

NO. 46239-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

DARRELL NELSON,

Appellant.

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

The Honorable Bryan E. Chushcoff, Judge  
The Honorable Garold E. Johnson, Judge  
The Honorable Ronald E. Culpepper, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE SILENT AND PRIVATE EXERCISE OF PEREMPTORY CHALLENGES IN THIS CASE VIOLATED THE CONSTITUTIONAL GUARANTEE OF A PUBLIC TRIAL.

The trial court took peremptory challenges by having the parties note on a chart which prospective juror they wanted to excuse off the record and outside the hearing of those in the courtroom an. 4RP 291-93; CP 244. Nelson contends, for reasons set forth more fully in the opening brief, that because exercising peremptory challenges is part of voir dire, and because the trial court failed to apply the Bone-Club<sup>1</sup> factors, the court violated Nelson's constitutional right to a public trial. Brief of Appellant (BOA) at 10-22. The State maintains the trial court did not violate Nelson's right to a public trial. Brief of Respondent (BOR) at 8-17. For the following reasons, Nelson asks this Court to reject the State's arguments.

Citing a three-judge concurrence in State v. Beskurt, 176 Wn.2d 441, 449-456, 293 P.3d 1159 (2013), the State first argues violations of the public trial right should be ignored on appeal absent an objection below. BOR at 8-11. This argument is without merit. Currently, a majority of the Supreme Court holds these violations can be raised for the first time on

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<sup>1</sup> State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

appeal. See, e.g., State v. Wise, 176 Wn.2d 1, 13 n.6, 288 P.3d 1113 (2012); State v. Strode, 167 Wn.2d 222, 229, 217 P.3d 310 (2009). Any change in this approach must come from the Supreme Court. Unless that happens, Nelson's public trial claim is properly before this Court.

The State next argues there was no public trial violation because the courtroom remained open at all times to members of the public. BOR at 12-17. As discussed in Nelson's opening brief, however, it was the trial judge's method of jury selection (exercising peremptory challenges outside of the jury's hearing and off the record) that effectively closed the proceedings to the public. BOA at 21. An otherwise open courtroom does not guarantee a public trial. Constitutional rights are violated when the methods employed deny the public an opportunity to scrutinize events. See BOA, at 21 (citing State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011); State v. Leyerle, 158 Wn. App. 474, 483, 242 P.3d 921 (2010)).

The courtroom is closed for purposes of the right to a public trial when "the public is excluded from particular proceedings within a courtroom." State v. Anderson, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2015 WL 2394961 (No. 45497-1-II, filed May 19, 2015) (citing State v. Gomez, 183 Wn.2d 29, 34-35, 347 P.3d 876). In Anderson, the for-cause challenges were exercised at a sidebar conference. Slip op. at 2. Although the public was not excluded from the courtroom and the sidebar was not in

a physically inaccessible location, this Court nonetheless found a closure. Id. at 5-6. The Court explained that the entire purpose of the sidebar is to prevent the public from hearing what is being said. Id. at 4-5. “Taking juror challenges at sidebar in this way thwarts public scrutiny just as if they were done in chambers or outside the courtroom.” Id. at 5-6. The court held the sidebar conference “constituted a closure of the juror selection proceedings because the public could not hear what was occurring.” Id. at 6.

There is no reason to differentiate the for-cause challenges at sidebar in Anderson from the peremptory challenges held on paper in this case. In both cases, an essential part of jury selection occurred in such a way as to “thwart[] public scrutiny.” Anderson, slip op. at 5. The public could not hear or see which potential jurors were challenged by which party.

The State also argues, based on State v. Love, 176 Wn. App. 911, 915, 309 P.3d 1209 (2013), review granted in part, 181 Wn.2d 1029 (2015) and Sublett’s experience and logic test, that peremptory challenges do not implicate the public trial right. BOR at 13-15. But Anderson expressly rejects the reasoning from Love that the State relies on in this case. Slip op. at 9-12. The State argues that the experience prong is met only if traditionally the proceeding was required to be held in public.

BOR at 14-15 (citing Love, 176 Wn. App. at 918-20). But, as Anderson points out, the correct inquiry is whether the proceeding was traditionally open to the public, not whether it was historically required to be. Slip op. at 10. Like for-cause challenges, peremptory challenges have traditionally been exercised in open court, subject to public scrutiny. State v. Wilson, 174 Wn. App. 328, 344, 298 P.3d 148 (2013).

