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Court of Appeals
Division III
State of Washington

NO. 32960-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

GENE CAMARATA

Appellant.

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

The Honorable Doug Federspiel, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	2
B. <u>STATEMENT OF THE CASE</u>	3
1. <u>Procedural Facts</u>	3
2. <u>Substantive Facts</u>	4
a. <u>Application for Voter Registration</u>	4
b. <u>Declaration of Candidacy</u>	7
c. <u>Sheriff's Investigation</u>	8
d. <u>Motion for Directed Verdict</u>	10
e. <u>Jury Instructions and Closing Arguments</u>	10
f. <u>Jury Inquiry</u>	12
g. <u>Motion for Judgment Notwithstanding the Verdict</u>	13
h. <u>Jury Selection</u>	14
C. <u>ARGUMENT</u>	16
1. THE STATE FAILED TO PROVE CAMARATA KNOWINGLY PROVIDED A FALSE ADDRESS ON HIS APPLICATION FOR VOTER REGISTRATION.....	16
2. THE EVIDENCE WAS INSUFFICIENT TO SHOW CAMARATA KNOWINGLY PROVIDED FALSE INFORMATION ON HIS DECLARATION OF CANDIDACY.	20

TABLE OF CONTENTS (CONT'D)

	Page
3. THE EVIDENCE WAS INSUFFICIENT TO SHOW CAMARATA PROVIDED THE INFORMATION IN KITTITAS COUNTY AS REQUIRED BY THE JURY INSTRUCTIONS.....	22
4. THE PROSECUTOR COMMITTED FLAGRANT, PREJUDICIAL MISCONDUCT BY ARGUING THE STATE NEED NOT SATISFY THE REQUIREMENTS OF THE INSTRUCTION IT PROPOSED.....	26
5. THE TRIAL COURT VIOLATED CAMARATA’S RIGHT TO A PUBLIC TRIAL BY CONDUCTING PEREMPTORY CHALLENGES AT SIDEBAR.	31
6. THE COURT ERRED WHEN IT GRANTED THE STATE’S MOTION TO STRIKE JUROR 36 WITHOUT DETERMINING WHETHER SHE WAS QUALIFIED.	36
a. <u>Exclusion of Juror 36 Without Inquiring Whether Her Civil Rights Had Been Restored Was a Material Departure from Washington Law and a Violation of Camarata’s Right to a Randomly Selected Jury.</u>	37
b. <u>The Violation of Camarata’s Due Process Right to a Jury Selected at Random from a Fair Cross Section of the Community Was Manifest Constitutional Error.</u>	42
c. <u>Exclusion of Juror 36 on an Unreasonable Basis Violated Her Constitutional Right to Unbiased Jury Selection Procedures.</u>	44
i. <u>There Was No Rational Basis to Exclude Juror 36 Based Solely on Her Felony Conviction Without Inquiring About Her Actual Qualification to Serve....</u>	45
ii. <u>Camarata Has Standing to Raise Juror 36’s Right to Equal Protection of the Law.</u>	48
D. <u>CONCLUSION</u>	50

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Batson v. Kentucky</u> 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).....	16, 49
<u>Brady v. Fibreboard Corp.</u> 71 Wn. App. 280, 857 P.2d 1094 (1993).....	39, 44
<u>Camarata v. Kittitas County</u> ___ Wn. App. ___, 346 P.3d 822 (2015).....	7
<u>Campbell v. Bradshaw</u> 674 F.3d 578 (6th Cir. 2012)	41
<u>In re Detention of Ross</u> 114 Wn. App. 113, 56 P.3d 602 (2002).....	43
<u>In re Pers. Restraint of Orange</u> 152 Wn.2d 795, 100 P.3d 291 (2004).....	33
<u>In re Pers. Restraint of Yates</u> 177 Wn.2d 1, 296 P.3d 872 (2013).....	43
<u>Pepperall v. City Park Transit Co.</u> 15 Wash. 176, 45 P. 743, 46 P. 407 (1896)	22
<u>Roche Fruit Co. v. Northern Pac. Ry.</u> 18 Wn.2d 484, 139 P.2d 714 (1943).....	41
<u>Seattle Times Co. v. Ishikawa</u> 97 Wn.2d 30, 640 P.2d 716 (1982).	32
<u>State v. Allen</u> 182 Wn.2d 364, 341 P.3d 268 (2015).....	28, 30
<u>State v. Anderson</u> ___ Wn. App. ___, ___ P.3d ___, 2015 WL 2394961 (No. 45497-1-II, filed May 19, 2015),	34, 35, 36

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Bone-Club</u> 128 Wn.2d 254, 906 P.2d 629 (1995).....	3, 32, 33, 34
<u>State v. Case</u> 49 Wn.2d 66, 298 P.2d 500 (1956).....	29
<u>State v. Chapin</u> 118 Wn.2d 681, 826 P.2d 194 (1992).....	17
<u>State v. Davenport</u> 100 Wn.2d 757, 675 P.2d 1213 (1984).....	28
<u>State v. Emery</u> 174 Wn.2d 741, 278 P.3d 653 (2012).....	28
<u>State v. Handley</u> 115 Wn.2d 275, 796 P.2d 1266 (1990).....	46
<u>State v. Hickman</u> 135 Wn.2d 97, 954 P.2d 900 (1998).....	13, 14, 22, 23, 24, 26
<u>State v. Kirkman</u> 159 Wn.2d 918, 155 P.3d 125 (2007).....	42
<u>State v. Lee</u> 128 Wn.2d 151, 904 P.2d 1143 (1995).....	22
<u>State v. Love</u> 176 Wn. App. 911, 309 P.3d 1209 (2013) <u>rev. granted</u> 340 P.3d 228 (2015).....	1, 35
<u>State v. Manussier</u> 129 Wn.2d 652, 921 P.2d 473 (1996).....	45
<u>State v. Marsh</u> 106 Wn. App. 801, 24 P.3d 1127 (2001).....	39
<u>State v. Nichols</u> 161 Wn.2d 1, 162 P.3d 1122 (2007).....	30

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Paumier</u> 176 Wn.2d 29, 288 P.3d 1126 (2012).....	34
<u>State v. Reed</u> 102 Wn.2d 140, 684 P.2d 699 (1984).....	29
<u>State v. Saintcalle</u> 178 Wn.2d 34, 309 P.3d 326 (2013).....	36
<u>State v. Smith</u> 155 Wn.2d 496, 120 P. 3d 559 (2005).....	17
<u>State v. Sublett</u> 176 Wn.2d 58, 292 P.3d 715 (2012)	32
<u>State v. Swanson</u> 181 Wn. App. 953, 327 P.3d 67 <u>review denied</u> , 339 P.3d 635 (2014)	28
<u>State v. Sweany</u> 162 Wn. App. 223, 256 P.3d 1230 (2011) <u>aff'd</u> , 174 Wn.2d 909 (2012)	24
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	31
<u>State v. Tingdale</u> 117 Wn.2d 595, 817 P.2d 850 (1991).....	39, 40, 41, 42
<u>State v. Warren</u> 165 Wn.2d 17, 195 P.3d 940 (2008).....	28
<u>State v. Willis</u> 153 Wn.2d 366, 103 P.3d 1213 (2005).....	22
<u>State v. Wilson</u> 174 Wn. App. 328, 298 P.3d 148 (2013).....	35

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Wise</u> 176 Wn.2d 1, 288 P.3d 1113 (2012).....	32, 33, 36
<u>State v. Worland</u> 20 Wn. App. 559, 582 P.2d 539 (1978).....	22
 <u>FEDERAL CASES</u>	
<u>Edmonson v. Leesville Concrete Co.</u> 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991).....	46
<u>Georgia v. McCollum</u> 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992).....	46, 48
<u>In re Winship</u> 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)	17
<u>J.E.B. v. Alabama ex rel. T.B.</u> 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994).....	45
<u>Lockhart v. McCree</u> 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986).....	43
<u>Powers v. Ohio</u> 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).37, 44-46, 48, 49	
<u>Presley v. Georgia</u> 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010)	32
<u>Press-Enter. Co. v. Superior Court</u> 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)	33
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	31
<u>Taylor v. Louisiana</u> 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975).....	43

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>Thiel v. Southern Pacific Co.</u> 328 U.S. 217, 66 S. Ct. 984, 90 L. Ed. 1181 (1946).....	44
<u>United States v. Williams</u> 264 F.3d 561 (5th Cir. 2001)	43

OTHER JURISDICTIONS

<u>State v. Mendoza</u> 227 Wis. 2d 838, 596 N.W.2d 736 (1999).....	39
--	----

RULES, STATUTRS AND OTHER AUTHORITIES

Former RCW 2.36.090.....	40
RAP 2.5.....	42, 49
RCW 2.36.070	37, 38, 39, 42, 46, 47
RCW 2.36.072	38
RCW 2.36.080	40, 47
RCW 2.36.100	39
RCW 9.94A.637	38, 47
RCW 29A.08.010.....	17, 18
RCW 29A.08.112	16, 18
RCW 29A.84.130.....	17
RCW 29A.84.311	20
U.S. Const, amend. VI	30, 32
U.S. Const. amend. XIV	17, 37, 42
U.S. Const. amend. XIV, § 1	45

TABLE OF AUTHORITIES (CONT'D)

	Page
Const. art. I, § 3.....	42
Const. art. I, § 12.....	37, 45
Const. art. I, § 22.....	30, 32
Const. art. VI, § 1.....	18
Const. art. VI, § 3.....	18

A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to prove appellant knowingly provided false information on his application for voter registration.

