

NO. 44366-0

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

BRAIN HUMES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank E. Cuthbertson, Judge

No. 12-1-00809-6

**RESPONDENT'S BRIEF IN RESPONSE TO APPELLANT'S
SUPPLEMENTAL BRIEF**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was appellant's right to a public trial violated when trial counsel exercised peremptory challenges in open court, reduced them to writing on a form designated for that purpose, reviewed by the court, and filed in the record?

B. STATEMENT OF THE CASE.

1. Procedure

Appellant was charged on March 8, 2012, for criminal acts occurring on March 6, 2012, which included felony harassment, assault in the fourth degree, and malicious mischief. CP 1-3. Appellant was arraigned and conditions of release set by the court. CP 146-47.

On April 12, 2012, the appellant signed for several court dates to include an omnibus hearing on May 8, 2012. CP 145. The defendant failed to appear for this court hearing.

On December 17, 2012, the State filed an amended information that eliminated the count of malicious mischief and added one count of bail jumping for his failure to appear for the May 8, 2012, omnibus hearing.

The case proceeded to jury trial on December 17, 2012. Counsel exercised their respective peremptory challenges and memorialized them

on a document created for that purpose. 12/17/12 RP 78-79. CP 145. The defendant was acquitted of all but the bail jumping charge. CP 103-115.

This appeal timely follows.

2. Facts Relevant to Supplemental Brief

The case was called for trial on December 17, 2012. The court tended to several issues and then called for a venire. The parties began jury selection immediately and were able to sit a jury that day. After the parties had had an opportunity to inquire of the panel, the court explained to the venire that the lawyers were going to begin to use their peremptory challenges outside of their hearing. 12/17/12 RP 78. He specifically told them the attorneys would be creating a list for the judge of their respective challenges which he would review and announce who would be sitting on the jury. *Id.* The peremptory challenge sheet was created by counsel, reviewed by the court, and filed in the court file. CP 145.

C. ARGUMENT.

1. THE OPEN-COURT EXCHANGE OF A PREMPTORY CHALLENGE SHEET BETWEEN COUNSEL DID NOT VIOLATE APPELLANT'S RIGHT TO A PUBLIC TRIAL WHEN THE SHEET WAS INCORPORATED INTO THE COURT RECORD.

"The public trial right is not absolute" *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d70, 292 P.3d 715 (2012) (citing *Waller v. Georgia*, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). "[I]t is

[nevertheless] strictly guarded to ensure that proceedings occur outside the public courtroom in only the most unusual circumstances." *State v. Leyerle*, 158 Wn. App. 474, 478, 242 P.3d 921 (2010) (citing *State v. Easterling*, 157 Wn.2d 167, 182, 137 P.3d 825 (2006)). The right "is found in article I, section 22 of the Washington 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." *Sublett*, 176 Wn.2d 58 at 71. "These provisions ensure a fair trial, foster public understanding and trust in the judicial system, and give [participants] the check of public scrutiny." *Leyerle*, 158 Wn. App. at 479 (citing *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); *Dreiling v. Jain*, 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004)).

Alleged public trial right violations are reviewed de novo. *Id.* (citing *State v. Momah*, 167 Wn.2d 140, 147-48, 217 P.3d 321 (2009); *State v. Bone-Club*, 128 Wn.2d 254, 256, 906 P.2d 325 (1995)). Reversal and remand for new trial is the remedy when a defendant's public trial right is violated. *State v. Leyerle*, 158 Wn. App. 474, 478, 242 P.3d 921 (2010) (*In re Personal Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004)). Whereas courtroom management decisions that do not amount to a public trial right infringing closure are reviewed for an abuse of discretion and will not be reversed unless they are manifestly

unreasonable or based on untenable grounds for untenable reasons. *State v. Lormor*, 172 Wn.2d 85, 93, 95, 257 P.3d 624 (2011); *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-7, 940 P.2d 1362 (1997); *see also* RCW 2.28.010.

- 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 Wn.2d 322, 332-33, 899 P.2d 1251 (1995); *State v. Davis*, 41 Wn.2d 535, 250 P.2d 548 (1952); 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 Wn.2d 918, 926, 155 P.3d 125 (2007); *State v. Scott*, 110 Wn.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. *Id.* 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." *Id.* at 935.

