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Court of Appeals  
Division III  
State of Washington

COA NO. 32114-2-III

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

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STATE OF WASHINGTON,

Respondent,

v.

DEAN ANDERS,

Appellant.

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

The Honorable Maryann C. Moreno, Judge

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AMENDED BRIEF OF APPELLANT

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CASEY GRANNIS  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The court violated appellant's constitutional right to a public trial during the jury selection process.

2. The court erred in failing to properly address appellant's request for an exceptional sentence downward.

3. The judgment and sentence contains two scrivener's errors.

Issues Pertaining to Assignments of Error

1. Whether the court violated appellant's constitutional right to a public trial when it conducted the peremptory challenge portion of the jury selection process in private without analyzing the requisite factors to justify closure?

2. Did the court abuse its discretion in failing to consider on the record whether there was a basis to impose a sentence outside the standard range and in failing to decide whether the request for a downward sentence was factually and legally supportable?

3. Whether the judgment and sentence mistakenly (1) indicates appellant has waived his presence for any restitution hearing and (2) refers to appellant's criminal history as carrying a domestic violence designation?

B. STATEMENT OF THE CASE

1. *Procedural Facts*

The State charged Dean Anders with first degree assault with a deadly weapon. CP 4. Anders was tried together with John Hill. 2RP 170. Anders's theory of the case was that he acted in defense of himself and his girlfriend Jacqueline Stokes. 2RP 792-801, 806-09. The jury was given instructions on self-defense, but found Anders guilty as charged. CP 27-29, 34-35. The trial court sentenced Anders to a standard range sentence of 204 months confinement. CP 46. Anders appeals. CP 60-74.

2. *Trial*

Anders and Richard Burt lived in a homeless encampment in the People's Park area of Spokane. 2RP<sup>1</sup> 192-93, 198-99. Anders lived in his tent with his girlfriend, Stokes. 2RP 613-14. Hill, also homeless, had a camp about 300 feet away. 2RP 676. The three men were acquainted with one another. 2RP 201-03, 616, 685.

Burt claimed that Anders and Hill attacked him late one night in March 2013 when he went over to Hill's campsite to borrow a tarp for his tent. 2RP 200, 204-206, 211. When Burt arrived at the campsite, he heard

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<sup>1</sup> The verbatim report of proceedings is referenced as follows: 1RP – 10/9/13; 2RP – five consecutively paginated volumes consisting of 10/16/13 & 10/21/13 (vol. I); 10/22/13 & 10/23/13 (vol. II); 10/24/13 (vol. III); 10/28/13 (vol. IV); 10/29/13, 10/30/13 & 11/15/13 (vol. V); 3RP – 10/22/13 (jury voir dire).

Hill and Anders arguing, with Hill saying "It's all your fault because you brought him up here." 2RP 226-27. Burt got involved in the bickering and Hill stuck him in the side with something sharp. 2RP 205-06. Anders then repeatedly hit Burt with a hammer, causing him to fall to the ground. 2RP 206. Hill and Anders took turns beating him while he lay in a fetal position. 2RP 206-07. After they stopped, Burt went back to his campsite and went to sleep. 2RP 208. He called 911 in the morning. 2RP 209.

Police located Burt in his sleeping bag at his campsite. 2RP 286. Burt had multiple injuries, including a fractured skull, fractured nose, fractured spine, fractured ribs, head lacerations and bruising. 2RP 237-38, 258-60. A number of bruises or imprints, which did not break the skin, had a waffle pattern consistent with being hit by a hammer.<sup>2</sup> 2RP 237, 258, 273, 275-76.

Burt said Hill was jealous of his relationship with Anders and he was attacked because of that jealousy. 2RP 218. He claimed he did nothing to instigate the incident. 2RP 234.<sup>3</sup>

Anders had a different version of events. According to Anders, he was awakened at about one o'clock in the morning by Burt, who was

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<sup>2</sup> Detective Ricketts described Burt's injuries as "defensive wounds." 2RP 415, 432.

<sup>3</sup> To Officer Shearer, Burt said Anders attacked him with a hammer for no reason — "out of the blue." 2RP 310, 328.

screaming and yelling "get up" outside Anders's tent door. 2RP 615, 618. Anders and his girlfriend, Stokes, were inside. 2RP 615. Anders put on his clothes. 2RP 617. Burt was drunk. 2RP 623. Anders and Burt exchanged words. 2RP 617. Stokes and Burt got into a "cussing yelling match." 2RP 618. Burt said "Fuck you, bitch, I'm going to kill you." 2RP 618. Burt put his foot through the front door of the tent and pulled on the top of the tent.<sup>4</sup> 2RP 618. Anders felt scared for himself and wanted to protect Stokes. 2RP 618. He told Burt to go away. 2RP 623-24. When Burt started to attack Stokes, Anders hit him in the chest with his shoulder, knocking Burt out of the tent. 2RP 624. After they wrestled on the ground, Anders told him "Richard, go home. You're drunk." 2RP 624. Burt eventually left. 2RP 624. Anders told Stokes to get her clothes on. 2RP 624. He feared for their lives. 2RP 624.