2. The evidence was insufficient to prove that appellant knowingly provided false information on his declaration of candidacy.

3. The evidence was insufficient to prove appellant provided false information in Kittitas County as required by the jury instructions.

4. The trial court erred in denying appellant's motion to dismiss.

5. The trial court erred in denying appellant's motion for judgment notwithstanding the verdict.

6. Prosecutorial misconduct denied appellant a fair trial when the prosecutor argued the State did not have to prove appellant was in Kittitas County.

7. Appellant received ineffective assistance of counsel when his attorney failed to object to the prosecutor's argument.

8. The trial court violated appellant's constitutional right to a public trial by conducting peremptory challenges at sidebar.¹

9. The court erred by granting the State's motion to strike Juror 36 without determining whether she was qualified to serve.

¹ The Supreme Court has granted review of this issue in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), rev. granted 340 P.3d 228 (2015).

10. Striking Juror 36 violated the constitutional guarantees of due process and equal protection.

Issues Pertaining to Assignments of Error

1. Must appellant's conviction for providing false information on a voter registration application be reversed when the State presented no evidence appellant knew he would not live at the address he provided for 30 days before the next election in which he voted?

2. Must appellant's conviction for providing false information on his declaration of candidacy be reversed because there was no evidence appellant was not registered at the address provided on the day he filed the declaration of candidacy?

3. Must appellant's convictions for providing false information on his voter registration application and declaration of candidacy be reversed because the State failed to prove he did so in Kittitas County, as required by the un-objected to jury instructions?

4. By arguing in closing that the State did not need to prove appellant was in Kittitas County, did the prosecutor commit incurable misconduct denying appellant a fair trial? Alternatively, was counsel ineffective in failing to object to the prosecutor's misstatement of the law?

5. Peremptory challenges were exercised at sidebar. Because the trial court did not analyze the Bone-Club² factors, did the trial court violate appellant's constitutional right to a public trial?

6. When a juror indicated she had been convicted of a felony 20 years earlier, did the court violate Washington law as well as constitutional due process and equal protection guarantees by excusing her without attempting to determine whether her civil rights were restored?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Kittitas County prosecutor charged appellant Gene Camarata with one count of providing false information on an application for voter registration and one count of providing false information in a declaration of candidacy. CP 45. The jury found him guilty on both counts. CP 83-84. The court denied his motions for a directed verdict and for judgment notwithstanding the verdict. 5RP³ 107; 6RP 23-24. The court imposed three months confinement, and credit for time served resulted in Camarata's immediate release. CP 98, 107. Notice of appeal was timely filed. CP 106.

² State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

³ There are six volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Mar. 10, Mar. 31, July 28, Sept. 30, 2014; 2RP – Nov. 20, 2014; 3RP – Nov. 21, 2014; 4RP – Nov. 24, 2014; 5RP – Nov. 25, Nov. 26, 2014; 6RP – Dec. 2, 2014.

2. Substantive Facts

a. Application for Voter Registration

On May 17, 2012, Gene Camarata registered online to vote in Kittitas County, Washington. Ex. 1. The application form requires a residential address. 4RP 48. In April and May 2012, he called the county auditor's office 30 to 50 times discussing addresses he might register and public offices he might declare himself a candidate for. 4RP 101.

He discussed registering at 1001 E. 8th #4, in Ellensburg, and a boat in the parking lot of the Ellensburg Chevrolet dealership, where he said he had often camped. 4RP 102-03. The elections supervisor who took his calls testified he did not mention any area in Kittitas County where he might be. 4RP 103. She testified she asked where he lived, but he would not tell her, and she did not get any sense of where he was. 4RP 103, 105. The bulk of the calls were within 30 days of Camarata's voter registration being filed. 4RP 126.

Ultimately, Camarata registered online to vote and gave as his residential address, "1001 E. 8th (#4)" in Ellensburg, Washington. 4RP 70, 107-08; Exs. 1, 2. Camarata formerly lived at, and registered to vote at, that address. 4RP 93-94. The registration lists him as not a member of the military and not an absentee voter living out of the United States. Exs. 1, 2.

As a mailing address, Camarata listed general delivery, Ellensburg, Washington, zip code 98926. 4RP 128.

In 2008, the apartment building at 1001 E. 8th was purchased by Kittitas County, used for SWAT team practice by the Sheriff's office and then burned to the ground in a fire department training exercise. 4RP 156-61; 5RP 38. By 2012, it was an unpaved vacant lot with a few trees and weeds that was occasionally used for overflow or recreational vehicle (RV) parking for the adjacent Kittitas County Fairgrounds. 4RP 144-46, 161-63, 213. The RV area can be rented out, and people sometimes pitch tents there. 4RP 217. There are public bathrooms with showers roughly two blocks away. 4RP 217.

To register to vote, a person must swear that he or she will have lived at the residential address for at least 30 days before the next election in which the person votes. 4RP 183, 200. The online application form includes a warning that knowingly providing false information is a felony. 4RP 60-62. The oath is inherently prospective, and the information given is only false if the voter knows he or she will not have lived at the given address for 30 days by the time he or she votes.⁴ 4RP 200, 207; Ex. 1. Moreover, a

⁴ The declaration on the online registration form states:

I declare that the facts on this voter registration form are true. I am a citizen of the United States, I will have lived at this address in Washington for at least 30 days immediately before the next election at which I vote, I will be at least 18 years old when I

temporary absence does not deprive a person of the right to vote in a given location so long as one intends to return to that place as one's primary residence. 4RP 197. The person's physical location at the time of registration is immaterial. 4RP 205. The next primary election was scheduled to take place in August 2012, with the general election in November. 4RP 75. No evidence was presented that Camarata voted in this or any election after his registration.

The website informs voters that, if they move, they may continue to vote at their old address until they have re-registered at their new address. 4RP 198. Additionally, homeless voters can list a "non-traditional" address so long as that is where they deem themselves to reside. 4RP 198-99. The non-traditional address should describe the location a voter deems to be his or her residence, even if that is under a specific bridge, for example. 4RP 50-51, 87, 198-99. However, the online form does not provide any way to indicate that the address provided is a non-traditional address or that the voter is technically homeless. Ex. 1B; 4RP 202.

Online voter registration applications go first to the Secretary of State's office in Olympia, Thurston County. 4RP 47-48, 51-53. The voter registration database is physically located on servers in Cheney, Washington,

vote, I am not disqualified from voting due to a court order, and I am not under Department of Corrections supervision for a Washington felony conviction.

Ex. 1B (emphasis added).

Spokane County. 4RP 165. The information is then transferred electronically to the individual counties the same day. 4RP 76. The counties have no ability to reject voter applications unless the necessary information is not provided or the registered address is not actually in that county. 4RP 53, 167-68. However, when Camarata called to verify that his registration had gone through, the auditor's office was concerned, so they alerted the prosecutor and the sheriff. 4RP 88-89, 107, 110. The sheriff filed a voter challenge, which was sustained on appeal by this Court. 4RP 89; Camarata v. Kittitas County, ___ Wn. App. ___, 346 P.3d 822 (2015).

b. Declaration of Candidacy

The day after he filed his voter registration application, Camarata filed a declaration of candidacy for democratic precinct committee member for the 22nd precinct in Ellensburg, a position for which no one else was running. 4RP 64, 111; Exs. 1, 3. Because information from the Secretary of State's Office website is transferred to the county the same day, by the time Camarata declared his candidacy, his voter registration application had been approved by the county. 4RP 76-77. Before filing his declaration of candidacy, Camarata called the auditor's office to make sure his voter registration had gone through. 4RP 110.