Prior to the adoption of RAP 2.5, the Washington Supreme 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 Wn. 142, 145-46, 217 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 Wn.2d 595, 601, 980 P.2d 1257 (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). *Id.* at 601. As noted in *State v. Beskurt*, 176 Wn.2d 441, 449-50, 293 P.3d 1159 (2013) (Madsen, J. *concurring*), when the Supreme Court decided *Bone-Club* in 1995, it cited to the *Marsh* rule without taking the impact of RAP 2.5(a)(3) into consideration. The failure to consider the impact of RAP 2.5(a)(3) has persisted in other decisions. *See e.g.*, *Brightman*, 155 Wn.2d at 514-15. Respect for stare decisis requires a

clear showing that an established rule is incorrect and harmful before it is abandoned. *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006).

Application of the *Marsh* rule is incorrect in this instance because it contradicts 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 courtroom procedures that adhere to his or her benefit, yet claim those procedures are the basis for error in the appellate court; and (3) it diminishes public respect for the court and wastes finite judicial resources when retrial is allowed in the absence of demonstrated prejudice as the *Marsh* rule does not require a showing of manifest error or actual prejudice.

These harms can be seen in the case now before the Court. The trial court articulated how peremptory challenges would be exercised without objection from the defense. 12/17/12 RP 78. The trial court then implemented that procedure in open court without objection. *Id.* Defendant exercised his peremptory challenges without the risk of offending potential jurors. *Id.* The resulting jury was seated in open court. 12/17/12 RP 79. There was nothing prejudicial about the peremptory challenge process. And a timely objection addressing open-court concerns might have prompted the trial court to avoid this claim

by adopting an alternative procedure. RAP 2.5(a)(3) governs this issue due to defendant's failure to object to the peremptory challenge procedure observed. His failure to show an issue of constitutional magnitude that caused actual prejudice should prove an insurmountable bar to review.

- b. Appellant's right to public trial was not violated when the trial court used its established practice of exchanging list of peremptory challenges.

The rules governing the constitutionality of an alleged courtroom closure only "come into play when" "the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." *Sublett*, 176 Wn.2d at 71; *State v. Lormor*, 172 Wn.2d 85, 92, 257 P.3d 624 (2011) (citing *Bone-Club*, 128 Wn.2d at 257 (no spectators allowed in courtroom during suppression hearing); *Easterling*, 157 Wn.2d at 172 (all spectators excluded during plea-bargaining). A courtroom closure implicating the public trial right must meet the standards announced in *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed. 2d 31 (1984), or Washington's equivalent *Bone-Club* analysis.

Courtroom management decisions are reviewed for an abuse of discretion when the courtroom remains open because "[i]n addition to its inherent authority, the trial court, under RCW 2.28.010, has the power to

... provide for the orderly conduct of its proceedings." *Lormor*, 172 Wn.2d at 93, 95.

"Neither the number of peremptory challenges nor the manner of their exercise is constitutionally secured." *United States v. Turner*, 558 F.2d 535, 538 (1977) (citing *Stilson v. United States*, 250 U.S. 583, 40 S. Ct. 28, 63 L. Ed. 1154(1919)).

"[W]ide discretion is committed to the [trial] courts in setting the procedure for the exercise of peremptory challenges...[yet] [t]he method chosen ... must not unduly restrict the defendant's use of his challenges, ... and ... the defendant must be given adequate notice of the system to be used." *Id.*

Washington's trial courts must also exercise their discretion in accordance with CrR 6.4(e). A defendant bears the burden of proving prejudice where the challenged procedure substantially complies with the rules governing jury selection. *See e.g., State v. Tingdale*, 117 Wn.2d 595, 600, 817 P.2d 850 (1991).

The public trial right was not implicated by the open court exchange of the peremptory challenge list in this case. Spectators had an opportunity to learn how peremptory challenges would be exercised when the process was described in open court before the strike list was exchanged. 12/17/12 RP 78. The list was then alternately passed between the parties in the presence of the venire followed by an open-court

announcement of stricken and seated jurors. 12/17/12 RP 79, CP 145.

The challenges could have been publicly scrutinized for any disconcerting patterns, either in court when announced, or when they were made part of the public record.