Anders could hear Burt screaming he was going to kill them out in the woods. 2RP 625. Anders knew Burt had killed before, which contributed to his fear. 2RP 619, 684. Burt had told Anders that he had been convicted of voluntary manslaughter. 2RP 192, 622. Burt also had a reputation for aggressiveness. 2RP 505-06.

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<sup>4</sup> There was a tear in Anders's tent and a footprint on the tent. 2RP 369; 557-58.

Burt approached the tent again. 2RP 625. Anders grabbed a framing hammer to protect himself and Stokes.<sup>4</sup> 2RP 625, 654. It was very dark. 2RP 626. No one else was present. 2RP 628. Anders went outside the tent. 2RP 625. Anders again told Burt to go home. 2RP 626-27. Burt lunged at Anders, cutting his arm.<sup>5</sup> 2RP 627. Anders thought Burt had a knife or sharp object. 2RP 655. When Burt charged again, Anders brought him to the ground and hit him in the back with the hammer several times. 2RP 627-28, 655-58. He did not swing the hammer with full force; his intention was not to kill or main Burt, but only to slow him down. 2RP 629.

Burt was in a drunken rage.<sup>6</sup> 2RP 629. When Burt tried to punch and grab Anders, Anders hit him in the hands with the hammer. 2RP 629, 658. By this point Anders was winded from asthma and in pain due to disk degenerative disease. 2RP 630. Anders felt he had to do something quick before Burt overpowered him. 2RP 630. Anders swung at Burt's neck several times to knock him down. 2RP 630-31. Burt went down, but

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<sup>4</sup> It was a 22 ounce hammer with a one inch waffle head. 2RP 655.

<sup>5</sup> Detective Ricketts described a cut on Anders's arm as "superficial." 2RP 415.

<sup>6</sup> Burt acknowledged drinking a fortified wine called Cisco that night, but denied admitting in an earlier interview that he had as many as four Rolling Rocks. 2RP 215. Burt told the defense investigator that he had three to four beers and some Cisco that night. 2RP 532. He also described Cisco as having a "low alcohol content." 2RP 216. In actuality, Cisco has an 18 percent alcohol content. 2RP 531.

then started to get back up. 2RP 631-32. Anders was still in fear for his life. 2RP 632. Anders struck him on the knees with the hammer. 2RP 632. Again he did not use full force. 2RP 633. He only wanted to stop Burt from getting up. 2RP 633. He told Burt to go home, saying they could not be friends any longer. 2RP 634. Burt stayed down and Anders went back into his tent. 2RP 633-34. Hill was not present for any of the altercation. 2RP 680-82.

Burt was gone when Anders went back outside to check if he was still there. 2RP 634. Anders and Stokes gathered their things and left the campsite because they feared for their lives. 2RP 635. They spent the remainder of the night in the woods. 2RP 635. In the morning, Anders and Stokes headed to town to report the incident. 2RP 638. On the way they saw patrol cars and waited for police. 2RP 638. When an officer returned, Anders told him what happened.<sup>7</sup> 2RP 639.

Anders acknowledged putting the waffle print wounds on Burt, but did so in self-defense. 2RP 655, 686. He admitted hitting Burt in the back of the head. 2RP 661. He denied hitting Burt on the top of the head with the hammer, maintaining those injuries happened when Burt ran into the

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<sup>7</sup> Anders initially told a police officer that he used a stick instead of a hammer; he later admitted using a hammer. 2RP 403, 669.

brush and a tree. 2RP 661. He denied hitting Burt on the bridge of the nose. 2RP 663. Burt injured his nose running into a tree. 2RP 663.