The declaration of candidacy listed the 1001 E. 8th address, which is in the 22nd precinct. 4RP 126, 138. The online declaration of candidacy

automatically imports the address from the person's voter registration; the person filing has no ability to edit the address. 4RP 192-93, 203. The oath for the declaration of candidacy is in the present tense. 4RP 208-09. The person must swear to be registered and residing at the registered address.⁵ 4RP 208-09; Ex. 1C. The online declaration of candidacy also warns that knowingly providing false information is a felony. 4RP 60-62.

There was no way to know if Camarata submitted the declaration of candidacy or the voter registration form. 4RP 112-13. But the elections supervisor testified the signature was his. 4RP 112-13. The online voter registration electronically imports the signature from the person's driver's license or identity card from the Department of Licensing. 4RP 54. The elections supervisor testified there was no way for Camarata to have lived at the 1001 E. 8th address for 30 days before the August election because that address "did not exist." 4RP 132. However, she admitted it was an identifiable location, within the correct jurisdiction, that someone might deem to be his or her place of business. 4RP 138-39.

c. Sheriff's Investigation

On June 12, 2012, less than a month after Camarata's registration, during the sheriff's investigation, Commander Higashiyama spoke with

⁵ The oath reads, "I declare that the above information is true, that I am a registered voter residing at the residential address and precinct listed above, and that I am a candidate for Precinct Committee Officer for the party and precinct listed above." Ex. 1.

Camarata by phone. 5RP 41-42. When he asked Camarata where he lived, Camarata told him he had been sleeping on buses in Yakima. 5RP 41-42. Higashiyama sent two letters to Camarata at general delivery in Ellensburg, asking him to reply to verify his address, but they were never claimed and were returned. 4RP 42-45. Also in June, he searched online for Camarata's address, which revealed the 1001 E. 8th address and 1001 University Way, which is a 7-11 store in Ellensburg. 5RP 69; Ex. 11.

In October, Higashiyama received letters from Camarata, with a return address of general delivery, Ellensburg, but postmarked Portland, Oregon. 5RP 47-48; Exs. 8, 9. He also had known Camarata to be found in motels in Pasco and a mission in Multnomah County, Oregon. 5RP 70-71. He testified that, as far as he knows, Camarata travels around and does not have a permanent residence anywhere. 5RP 71. On some occasions, Higashiyama has met Camarata in person at motels in Yakima and Pasco. 5RP 75. In March, 2014, Higashiyama obtained a copy of Camarata's driver's license, issued in 2010 and still valid, which lists the address of the Red Apple Motel in Yakima. 5RP 58-59; Ex. 10.

Higashiyama testified he never went to 1001 E. 8th at any time near when Camarata registered or near the election to see if he was camped there. 5RP 58. Nor did he investigate the Internet Protocol address of the computer from which the application and declaration were submitted. 5RP 80.

d. Motion for Directed Verdict

At the close of the State's case, Camarata moved for a directed verdict on three grounds: 1) the State added the element of "in Kittitas County," and failed to prove Camarata was in the county, or even in Washington, when he submitted the online voter registration and declaration of candidacy; 2) the State failed to prove Camarata provided any false information on his declaration of candidacy because it automatically imported the address from his registration; and 3) the State failed to prove Camarata knowingly provided false information because it failed to prove he did not intend to live at the address he registered for 30 days before the election. 5RP 82-88.

The prosecutor argued it needed to prove only that Camarata registered in Kittitas County, not that he was in Kittitas County when he submitted the forms. 5RP 89-91. He argued Camarata had no intention of living at 1001 E. 8th because the building did not exist. 5RP 95. The court denied the motion based on "direct and circumstantial evidence." 5RP 107.

e. Jury Instructions and Closing Arguments

Despite counsel's motion, the prosecutor submitted proposed to-convict jury instructions including Kittitas County as an element. CP 127-28. Instruction 6, the to-convict instruction for count I, declares the State must prove beyond a reasonable doubt that "(1) On or about May 17, 2012, in

Kittitas County, Washington, the defendant knowingly provided false information on an application for voter registration.” CP 62. Instruction 8, the to-convict instruction for count II, is nearly identical, and declares the State must prove beyond a reasonable doubt that “(1) On or about May 18, 2012, in Kittitas County, Washington, the defendant knowingly provided false information on his declaration of candidacy.” CP 64. Camarata did not object to these instructions. 5RP 116-17, 129.

In closing, the prosecutor argued it was the “(#4)” on Camarata’s registered address that proved it was false. 5RP 163-64. Even if he were camping out at the vacant lot at 1001 E. 8th, the unit designated #4 no longer existed and was false. 5RP 163-64. He also argued the address was false because if Camarata were camping there, he should have given a narrative non-traditional address instead of the traditional address of a building and unit that no longer existed. 5RP 157. He argued the “in Kittitas County” element was proved because no matter where the registration and declaration were submitted, they arrived in Kittitas County. 5RP 157, 165-66. He also argued the address was false because Camarata’s driver’s license listed a Yakima address. 5RP 162.

Camarata argued he had attempted to register as best he could. 5RP 182. The online form had no box to check to indicate homelessness or a non-traditional address. 5RP 171. He argued the State failed to prove he did

not deem 1001 E. 8th his address and intend to live there for 30 days before the election. 5RP 173. He argued that, because his registration was accepted when he Camarata submitted his declaration of candidacy, it was true that he was registered at that address. 5RP 184. He argued Camarata may have put the “#4” in parentheses to indicate the unit no longer existed. 5RP 186.

In rebuttal, the State argued a non-traditional address would describe Camarata’s location with precision, and because of the “(#4),” the address he gave did not do that. 5RP 189-90. He described the defense argument about where Camarata was when he submitted the application and declaration as a red herring or a rabbit’s hole to go down. 5RP 191.

f. Jury Inquiry

During deliberations, the jury sent the Court an inquiry asking, “Please give some clarification on rule 6 #1 (1) Did Gene need to be in Kittitas? Or (2) Was the crime in Kittitas County (Physically)?” CP 82. The prosecutor suggested simply referring the jury to the instructions, while Camarata asked the court to answer that every element must be proved beyond a reasonable doubt. 5RP 197-98.

At this point, the trial court explained the dilemma that arose when Camarata moved for a directed verdict the day before. 5RP 199. The court did not feel it could suggest removing the county from the instructions without improperly acting as an advocate. 5RP 199. The prosecutor

explained it was included because a person registers to vote in a specific county and he believed the instructions, as written, encompassed a person who registered in Kittitas County even if not physically present in the county at the time. 5RP 202, 204. Camarata agreed that a response telling the jury to refer to and follow the instructions was acceptable, and that was the answer the court provided. 5RP 204; CP 82.

g. Motion for Judgment Notwithstanding the Verdict

After the jury returned guilty verdicts, Camarata moved for judgment notwithstanding the verdict, arguing the jury disregarded the element that the defendant must have provided the false information while in Kittitas County. 5RP 211; CP 86-87. He relied on State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998), holding that unobjected-to jury instructions become the law of the case and any unnecessary additional elements must be proved beyond a reasonable doubt. 5RP 211; CP 88-90. He also argued there was no evidence Camarata knew he would not live at 1001 E. 8th as a non-traditional address for 30 days before the election. 6RP 7; CP 94-95.

The prosecutor argued the jury did not need to find Camarata was physically in Kittitas County when he submitted the forms, but if he did, the evidence was sufficient because the letters Camarata sent to Commander Higashiyama, although postmarked Portland, gave a return address in Ellensburg. 6RP 16. Defense counsel responded Camarata had been

prejudiced by counsel's ignorance of how much Camarata was disliked in Kittitas County. 6RP 19-20. He explained Camarata had asked for a change of venue, but counsel declined to file a motion, knowing how difficult it was to win. 6RP 19.

