 176 Wash. App. 911. The court concluded that use of a side bar to conduct challenges for cause did not constitute a courtroom closure. *Love*, 176 Wash. App. at 920.

Upon review, this Court, in *Love*, 183 Wash. 2d at 607, found that observers could watch the trial judge and counsel ask questions of potential jurors, listen to the answers to those questions, see counsel exercise challenges at the bench and on paper, and ultimately evaluate the empaneled jury. The transcript of the discussion about for cause challenges and the struck juror sheet showing the peremptory challenges are both publically available.[2] The public was present for and could scrutinize the

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[2] Appellant appears to assert based on the comment that "*The transcript of the discussion about for cause challenges and the struck juror sheet showing the peremptory challenges are both publically available*" from *Love*, 183 Wash. 2d at 183 Wn.2d at, 607, that to comport with public trial requirements, these documents would have to be *immediately* filed and available. Clearly, this argument does not follow from the comment in *Love*, 183 Wash. 2d 598. Transcripts from trial proceedings, and documents created or discussed during trial, would rarely be immediately available for public inspection.

selection of the jury from start to finish, affording him the safeguards of the public trial right missing in cases where we found closures of jury section. The procedures used comported with the minimum guarantees of the public trial right and find no closure here. *Love*, 183 Wash. 2d at 607.

In the present case, defendant does not point to any ruling of the court that excluded spectators or any other person from the courtroom during the voir dire process. The record indicates that all of voir dire and the exercise of peremptory challenges were carried out in an open courtroom. Peremptory challenges were made by the attorneys in open court, albeit by a written process. Presumably, defendant could see the peremptory sheet and discuss the process with his attorney while it was going on. The written record of the process was reviewed by the court and filed in the clerk's file, making it available for public inspection. None of the peremptory challenges were contested and there was no need for the court to make any decisions on the peremptory challenges. The record offers no basis to assume that anything occurred during this process other than the written communication, among counsel and the court, of the names of the prospective jurors each counsel had decided to excuse by the right of peremptory challenge.

Anyone can subsequently look at the peremptory challenge sheet and see exactly which party exercised which peremptory against which prospective juror and in what order. [3]

Defendant has failed to identify any closure of the courtroom during voir dire and fails to show how the procedures used in an open court undermined the purposes of the public trial right. Anyone sitting in the courtroom would know which jurors were excused for cause and why. The parties carefully recorded the names of the prospective jurors who were removed by peremptory challenge, as well as the order in which each challenge was made, and the party who made it. This document is easily understood, and it was made part of the court record, available for public scrutiny. These procedures satisfied the court's obligation to ensure the open administration of justice.

c. Defendant did not present competent evidence to support the claim that the strike sheets were not part of the publicly available file, and his claim is groundless in light of the actual record.

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[3] Additionally, both the prosecution and defense are forbidden from removing a juror with a peremptory challenge for an improper purpose. Thus, if there was a concern that a juror was being removed for an improper reason, it is immaterial which party exercised a peremptory against that juror. Any potential juror who felt that he or she was being improperly removed from the jury could raise his or her concern with the trial court. Under the written process used here, the court would know who had exercised its peremptory against that person and could decide whether it was necessary for that party to explain its reasons for doing so. The procedure used below protects the values of the public trial right.

The record offered by the defendant does not support the absence of the strike sheet, or a delay in placing the strike sheet, in the clerk's file. Defendant asserts the absence of the strike sheet based on reference to the clerk's electronic docket and the attorney's email exchanges with a staff member at the clerk's office. The emails and the docket are not the clerk's file, or the official record of the trial. From the emails (CP 178-81), it is apparent that Appellant's attorney did not actually review the clerk's file, but rather sent an email asking a staff person to provide docket numbers. The attorney was advised the strike sheets were not input into the "docketing" so there was no assigned docket number. The attorney again requested docket numbers, but did still did not apparently seek review of the actual physical file, or ask if the requested documents were contained within the clerk's physical file. See CP 178-81.