Stokes testified that she was awakened by the sound of someone screaming and charging the tent. 2RP 516-17. She heard the screamer say "I'm going to fuckin' kill the bitch." 2RP 517. Stokes thought the threat was directed towards her and she started crying. 2RP 517. She tried to find her clothes. 2RP 518. Anders jumped up and yelled at Burt: "What are you doing, Richard? Get the hell out of here." 2RP 518. Burt kept charging, trying to push his way into the tent. 2RP 518. Anders pushed him away. 2RP 518, 520. Stokes stayed in her tent, where she heard wrestling. 2RP 519. She noticed a cut on Anders arm when he returned to the tent. 2RP 520. She was worried for her safety and for Anders. 2RP 521

Hill testified that he heard screaming while he was at his campsite that night. 2RP 691. He heard "I hate you, I'm going to kill you, you mother fucker." 2RP 692. He thought someone named Debbie was challenging Stokes. 2RP 693. The noise died down for a little bit. 2RP 695. Hill then heard someone walking to Hill's old campsite and then back to Anders's site, saying "I'm going to kill you mother fucker. I'm going to get you." 2RP 695-97. He then heard screaming again for about five minutes. 2RP 697. A person stormed off down the trail and

disappeared into the dark. 2RP 697. Hill denied seeing Burt or being involved in an altercation with him that night. 2RP 697-98.

C. ARGUMENT

1. THE COURT VIOLATED ANDERS'S RIGHT TO A PUBLIC TRIAL WHEN IT CONDUCTED A PORTION OF THE JURY SELECTION PROCESS IN PRIVATE.

Peremptory challenges were silently exercised on a piece of paper in a manner that did not allow for public scrutiny. That piece of paper was not filed until after the trial was over. The court erred in conducting the peremptory challenge portion of the jury selection process in private without justifying the closure under the standard established by Washington Supreme Court and United States Supreme Court precedent. This structural error requires reversal of the conviction.

a. Peremptory Challenges Were Silently Exercised On Paper With No Contemporaneous Announcement Of Those Challenges In Open Court.

Jury selection took place on October 22. 3RP. The venire panel was questioned on the record in the courtroom. 3RP 3-85. With reference to whether the jury selection processed should be finished before jurors were excused for lunch, Hill's counsel said "I'd hate to be brought back for 10 minutes more while the attorneys passed a sheet of paper back and forth." 3RP 87. The court decided to press on and pick the jury. 3RP 87. While the panel remained in the courtroom, the parties exercised their

peremptory challenges. 3RP 88. The transcript states "Peremptory challenge process being conducted silently with the assistance of the bailiff." 3RP 88. When the process was finished, the court announced on the record who would serve as jurors for the trial by number and excused the rest of the venire. 2RP 173-74; 3RP 89. At no time did the court announce in open court which party had removed which potential jurors. A document indicating which side (but not which defendant) exercised a peremptory on which juror was filed, but not until October 31, after the trial was completed. CP 112.

b. Peremptory Challenges Are Part Of The Jury Selection Process And Must Be Open to Public Scrutiny.

The federal and state constitutions guarantee the right to a public trial to every defendant. U.S. Const. amend VI; Wash. Const. art I, § 22. Additionally, article I, section 10 expressly guarantees to the public and press the right to open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). Whether a trial court has violated the defendant's right to a public trial is a question of law reviewed de novo. Easterling, 157 Wn.2d at 173-74.

The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). This is a core safeguard in our system of justice. State v.

Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). The open and public judicial process helps assure fair trials, deters misconduct by participants, and tempers biases and undue partiality. Wise, 176 Wn.2d at 5-6.

The trial court violated Anders's right to a public trial in holding peremptory challenges in private. The right to a public trial encompasses jury selection. Presley v. Georgia, 558 U.S. 209, 723-24, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); Wise, 288 P.3d at 1118 (citing State v. Brightman, 155 Wn.2d 506, 515, 122 P.3d 150 (2005)). Peremptory challenges are an integral part of selecting a jury. See State v. Saintcalle, 178 Wn.2d 34, 52, 309 P.3d 326 (2013) (peremptory challenges established by Washington's first territorial legislature over 150 years ago). "The peremptory challenge process, precisely because it is an integral part of the voir dire/jury impanelment process, is a part of the 'trial' to which a criminal defendant's constitutional right to a public trial extends." People v. Harris, 10 Cal. App.4th 672, 684, 12 Cal. Rptr. 2d 758 (Cal. Ct. App. 1992) (peremptory challenges conducted in chambers violate public trial right, even where such proceedings are reported), review denied, (Feb 02, 1993). Courts may not keep this proceeding from the public's view by closing the courtroom. Nor may the same result be achieved by conducting the challenges silently on a piece of paper that is not filed until after the trial is finished.