The court denied the motion for judgment notwithstanding the verdict. 6RP 23-24. The court concluded that, unlike Hickman, Camarata waived any objection to venue by not raising it before jeopardy attached. 6RP 25. The Court also found the evidence was sufficient to show Camarata provided false information while in Kittitas County because Camarata called the auditor discussing various locations in Kittitas County he could register, he registered at an address in Kittitas County, he gave a return address of general delivery Ellensburg on letters, and the internet search showed two different Ellensburg addresses for him. CP 30-32. Finally, the court found unit #4 was false because the unit burned down and there was no way Camarata could live there for 30 days before the 2012 election. CP 34.

h. Jury Selection

During voir dire, Juror 36 told the bailiff she had been convicted of a felony 20 years earlier. 2RP 4-5. The court learned this from the bailiff, and informed the parties, "there's no indication that she's had her rights restored, which would make her ineligible." 2RP 4. The prosecutor checked the juror information sheet, and noticed it asked only whether a person was in prison

or on community custody with the Department of Corrections, which the juror had answered truthfully. 2RP 5. Defense counsel pointed out that her eligibility would depend on whether she received a certificate of discharge. 2RP 6. The court stated, "If she got her rights restored, then she could be eligible, but I didn't know – if that had happened, and I've got no way to know." 2RP 6. Because she was number 36, relatively far down the list and unlikely to be seated on the jury, the prosecutor moved to strike. 2RP 6. He explained the basis was "to eliminate issues for this case." 2RP 6-7. When asked for his opinion, defense counsel stated, "I don't know." 2RP 7.

At the end of voir dire, the court again brought up the subject of Juror 36, declaring, "I don't think under the statute she's eligible to be a juror." 2RP 71. Defense counsel responded, "I'll defer to the court. I didn't have time to read it. I don't really know. I think the presumption is that it's a good chance that she's not qualified." 2RP 71. The State's position was, "the pool is big enough, and the presumption is that she's not qualified." 2RP 72. The court excused Juror 36. 2RP 72-74.

After jurors were questioned in open court, the court held a sidebar for exercise of peremptory challenges. The Verbatim Report of Proceedings states, "[discussion off the record regarding peremptory challenges]." 3RP 97. Immediately thereafter, the court announced which jurors had been selected. 3RP 97. On the record, the court asked counsel to verify that the

list of names and numbers accurately reflected the selection counsel had made. 3RP 98. The court then asked if there was any objection to the methodology including, but not limited to, Batson⁶ challenges. 3RP 98. The transcript does not record an answer from defense counsel to either question. 3RP 98. At that point, the remainder of the jury pool was excused and the jury was sworn in. 3RP 98-99. A jury packet was filed in the court file including a list of the peremptory challenges by each side including the name and juror number. CP 109. A master list of potential jurors also reflected the name, number, and address of each as well as when they were excused from the panel and by which party. Id.

C. ARGUMENT

1. THE STATE FAILED TO PROVE CAMARATA KNOWINGLY PROVIDED A FALSE ADDRESS ON HIS APPLICATION FOR VOTER REGISTRATION.

The evidence was insufficient to show Camarata knowingly provided false information on his voter registration application. First, according to the sworn declaration, the information was only false if he knew he would not live there for 30 days before the next election in which he voted. To find Camarata guilty, the jury would have to find he knew he would not live at 1001 E. 8th for 30 days before the next election in which he voted. RCW 29A.08.112; Ex. 1B. Since he has not yet voted, it is impossible to

⁶ Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

determine which 30 days would be relevant. Moreover, since it is possible to camp there, see 4RP 217, it cannot be proved that Camarata knew he would not use that location as his residence for at least 30 days before the hypothetical future election in which he votes. There was no evidence that the address Camarata provided was false or that Camarata knew it to be so.

Due process under the Fourteenth Amendment of the United States Constitution requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P. 3d 559 (2005). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the State, a rational trier of fact could find each essential element of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992).

RCW 29A.84.130(1) provides that any person who “knowingly provides false information on an application for voter registration” is guilty of a class C felony. Thus, the State had the burden to prove both that the address Camarata gave was false and that he knew it to be so.

The address required for voter registration is the “residential address.” RCW 29A.08.010. The residential address is the “actual physical location of the voter in Washington,” and may be a traditional street address or a non-traditional description of the person’s residence. RCW 29A.08.010.

When a person lacks a traditional address, the person's residential address is any "identifiable location that the voter deems to be his or her residence." RCW 29A.08.112. A voter registering with a non-traditional address must also provide a valid mailing address and must, as per article VI, section 1 of the Washington Constitution, live in the area for at least 30 days before the election.⁷ RCW 29A.08.112.

Based on these statutory requirements, the address Camarata provided was not proved to be false. 1001 E. 8th is an identifiable location in Ellensburg, as required by the non-traditional address provision. 4RP 139. It is a vacant lot, part of which is used for parking RVs. 4RP 161-63. People have been known to camp there. 4RP 161-62, 217. Camarata also provided a valid mailing address of General Delivery, Ellensburg.⁸ Ex. 2A.

The only other requirement to make his address valid is the timing. Notably absent from the statute requiring a residential address is any requirement that the address be current. See RCW 29A.08.010. According to the attached oath, the voter attests only that he or she *will* reside there for 30 days prior to the election. Ex. 1B. Assuming the pertinent election to be

⁷ Article VI, section 1 provides:

All persons of the age of eighteen years or over who are citizens of the United States and who have lived in the state, county, and precinct thirty days immediately preceding the election at which they offer to vote, except those disqualified by Article VI, section 3 of this Constitution, shall be entitled to vote at all elections.

⁸ Letters Higashiyama sent to this address to attempt to verify the mailing address in June 2012, were returned after no one claimed them. 5RP 42-46.

the August 2012 primary or the November 2012 general election, the evidence showed that no one even attempted to verify whether Camarata was living or camping at the 1001 E. 8th location around that time. 5RP 58.

However, the 2012 elections are not necessarily the pertinent ones because no evidence was presented that Camarata voted in them. Since he has not voted, the 30-day time frame has not been triggered. According to the online oath, a voter must declare that he or she have lived at the residential address for at least 30 days immediately prior to the election “in which I vote.” Ex. 1B. From this, a voter such as Camarata would likely conclude that a residential address was true so long as the person *intended* to reside there for 30 days before voting. The address cannot be proven false except by proving the person did not reside there for 30 days before voting. If the person has not voted, the residential address is not demonstrably true or false. Given this reasonable interpretation of the form, the State cannot prove Camarata knew that the address he provided was false. So long as he intended to reside there for 30 days before voting at some point in the future, it was true to the best of his knowledge and he did not knowingly provide false information. No evidence was presented that Camarata knew he would vote without having lived at this location for 30 days.

The State will likely argue, as it did at trial, that the use of the “(#4)” proves the address was false because with the destruction of the building,

unit 4 ceased to exist. 5RP 163-64. This argument should be rejected for several reasons. First, the website informs voters that they can continue to vote at an old address until a new one is registered. 4RP 198. Thus, Camarata may have simply tried to accurately list his prior residence. He may also have used parentheses to indicate that unit 4 no longer existed. 5RP 186. Moreover, no evidence was presented that Camarata knew the building at 1001 E. 8th had been destroyed. He had lived in the past but more recently had been homeless and seen in many places such as Yakima, Pasco, and Portland, Oregon. He may have been unaware the building was destroyed and intended to return to his old home to vote.

In short, an address is not false unless the person does not deem it to be his or her residence within the relevant time period. Ex. 1B. The State failed to present evidence that Camarata did not intend to reside at 1001 E. 8th within 30 days of an election in which he voted, or even the next election that occurred. His conviction for knowingly providing false information on a voter registration application must be reversed.

2. THE EVIDENCE WAS INSUFFICIENT TO SHOW CAMARATA KNOWINGLY PROVIDED FALSE INFORMATION ON HIS DECLARATION OF CANDIDACY.

RCW 29A.84.311 provides that a person who “knowingly provides false information on his or her declaration of candidacy” is guilty of a class

C felony. The address for online declarations of candidacy is automatically imported from the voter registration database, and the candidate has no ability to alter that information. 4RP 192-93. Thus, the address on Camarata's declaration of candidacy was the same as on his voter registration application. And the evidence was insufficient to show it was knowingly false for the same reasons discussed above. The State made no effort to demonstrate he did not deem it his residence when he filed his declaration of candidacy or at the time of the general or primary elections. 5RP 58 (Higashiyama did not check to see if anyone was living at the 1001 E. 8th address).

