

NO. 69273-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROBERT GORDON SHAVER, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA LINDE  
THE HONORABLE CATHERINE SHAFFER

**BRIEF OF RESPONDENT**

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

GRACE ARIEL WIENER  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

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**A. ISSUES**

1. To establish a violation of public trial rights, a defendant must show: 1) that experience and logic illustrate that the challenged event implicated the core values of the public trial right, and 2) if so, that the trial court failed to conduct a Bone-Club analysis and make findings on the record before closing the courtroom. During jury selection, both counsel wrote peremptory challenges on paper and the court then read aloud the list of challenged jurors without designating which lawyer struck which juror. Is the identity of the challenging lawyer part of the core value of the public trial right when the entire jury selection process, including the exercise of peremptory challenges, occurred in open court and the peremptory challenge list was filed in the public record?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged Robert Gordon Shaver, Jr. with the following charges: stalking-domestic violence (DV), burglary in the first degree-DV, unlawful imprisonment-DV, assault in the third degree-DV, and 2 counts of misdemeanor violation of a court

order-DV. CP 14-18; 1RP 105-06<sup>1</sup>. The felony offenses (burglary, unlawful imprisonment, and assault) were filed with the aggravating factor of being part of an ongoing pattern of psychological, physical or sexual abuse of the same or multiple victims. Id., RCW 9.94A.535(3)(h)(i).

The Honorable Barbara Linde received the case for trial on March 28, 2012. 1RP 19. The jury convicted Shaver of all charges, except the burglary. CP 69-76; 1RP 927-28. The trial court declared a mistrial on the burglary in the first degree-DV charge since the jury was unable to reach a unanimous verdict. CP 77; 1RP 929. After the first day of the burglary retrial, Shaver pled guilty to an amended charge of second degree burglary-DV on July 26, 2012. CP 80-93; 5RP 2-11.

At sentencing on August 3, 2012, Judge Linde imposed 56 months incarceration and a ten year no contact order prohibiting Shaver from having contact with the victim. CP 94-104; 1RP 930-49. Shaver timely appealed. CP 106.

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<sup>1</sup> The Verbatim Report of Proceedings consists of ten volumes, which will be referenced as in the appellant's brief.

## 2. SUBSTANTIVE FACTS

### a. Facts Of The Case

Shaver and victim Chun-Mei Huang dated for approximately five months, until Huang ended the relationship around September 5, 2011. CP 6. Between September 5<sup>th</sup> and September 25<sup>th</sup> of that year, Shaver tampered with Huang's vehicle and sent her repeated text and email messages, including on one occasion that he had ingested painkillers and sleeping pills to kill himself. CP 6-9.

In the early morning hours of September 25, 2011, Shaver broke into Huang's apartment, climbed on top of her in bed, and struck her in the head and face with a prod-style taser. CP 9-11. As Huang attempted to wrestle Shaver off of her, the two fell off the bed onto the floor. Id. Shaver shoved Huang's head face down into the carpet and bound her hands and feet together with clothing. Id. When Huang tried to yell for help, Shaver stuffed clothing into her mouth, gagging her and making it difficult for her to breathe. Id.

During the thirty minutes Huang remained bound on the floor with Shaver on her back, Shaver talked about killing himself and commented about throwing Huang into the water while she was tied up. CP 10. Huang spoke nicely to Shaver, expressed being in

pain, and offered him food and coffee to try to soothe him. CP 10. Shaver eventually untied the restraints and got off of Huang's back.

Over the next four hours, Shaver remained at Huang's apartment and discussed many topics with Huang, including his method for breaking into Huang's apartment and the protection order that she had recently taken out against him. CP 10-11. Huang continued to speak nicely and offer food or coffee to Shaver, fearing he would assault her again at any moment. CP 10. Shaver eventually tried to clean up traces of his presence and left. CP 10-11. After this incident, Shaver repeatedly contacted Huang via text, phone, and email in violation of the protection order against him. CP 11-12.

b. Facts Pertaining To Peremptory Challenge Selection

During the second day of jury selection, the trial court inquired of the prosecutor and Shaver's defense counsel as to whether they were "prepared to do peremptories on paper passing

it back and forth,” as they had discussed.<sup>2</sup> 1RP 176. Both counsel indicated they would be prepared to do so. Id.

After each counsel had two voir dire rounds, the judge explained to the jury the next steps in the process:

“[T]he parties are going to inform the court here shortly, after they’ve had a chance to go over and consider your answers and consider the qualities they’re looking for in this particular case for this particular jury. Once they have made their decisions, they will hand that up to the court and I’ll announce then who the final participants in this jury will be. But rather than not use this time well, I’m going to go ahead and read you some general instructions and these apply especially to those of you who will be selected to serve on this jury. For those who ultimately don’t, you won’t need to abide by these comments, but again just to spend the time well while we have this down time.”

