

No. 32925-9-III

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

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Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Respondent,

v.

DON ARTHUR MOORE,

Appellant.

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

The Honorable Judge Christopher E. Culp

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION

Appellant Don Arthur Moore accepts this opportunity to reply to the State's brief. Mr. Moore requests that the Court refer to his opening brief for issues not addressed in this reply.

B. ARGUMENT IN REPLY

1. The exercise of peremptory challenges silently by writing violated Mr. Moore's constitutional right to a public trial.

This argument pertains to Issue 1 raised in Mr. Moore's opening brief. Mr. Moore argues that because the paper list of peremptory challenges was not filed in the trial court for more than one year after the jury trial, the written peremptory challenges done here were not publically available, and therefore, not consistent with the public trial. *See* Amended Appellant's Opening Brief pgs. 18-24; *see also State v. Love*, 183 Wn.2d 598, 607, 354 P.3d 841 (2015).

a. The constitutional right to a public trial may be raised for the first time on appeal, without a showing of actual prejudice.

In its response brief, the State argues RAP 2.5(a)(3) should be applied to constitutional right to a public trial cases, allowing appellate review for the first time on appeal only if the alleged error is both constitutional and manifest, requiring a showing of actual prejudice. *See* State's Brief pgs. 20-24. To support its argument, the State relies upon a concurring opinion from our Supreme Court. *See State v. Beskurt*, 176 Wn.2d 441, 449-456, 293 P.3d 1159 (2013).

However, a concurring opinion from our Supreme Court is not binding authority. *See, e.g., State v. Willis*, 153 Wn.2d 366, 373, 103 P.3d 1213 (2005) (where the defendant relied upon a concurrence to support his argument, concluding the case does not support his argument, because a concurrence is not binding). Thus, *Beskurt* does not support the State's argument. *See Beskurt*, 176 Wn.2d at 449-456. Our Supreme Court has repeatedly held that a defendant may raise the constitutional right to a public trial issue for the first time on appeal. *See, e.g., State v. Bone-Club*, 128 Wn.2d 254, 257, 906 P.2d 325 (1995) (citing *State v. Marsh*, 126 Wash. 142, 146-47, 217 P. 705 (1923)); *State v. Brightman*, 155 Wn.2d 506, 514-15, 122 P.3d 150 (2005); *State v. Paumier*, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012); *State v. Wise*, 176 Wn.2d 1, 9, 28 P.3d 1113 (2012); *State v. Koss*, 181 Wn.2d 493, 498, 334 P.3d 1042 (2014); *State v. Andy*, 182 Wn.2d 294, 301, 340 P.3d 840 (2014).

In addition, our Supreme Court has repeatedly rejected the arguments the State makes here. *See State's Brief pgs. 20-24; see also State v. Shearer*, 181 Wn.2d 564, 569-72, 334 P.3d 1078 (2014); *State v. Sublett*, 176 Wn.2d 58, 123-28, 150-56, 292 P.3d 715 (2012); *Paumier*, 176 Wn.2d at 36-37, 52-56; *Wise*, 176 Wn.2d at 15, 25.

Mr. Moore requests this Court follow established precedent from our Supreme Court and consider his constitutional right to a public trial issue for the first time on appeal, without requiring a showing of actual prejudice.

b. A courtroom closure occurred during voir dire.

In its response brief, the State argues no courtroom closure occurred during voir dire. *See* State's Brief pgs. 24-30.

Mr. Moore's argument here is that the written peremptory challenges made on the struck juror sheet constituted a courtroom closure. *See Love*, 183 Wn.2d at 604, 606-07. In contrast to the facts in *Love*, the written peremptory challenges conducted here are not consistent with the public trial right, because they were not filed in the public record. *See Love*, 183 Wn.2d at 607. Because the paper list of peremptory challenges was not filed in the trial court for more than one year after the jury trial, the written peremptory challenges done here are not consistent with the public trial right. *Cf. Love*, 183 Wn.2d at 607. It was only after Mr. Moore raised this public trial argument on appeal that the written peremptory challenges were filed in the trial court. (CP 179-181, 199, 207-221, 224-235). Had this argument not been raised on appeal, it is certainly likely that the written peremptory challenges would not have been filed in the trial court.

The State asserts "[t]he strike sheet was made part of the record." *See* State's Brief pg. 18. The State asserts the strike sheet was filed on September 9, 2014, the date of voir dire, based upon the date of filing listed on the Supplemental Clerk's Papers Index filed on January 15, 2016. *See* State's Brief pg. 18. However, the strike sheets themselves are not dated-stamped with a filing date. (CP 215-221). They do contain a date of "9/9/2014" in the upper right-hand corner, but this does not indicate the documents were filed

on this date. (CP 215-221). Had the strike sheets been filed on September 9, 2014, so that they would be publicly available, there would have been a date stamp on the document. The fact that the strike sheets themselves are not date-stamped supports Mr. Moore's argument that these documents were not publicly available. (CP 215-221). In addition, the trial court docket shows that as of September 10, 2015, the strike sheets were not filed in the trial court. (CP 224-235).

The State argues "[t]he written sheet indicating the peremptory challenges used by each side was *filed in the clerk's file*, thereby making it a public document." *See* State's Brief pg. 26 (emphasis added). It appears the State attempts to argue there were two versions of the juror strike sheets: an "original strike sheet" maintained in the "clerk's file," which the State identifies as CP 215-221, and a "duplicate" list that the clerk made, indicating the peremptory challenges and utilized by the clerk's office for processing payments, which the State identifies as CP 209-214. *See* State's Brief pg. 18, n. 16. It appears this may be an attempt by the State to explain the emails between the State and the Okanogan County Clerk. (CP 207-208).