Additionally, the address was not false because the address information in the declaration of candidacy is intended only to confirm the person's registered address. 4RP 192-93. The attached declaration states only that the person is registered to vote and residing at that address. Ex. 1C. When Camarata submitted his declaration of candidacy, his voter registration application had been approved and he was registered at that address. 4RP 77. Because the address on his declaration of candidacy was, in fact, his registered address, the information was not false, or at least not knowingly so. Camarata's conviction for knowingly providing false information on a declaration of candidacy must be reversed for insufficient evidence.

3. THE EVIDENCE WAS INSUFFICIENT TO SHOW CAMARATA PROVIDED THE INFORMATION IN KITTITAS COUNTY AS REQUIRED BY THE JURY INSTRUCTIONS.

The doctrine of the law of the case provides that jury instructions not objected to become the law of the case. State v. Willis, 153 Wn.2d 366, 374, 103 P.3d 1213 (2005) (citing State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998)). The law of the case is an established doctrine with roots reaching back to the early days of statehood. Hickman, 135 Wn.2d at 101-02 (citing Pepperall v. City Park Transit Co., 15 Wash. 176, 180, 45 P. 743, 46 P. 407 (1896)). In a criminal case, the State assumes the burden of proving otherwise unnecessary elements of the offense when such elements are included without objection in a jury instruction. Willis, 153 Wn.2d at 374-75 (citing Hickman, 135 Wn.2d at 102; State v. Lee, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995); State v. Worland, 20 Wn. App. 559, 565-68, 582 P.2d 539 (1978)).

The to-convict jury instruction for count I required the State to prove beyond a reasonable doubt that “On or about May 17, 2012, in Kittitas County, Washington, the defendant knowingly provided false information on an application for voter registration.” CP 62. Similarly, the to-convict instruction for count II provided, “On or about May 18, 2012, in Kittitas County, Washington, the defendant knowingly provided false information on

his declaration of candidacy.” CP 64. The plain language of both of these instructions required the State to prove Camarata was present in Kittitas County when he submitted the information on the online forms. Because there was no evidence of his location, the trial court erred in denying Camarata’s motion for judgment notwithstanding the verdict. The lack of evidence that Camarata was in Kittitas County when he submitted the forms requires reversal of both his convictions for insufficient evidence.

In Hickman, the state charged a defendant by information with committing insurance fraud “in Snohomish County, Washington” and agreed to jury instructions requiring proof of the Snohomish County venue as an element of the crime. 135 Wn.2d at 99, 105. By acquiescing to jury instructions that included venue as required to convict, the state assumed the burden of proving it under the “law of the case” doctrine even though venue was not otherwise an element of insurance fraud. Id. at 99. The Supreme Court found the evidence insufficient to prove the crime took place in Snohomish County, reversed the conviction, and dismissed with prejudice. Id. at 99, 105-06. Hickman controls the outcome in this case.

Here, the State not only acquiesced in the instructions containing “in Kittitas County” as an element, it proposed them. CP 127-28. And it failed to suggest any changes, even after counsel brought the deficiency of proof to

the court and the State's attention by moving to dismiss at the close of the State's case. 5RP 83-85, 200.

The court denied Camarata's motion for judgment notwithstanding the verdict for two reasons, both of which are untenable. First, the court concluded Camarata had waived the issue by failing to object to venue before jeopardy attached. 6RP 25. But the court's reasoning fails to appreciate that a challenge under Hickman is not a venue objection. It is a challenge to the sufficiency of the evidence. Insufficiency of the evidence is not waived and can be raised for the first time on appeal. As this Court explained in State v. Sweaney, (where the State advanced a similar argument): "The State's argument overlooks the longstanding maxim that a criminal defendant may always challenge the sufficiency of the evidence supporting a conviction for the first time on appeal." State v. Sweaney, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011) aff'd, 174 Wn.2d 909 (2012) (discussing Hickman).

The trial court also erred in finding there was sufficient evidence for a jury to find beyond a reasonable doubt that Camarata was in Kittitas County when he submitted the online forms. 6RP 30-34. The court listed the following evidence as proof Camarata was in Kittitas County:

- When he called the county auditor's office in the month before he registered, he discussed registering as his residential address

a boat in an Ellensburg parking lot where he had camped a lot. 4RP 102-03; 6RP 30.

- He also discussed registering the 1001 E. 8th address, which is in Ellensburg, and photographs show areas where someone could pitch a tent and camp. 4RP 102-03; 6RP 30-31.
- He also discussed registering the Yakima River canyon, most of which is in Kittitas County. 4RP 102-03; 6RP 30.
- His registration form lists a mailing address of General Delivery, Ellensburg and the boxes for absentee or military voters are not checked. Ex. 2A; 6RP 31.
- His campaign mailing address is also General Delivery, Ellensburg. Ex. 3A; 6RP 31.
- Internet searches for his address resulted in Ellensburg addresses and phone numbers. Ex. 11; 6RP 31-32.
- No evidence shows Camarata was living anywhere other than Kittitas County at the time. 6RP 33.

None of this amounts to proof beyond a reasonable doubt that Camarata was in Kittitas County when he submitted the forms. Online forms can be submitted and phone calls can be made from virtually anywhere. The discussion of addresses and the addresses he listed on the online forms gives no information about Camarata's location at the time he submitted them because, as discussed above, the time frame for those addresses is 30 days from the election, not the time the form is submitted. Ex. 1. The election supervisor testified that, from his calls, she did not get any sense of where he lived or where he might be located. 4RP 103. Additionally, the trial court's reasoning must also be rejected because the

court shifted the burden of proof to Camarata by reasoning that there was no evidence Camarata was anywhere other than Kittitas County. 6RP 33.

Because there was no evidence Camarata was in Kittitas County when he provided information on his declaration of candidacy or his voter registration application, the evidence fails to support his conviction under the law of the case. Hickman provides an additional reason why Camarata's convictions must be reversed and this case dismissed.

4. THE PROSECUTOR COMMITTED FLAGRANT, PREJUDICIAL MISCONDUCT BY ARGUING THE STATE NEED NOT SATISFY THE REQUIREMENTS OF THE INSTRUCTION IT PROPOSED.

Because the law of the case required the State to prove Camarata provided false information in Kittitas County, the prosecutor's closing argument misled the jury as to the law of the case. This argument was flagrant, prejudicial misconduct requiring reversal of Camarata's conviction.

Despite the jury instructions requiring proof that "in Kittitas County, Washington, the defendant knowingly provided false information," the prosecutor argued in closing:

It doesn't matter where you are. Fresno, Camp LeJeune. You can put in – hey, I'm going to be there – and you send it off. You can do it online. You can obviously do it wherever you're at, but it's ultimately going to be in Kittitas County. That's where you're registered.

5RP 157. Later, the prosecutor argued,

Well, jeez, the State can't really show where he pressed Enter. I mean, the State would have to concede that he's everywhere.

I'd submit to you when you look at the instructions, it's quote obvious that they encompass that filing, registering to vote and filing your Declaration of Candidacy, you're filing in the County because that is where it's going. Because if you really think about it, where is it going when you file online. It's going to Olympia. We heard that from Nicholas Pharris. It's going through their database, their system they have set up.

You're in Fresno again, you register to vote online. Yep, I'm not going to get back in time, I better do it now, goes to Olympia, goes to the Auditor's office. It's in Kittitas County.

5RP 165-66. And finally, in rebuttal, the prosecutor argued:

In Kittitas County, that's impossible. You didn't hear any evidence about where he pressed the buttons, and that is a red herring, a rabbit's hole to go down.

As we heard from Nick Pharris, as you heard from everybody, you could actually send off your application and Register to Vote, file your Declaration, and you're not in Kittitas County, but you're filing in Kittitas County and it needs to be in there because we have to know where you're registering to vote and where you're filing. Is the case in Pierce County, Thurston County, or any other County? And we know that because if you really want to get technical about it, we know it all – if you file online, if I declare Declaration of Candidacy online, it's going to Thurston County first.

5RP 190-91. The State was required to but could not prove that “in Kittitas County, Washington, the defendant knowingly provided false information.”

So instead it argued it did not need to prove Camarata provided the

information while in Kittitas County. This argument misstated the law of the case, relieved the State of its burden to prove an element of the offense contained in the unobjected-to jury instructions, and encouraged jury nullification.