3RP 51.

After reading preliminary instructions, the trial court read aloud on the record the list of the twelve jury venire members who had been excused by the parties, but did not identify who struck which prospective juror. 3RP 58-59. Thirteen members were seated and sworn in to hear Shaver’s case. 3RP 58-59.

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<sup>2</sup> On Thursday, March 29, 2011, prior to the first panel of jurors being brought to the courtroom, the judge and counsel discussed voir dire and jury selection from 10:05 a.m. to 10:24 a.m. This discussion was not transcribed. 1RP 149.

**C. ARGUMENT**

**1. THE TRIAL COURT'S PEREMPTORY CHALLENGE PROCESS PRESERVED THE FOUNDATIONAL PRINCIPLE OF AN OPEN JUSTICE SYSTEM**

Shaver contends that the trial court violated his constitutional right to a public trial by not conducting a Bone-Club<sup>3</sup> analysis before “having peremptory challenges conducted privately” and that, because of the manner in which peremptory challenges were made, it was not readily apparent to the jurors or the public which party made which peremptory strike. Appellant’s Brief at 2. This argument should be rejected. The public trial right did not attach to the identity of the lawyer exercising any given peremptory challenges because identifying the challenging lawyer does not implicate the core values of the public trial right. Therefore, Shaver has not established that a closure or public trial right violation occurred. His argument should be rejected and his conviction affirmed.

Whether the constitutional right to a public trial has been violated is a question of law, subject to de novo review on direct appeal. Bone-Club, 128 Wn.2d at 256. A criminal defendant’s right to a public trial is found in article I, section 22 of the Washington

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<sup>3</sup> State v. Bone-Club, 128 Wn.2d 254, 256, 906 P.2d 325 (1995).

State Constitution and the Sixth Amendment to the United States Constitution, both of which provide a criminal defendant with a “public trial by an impartial jury.” Additionally, article I, section 10 of Washington’s Constitution provides that “[j]ustice in all cases shall be administered openly,” granting both the defendant and the public an interest in open, accessible proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). There is a strong presumption that courts are to be open at all stages of trial. State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012). The right to a public trial ensures a fair trial, reminds the prosecutor and judge of their responsibilities to the accused and the importance of their functions, encourages witnesses to come forward, and discourages perjury. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

However, the public trial right is not absolute and all-encompassing; a trial court may close the courtroom under certain circumstances. State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009); State v. Strode, 167 Wn.2d 222, 226, 217 P.3d 310 (2009). The public trial right may be overcome to serve an overriding interest based on findings that closure is essential and narrowly tailored to preserve higher values. Press-Enterprise Co.

v. Superior Court of California, 464 U.S. 501, 510, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).

The first part of determining whether a defendant's constitutional right to a public trial was violated is to analyze whether a closure that triggers the public trial right occurred. Sublett, 176 Wn.2d at 71. A closure of a trial "occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave"; however, not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if the courtroom is closed to the public during the interaction. Id. (citing State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011)).

The United States Supreme Court formulated the experience and logic test to evaluate whether, under considerations of experience and logic, the core values of the public trial right are implicated by a particular proceeding, and thus whether the public trial right attached to that proceeding. Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1, 8-10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986). 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." Id. at 8. The second part of the test,

the logic prong, asks “whether public access plays a significant positive role in the functioning of the particular process in question.” Id. If the answer to both is yes, the public trial right attaches. Id. at 7-8.

If the public trial right attaches, the trial court, before closing the proceeding to the public, is required to perform a weighing test consisting of five criteria and enter specific findings on the record to justify any ensuing closure: (1) the proponent of closure must show a compelling interest, and if based on anything other than defendant’s right to a fair trial, must show serious and imminent threat to that right; (2) anyone present when the closure motion is made must be given opportunity to object; (3) the least restrictive means available for protecting the threatened interests must be used; (4) the court must weigh the competing interests of the proponent of the closure and the public; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-59.

If it is determined upon appeal that a closure that triggered the public trial right occurred at trial, the court then looks to whether the trial court properly conducted a Bone-Club analysis before closing the courtroom. If the trial court failed to do so, then a per se

prejudicial public trial violation has occurred, even where the defendant failed to object at trial. State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006); In re Pers. Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

The jury selection process is presumptively open to the public because, “[T]he process of juror selection... is itself a matter of importance, not simply to the adversaries, but to the criminal justice system.” In re Orange, 152 Wn.2d at 804 (quoting Press-Enterprise Co., 464 U.S. at 505). The Washington Supreme Court has stressed the necessity of public voir dire. Indeed, in State v. Momah, the court noted that voir dire is a significant aspect of trial because it allows parties to secure their article I, section 22 right to a fair and impartial jury through juror *questioning*. 167 Wn.2d at 152 (emphasis added).