There is no showing public attendance was prohibited when the list was exchanged. The doors were not closed to all spectators as they were in *Brightman*, 155 Wn.2d at 511, 122 P.3d 150. Defendant was not excluded from attending like the defendant in *Easterling*, 157 Wn.2d at 172, 137 P.3d 825. None of the proceeding was conducted in an inaccessible location such as the judge's chambers as happened in *Momah*, 167 Wn.2d at 146, 217 P.3d 321, and *State v. Strode*, 167 Wn.2d 222, 224, 217 P.3d 310 (2009), or a hallway like the one at issue *Leyerly*, 158 Wn. App. 482. The claimed public trial right violation could not have occurred as defendant's courtroom was not closed when peremptory challenges were exercised.

The argument defendant advances to urge reversal of his conviction in this case would require courts to find courtroom closures whenever spectators are incapable of perceiving every aspect of a trial court's publicly-conducted business with their full array of senses. That requirement was rejected by the Ninth Circuit in *D'Aquino v. United States*, 192 F.2d 338, 365 (1951). In that case, the government introduced

five audio records inaudible without the earphones provided to select participants and attendees such as court, counsel, and the media. *Id.* D'Aquino argued the procedure denied her a public trial because public spectators could not hear the exhibits. *Id.* The Ninth Circuit found that claim "wholly without merit" analogizing the argument to a claim that the public trial right was violated "because certain exhibits such as photographs, samples of handwriting, etc., although examined by the parties and by the jury were not passed around to the spectators in the courtroom." *Id.* (Citing *Gillians v. United States*, 87 U.S.App.D.C. 16, 182 F.2d 962, 972-73 (1950)).

Similar courtroom practices are common in Washington. Exhibits may be properly admitted, yet never published in a way that permits public inspection before the verdict is entered. *See e.g.*, ER 611(a); ER 901(a). They may even be properly withheld from the jury when used for limited purposes such impeachment under ER 608(b) or refreshing witness recollection under ER 612. *See also* WPIC 1.02 ("[e]xhibits may have been marked ... but they do not go ... to the jury room...."). The public quality of the proceeding is nevertheless preserved through the inclusion of those exhibits in a public record capable of subsequent review. *See e.g.*, *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37, 640 P.2d 716 (1982). The public's right to open criminal trials does not impose upon

trial courts a duty to tailor publicly conducted proceedings to the viewing preferences of its audience.

- c. Neither experience nor logic precludes the use of the peremptory sheet in selecting a jury.

"Before determining whether there was a [public trial right] violation, [reviewing courts] first consider whether the proceeding at issue implicates the public trial right, thereby constituting a closure at all." *Sublett*, 176 Wn.2d at 71. "Existing case law does not hold that a defendant's public trial right applies to every component of the broad jury selection process.... Rather, [it] addresses application of the public trial right related only to a specific component of jury selection—i.e., the voir dire of prospective jurors who form the venire...." *State v. Wilson*, 174 Wn. App. 328, 338, 298 P.3d 148 (2013); *Orange*, 152 Wn.2d at 807-08 (entire voir dire closed to all spectators); *Brightman*, 155 Wn.2d at 511 (entire voir dire closed to all spectators). *State v. Paumier*, 176 Wn.2d 29, 288 P.3d 1126 (2012), *State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012), and the cases these opinions cite for support all involved courtroom closures during ... the voir dire component of jury selection ... The[y] did not... address or purport to characterize as "courtroom closures" the entire jury selection spectrum (from initial summons to jury

empanelment)...." *Wilson*, 174 Wn. App. at 339-40; *Lormor*, 172 Wn.2d at 93 (citing *Momah*, 167 Wn.2d at 146; *Strode*, 167 Wn.2d at 224).

The exercise of peremptory challenges is a component of Washington's jury selection process that has yet to be specifically addressed in our Supreme Court's recent expansion of public trial right jurisprudence. *Wilson*, 174 Wn. App. at 338. A determination of whether peremptory challenges must be exercised in public must come from application of the "experience and logic test." *Sublett*, 176 Wn.2d at 141.