“The prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury.” State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). Thus, a prosecutor may not shift or diminish the State’s burden to prove every element of the offense beyond a reasonable doubt. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008) (improper for prosecutor to argue reasonable doubt does not mean to give the defendant the benefit of the doubt). In short, “The prosecutor may not misstate the law to the jury.” State v. Swanson, 181 Wn. App. 953, 959, 327 P.3d 67, review denied, 339 P.3d 635 (2014).

A misstatement of law requires reversal when there is a substantial likelihood that it affected the jury’s verdict and thereby denied the defendant a fair trial. State v. Allen, 182 Wn.2d 364, 375, 341 P.3d 268 (2015). Even where there is no objection, reversal is required when a prosecutor’s remark is so flagrant and ill-intentioned that it causes an enduring prejudice that could not have been neutralized by a curative instruction to the jury. State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

Prosecutors, in their quasi-judicial capacity, usually exercise a great deal of influence over jurors. State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956). Statements made during closing argument are presumably intended to influence the jury. State v. Reed, 102 Wn.2d 140, 146, 684 P.2d 699 (1984). Otherwise, there would be no point in making them. Although jurors are instructed to disregard any argument not supported by the court's instructions, they are also instructed to consider the lawyers' remarks because they are "intended to help you understand the evidence and apply the law." CP 56 (Instruction 1).

One problem here is that the jury was in no position to determine whether the prosecutor's misstatement of the law was actually supported by the court's instructions. On the contrary, the jury's inquiry shows the prosecutor's argument had the desired effect of confusing the jury about the additional element. The jury submitted an inquiry asking whether it had to find Camarata or the crime was physically in Kittitas County. CP 82. Instead of, as Camarata requested, instructing the jury it had to find every element of the offense beyond a reasonable doubt, the court simply instructed the jury to refer to and follow the instructions. CP 82. This response did not even attempt to resolve the jury's confusion or correct the false impression created by the prosecutor's argument. The failure to give a meaningful response to the jury's inquiry had the same effect as overruling

an objection – it indicated to the jury that the prosecutor’s statement of the law was not incorrect. See Allen, 182 Wn.2d at 378 (jury’s interpretation of the law was “tainted” by prosecutorial misstatements of law of accomplice liability because court twice overruled objections).

The plain language of the jury instructions required the jury to find Camarata provided false information *in* Kittitas County. CP 62, 64. Instead, the prosecutor argued he need only have provided it *to* Kittitas County. 5RP 157, 165-66, 191. This was flagrant misconduct that relieved the State of its burden to prove an element contained in the jury instructions. A curative instruction was not available, as demonstrated by the Court’s refusal to even give a meaningful answer to the jury’s inquiry. CP 82; 5RP 199-201. When the court refused to respond to an inquiry directly from the jury indicating actual confusion, it is highly unlikely the court would have granted an instruction at counsel’s request.

Alternatively, in the event this Court finds the misconduct could have been cured by instruction, counsel was constitutionally ineffective in failing to object and request such an instruction. “A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude.” State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). The right to effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the

Washington State Constitution is violated when the attorney's deficient performance prejudices the defendant such that confidence in the outcome is undermined. Strickland v. Washington, 466 U.S. 668, 685-87, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 229, 743 P.2d 816 (1987).

If the jury were properly instructed it had to find the elements, including "in Kittitas County" beyond a reasonable doubt, it would almost certainly have acquitted because there was no evidence where Camarata was when he submitted the online forms. Indeed, the State spent much of its case trying to prove Camarata was *not* in Kittitas County. 5RP 41-42 (Camarata told Higashiyama he was sleeping on busses in Yakima); 5RP 43-45 (letters to Camarata at Ellensburg General Delivery returned unopened); 5RP 47-48 (Camarata's letters to Higashiyama in October postmarked Portland, Oregon). The failure to ensure Camarata obtained the full benefit of the burden of proof beyond a reasonable doubt for every element in the jury instructions was unreasonably deficient performance that prejudiced Camarata. Reversal is therefore required.

5. THE TRIAL COURT VIOLATED CAMARATA'S RIGHT TO A PUBLIC TRIAL BY CONDUCTING PEREMPTORY CHALLENGES AT SIDEBAR.

Structural error requires reversal of Camarata's conviction because the exercise of peremptory challenges was hidden from public view in

violation of Camarata's right to a public trial. The record indicates peremptory challenges were exercised at sidebar, and the court failed to perform a Bone-Club analysis on the record. 3RP 97-98.

Jury selection is a critical part of trial that must be open to the public. State v. Wise, 176 Wn.2d 1, 11, 288 P.3d 1113, 1118 (2012). Even if it were not already clear that the public trial right prohibits closed jury selection proceedings, such proceedings also violate the public trial right under the "experience and logic" test announced in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012).

The Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington Constitution guarantee the accused a public trial by an impartial jury.⁹ Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); Bone-Club, 128 Wn.2d at 261-62. Additionally, article I, section 10 of the Washington Constitution provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." This 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).

⁹ 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"

While the right to a public trial is not absolute, a trial court may close proceedings to public view only “under the most unusual circumstances.” Bone-Club, 128 Wn.2d at 259. Before a closure, the court must first apply on the record the five factors set forth in Bone-Club. In re Pers. Restraint of Orange, 152 Wn.2d 795, 806-09, 100 P.3d 291 (2004).

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.” Id. at 804 (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). In Wise, 10 jurors were questioned privately in chambers during voir dire, and six were excused for cause. 176 Wn.2d at 7. The court held the public trial right was violated because jurors were questioned in a room not open to the public without consideration of the Bone-Club factors. Id. at 11-12. Wise does not indicate any reason to depart from this holding when the private part of voir dire is peremptory challenges.

In Slert, the court and counsel reviewed jury questionnaires in chambers and, on the basis of the answers, agreed to excuse four jurors. Slert, 181 Wn.2d at 602. Justice Gonzalez’ lead opinion concluded the label of “jury selection” was not determinative and this process was not substantially similar to the voir dire considered in Wise. Id. at 604-05. However, Justice Wiggins, concurring in result, concluded that, “It appears

that this is a voir dire case that easily could have been decided under *Paumier* and *Wise*.” Id. at 610 (Wiggins, J., concurring in result).¹⁰ Justice Wiggins rejected the public trial violation only because Slert failed to object. Id. at 612. Justice Wiggins concluded that “every stage of judicial proceedings,” presumably to include the review of the questionnaires in Slert, “must be presumptively open” and may be closed only after application of the Bone-Club factors. Id.

The four dissenters concluded the dismissal of jurors for cause behind closed doors was voir dire, which this Court has repeatedly held implicates the public trial right. 181 Wn.2d at 612-13 (Stephens, J., dissenting). Thus, five members of the Washington Supreme Court appear to agree that jury questionnaires and four-cause dismissals are an integral part of voir dire that must be open to the public.

A recent decision by Division Two of the Court of Appeals is in accord. In State v. Anderson, ___ Wn. App. ___, ___ P.3d ___, 2015 WL 2394961 (No. 45497-1-II, filed May 19, 2015), 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, the court nonetheless found a closure. Id. at 5-6. The court explained that the purpose of a sidebar is to prevent the public from

¹⁰ State v. Paumier, 176 Wn.2d 29, 288 P.3d 1126 (2012).

hearing what is 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.

Anderson expressly rejected the reasoning from Love. Slip op. at 9-12. The Love court held that the experience prong of Sublett’s “experience and logic” test was not met because traditionally there was no requirement that the proceeding be held in public. Love, 176 Wn. App. at 918. 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. See State v. Wilson, 174 Wn. App. 328, 344, 298 P.3d 148 (2013) (differentiating administrative excusals from for-cause and peremptory challenges, which historically occur in open court).

The “logic” portion of the Sublett test also indicates peremptory challenges must be public. As the Anderson court explained, 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 public has “ a vital interest” in

overseeing for-cause challenges even though they are “less prone to arbitrary or improper exercise than peremptory challenges.” Slip op. at 12.

When the public cannot see which jurors are excused and by which party, it cannot act as a check on peremptory challenges motivated by race or other bias. Ignoring bias does not render our judicial system immune to it. See generally, State v. Saintcalle 178 Wn.2d 34, 35-36, 44-49, 52, 309 P.3d 326 (2013) (acknowledging the challenge presented by unconscious racial bias in jury selection).

