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AUG 13, 2013

Court of Appeals  
Division III  
State of Washington

Court of Appeals No. 30764-6-III

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

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STATE OF WASHINGTON,

Respondent,

v.

STEVEN SWINFORD,

Appellant.

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On Appeal from the Chelan County Superior Court  
The Honorable Lesley A. Allan, Judge

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SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

The trial court violated the constitutional right to a public trial by taking peremptory challenges privately.

Issue Pertaining to Supplemental Assignment of Error

During jury selection, the parties made peremptory challenges privately by quietly passing a piece of paper back and forth. Because the trial court did not analyze the Bone-Club<sup>1</sup> factors before conducting this important portion of voir dire in a private proceeding, did the trial court violate appellant's constitutional right to a public trial?

B. SUPPLEMENTAL STATEMENT OF THE CASE<sup>2</sup>

Jury selection in this case occurred on February 3 and 6, 2012. 1RP 2-206. After the parties finished asking potential jurors questions, the court announced the attorneys would be passing a piece of paper back and forth to exercise peremptory challenges. 1RP 203. Afterward, certain jurors were excused and others seated in their places. 1RP 204. Although the transcripts list which party exercised each peremptory challenge, it

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

<sup>2</sup> This brief refers to the verbatim reports as follows: 1RP – 2/3 and 2/6/12; 2RP – 2/7/12; and 3RP – 2/8/12; 4RP – 2/9 and 2/10/12; and 5RP – 3/30/12.

appears this information was not announced contemporaneously in open court. 1RP 203-04.

C. SUPPLEMENTAL ARGUMENT

THE TRIAL COURT VIOLATED THE APPELLANT'S RIGHT TO A PUBLIC TRIAL BY HAVING THE ATTORNEYS EXERCISE PEREMPTORY CHALLENGES PRIVATELY.

1. Introduction to applicable law

The Sixth Amendment and article I, section 22 guarantee the accused a public trial by an impartial jury.<sup>3</sup> Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 629 (1995). Additionally, article I, section 10 provides that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” This latter provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

While the right to a public trial is not absolute, a trial court may restrict the right only “under the most unusual circumstances.” Bone-Club, 128 Wn.2d at 259. Before a judge can close any part of a trial, it

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<sup>3</sup> The Sixth Amendment provides in pertinent part that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .” Article I, section 22 provides that “[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury . . . .”

must first apply on the record the five factors set forth in Bone-Club, Orange, 152 Wn.2d at 806-07, 809. A violation of the right to a public trial is presumed prejudicial and is not subject to harmless error analysis. State v. Wise, 176 Wn.2d 1, 16-19, 288 P.3d 1113 (2012); State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006); In re Personal Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

2. Peremptory challenges are considered part of “voir dire,” which must be conducted openly.

The public trial right applies to “the process of juror selection,” which “is itself a matter of importance, not simply to the adversaries but to the criminal justice system.” Orange, 152 Wn.2d at 804 (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). The exercise of peremptory challenges, governed by CrR 6.4, constitutes a part of “voir dire,” to which the public trial right attaches. State v. Wilson, 174 Wn. App. 328, 342-43, 298 P.3d 148 (2013); see also People v. Harris, 10 Cal.App.4th 672, 684, 12 Cal.Rptr.2d 758 (1992) (state and federal authority support conclusion that “peremptory challenge process is a part of the ‘trial’ to which a criminal defendant's constitutional right to a public trial extends”); accord, Hollis v.

State, 221 Miss. 677, 74 So.2d 747 (1954) (to comply with state constitutional mandate of a public trial, peremptory challenges must be exercised at the bar, in open court, not at a private conference); cf. State v. Sublett, 176 Wn.2d 58, 70-71, 77, 292 P.3d 715 (2012) (consistent with CrR 6.15, in-chambers discussion of jury's question posed during deliberations did not implicate public trial right).