In State v. Irby, the Court held that an email exchange between the trial court and counsel where they discussed jury questionnaire responses and dismissed seven potential jurors for cause implicated the defendant’s trial rights because the email exchange “did not simply address the general qualifications of 10 potential jurors, but instead tested their fitness to serve as jurors in [Irby’s] particular case.” 170 Wn.2d 874, 882, 246 P.3d 796 (2011).

Accordingly, the Court held that the email exchange was a portion of jury selection and that the email exchange violated Irby's right under the federal and state constitutions to be present at critical stages of his trial. Id. at 882.

The purpose and general process of jury selection in criminal trials, including voir dire examination as well as for cause and peremptory challenges, is governed by superior court criminal rule 6.4. With respect to how peremptory challenges are taken, this rule sets forth specific parameters, all of which were followed in this case:

"After prospective jurors have been passed for cause, peremptory challenges shall be exercised alternately first by the prosecution then by each defendant until the peremptory challenges are exhausted or the jury accepted. Acceptance of the jury as presently constituted shall not waive any remaining peremptory challenges to jurors subsequently called."

CrR 6.4(e)(2). The rule does not require that the jury and public must be informed as to which party struck which prospective juror, although this information was open to the public because, as noted, the court filed the paper on which peremptory challenges were listed. CP 118.

There is nothing in experience or logic which would require public awareness as to the identity of the lawyer challenging any given juror. Shaver has cited no case supporting this contention. Superior court criminal rule 6.4 does not require it.

It is undisputed that the questioning of jurors in this case and the exercising of peremptory challenges occurred in a courtroom open to the public and press. No part of jury selection occurred over email, in chambers, in a jury room, in a hallway, at sidebar, or at any other location besides the open courtroom. There is nothing in the record to suggest that the doors to the courtroom were locked or that the public was excluded in any way from being present during the proceedings. Shaver, his defense counsel, the prosecutor, the judge, and the jury panel were all present throughout the jury selection process, including when peremptory challenges were selected. Both counsel and Shaver knew which jurors were challenged because they passed a piece of paper back and forth between them writing down their next peremptory challenge. After each counsel had written down all their challenges, the judge read the names of those challenged on the record to the jury and any spectators. Furthermore, the paper passed between the lawyers was filed in the public court record the

same day the challenges were made, making it accessible for any interested person to view. CP 118.

Because the peremptory challenge process occurred in open court with all present and the list of those challenged was available through public court records, Shaver's challenge is limited to the fact that the manner in which peremptory challenges were exercised did not make it readily apparent to the jury and any spectators<sup>4</sup> which lawyer excused which juror. However, no existing case law suggests that which lawyer exercised which peremptory challenges is information necessarily revealed to jurors and any spectators historically on a local, state or national level and, if so, the manner in which this occurs.

Shaver is unable to show that the information regarding which party made which peremptory strike has historically been open to the press and general public. Therefore, the experience prong of the experience and logic test illustrates that Shaver's public trial rights were not violated by the peremptory challenge selection process.

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<sup>4</sup> The phrase "jurors or any spectators" (as opposed to the "press" or "public") is used here and elsewhere in this brief because the list of peremptory challenges was filed in the public court record and therefore the only individuals who did not have immediate access to this information were those jurors and any spectators in the courtroom during this peremptory challenge process. CP 118.

The logic prong of the test also indicates that Shaver's public trial rights were not implicated by this process. Shaver has failed to show that relaying to the jury and any spectators which party excused which prospective juror has a significant positive role in the functioning of peremptory challenges being exercised. Press-Enterprise Co., 478 U.S. at 8-10.

In determining whether logic prong counsels toward a finding of openness, a trial or reviewing court must consider whether openness will "enhance both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Id. at 508. Relevant to the logic inquiry are the overarching policy objectives of having an open trial such as fairness to the accused ensured by permitting public scrutiny of proceedings. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980).

As it pertains to this case, the logic prong of the test is whether disclosing to jurors and any spectators which lawyer excused which prospective juror increases the fairness of the jury selection process. The fairness of this process would not be enhanced by telling the jury and any spectators which lawyer struck

which jurors.<sup>5</sup> There is no logical purpose of telling jurors and any spectators which party excused which jurors, nor any perceivable benefit related to the public trial right that would flow from it.

There is no reason whatsoever to believe that the process used in selecting peremptory challenges diminished the prosecutor's or judge's understanding of their responsibility to the accused and the importance of their functions. Furthermore, there are numerous considerations that make the peremptory challenge process used in this trial just as fair as in a case where the prosecutor and defense counsel state their challenges aloud on the record. The trial court explained on the record to the jury its reason for using the process that it chose to use. Any members of the jury, the press, or the public who may have been present when the court explained its procedures with respect to this portion of the jury selection process could see that Shaver was being treated in an open and fair manner.