However, when the State emailed the Okanogan County Clerk on September 17, 2015, asking if the struck juror sheets are either filed with the court or made part of the court file, the Clerk's office only sent the State what it refers to as the "duplicate" list. (CP 207-214). No mention was made of the "original strike sheet" the State now claims was maintained in the "clerk's file." (CP 215-221). Presumably, if the "original strike sheet" was

maintained in the “clerk’s file,” as the State now asserts, why didn’t the clerk herself, Charleen Groomes, respond to the Mr. Sloan’s email inquiry by informing him of this fact? (CP 207-208). Instead, this “original strike sheet” did not appear until it was filed in trial court as trial docket number 140.1, sometime after September 10, 2015 and before December 15, 2015. (CP 199, 215-222, 224-235). Contrary to the arguments made by the State here, the struck juror sheets were not filed in the trial court until Mr. Moore raised this public trial issue on appeal. (CP 179-181, 199, 207-221, 224-235). Furthermore, juror strike sheets “found . . . in Charleen's box separated from the other case documents[]” were not publically available. (CP 208); *see also Love*, 183 Wn.2d at 607. Presumably, the contents of a court clerk’s personal inbox are not available for public viewing.

The State argues “[a]nyone can subsequently look at the peremptory challenge sheet and see exactly which party exercised which peremptory again which prospective juror and in what order.” *See State’s Brief* pg. 29. Mr. Moore disagrees with this statement. “Anyone” could not look at the peremptory challenge sheet following voir dire. Over one year after voir dire, Mr. Moore’s appellate counsel attempted to look at the peremptory challenge sheet, and was unable to obtain a copy. (CP 179-181, 224-235). This does not meet the requirement set forth in *Love* that the document be available for public scrutiny. *See Love*, 183 Wn.2d at 607.

c. Mr. Moore supplemented the appellate record with evidence sufficient to show the paper list of peremptory was not filed in the trial court for more than one year after the jury trial.

The State argues Mr. Moore does not present competent evidence to support the claim that the juror strike sheets were not part of the publicly available file. *See* State's Brief pgs. 30-33. The State argues the trial court docket and emails relied upon by Mr. Moore "are not the clerk's file or the official record of the trial." *See* State's Brief pg. 30.

The documents relied upon by Mr. Moore to support his public trial argument are now part of the appellate record. (CP 236-239). A Commissioner of this Court granted Mr. Moore's motions to supplement the appellate record. (CP 236-239). The State did not move to modify the Commissioner's Ruling, and therefore, should not now be permitted to challenge the substance of the ruling. *See* RAP 17.7 (governing objections to a Commissioner's ruling); *see also* *Detention of Broer v. State*, 93 Wn. App. 852, 857, 957 P.2d 281 (1998) (stating "[i]f an aggrieved party fails to seek modification of a commissioner's ruling within the time permitted by RAP 17.7, the ruling becomes a final decision of this court."). Therefore, this Court should consider the documents in the supplemental clerk's papers in deciding whether Mr. Moore's constitutional right to public trial was violated. (CP 166-239).

The State argues "there is not a requirement to assign them [the juror strike sheets] a "docket" number. *See* State's Brief pg. 32. The State further argues "[t]he absence of an assigned docket number is not

determinative of whether or not the strike sheet is part of the record.” *See* State’s Brief pg. 32.

However, where a county assigns subnumbers to documents filed in the trial court, the designation of clerk’s papers must refer to the subnumber. *See* RAP 9.6(b)(2) (stating “[e]ach designation or supplement shall specify the full title of the pleading, the date filed, and, in counties where subnumbers are used, the clerk’s subnumber.”). Okanogan County uses subnumbers. (CP 182-203, 224-235). Therefore, in order for appellate counsel to designate trial court documents as Clerk’s Papers for purposes of the appeal, they must be assigned a subnumber. *See* RAP 9.6(b)(2).

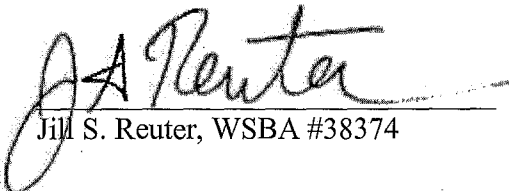
If an appellate attorney cannot designate a document from the trial court for purposes of appellate review, then a document cannot be considered publically available. If a document is not readily available to appellate counsel, and/or able to transfer to the appellate courts for purposes of appellate review, then a document most certainly is not available to the general public. Thus, because the paper list of peremptory challenges was not filed in the trial court, and assigned a subnumber, for more than one year after the jury trial, the list was not publically available. *See Love*, 183 Wn.2d at 607.

C. CONCLUSION

Based upon the arguments set forth above and those set forth in Mr. Moore's opening brief, his conviction should be reversed and the case remanded for a new trial.

At a minimum, the firearm enhancement should be vacated and the case should be remanded for resentencing on two deadly weapon sentencing enhancements.

Respectfully submitted this 1st day of June, 2016.


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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 32925-9-III
vs.)
DON ARTHUR MOORE) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Jill S. Reuter, of counsel for Nichols Law Firm, PLLC, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on June 1, 2016, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the attached Appellant's Reply Brief to:

Don Arthur Moore, DOC #960633
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

Having obtained prior permission from the Okanogan County Prosecutor's Office, I also served the Respondent State of Washington at ksloan@co.okanogan.wa.us and sfield@co.okanogan.wa.us using Division III's e-service feature.

Dated this 1st day of June, 2016.


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