Appellate courts employ the experience and logic test to determine whether a proceeding implicates the public trial right. State v. Smith, \_\_ Wn.2d \_\_, \_\_ P.3d \_\_, 2014 WL 4792044 at \*2 (slip op. filed Sept. 25, 2014) (citing State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715 (2012)). 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." Sublett, 176 Wn.2d at 73 (quoting Press-Enterprise Co. v. Superior Court of California, Riverside County, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). The logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." Sublett, 176 Wn.2d at 73. The "guiding principle" is 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. Smith, 2014 WL 4792044 at \*8.

The "experience" component of the Sublett test is satisfied here. Historical evidence reveals "since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). The criminal rules of procedure show our courts have historically treated the peremptory challenge process as part of voir

dire on par with for cause challenges. State v. Wilson, 174 Wn. App. 328, 342, 346, 298 P.3d 148 (2013) (public trial right not implicated when the bailiff excused the two jurors solely for illness-related reasons before voir dire began, contrasting voir dire process involving for cause and peremptory challenges). CrR 6.4(b) contemplates juror voir dire as involving peremptory and for cause juror challenges. Wilson, 174 Wn. App. at 342. CrR 6.4(b) describes "voir dire" as a process where the trial court and counsel ask prospective jurors questions to assess their ability to serve on the defendant's particular case and to enable counsel to exercise intelligent "for cause" and "peremptory" juror challenges. Id. at 343.

This stands in sharp contrast with CrR 6.3, which contemplates administrative excusal of some jurors appearing for service before voir dire begins in the public courtroom. Id. at 342-43. In further contrast, a trial court has discretion to excuse jurors outside the public courtroom under RCW 2.36.100(1), but only so long as "such juror excusals do not amount to for-cause excusals or *peremptory challenges* traditionally exercised during voir dire in the courtroom." Id. at 344 (emphasis added); see also State v. Jones, 175 Wn. App. 87, 97-101, 303 P.3d 1084 (2013) (trial court violated the right to public trial when, during a court recess off the record, the trial court clerk drew four juror names to determine which

jurors would serve as alternates, comparing to voir dire process involving for cause and peremptory challenges).

The "logic" component of the Sublett test is satisfied as well. "Our system of voir dire and juror challenges, including causal challenges and peremptory challenges, is intended to secure impartial jurors who will perform their duties fully and fairly." Saintcalle, 178 Wn.2d at 74 (Gonzalez, J., concurring). "The peremptory challenge is an important 'state-created means to the constitutional end of an impartial jury and a fair trial.'" Id. at 62 (Madsen, C.J., concurring) (quoting Georgia v. McCollum, 505 U.S. 42, 59, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992)).

While peremptory challenges may be exercised based on subjective feelings and opinions, there are important constitutional limits on both parties' exercise of such challenges. McCollum, 505 U.S. at 48-50. A prosecutor is forbidden from using peremptory challenges based on race, ethnicity, or gender. Batson v. Kentucky, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); Rivera v. Illinois, 556 U.S. 148, 153, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009); State v. Burch, 65 Wn. App. 828, 836, 830 P.2d 357 (1992). Discrimination in the selection of jurors places the integrity of the judicial process and fairness of a criminal proceeding in doubt. Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).

The exercise of peremptory challenges directly impacts the fairness of a trial. It is inappropriate to shield that process from public scrutiny. The public trial right encompasses 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. Brightman, 155 Wn.2d at 514; State v. Leyerle, 158 Wn. App. 474, 479, 242 P.3d 921 (2010). An open peremptory process of jury selection acts as a safeguard against discriminatory removal of jurors. Public scrutiny discourages discriminatory removal from taking place in the first instance and, if such a peremptory challenge is exercised, increases the likelihood that the challenge will be denied by the trial judge.

The Supreme Court's recent Saintcalle opinion was fractured on how to deal with the persistence of racial discrimination in the peremptory challenge process, but all nine justices united in the recognition that the problem exists. See Saintcalle, 178 Wn.2d at 49, 60 (Wiggins, J., lead opinion), at 65 (Madsen, C.J., concurring), at 69 (Stephens, J., concurring), at 118 (Gonzalez, J., concurring), at 118-19 (Chambers, J., dissenting). In light of that problem, it cannot convincingly be maintained that the peremptory challenge process, as it unfolds in real time at the trial level,

gains nothing from being open to the public. The public nature of trials is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Wise, 176 Wn.2d at 6. "Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges [and] lawyers . . . will perform their respective functions more responsibly in an open court than in secret proceedings." Id. at 17 (quoting Waller v. Georgia, 467 U.S. 39, 46 n.4, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). The peremptory challenge process squarely implicates those values.

