

No. 44279-5-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,
Respondent,

v.

VERNE JACKSON,
Appellant.

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

REPLY BRIEF

JAN TRASEN
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WASHINGTON APPELLATE PROJECT
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A. ARGUMENT

UNDER THE EXPERIENCE AND LOGIC TEST, THE PRIVATE, UNRECORDED CONFERENCES USED FOR JUROR CHALLENGES VIOLATED MR. JACKSON'S PUBLIC TRIAL RIGHTS.

1. The exercise of peremptory challenges is a vital part of voir dire, and the State's efforts to distinguish Mr. Jackson's case should be rejected. Exercising juror challenges is a vital part of voir dire. See State v. Wilson, 174 Wn. App. 328, 343, 298 P.3d 148, 156 (2013) (observing that unlike hardship strikes made by clerk, voir dire involves trial court and counsel questioning prospective jurors to determine their ability to serve fairly and to enable counsel to exercise informed challenges for cause and peremptory challenges); State v. Vreen, 99 Wn. App. 662, 668, 994 P.2d 905 (2000) (recognizing "it is the interplay of challenges for cause and peremptory challenges that assures the fair and impartial jury"), aff'd, 143 Wn.2d 923 (2001).

2. The State's attempt to distinguish this case from *Sfert* should be rejected. In its responsive briefing, the State implies that the instant case is distinct from State v. Sfert, when in fact, the two cases are quite similar. 169 Wn. App. 766, 774 n. 11, 282 P.3d 101 (2012), review granted, 299 P.3d 20 (2013). This Court should

be guided by its decision in State v. Slert, in which it rejected the argument that no public trial violation occurred if jurors were dismissed at sidebar, rather than in chambers. Id. This Court noted in Slert that any private discussion amongst counsel would have involved dismissal for case-specific reasons, thereby calling for public review. Id.; see State v. Leyerle, 158 Wn. App. 474, 483, 242 P.3d 921 (2010) (questioning juror in public hallway outside courtroom is a closure despite the fact courtroom remained open to public). By failing to first apply the Bone-Club factors before hearing the peremptory challenges at the bench, the trial court violated Mr. Jackson's constitutional right to a public trial.¹

The State also urges this Court to adopt the reasoning of a recent decision from Division Three, in State v. Love, ___ Wn. App. ___, 309 P.3d 1209 (2013); Brief of Respondent at 8-9. In Love, Division Three held the defendant had not established manifest constitutional error allowing him to raise the public trial claim for the first time on appeal under RAP 2.5(a). The Love Court noted that the record established the defendant was beside his counsel during the information gathering phase of voir dire,

¹ Although the State has now designated the peremptory challenge worksheet, this provides little in the way of a record of the private conversations that transpired amongst counsel, lacking a recorded proceeding.

and that he apparently had the opportunity to provide input to his counsel.
309 P.3d at 1215.

This case is different from Love, however. Mr. Jackson was not only excluded from the sidebar conference during which the cause challenges were conducted, but he was also excluded from the peremptory challenge conference. CP 72 (Video of proceedings). Moreover, as discussed below, the record does not support the State's assertion that peremptory challenges were made in a location within the courtroom, as this second unrecorded conference is not visible in the video record of proceedings. CP 72. It is clear from the record that Mr. Jackson was not present during the peremptory challenge process; thus, his inability to communicate with counsel caused him prejudice. RAP 2.5(a).

3. The new materials filed by the State support Mr. Jackson's public courtroom argument on appeal. Following this Court's order of December 9, 2013, the State filed a video recording, pursuant to the State's RAP 9.10 motion. This disc appears to show the proceedings on the day of trial, from four different angles of the courtroom. CP 72.

This additional evidence only supports Mr. Jackson's argument that the jury challenges were conducted in a private,

closed proceeding, which excluded him from participating or from consulting with his counsel, as discussed above. CP 72 (1:45 to 2:01). For more than twenty minutes of silence, Mr. Jackson sits at the counsel table alone, as does the trial judge. CP 72. Nowhere, in any of the four frames that can be seen in the video, can a viewer see either counsel. CP 72 (four frames showing: 1) judge's bench, 2) jury box, 3) jury venire, and 4) counsels' tables with defendant sitting alone). Although the State suggests that the peremptory challenges were conducted at the clerk's desk, this assertion is not supported by the record. CP 72.²

The trial court here effectively closed the courtroom when it conducted juror challenges at the bench, or possibly outside the courtroom, in the case of peremptory challenges, in the absence of oral or written findings explaining the need for such a procedure, or any apparent analysis of the rights and interests at stake or the alternatives available.

4. Reversal is required. The remedy for a violation of the public's right of access is remand for a new trial. State v. Easterling, 157 Wn.2d 167, 179-80, 137 P.3d 825 (2006).

² Perhaps the peremptory challenge conference was conducted outside in the hallway; perhaps it was conducted in the judge's chambers – it is impossible to speculate on the record provided by the State, since the parties are not visible in the video for over twenty minutes. CP 72.

Because of the court's violation of Mr. Jackson's right to a public trial constitutes structural error, prejudice is presumed and reversal is required. State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); State v. Bone-Club, 128 Wn.2d 254, 257, 900 P.2d 235 (1995).

B. CONCLUSION

For the reasons stated above, Mr. Jackson respectfully asks this Court to reverse his conviction and remand for a new trial.

DATED this 2nd day of January, 2014.

Respectfully submitted,



JAN TRASEN (WSBA 41177)
Washington Appellate Project (WSBA 91052)
Attorney for Appellant

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DIVISION TWO**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
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v.)	NO. 44279-5-II
)	
VERNE JACKSON,)	
)	
APPELLANT.)	

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SIGNED IN SEATTLE, WASHINGTON THIS 2ND DAY OF JANUARY, 2014.

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January 3, 2014

David Ponzoha
Clerk of the Court
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Re: **State v. Jackson, No. 44279-5-II**

Dear Clerk of the Court:

Enclosed please find a corrected signature page to the reply brief filed yesterday in the above-referenced case. The brief was filed yesterday with an inadvertently incorrect signature page. Nothing substantive has been changed and the pagination remains the same.

Respectfully,



Mafla L. Zink
Attorney at Law

Encl.

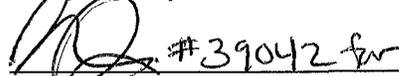
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Respectfully submitted,



JAN TRASEN (WSBA 41177)

Washington Appellate Project (WSBA 91052)

Attorney for Appellant

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 44279-5-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered by other court-approved means to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

- respondent Amie Hunter [huntera@co.cowlitz.wa.us]
Cowlitz County Prosecuting Attorney
- appellant
- Attorney for other party


MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: January 3, 2014

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