That test requires courts to assess a closure by consideration of both history (experience) and the purposes of the open trial provision (logic). *Id.* at 73. The experience prong asks whether the practice in question has been historically open to the public, while the logic prong asks whether public access is significant to the functioning of the right. *Id.* The *Bone-Club* analysis must be applied before the court can close the courtroom if both prongs are answered affirmatively. *Id.*

A historical review of peremptory challenges in this state reveals they do not need to be exercised in public. *State v. Love*, 176 Wn. App. 911, 919, 309 P.3d 1209 (2013). "[I]n over 140 years ... there is little evidence of public exercise of such challenges, and some evidence that they were conducted privately." *Id.* The *Love* court only discovered one case in which defense challenged the "use of secret—written—peremptory

jury challenges" as defendant does in the instant case. 176 Wn.App. at 918 (quoting *State v. Thomas*, 16 Wn. App. 1, 13, 553 P.2d 1357 (Div. 2, 1976)). *Thomas*, like defendant, argued "Kitsap County's use of secret—written—peremptory jury challenges denie[d] both a fair and public trial." This Court held that claim "ha[d] no merit" due in part to the Court's "fail[ure] to see how th[at] practice, which is utilized in several counties in this state, could in any way prejudice the defendant." 16 Wn. App. at 13. This Court concluded the "manner of exercise ... rests exclusively with the legislature and the courts, subject only to the requirement of a fair and impartial jury." *Id.* (citing *State v. Persinger*, 62 Wn.2d 362, 383 P.2d 497 (1963)). *Love* found *Thomas* to be "strong evidence that preemptory challenges can be conducted in private." *Id.*

Love's analysis of the logic prong similarly revealed that public exercise of preemptory challenges is not necessary. *Id.* The purposes of the public trial right are: to ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. *Brightman*, 155 Wn.2d at 514. "Those purposes are not furthered by a party's actions in exercising a preemptory challenge ... as [it] presents no question of public oversight." *Love, Id.*

Any risk that privately exercised peremptory challenges might conceal a litigant's attempt to strike potential jurors for impermissible reasons, such as race, is negated when objections to challenges and the identity of stricken jurors are either disclosed in open court at trial or committed to the public record as public scrutiny could follow either form of disclosure. *See e.g., Cohen v. Senkowski*, 290 F.3d 485, 490 (2nd Cir. 2002) (*citing United States v. Fontenot*, 14 F.3d 1364, 1370 (9th Cir.1994)). "The written record of [the peremptory challenge process consequently] satisfies the public's interest in the case and assures that all activities were conducted aboveboard, even if not within public earshot." *Love*, 176 Wn. App. at 919.

Love found further support for its reasoning through analogy to *Sublett* since a written record of the peremptory challenge process had been committed to public record in *Love* as the written jury question and response had been, pursuant CrR 6.15(f)(1), in *Sublett*. *Love, Id.* The *Sublett* Court found that rule's directive to "put the questions, answer and objections in the record" sufficiently advanced and protected the interests underlying the constitutional requirements of open courts to include the appearance of fairness...." 176 Wn.2d at 77. The public filing of the peremptory challenge list in defendant's case ensured commensurate protection of the public trial right. *See* CP 145.

Allowing parties to privately exchange a peremptory challenge list also logically serves legitimate interests in facilitating confidential communications on how peremptory challenges should be exercised. Such communications often involve the expression of protected mental impressions about the perceived merit of particular jurors or insights into the opponent's strategy, which in turn influences the way peremptory challenges are exercised. The doctrines of work product and attorney client privilege as applied to an adversarial trial proceeding warrant giving parties the ability to freely discuss and exercise peremptory challenges beyond the observation of opponents and spectators. *See e.g.*, ER 201; ER 502 (*disclosures made in a proceeding waive attorney-client privilege or work product protection*); CR 26(b)(4) (*absolute protection from disclosure of mental impressions*). Similar concern for protecting confidential information parties beneficially use to facilitate publicly conducted voir dire contributed to the Supreme Court's decision that the sealing of juror questionnaires did not constitute a courtroom closure in *Beskurt*, 176 Wn.2d at 447.

Neither experience nor logic require peremptory challenges to be publicly exercised, at least where auxiliary safeguards of the public trial right are present to the degree observed in this case.

D. CONCLUSION.

Appellant's right to a public trial was not violated when trial counsel exercised their peremptory challenges on paper and the paper was filed and made part of the court file. The use of the open-court exchange of the peremptory challenges sheet did not violate the appellant's right to a public trial and his motion for a new trial should be denied.

DATED: February 25, 2014.

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Certificate of Service:

The undersigned certifies that on this day she delivered by es mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2-25-14 *[Signature]*
Date Signature

PIERCE COUNTY PROSECUTOR

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