Additionally, since the parties were both aware of which jurors were being stricken by the other party, each still had the

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<sup>5</sup> However, it is possible that fairness may be enhanced by *not* sharing this information with the jurors. A party's decision about how to exercise their peremptory challenges is a subjective determination made at the party's discretion without on-the-record discussion about the excused jurors' qualifications to serve impartially. Some judges feel this process protects lawyers from ill-will that may be engendered by their challenges.

opportunity to object to any perceived discriminatory motive behind exercised peremptory challenges. RCW 2.36.080; Batson v. Kentucky, 476 U.S. 79, 96-98, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); State v. Burch, 65 Wn. App. 828, 834, 830 P.2d 357 (1992). Not having jurors or spectators know which party challenged which jurors did not compromise either party's ability to make a Batson challenge, another factor protecting the fairness of the proceedings.

Because Shaver has not shown that which party challenged which prospective juror is information that has historically been open to the press and general public, nor any showing that the peremptory challenge selections of the lawyers would play any "significant positive role" in the jury selection process, this court should find that there was no courtroom closure that implicated Shaver's public trial rights. Since a closure that triggered the public trial right did not occur, the public trial right does not attach to the particular procedure used for exercising peremptory challenges and the Bone-Club factors did not have to be considered by the court. Whereas the foundational principle of an open justice system was preserved, this court should reject Shaver's argument and affirm his convictions.

Shaver has failed to analyze the peremptory challenge process used in this case under the experience and logic test, and also provides no authority for his assumption that a closure occurred in this case. Shaver claims that, “the private proceeding was no less a violation of the right to a public trial than the closed voir dire sessions that Washington courts have repeatedly held to violate the public trial right.” Appellant’s Brief at 6. Shaver asserts that the peremptory challenge process used was similar to a sidebar, an in-chambers conference or courtroom closure. Appellant’s Brief at 5. However, he makes no mention of *how* the process used in this case is similar to any of those, conceding that there is no Washington case with identical facts. Appellant’s Brief at 6.

Many factors about the present case renders distinguishable State v. Slert, 169 Wn. App. 766, 282 P.3d 101 (2012), the primary case relied upon in Shaver’s brief. In Slert, the Court of Appeals (Division II) reversed Slert’s conviction, holding that an in-chambers conference during which the court and counsel discussed jury questionnaires specific to the case and the court dismissed four jurors off the record violated Slert’s right to a public trial. 169 Wn. App. at 778-79. The court found that, as in Irby, the

questionnaires were part of jury selection because they dealt with publicity from Slerf's earlier trials and thus were "designed to elicit information with respect to [the jurors'] qualifications to sit" as jurors in Slerf's particular case, as opposed to inquiring about the jurors' general qualifications. 170 Wn.2d at 882 (quoting Irby Clerk's Papers at 1234). Because the record indicated that the in-chambers conference involved the dismissal of four jurors for case-specific reasons based at least in part on the jury questionnaires, the court held that the conference and dismissals were part of the jury selection process to which the public trial right applied. Id. at 774.

The court added that, "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 Slerf's and the public's purview." Id. at n.11. Thus, in Slerf, as in Irby, the Court held a violation of the public trial right occurred when there was discussion regarding the juror's qualifications to sit on the specific case at hand that the defendant and public was not privy to. Id., Irby, 170 Wn.2d at 882.

The present case is entirely distinguishable from both Sler and lrby. Here, the peremptory challenge procedure used occurred in open court and involved no discussion whatsoever, let alone any discussion designed to determine jurors' individual fitness for serving on Shaver's particular jury. The defendant, jury, and any spectators were present during the process. The challenged jurors were dismissed on the record and anyone who wanted to know which party struck which juror could access this information through the public record.

The trial court in Shaver's case did not violate his public trial rights because, under considerations of experience and logic, those rights were not implicated by the peremptory challenge process used. The court was not required to conduct a Bone-Club analysis because no closure existed at any point of the jury selection process. Therefore, the trial court protected the foundational principle of an open justice system.

**D. CONCLUSION**

For the reasons stated above, the Court should find that the trial court preserved Shaver's right to a public trial and thus affirm all of Shaver's convictions.

DATED this 6<sup>th</sup> day of September, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
GRACE ARIEL WIENER, WSBA #40743  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher H. Gibson, the attorney for the appellant, at Nielsen, Broman & Koch, PLLC, 1908 East Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. ROBERT SHAVER, JR., Cause No. 69273-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 6<sup>th</sup> day of September, 2013

W Brame  
Wynne Brame  
Done in Seattle, Washington