This Court has nonetheless held no public trial violation occurs when peremptory challenges are exercised at sidebar out of public earshot. State v. Love, 176 Wn. App. 911, 916-20, 309 P.3d 1209 (2013).<sup>8</sup> Love was wrongly decided. The experience prong of the "experience and logic" test is met because the relevant court rule envisions both for cause and peremptory challenges taking place in open court. Wilson, 174 Wn. App. at 342-44; Jones, 175 Wn. App. at 98, 101.

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<sup>8</sup> A petition for review has been filed in Love. Division Two has adhered to Love without independent analysis. State v. Dunn, 180 Wn. App. 570, 574-75, 321 P.3d 1283 (2014); State v. Webb, \_\_ Wn. App. \_\_, 333 P.3d 470, 472-73 (2014).

Love relied in part on the absence of evidence that, historically, these challenges were made in open court. Love, 176 Wn. App. at 918-919. But history would not necessarily reveal common practice unless the parties made it an issue. History does not tell us these challenges were commonly done in private, either.

Love's reliance on State v. Thomas, 16 Wn. App. 1, 13, 553 P.2d 1357 (1976) as a basis to conclude peremptory challenges do not meet the "experience" prong is misplaced. Love, 176 Wn. App. at 918. Thomas rejected the argument that "Kitsap County's use of secret – written – peremptory jury challenges" violated the defendant's right to a fair and public trial where the defendant had failed to cite to any supporting authority. Thomas, 16 Wn. App. at 13. Thomas, however, predates the seminal public trial decision in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995) by nearly 20 years. Prior to Bone-Club,<sup>9</sup> there were likely common, but unconstitutional, practices that ceased with issuance of that decision.

Moreover, Thomas noted in 1976 that secret peremptories were used "in several counties" according to a Bar Association directory. Thomas, 16 Wn. App. at 13 & n.2. There are 39 counties in Washington. The implication, then, is that only several of the 39 counties used secret

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<sup>9</sup> State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

peremptories as of 1976.<sup>10</sup> That shows an established historical practice of public peremptory challenges in this state with a few exceptions.

Turning to the "logic" prong, Love's assertion that the exercise of peremptory challenges "presents no questions of public oversight" does not hold up. Love, 176 Wn. App. at 919-20. As argued, the benefit of public oversight to deter discriminatory removal of jurors during the peremptory process satisfied the logic prong. Love failed to consider that an after-the-fact record removes the public's ability to scrutinize what is occurring at a time when error can still be avoided. The court also failed to mention or consider the increased risk of discrimination against protected classes of jurors resulting from late disclosure. "Few aspects of a trial can be more important . . . than whether the prosecutor has excused jurors because of their race, an issue in which the public has a vital interest." State v. Sadler, 147 Wn. App. 97, 116, 193 P.3d 1108 (2008), review denied, 176 Wn.2d 1032 (2013), overruled on other grounds by State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715, 722 (2012). The potential for discriminatory exercise of peremptory challenges presents serious questions requiring public oversight. See Saintcalle, 178 Wn.2d at 34 (discussing whether peremptory challenges should be abolished

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<sup>10</sup> The source of the court's information is actually dated 1968. Thomas, 16 Wn. App. at 13 n.2.

entirely due to the danger of discriminatory application). An open peremptory challenge process enhances both the basic fairness of the criminal trial and the appearance of fairness essential to public confidence in the system.

c. The Procedure Used In This Case Was Private.

One type of "closure" is "when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). Physical closure of the courtroom, however, is not the only situation that violates the public trial right. Another type of closure occurs where a proceeding takes place in a location inaccessible to the public, such as a judge's chambers or hallway. Lormor, 172 Wn.2d at 93 (chambers); Leyerle, 158 Wn. App. at 477, 483, 484 n.9 (moving questioning of juror to hallway outside courtroom was a closure).

Here, the peremptory challenge portion of the jury selection process was conducted in private. The piece of paper silently passed between the attorneys was inaccessible to the public at the time the peremptory challenges were exercised. It remained inaccessible until after the trial was over. The procedure in this case violated the right to a public trial to the same extent as any in-chambers conference or other courtroom closure would have. Though the courtroom itself remained open to the

public, the peremptory challenge proceeding was not conducted in an open manner.

What took place in private should have taken place in open court so that the public could observe the peremptory challenge process as it was taking place. The ultimate composition of the jury was announced in open court. But the selection process was actually closed to the public at the time because which party exercised which peremptory challenge and the order in which the peremptory challenges were made were not subject to public scrutiny. The sequence of events through which the eventual constituency of the jury "unfolded" was kept private. Harris, 10 Cal. App.4th at 683 n.6.