The “logic” portion of the Sublett test also indicates peremptory challenges must be open. As the Anderson court explains, a proceeding should logically be open to the public when public scrutiny can act as a check against abuses. That is particularly the case for peremptory challenges. Anderson, slip op. at 12. The court noted that the for-cause challenges at issue in Anderson were “less prone to arbitrary or improper exercise than peremptory challenges.” Slip op. at 12. Nevertheless, the court held the public has “a vital interest” in overseeing even the for-cause challenges. Slip op. at 12. Moreover, it serves the appearance of fairness to ensure that for-cause challenges are subject to public scrutiny. Slip op. at 12-13. The same is true for peremptory challenges, which are even more susceptible to abuse. Slip op. at 12.

Both logic and experience dictate that peremptory challenges implicate the right to a public trial and may not be shielded from view without careful application, on the record, of the Bone-Club factors. With

no suggestion that the court considered the competing interests at stake before holding peremptory challenges on paper, this Court should hold that Nelson's right to a public trial was violated and reverse his conviction.

2. THE COURT ERRED IN ADMITTING ER 404 (b) EVIDENCE FOR AN IMPROPER PURPOSE AND WITHOUT CONDUCTING THE REQUISITE BALANCING TEST.

ER 404 (b) bars admission of “[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith.” This rule applies to evidence of other acts regardless of whether they occurred before or after the charged crime. State v. Bradford, 56 Wn. App. 464, 467, 783 P.2d 1133 (1989).

Nelson contends the trial court erred in admitting under ER 404 (b), evidence that he threatened suicide and punched holes in the ceiling of his house several days before the charged incident because it misapplied the res gestae exception and failed to make necessary findings on the record to justify admission. BOA at 22-28.

The State concedes the trial court failed to engage in the required balancing test on the record before admitting the ER 404 (b) evidence.

BOR at 27. The State nonetheless cites State v. Tharp,<sup>2</sup> State v. Turner,<sup>3</sup> and State v. Grier<sup>4</sup> for the proposition that the ER 404(b) evidence was properly admitted under res gestae. BOR at 19-24. Each case is factually distinguishable.

Tharp was charged with second degree murder. 27 Wn. App. at 200. Over his objection, the trial court admitted evidence that Tharp was also involved in a burglary, vehicle prowl, and car theft within 24 hours of the murder. Tharp, 27 Wn. App. at 200-02. The Court of Appeals concluded evidence of the three “collateral crimes” was properly admitted as gestae evidence because the jury was entitled to know the whole story. Tharp, 27 Wn. App. at 205-06.

During Turner’s trial for second degree assault and reckless endangerment, the trial court admitted evidence that Turner had previously pointed a gun at the alleged assault victim and threatened to shoot him. Turner, 29 Wn. App. at 283, 286. Evidence was also admitted that about eight months before the alleged assault, Turner had asked a police officer a hypothetical question about using a gun to defend his property. Id. The

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<sup>2</sup> 27 Wn. App. 198, 616 P.2d 693 (1980), aff’d, 96 Wn.2d 591, 637 P.2d 961 (1981).

<sup>3</sup> 29 Wn. App. 282, 627 P.2d 1324, rev. denied, 95 Wn.2d 1030 (1981).

<sup>4</sup> 168 Wn. App. 635, 278 P.2d 225 (2012).

Court of Appeals concluded the uncharged ER 404(b) evidence was properly admitted because Turner's hypothetical question "indicated a frame of mind relevant to proof of intent in the present case," and the prior incident involving the complaining witness was probative of motive. Turner, 29 Wn. App. at 290.

Grier is the third case cited by the State. During Grier's murder trial, the State sought to admit two prior incidents involving Grier as res gestae evidence. First, the State sought to admit evidence that on the night of the murder Grier waived a gun around, told her son she could kill him, and called her son insulting names. The State also sought to admit evidence that one week before the complaining witness was murdered, Grier brandished a gun at a dinner party where the complaining witness was present. Grier, 168 Wn. App. at 640-41. The trial court admitted Grier's behavior on the night of the murder as res gestae evidence. The trial court did not make a ruling on the admissibility of Grier's branding a gun during the previous week's dinner party. Grier, 168 Wn. App. at 643-44.

The Court of Appeals concluded Grier's behavior on the night of the murder was properly admissible as res gestae evidence, "because it was evidence of the continuing events leading to the murder[.]" Grier, 168 Wn. App. at 647. The Court of Appeals assumed, without deciding,

that evidence of Grier's brandishing a gun the previous week was "too attenuated to be considered res gestae[.]" Grier, 168 Wn. App. at 644. The Court concluded any error in admission of this evidence was harmless. Grier, 168 Wn. App. at 651-52.