For purposes of the public trial analysis, peremptory challenges should not be differentiated from for-cause challenges. Peremptory challenges are unlike administrative excusals because peremptory challenges occur after the venire is sworn and after jurors are examined in open court. Peremptory challenges are exercised on the basis of voir dire and strongly implicate the fairness of the overall proceedings. Like the for-cause excusals in Slert and Anderson, they are a substantial part of the jury selection held to be integral in Wise. Insulating this essential part of the trial from public scrutiny was structural error that requires reversal of Camarata’s convictions.

6. THE COURT ERRED WHEN IT GRANTED THE STATE’S MOTION TO STRIKE JUROR 36 WITHOUT DETERMINING WHETHER SHE WAS QUALIFIED.

“Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not

have the opportunity to contribute to our civic life.” Powers v. Ohio, 499 U.S. 400, 402, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). Under Washington law, this includes those previously convicted of a felony who have discharged their debt to society and are entitled to be reintegrated into the life of responsible citizenship. RCW 2.36.070.

With the modern trend of mass incarceration, reintegration into society becomes even more important. Our Legislature implicitly recognized the need for former convicts to participate in the democratic process when it mandated that, upon restoration of civil rights, a convicted person was again qualified to serve on a jury. RCW 2.36.070. Unfortunately, the trial court here ignored this mandate. The exclusion of Juror 36 from the panel was in violation of Washington law on jury selection, Camarata’s due process right to a randomly selected jury, and Juror 36’s constitutional right to equal protection of the laws under the Fourteenth Amendment and article I, section 12 of Washington’s Constitution.

- a. Exclusion of Juror 36 Without Inquiring Whether Her Civil Rights Had Been Restored Was a Material Departure from Washington Law and a Violation of Camarata’s Right to a Randomly Selected Jury.

During voir dire, Juror 36 revealed to the bailiff that she had been convicted of a felony 20 years earlier. 2RP 4. Based on this conviction, the

court presumed her civil rights had not been restored and struck her from the jury panel. 2RP 4-5, 71, 74. Excusing Juror 36 on the basis of her felony conviction without asking whether her civil rights had been restored violated Washington's jury statutes designed to guarantee impartiality by random selection of jurors.

All civil rights are restored with discharge of a criminal sentence. RCW 9.94A.637(5). Discharge may occur after all terms and conditions of a criminal sentence, including payment of all legal financial obligations, have been satisfied. RCW 9.94A.637(1). Under RCW 2.36.070, all persons are competent to serve on juries except those disqualified for one of the specific reasons listed, including a person who "has been convicted of a felony and has not had his or her civil rights restored."

There was no basis for the court's assumption that Juror 36 was not qualified. After 20 years, it is likely her civil rights had been restored. But the error was in excusing her without even attempting to find out. Courts are required by law to determine, by means of a declaration from the juror, whether each summoned person meets the statutory qualifications. RCW 2.36.072. In deciding to exclude Juror 36, the trial court acknowledged the possibility that her civil rights had been restored but then declared, "I've got no way to know." 2RP 6. This is simply false. The court could have asked

Juror 36, as RCW 2.36.072 requires, to declare in written or electronic form, whether she met the qualifications.¹¹

Courts may not simply assume jurors lack the qualifications to serve. Except those who are disqualified under RCW 2.36.070, “no person may be excused from jury service by the court except upon a showing of undue hardship, extreme inconvenience, public necessity, or any reason deemed sufficient by the court.” RCW 2.36.100 (emphasis added). Under similar circumstances, Wisconsin’s supreme court held it was error for a court to strike jurors for cause solely on the basis of a criminal conviction without inquiring into actual bias. State v. Mendoza, 227 Wis. 2d 838, 850-51, 596 N.W.2d 736, 743 (1999).

Excusing Juror 36 solely on the basis of her felony conviction, without even inquiring as to restoration of her civil rights, was a material departure from our state’s law governing jury selection. When such a material departure occurs, prejudice to the defendant is presumed. State v. Marsh, 106 Wn. App. 801, 807, 24 P.3d 1127 (2001) (citing State v. Tingdale, 117 Wn.2d 595, 600, 817 P.2d 850 (1991)); see also Brady v. Fibreboard Corp., 71 Wn. App. 280, 284, 857 P.2d 1094 (1993) (presuming prejudice where judge other than trial judge excused several jurors based on mailed questionnaires).

¹¹ Apparently, the juror information sheet fails to request information about a felony conviction or restoration of civil rights. 3RP 5.

In Tingdale, the court clerk excused, sua sponte, three jurors it believed to be personally acquainted with the defendant. 117 Wn.2d at 597. Rather than inquiring further, the court relied on the clerk's assertion and ordered the jurors be excused. Id. at 598. The Washington Supreme Court reversed the Court of Appeals and declared the trial court's ruling an abuse of discretion. Id. at 600.

First, the court noted the express legislative policy of selecting jurors at random. 117 Wn.2d at 600 (discussing former RCW 2.36.090).¹² Many jury selection methods may be proper so long as they substantially comply with the statute by preserving the element of chance. Id. The court found that the practice of permitting the court to excuse jurors on the basis of acquaintance with the defendant, without further inquiry, removed the element of chance and essentially permitted the court to select a jury of its own choosing. Id. at 601. The court also noted that mere acquaintance with the defendant was not a basis to excuse a juror for cause. Id.

Because there was nothing in the record to establish that these jurors were disqualified, the trial court abused its discretion in excusing them. Id. at 602. Because the excusal was a material violation of the statute, the court presumed prejudice and reversed. Id. at 600, 602 (citing Roche Fruit Co. v. Northern Pac. Ry., 18 Wn.2d 484, 139 P.2d 714

¹² Current RCW 2.36.080 also states, "It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population."

(1943)). Camarata's case also involves a material violation of the jury selection statutes, and, under Tingdale, prejudice should be presumed.

In addition to the material violation of the statute, the Tingdale court also found actual prejudice because, in rejecting a qualified juror, the court allowed a potentially unqualified juror, a friend of the sheriff, to serve. 117 Wn.2d at 602. This additional concern is also present in this case. The wrongful exclusion of Juror 36 matters because Juror 37, who took her place, was personally acquainted with county auditor Jerrod Pettit, who testified for the State at trial. 2RP 18; CP 111.

Juror 37 told the court he was "not sure" he could act fairly in the case. 2RP 18. He first told the court he did not have concerns, and then, when asked if he had some serious concerns he answered, "Yeah, [inaudible]." 2RP 18. When the court specifically asked whether he could set aside any preconceived notions and act fairly, Juror 37 responded only, "I would do my best." 2RP 18. Camarata could not exercise a peremptory challenge on Juror 37 because he had already spent all his peremptory challenges on jurors with lower jury numbers. CP 109. The question of juror bias entails inquiring "did the juror swear that he could set aside any opinion he might hold and decide the case on the evidence." Campbell v. Bradshaw, 674 F.3d 578, 594 (6th Cir. 2012). Juror 37 did not so swear. Thus, the erroneous dismissal of Juror 36 permitted a juror to serve who

was personally acquainted with a State witness and who had serious reservations about his ability to be fair.

Nothing in the record shows Juror 36 was not qualified to serve. Mere conviction of a felony does not disqualify her. RCW 2.36.070. To allow the judge to excuse those convicted of a felony without asking about restoration of civil rights permits the judge to select arbitrarily among potential jurors. As in Tingdale, the excusal of a juror without grounds showing disqualification was an abuse of discretion and a material violation from the statutes. Camarata's convictions should be reversed.

- b. The Violation of Camarata's Due Process Right to a Jury Selected at Random from a Fair Cross Section of the Community Was Manifest Constitutional Error.

This violation of Washington jury selection law is also a violation of due process amounting to manifest constitutional error that may be considered for the first time on appeal. RAP 2.5(a). An error may be considered, despite being raised for the first time on appeal, when the error is truly constitutional and had practical and identifiable consequences for the defendant at trial. State v. Kirkman, 159 Wn.2d 918, 926-27, 935, 155 P.3d 125 (2007). Each of these requirements is met in this case.

“No person shall be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV; Const. art. I, § 3. “Due

process requires the government to treat its citizens in a fundamentally fair manner.” In re Detention of Ross, 114 Wn. App. 113, 121, 56 P.3d 602 (2002). Due process under the sixth amendment to the United States Constitution and article 1, section 22 of the Washington Constitution also includes the right to an impartial jury. Furthermore, due process requires the jury be drawn from a fair cross-section of society. United States v. Williams, 264 F.3d 561, 567 (5th Cir. 2001); In re Pers. Restraint of Yates, 177 Wn.2d 1, 19, 296 P.3d 872 (2013).