The Court of Appeals has recognized that a sidebar used to dismiss jurors implicates the public trial right. State v. Slert, 169 Wn. App. 766, 774 n.11, 282 P.3d 101 (2012) (rejecting argument that no public trial 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."), rev'd on other grounds, \_\_\_ Wn.2d \_\_\_ P.3d \_\_\_, 2014 WL 4792052 (slip op. filed Sep 25, 2014).

The Supreme Court recently held evidentiary side bar conferences do not implicate the public trial right. Smith, 2014 WL 4792044 at \*1, 2, 5. But the Supreme Court cautioned "merely characterizing something as a 'sidebar' does not make it so. To avoid implicating the public trial right, sidebars must be limited in content to their traditional subject areas, should be done only to avoid disrupting the flow of trial, and must either be on the record or be promptly memorialized in the record. Whether the event in question is actually a sidebar is part of the experience prong inquiry and is not subject to the old legal-factual test." Id. at \*3 n.10.

As argued, experience shows peremptory challenges are regarded as part of the jury selection process on par with for cause challenges and therefore must be exercised in open court. Peremptory challenges conducted at sidebar do not qualify as a "traditional subject area" for sidebars and thus are not immune from a public trial challenge. There is no indication in this record that exercising peremptory challenges in private was done to avoid disrupting the flow of trial. They could have been exercised just as easily by having the attorneys announce their respective challenges in open court while the panel was present. Finally, the peremptory challenges were not on the record or promptly memorialized on the record. The peremptory challenge sheet was not filed until after the trial was over. CP 112.

Generally speaking, the availability of a record of an improperly closed voir dire fails to cure an improper closure. See State v. Paumier, 176 Wn.2d 29, 32, 37, 288 P.3d 1126 (2012) (reversing conviction due to in-chambers questioning of potential jurors despite fact that questioning was recorded and transcribed). While members of the public could discern, after the trial, which prospective jurors had been removed by which side (assuming they knew to look in the court file), the public could not tell, at the time the challenges were made, which party had removed any particular juror, making it impossible to determine whether a particular side had improperly targeted any protected group for removal.

The mere opportunity to find out, after the trial is already completed, which side eliminated which jurors is insufficient to protect the public trial right. Members of the public would have to know the sheet documenting peremptory challenges had been filed and that it was subject to public viewing. Moreover, members of the public would have to remember the identity, gender, and race of those individuals excused from jury service to determine whether protected group members had been improperly targeted. This is not realistic. At minimum, what happened off the record needed to be "promptly memorialized in the record." Smith, 2014 WL 4792044 at \*3 n.10. That did not happen here.

d. The Conviction Must Be Reversed Because The Court Did Not Justify The Closure Under The Bone-Club Factors.

*Before* a trial court closes the jury selection process off from the public, it must consider the five factors identified in Bone-Club on the record. Wise, 176 Wn.2d at 12. Under the Bone-Club test, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-60; Wise, 176 Wn.2d at 10.

There is no indication the court considered the Bone-Club factors before the peremptory challenge process took place in private. The trial court errs when it fails to conduct the Bone-Club test before closing a court proceeding to the public. Wise, 176 Wn.2d at 5, 12. The court here erred in failing to articulate a compelling interest to be served by the closure, give those present an opportunity to object, weigh alternatives to

the proposed closure, narrowly tailor the closure order to protect the identified threatened interest, and enter findings that specifically supported the closure. Orange, 152 Wn.2d at 812, 821-22.

The violation of the public trial right is structural error requiring automatic reversal because it affects the framework within which the trial proceeds. Wise, 176 Wn.2d at 6, 13-14. A defendant does not waive his right to challenge an improper closure by failing to object to it. Id. at 15. The issue may be raised for the first time on appeal. Id. at 9. Anders's conviction must be reversed due to the public trial violation. Id. at 19.

2. THE COURT ABUSED ITS DISCRETION IN FAILING TO ADDRESS ANDERS'S REQUEST FOR AN EXCEPTIONAL SENTENCE DOWNWARD AT SENTENCING.

Anders challenges the procedure by which the court failed to grant an exceptional sentence downward. Remand for resentencing is required because the record does not show the court considered Anders's request for an exceptional sentence and decided whether the statutory bases for imposing the sentence were legally and factually supportable.

"The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence." RCW 9.94A.535(1). A trial court may thus impose an exceptional sentence downward based on the mitigating

factor that "[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident." RCW 9.94A.535(1)(a). A victim's words alone are sufficient to trigger application of this mitigating factor. State v. Whitfield, 99 Wn. App. 331, 336-37, 994 P.2d 222 (1999).