As each of the cases relied upon the State demonstrates, under res gestae, evidence of other bad acts are only "admissible to complete the story of a crime or to provide the *immediate context for events close in both time and place to the charged crime.*" State v. Lillard, 112 Wn. App. 422, 432, 93 P.3d 969 (2004), rev. denied, 154 Wn.2d 1002 (2005) (emphasis added). Significantly, in Tharp and Grier, only the defendant's conduct within 24 hours of the charged offense was found properly admissible as res gestae evidence. Indeed, in Grier, the Court concluded that behavior a week prior to the charged offense was likely "too attenuated to be considered res gestae." Grier, 168 Wn. App. at 644. In Turner, the trial court did not admit the uncharged acts from several weeks earlier under the res gestae exception, and the Court of Appeals did not conclude the evidence would have been properly admitted on that basis.

Unlike, Tharp, Turner, and Grier, evidence that Nelson threatened suicide and cut holes in the ceiling of his house several days before the charged incident does not qualify as res gestae because it is not an inseparable part of the assault and was not close in both time and placed to

the charged offense. State v. Mutchler, 53 Wn. App. 898, 901, 771 P.2d 1168, rev. denied, 113 Wn.2d 1002 (1989). Nelson's other acts were not "a link in the chain of an unbroken sequence of events surrounding the charged offense." State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997) (citation omitted). Nor were prior acts part of the "same transaction" as the charged assault. Mutchler, 53 Wn. App. at 901-02. The jury would have still heard the complete story of the assault in the absence of evidence that Nelson had engaged in other acts in the days before the assault. Evidence that Nelson threatened suicide and cut holes in the ceiling of his house was hardly necessary to prove that he committed the assault. BOA at 24-26.

The State also contends admission of the ER 404(b) evidence was not prejudicial to Nelson's case. BOR at 29-31. The State maintains that Nelson cannot challenge the lack of a limiting instruction for the first time on appeal. BOR at 29-31. But Nelson does not challenge the trial court's failure to give a limiting instruction. Rather, Nelson simply points out that the prejudicial impact of admission of the ER 404(b) evidence was further compounded by the lack of a relevant limiting instruction. BOA at 27-28. Without a limiting instruction, the jury was free to consider the prior acts as evidence of Nelson's unstable character and action in conformity

therewith in committing the charged assault. This Court should reverse and remand for a new trial.

3. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO RULE ON NELSON'S WRIT FOR HABEAS CORPUS.

For reasons discussed in the opening brief, Nelson argues the trial court abused its discretion by failing to rule on Nelson's writ for habeas corpus. 6RP 23; BOA at 29-30.

The State, citing State v. Dallman,<sup>5</sup> maintains the trial court properly declined to hear Nelson's writ. BOR at 31-33. Dallman is factually distinguishable from Nelson's case.

The trial court denied Dallman's petition for writ of habeas corpus without hearing or comment. Dallman, 112 Wn. App. at 581. "But the trial court did review the petition and properly treated it as a successive collateral attack barred under RCW 10.73.140." Dallman, 112 Wn. App. at 584.

On appeal, Dallman argued his filing of the habeas corpus petition required a full hearing and response by the State. Dallman, 112 Wn. App. at 585. The Court of Appeals disagreed, noting the petition was never perfected and it was an impermissible collateral attack barred by RCW

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<sup>5</sup> 112 Wn. App. 578, 50 P.3d 274 (2002), rev. denied, 148 Wn.2d 1022 (2003).

10.73.140. The Court of Appeals concluded the trial court properly exercised its authority in summarily dismissing Dallman's habeas corpus petition. Dallman, 112 Wn. App. at 585.

Unlike Dallman, Nelson does not contend his filing of the writ of habeas corpus required a full hearing and response by the State. Rather, Nelson argues the trial court abused its discretion by utterly failing to exercise its discretion and rule on Nelson's writ. BOA at 29-30. Indeed, unlike Dallman, where the trial court denied the petition, here the trial court refused to "ma[k]e any ruling," on Nelson's writ. 6RP 23. Remand for a ruling on the writ of habeas corpus is required.

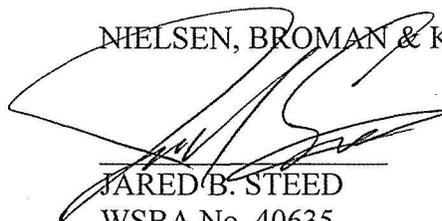
B. CONCLUSION

For the reasons discussed above and in the opening brief, this court should reverse Nelson's conviction and remand for a new trial.

DATED this 13<sup>th</sup> day of July, 2015.

Respectfully submitted,

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DIVISION TWO

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v.	)	COA NO. 46239-7-II
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	)	
Appellant.	)	

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I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

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[X] DARRELL NELSON  
3324 S. M STREET  
TACOMA, WA 98418

SIGNED IN SEATTLE WASHINGTON, THIS 13<sup>TH</sup> DAY OF JULY 2015.

x Patrick Mayovsky

**NIELSEN, BROMAN & KOCH, PLLC**

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