The right to a public trial is concerned with “circumstances in which the public's mere presence passively contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny.” State v. Bennett, 168 Wn. App. 197, 204, 275 P.3d 1224 (2012) (citing State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005)). Although peremptory challenges may be exercised based on subjective feelings and opinions, there are important constitutional limits on both parties' exercise of such challenges. Georgia v. McCollum, 505 U.S. 42, 49, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992); Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Based on these constitutional limitations, public scrutiny of the exercise of peremptory challenges is essential. The procedure in this case thus violated the right to a public trial.

3. The procedure in this case was, in fact, closed to the public.

Even if the procedure occurred in an otherwise open courtroom, any assertion that the procedure was, in fact, public, should be rejected. The procedure was essentially a sidebar, which occurs outside of the public's scrutiny, and thus violates the appellant's right to a fair and public trial. State v. Slert, 169 Wn. App. 766, 774 n.11, 282 P.3d 101 (2012) (rejecting argument that no violation occurred if jurors were actually dismissed not in chambers but at a sidebar and stating "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 Slert's and the public's purview"), review granted, 176 Wn.2d 1031 (2013); see also Harris, 10 Cal.App.4th at 684 (exercise of peremptory challenges in chambers violates defendant's right to a public trial). The procedure the court utilized was as closed to the public as if it had taken place in chambers.

4. A record made after-the-fact record does not cure the error.

Despite the after-the-fact record set forth in the transcript, the trial court violated the right to a public trial in the first instance by taking peremptory challenges in the manner described the above.

First, generally speaking, the availability of a record of an improperly closed voir dire fails to cure the error. State v. Paumier, 176 Wn.2d 29, 32, 37, 288 P.3d 1126 (2012); see also Harris, 10 Cal.App.4th at 684 (holding, based on application of federal law, that after-the-fact availability of transcripts of peremptory challenges conducted in chambers does not public trial violation or render those proceedings “public); cf. People v. Williams, 26 Cal.App.4th Supp. 1, 6-8, 31 Cal.Rptr.2d 769 (1994) (peremptory challenge could be held at sidebar if challenge and party making it was then *immediately* announced in open court).

Second, while parties need give no rationale for such challenges, their open exercise is essential given the important limits on such challenges, which may be triggered solely by a juror’s appearance. While in most cases peremptory challenges are not subject to a ruling by the trial court, it is the very lack of court control that makes it crucial they be open to public scrutiny in all cases. See State v. Saintcalle, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2013 WL 3946038, \*7, \*30-32, \*46-47 (Aug. 1, 2013) (notwithstanding majority of justices’ affirmance of denial of Batson challenge, lead opinion, concurrence and dissent underscoring harm resulting from improper race-based exercise of peremptory challenges and

highlighting difficulty of obtaining appellate relief even where discriminatory exercise may have occurred). Saintcalle highlights the need for public scrutiny, which encourages parties to police themselves and enhance the fairness of the trial process. Thus, an after-the-fact written record of such challenges is inadequate, given the need for scrutiny in the first instance.

In summary, peremptory challenges are part of voir dire, to which the public trial right applies. Wilson, 174 Wn. App. at 342-43. The multitude of cases prohibiting closed voir dire controls the result here. Because the error is structural, prejudice is presumed, and reversal is required. Wise, 176 Wn.2d at 16-19.

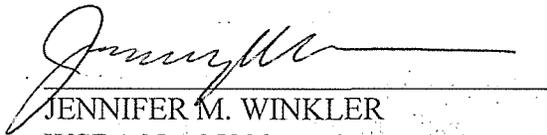
D. CONCLUSION

The trial court violated Mr. Swinford's right to a public trial by taking peremptory challenges by quietly passing a sheet of paper back and forth. This Court should reverse his conviction.

DATED this 3<sup>TH</sup> day of August, 2013.

Respectfully submitted,

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State v. Steven Swinford

No. 30764-6-III

Certificate of Service

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 13<sup>th</sup> day of August, 2013, I caused a true and correct copy of the **supplemental brief of appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 13<sup>th</sup> day of August, 2013.

X  \_\_\_\_\_