Another mitigating factor is that "[t]he defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct." RCW 9.94A.535(1)(c). This factor applies to failed claims of self-defense. State v. Pascal, 108 Wn.2d 125, 136-37, 736 P.2d 1065 (1987). "[T]here will be situations in which a particular legal defense is not fully established, but where the circumstances that led to the crime, even though falling short of establishing a legal defense, justify distinguishing the conduct from that involved where those circumstances were not present." Pascal, 108 Wn.2d at 136. This factor distinguishes the blameworthiness of a particular defendant's conduct from that normally present in that crime. Id.

At sentencing, Anders requested an exceptional sentence downward of 84 months total based on the mitigating circumstances that (1) Burt was the aggressor and (2) the failed self-defense claim. 2RP 853-54.

The State responded there was no basis for an exceptional sentence downward because evidence that Burt was the aggressor came only from the testimony of Anders and Stokes. 2RP 855. Also, Burt sustained severe injuries and the jury rejected Anders's self-defense claim. 2RP 855.

After Anders spoke on his own behalf about how he acted in self-defense, the court commented that it had to honor the jury's decision and while Anders claimed self-defense, Burt's injuries were very severe. 2RP 859-60. The court found it "difficult to fathom . . . exactly . . . what went on up there and what happened." 2RP 860. The court recited the standard range as 162 to 216 months plus the 24-month deadly weapon enhancement. 2RP 860-61. It described the offense as a "very significant assault. And I know the state is asking for the high end, and I know Mr. Burt would like more than the standard sentence range even allows. I'm going to impose 180 months, and that's about 15 years plus the enhancement of 24. There's no magic to my sentence here other than, Mr. Anders, I know you're -- you're tearful. I can't tell if you're remorseful. You've apologized . . . but I don't really sense that you're taking real responsibility for it. And that's okay. You don't . . . have to do that." 2RP 861-62.

The court did not address Anders's contention that Burt was the aggressor. It did not consider on the record whether there was a basis to

impose a sentence outside the standard range, nor did it decide such a basis was either factually or legally insupportable.

A defendant generally cannot appeal a standard range sentence. RCW 9.94A.585(1); State v. Williams, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). But a defendant "may appeal a standard range sentence if the sentencing court failed to comply with procedural requirements of the SRA or constitutional requirements." State v. Osman, 157 Wn.2d 474, 481-82, 139 P.3d 334 (2006).

"While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). "The failure to consider an exceptional sentence is reversible error." Grayson, 154 Wn.2d at 342. "Similarly, where a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal." Id.

A court also abuses its discretion if it relies on an impermissible basis for refusing to impose an exceptional sentence below the standard range. State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002, 966 P.2d 902 (1998). "A court

relies on an impermissible basis for declining to impose an exceptional sentence below the standard range if it takes the position, for example, that no drug dealer should get an exceptional sentence down or it refuses to consider the request because of the defendant's race, sex or religion." Garcia-Martinez, 88 Wn. App. at 330.

A trial court likewise abuses its discretion when it gives no reason for its discretionary decision. State v. Hampton, 107 Wn.2d 403, 409, 728 P.2d 1049 (1986). In contrast, "a trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling." Garcia-Martinez, 88 Wn. App. at 330. In other words, there is nothing to appeal if the trial court considered whether there is a basis to impose a sentence outside the standard range, decided that it is either factually or legally insupportable and then imposed a standard range sentence. Id. Appellate courts have thus upheld a trial court's denial of an exceptional sentence downward where the record shows the trial court expressly considered the request and found no factual or legal basis to impose it. Id. at 325, 330-31; State v. Khanteechit, 101 Wn. App. 137, 139-41, 5 P.3d 727 (2000).

The record in Anders's case does not allow for the conclusion that the court at sentencing considered Anders's request and rejected the basis

for it. The record does not show the court actually considered whether there was a basis to impose a sentence outside the standard range. The court did not decide the aggressor and failed self-defense mitigators were either factually or legally insupportable.

That is a problem because the reviewing court is unable to determine whether the trial court used the correct legal standard in relation to the exceptional sentence request. The trial court necessarily abuses its discretion when its decision is based on an erroneous view of the law or involves application of an incorrect legal analysis. State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009); Dix v. ICT Group, Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). "Remand for resentencing is often necessary where a sentence is based on a trial court's erroneous interpretation of or belief about the governing law." State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002).