The accuracy of, and reliance upon, docket notations is questionable; as the notes do not indicated who made the notations, or whether they were made in court or out of court.[4] The

[4]The ACORDS docket, is not a complete or official record of the file, and is not determinative of the documents contained within the physical file. As an example, reference to a "Letter review" between the 12/11/13 and 12/16/13 does not include a separate docket entry for the letter that was reviewed. Yet, defendant's assertion implies that his preferred electronic access to ACORDS should somehow create a presumption that ACORDS *is* the complete and official court record.

notes and emails are not sworn or signed, nor is their accuracy affirmed in any manner by any party.

The records offered by defendant are hearsay and would not be admissible under the evidence rules. Moreover, they do not satisfy any standard of admissibility under ER 803(10) - Absence of public record or entry. The rule requires such evidence be in the form of a certification in accordance with ER 902 (self-authentication), or testimony. The proponent of the evidence is required to establish by certificate under ER 902 or by live testimony that a diligent search failed to disclose the record in question.[5] The records offered are not sufficient to prove the absence of the record.

Jury selection was part of trial record. The issue raised by defendant was not only speculative, but was *contradicted* by the presence of the *actual* records in the clerk's physical file. The clerk's file is the court record, and it is notice to the world of what it contains and all interested persons have access to it. *Shumate v. Ashley*, 46 Wash. 2d 156, 157, 278 P.2d 787, 788 (1955).

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[5] The records offered are also not the type permitted on review under RAP 9.1(a).

The original strike sheets were properly made part of the clerk's physical file on September 9, 2014, the day the jury was selected.[6] RCW 2.32.050 sets out the powers of court clerks, and RCW 36.23.030 sets out the records to be kept by the Superior Court Clerk.[7] The strike sheets are not formal pleadings, orders, decrees, or judgments, and not delivered for the purpose of filing per court rule or statute. As such, there is not a requirement to assign them a "docket" number. The strike sheets would fall within the "records, files, and other books and papers appertaining to the court" that are to be kept by the clerk. The absence of an assigned

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[6] A duplicate of the strike sheet was also prepared and used by the Clerk to pay jury fees. It is this duplicate that was kept by the clerk (and that was *also* made part of the record at a later date) that defendant uses to try to create an argument that the original strike sheets were not made part of the record in a timely manner.

[7] RCW 2.32.050, states in part: ... it is the duty...of each county clerk for each of the courts for which he or she is clerk:...(2) To record the proceedings of the court; (3) To keep the records, files, and other books and papers appertaining to the court; (4) To file all papers delivered to him or her *for that purpose* in any action or proceeding in the court as directed by court rule or statute (emphasis added);...
RCW 36.23.030 states in part The clerk of the superior court ...shall keep the following records: (1) A record in which he or she shall enter all appearances and the time of filing *all pleadings* in any cause; (2) A docket in which before every session, he or she shall enter the titles of all causes pending before the court at that session in the order in which they were commenced, beginning with criminal cases, noting in separate columns the names of the attorneys, the character of the action, *the pleadings on which it stands* at the commencement of the session. One copy of this docket shall be furnished for the use of the court and another for the use of the members of the bar; (3) A record for each session in which he or she shall enter the names of witnesses and jurors, with time of attendance, distance of travel, and whatever else is necessary to enable him or her to make out a complete cost bill; (4) A record in which he or she shall record the daily proceedings of the court, and *enter all verdicts, orders, judgments, and decisions thereof, which may, as provided by local court rule, be signed by the judge*; but the court shall have full control of all entries in the record at any time during the session in which they were made;...(emphasis added)...

docket number is not determinative of whether or not the strike sheet is part of the record. The strike sheets were in the publicly available file. Defendant cannot show with *any* credible evidence that they were unavailable.

E. CONCLUSION

For the forgoing reasons, the claims made on appeal should be denied and the defendant's conviction and sentence affirmed.

Dated this 6th day of April, 2017

Respectfully Submitted by:

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I, Karl Sloan, do hereby certify under penalty of perjury that on April 6, 2017, I provided by email service a true and correct copy of the Answer to Petition for Discretionary Review:

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