The jury must be randomly drawn from a fair cross section of the community so that the jury can ““make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and . . . professional or perhaps over conditioned or biased response of a judge.”” Yates, 177 Wn.2d at 19 (quoting Taylor v. Louisiana, 419 U.S. 522, 527, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975)). A jury randomly selected from a fair cross-section of the community is generally presumed to be impartial. Lockhart v. McCree, 476 U.S. 162, 184, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986).

The “fair cross section” requirement is violated when the court excludes a cognizable and distinct group. Williams, 264 F.3d at 568. Those convicted of a felony are a cognizable and distinct group. By excluding them in this case, the trial court violated the requirement of

drawing the jury from a fair cross-section of society. It also replaced the element of chance, the primary method for preserving impartiality, with arbitrary selection by the trial court. See Brady, 71 Wn. App. at 283 (pre-trial excusal of jurors based on mailed questionnaire violated principle of random jury selection). The court excused Juror 36 without any showing that she was actually disqualified. 3RP 5-7, 71-72, 74. This violated fundamental fairness and the guarantee of an impartial jury.

The error in this case deprived Camarata of the right to a jury randomly selected from a fair cross section of the community and had the practical consequence of permitting a potentially biased juror, who was personally acquainted with a State's witness and who could not assure the judge he would be fair, to serve on the jury. 2RP 18. Both randomness and actual impartiality were compromised for the sake of a false efficiency. Camarata's convictions should be reversed.

c. Exclusion of Juror 36 on an Unreasonable Basis Violated Her Constitutional Right to Unbiased Jury Selection Procedures.

All citizens enjoy the constitutional right not to be excluded from jury service on the basis of irrelevant factors such as race or employment status. Powers v. Ohio, 499 U.S. 400, 404, 111 S. Ct. 1364, 1367, 113 L. Ed. 2d 411 (1991); cf. Thiel v. Southern Pacific Co., 328 U.S. 217, 223-24, 66 S. Ct. 984, 90 L. Ed. 1181 (1946) (daily wage earners cannot be

excluded from jury service “without doing violence to the democratic nature of the jury system”). Jurors may not be rejected on a false assumption that they are not qualified to serve. Powers, 499 U.S. at 404. Juror qualification is an individual, rather than a group or class matter, and courts may not use assumptions about categories such as race or employment as a proxy for actual qualifications to serve on a jury. Id.

“The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system.” J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 161 n. 13, 114 S. Ct. 1419, 1438, 128 L. Ed. 2d 89 (1994). In addition to violating due process and Washington law, the court’s conduct also violated Juror 36’s equal protection right not to be excluded from jury service based on unfair discrimination.

- i. There Was No Rational Basis to Exclude Juror 36 Based Solely on Her Felony Conviction Without Inquiring About Her Actual Qualification to Serve.

The right to equal protection guarantees, “persons similarly situated with respect to the legitimate purpose of the law must receive like treatment.” State v. Manussier, 129 Wn.2d 652, 672, 921 P.2d 473 (1996); U.S. Const. amend. XIV, § 1; Const. art. I, § 12. Washington courts

construe the Federal and State constitutional provisions substantially identically and treat them as one issue. Manussier, 129 Wn.2d at 672.

Under the equal protection clause, individual jurors have a right to nondiscriminatory jury selection procedures. J.E.B., 511 U.S. at 140-41, (citing Powers, 499 U.S. at 412; Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991); Georgia v. McCollum, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992)). In general, two factors must be satisfied to establish an equal protection violation. First, an individual must be a member of a class such that the individual is similarly situated to others who are treated differently. State v. Handley, 115 Wn.2d 275, 289-90, 796 P.2d 1266 (1990). Second, where no suspect classification or fundamental right is at issue, there must be no rational basis for the differential treatment. Id.

Juror 36 is similarly situated, for purposes of the juror qualification statute, RCW 2.36.070, to those throughout Washington who have been convicted of a felony. But unlike others with felony convictions in their history, she was excluded from jury service solely on that basis, without regard for whether her rights had been restored.

Additionally, she is similarly situated to all others summoned for jury service where there may be reason to doubt their qualifications. A juror who appears young is not excluded without inquiry as to actual age. Those who

might appear to be immigrants are not excluded unless they are actually not United States citizens. But Juror 36 was excluded because the court and prosecutor apparently deemed it unlikely her civil rights had been restored since her felony conviction 20 years ago. 3RP 5-7, 71-72.

Excluding all jurors convicted of felonies lacks any rational basis. A felony conviction is not a valid proxy for actual qualification of the juror. Washington law expressly provides that those convicted of a felony may serve so long as their civil rights have been restored. RCW 2.36.070(5). There can be no rational basis for excluding all convicted felons from jury service when the state's explicit objective is that such persons *not* be excluded so long as their rights have been restored. Id. The court's failure to inquire lacks a rational basis because it works against the state's express goals of reintegrating former felons into the democratic process and ensuring random selection of jurors. Id.; RCW 2.36.080.

Nor is there any rational basis for failing to inquire about restoration of rights after a felony conviction. As discussed above, someone could simply have asked Juror 36 if she had received a certificate of discharge, which would restore her right to serve on a jury. RCW 9.94A.637(5). Concerns about embarrassment could be addressed by inquiring without the other jurors present. Or, the question could have been, like other qualification information, included in the juror data sheet. 3RP 5. As the

court noted, there was no indication Juror 36 gave false information, no reason not to take her at her word. 3RP 5. On the contrary, she came forward to report her conviction even though no one asked. 3RP 4-5. Given the ease of asking Juror 36 if she met the qualifications, the court's decision to exclude her from jury service without inquiry lacked any rational basis.

ii. Camarata Has Standing to Raise Juror 36's Right to Equal Protection of the Law.

Accused persons have a right "to be tried by a jury whose members are selected by nondiscriminatory criteria." McCullum, 505 U.S. at 46. This is true even if the accused does not belong to the same class as the juror. Id. at 55; Powers, 499 U.S. at 415.

In Powers, a white juror was allowed to challenge the exercise of peremptory challenges against black jurors. 499 U.S. at 415. The court reasoned that 1) there was a cognizable injury to the defendant as well as to the integrity of the courts, 2) there was a sufficiently close relationship between the defendant and the juror based on the relationship of trust created during voir dire, and 3) jurors are unlikely to be able to pursue vindication of their equal protection rights as jurors through any other avenue. Id. at 411-15. The same considerations mandate permitting Camarata to raise Juror 36's equal protection rights in this case.

Moreover, as someone convicted of a felony (witness tampering) in 2007, Camarata is also a member of the same class as Juror 36. CP 97. He therefore has standing to challenge the discriminatory classification even without the Powers analysis. Cf. Powers, 499 U.S. at 405 (discussing Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), where black defendant challenged exercise of peremptory challenges against black jurors). Like the due process violation discussed above, excusing Juror 36 on an impermissible basis in violation of equal protection is manifest constitutional error that may be raised despite the lack of objection below under RAP 2.5.

The State may argue the record does not show whether Juror 36's rights were restored. But the process used by the trial court amounted to a blanket exclusion from jury service of all those convicted of a felony without regard for restoration of their civil rights. This was in direct contravention of equal protection, due process, and state law.

Those convicted of a felony are in a unique position to appreciate the seriousness of the juror's role. Camarata has no right to have a convicted felon on the jury. But he does have the right to have the jury selected randomly so that former convicted felons are not unlawfully excluded from the pool of potential jurors. The trial court's assumption that Juror 36 was not qualified was an affront to the civil rights of former convicts and resulted

in a potentially biased juror serving on the jury. Camarata's convictions should be reversed because the trial court's excusal of Juror 36 violated state law, due process, and the equal protection right to non-discriminatory jury selection practices.

D. CONCLUSION

Camarata's convictions must be reversed with prejudice because the evidence was insufficient. Alternatively, Camarata's convictions should be reversed because of prosecutorial misconduct, ineffective assistance of counsel, violation of his right to public trial, and/or violation of the juror selection statutes, due process, and equal protection.

DATED this 8th day of ~~June~~^{July}, 2015.

Respectfully submitted,

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State v. Gene Camarata

No. 32960-7-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 8th day of July, 2015, I caused a true and correct copy of the **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 8th day of July, 2015.

X 