The trial court commented on the severity of the assault, but we do not know if the court rejected the exceptional down request because the severity of the assault was disproportional to Burt's aggression. If it did, then it applied the wrong legal standard. A defendant's response need not be proportional to the victim's provocation. Whitfield, 99 Wn. App. at 337-38. The statutory language of the failed defense mitigator under

RCW 9.94A.535(1)(c) does not contain a proportionality requirement either.

In some instances, appellate courts may overlook a court's abuse of discretion if its decision can be affirmed on any ground within the pleadings and the proof. Rafay, 167 Wn.2d at 655. "But such a rule presupposes that we have some knowledge of the reasons upon which the lower court based its decision, and the rule should not apply where, as here, we have no insight into the lower court's reasoning." Id. Because the trial court did not articulate a reason for denying the exceptional sentence downward, this Court cannot be sure what legal standard the trial court applied. Id. Depending on what the trial court thought about the issue or to what extent the court did or did not incorporate the proper legal standard into its reasoning, it may be that it abused its discretion per se based on an erroneous interpretation of law. Id.

We cannot be sure the trial court refused to give an exceptional sentence downward based on an erroneous view that the mitigators were inapplicable as a matter of law. Anders requests remand for resentencing so that the trial court may consider Anders's request for an exceptional downward sentence, determine on the record whether the request is factually and legally supportable, and then exercise its discretion in imposing a proper sentence.

3. TWO SCRIVENER'S ERRORS SHOULD BE CORRECTED IN THE JUDGMENT AND SENTENCE.

The following boilerplate language and checked box appear in the judgment and sentence: " The defendant waives any right to be present at any restitution hearing (sign initials) \_\_\_\_\_" CP 49. The checked box is a clerical error. Restitution was imposed as part of the sentencing hearing and Anders was present for it. 2RP 862; CP 55. But the record does not show Anders waived his right to be present for any future restitution hearing. 2RP 845-68. That is potentially significant because the State indicated it might seek more restitution at a future time. 2RP 847. The box for waiver should not have been checked.

Another error is contained in Section 2.2 of the judgment and sentence, which sets forth three offenses as criminal history. CP 44. With reference to this criminal history, the judgment and sentence contains the boilerplate finding that "\*DV: Domestic Violence was pled and proved." CP 44. The DV designation is a clerical error. The record does not reflect that Anders's prior offenses were domestic violence offenses. CP 56-57; 2RP 845-46.

The remedy is to remand to the trial court for removal of the errors in the judgment and sentence. See In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701, 117 P .3d 353 (2005) (remanding to trial court for

correction of the scrivener's errors in the judgment and sentence); State v. Naillieux, 158 Wn. App. 630, 646-47, 241 P.3d 1280 (2010) (same).

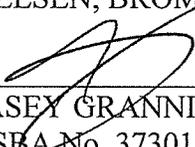
D. CONCLUSION

For the reasons set forth, Anders requests that this Court reverse the conviction. If this Court declines to do so, then the case should be remanded for resentencing and for correction of the scrivener's errors in the judgment and sentence.

DATED this 20<sup>th</sup> day of October 2014

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

  
\_\_\_\_\_  
CASEY GRANNIS  
WSBA No. 37301  
Office ID No. 91051  
Attorneys for Appellant

ERIC J. NIELSEN  
ERIC BROMAN  
DAVID B. KOCH  
CHRISTOPHER H. GIBSON  
DANA M. LIND

OFFICE MANAGER  
JOHN SLOANE

LAW OFFICES OF  
**NIELSEN, BROMAN & KOCH, P.L.L.C.**

1908 E MADISON ST.  
SEATTLE, WASHINGTON 98122  
Voice (206) 623-2373 · Fax (206) 623-2488

WWW.NWATTORNEY.NET

LEGAL ASSISTANT  
JAMILAH BAKER

JENNIFER M. WINKLER  
CASEY GRANNIS  
JENNIFER J. SWEIGERT  
JARED B. STEED  
KEVIN A. MARCH  
MARY T. SWIFT

OF COUNSEL  
K. CAROLYN RAMAMURTI

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State v. Dean Anders

No. 32114-2-III

Certificate of Service by email

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 20<sup>th</sup> day of October, 2014, I caused a true and correct copy of the **Amended 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.

Spokane County Prosecuting Attorney  
[SCPAappeals@spokanecounty.org](mailto:SCPAappeals@spokanecounty.org)

Dean Anders  
DOC No. 771473  
Coyote Ridge Corrections Center  
P.O. Box 769  
Connell, WA 99326

Signed in Seattle, Washington this 20<sup>th</sup> day of October, 2014.

x 