SUPREME COURT NO. 91148-7

NO. 44919-6-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DUSTIN MARKS,

Petitioner.

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

The Honorable James Orlando, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Dustin Marks asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

The petitioner seeks review of the Court of Appeals' part-published decision in State v. Dustin Wade Marks, 44919-6-II,[1] dated December 2, 2014, which is attached as an Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Did the trial court violate the petitioner's right to a public trial by taking peremptory challenges in a proceeding that was not open to public scrutiny?

2. Did the trial court err in ordering the petitioner to pay a discretionary legal financial obligation (LFO) without meaningfully considering his ability to pay; and may the issue be raised for the first time on appeal?

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[1] State v. Marks, ___ Wn. App. ___, ___ P.3d ___, 2014 WL 6778304 (Dec. 2, 2014).

D. STATEMENT OF THE CASE[2]

The State charged Marks with first degree assault with a firearm enhancement, first degree unlawful possession of a firearm, second degree vehicle prowling, and reckless endangerment for events occurring March 16, 2012. CP 1-2. Marks's defense was mistaken identity. 6RP 697.

Jury selection occurred on April 15, 2013. After the parties finished asking potential jurors questions, the court announced the attorneys would "do their final selection [of jurors] in writing." 2RP 148. The transcript notes that the case went "[o]ff the record" for the attorneys to do peremptory challenges. The transcript then notes, "Sidebar held, but not reported." 2RP 150. Afterward, the court called the names of the remaining jurors and their seat assignments. 2RP 150. A list of the excused jurors, and who exercised the peremptory challenges, was included in the court file. See CP 80 (list of five peremptory challenges by State and eight by defense).

The jury found Marks guilty as charged. CP 10-16. The court sentenced him within the standard range on assault and firearm possession, for a term totaling 378 months of incarceration. CP 63. The

[2] This petition refers to the verbatim reports as follows: 1RP – 4/11/13; 2RP –4/15/13; 3RP – 4/16/13; 4RP – 4/17/13; 5RP – 4/18/13; 6RP – 4/22, 4/23, and 5/17/13; and RP (12/7/12). The first six volumes listed are consecutively paginated. .

court also sentenced Marks to concurrent sentences of 365 days on the remaining two charges. CP 106-07. The judgment and sentence contained boilerplate language indicating the court considered Marks's ability to pay LFOs. RP 60. The court ordered $2,300 in LFOs, including $800 in mandatory fees and $1,500 in discretionary fees for Marks's appointed attorney. RP 60-61.

Marks appealed, arguing each of the issues identified above. CP 74.

In the published portion of its December 2, 2014 opinion, Division Two of the Court of Appeals rejected the first argument, purportedly relying in part on the Court's own opinion in State v. Wilson, 174 Wn. App. 328, 335-37, 298 P.3d 148 (2013) to hold that the exercise of peremptory challenges was not a part of "voir dire." Opinion (Op.) at 3-5 The Court therefore determined that application of the "experience and logic" test was necessary and ruled that the private exercise of peremptory challenges did not implicate the public trial right, relying on its opinion in State v. Dunn, 180 Wn. App. 570, 321 P.3d 1283 (2014). Op. at 6.

That decision, in turn, relied on Division Three's decision in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013) in rejecting a similar argument.[3]

In the unpublished portion of the decision, the Court rejected Marks's argument challenging the trial court's imposition of discretionary LFOs without consideration of his ability to pay. Citing State v. Blazina, 174 Wn. App. 906, 911, 301 P.3d 492, review granted, 178 Wn.2d 1010 (2013), the Court held the issue could not be raised for the first time on appeal. Op. at 6-7.

E. REASONS REVIEW SHOULD BE ACCEPTED

1. BECAUSE THE EXERCISE OF PEREMPTORY CHALLENGES IN THIS CASE VIOLATED MARKS'S RIGHT TO PUBLIC JURY SELECTION, THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(1), (3), AND (4).

The Sixth Amendment and article I, section 22 guarantee the accused a public trial by an impartial jury.[4] Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); State v. Bone-Club,

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[3] A petition for review was filed in Love under case no. 89619-4 and is set to be considered on January 6, 2015. A petition for review was filed in Dunn on May 7, 2014 and is also set to be considered on January 6, 2015 under case no. 90238-1.

[4] 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 in part that "[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury . . . ."

128 Wn.2d 254, 261-62, 906 P.2d 629 (1995). Additionally, article I, section 10 provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." This latter provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

While the right to a public trial is not absolute, a trial court may restrict the right only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Before a judge can close any part of a trial, he or she must first apply on the record the five factors set forth in Bone-Club. In re Personal Restraint of Orange, 152 Wn.2d 795, 806-07, 809, 100 P.3d 291 (2004). A violation of the right to a public trial is presumed prejudicial on a direct appeal and is not subject to harmless error analysis. State v. Wise, 176 Wn.2d 1, 16-19, 288 P.3d 1113 (2012); State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006).

Jury selection in a criminal case is subject to the public trial right and is typically open to the public. Strode, 167 Wn.2d at 227 (lead opinion); Strode, 167 Wn.2d at 236 (concurrence). Strode, which the Court's opinion ignores, Op. at 2-5, supports the conclusion that the public trial right attaches to parties' challenges of jurors. There, jurors were questioned, and "for-cause" challenges conducted, in chambers.

This Court treated the "for-cause" challenges in the same manner as individual questioning and held exercise in chambers violated the public trial rights. Strode, 167 Wn.2d at 224, 227, 231 (lead opinion); Strode, 167 Wn.2d at 236 (concurrence).

Contrary to the Court's opinion here, the Wilson decision supports that the public trial right attaches not only to "for-cause," but also to peremptory challenges. There, the Court applied the "experience and logic" test adopted by this Court in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012) to find that the administrative excusal of two jurors for illness did not violate Wilson's public trial rights. The Court noted that, historically, the public trial right has not extended to excusals for hardship before voir dire begins. But in doing so, Division Two expressly differentiated between those excusals and "for-cause" and peremptory challenges, which must occur openly. Wilson, 174 Wn. App. at 342 (unlike potential juror excusals governed by CrR 6.3, exercise of peremptory challenges, governed by CrR 6.4, constitutes part of "voir dire," to which the public trial right attaches). Thus, in Wilson, Division Two appeared to recognize, correctly, that "for-cause" and peremptory challenges are part of voir dire, which must be conducted openly, to be distinguished from the broader concept of "jury selection," which may encompass proceedings that need not. Wilson, 139 Wn. App. at 339-40 .

The Court's current attempt to reframe its prior consideration of the matter makes little sense. The Court observes that CrR 6.4(b) refers to "voir dire examination." Op. at 5. But, contrary to the Court's reasoning, the court rule's inclusion of the term "examination" instead indicates that the "examination" portion should be differentiated from "voir dire" as a whole. Court rules are interpreted in the same manner as statutes, Jafar v. Webb, 177 Wn. 2d 520, 526, 303 P.3d 1042 (2013), and this Court presumes statutes do not include superfluous language. State v. Roggenkamp, 153 Wn.2d 614, 624-25, 106 P. 106 P.3d 196 (2005). The Court's reframing of its discussion of the matter in Wilson violates this principle. Moreover, if "voir dire examination" enables the intelligent exercise of peremptory challenges, then it follows that peremptory challenges themselves are an integral part of "voir dire." Contrary to the Court of Appeals' opinion in this case, and consistent with its decision in Wilson, such challenges are part of that portion of jury selection that must be conducted openly, and are subject to existing law clearly establishing that the public trial right applies.

Assuming for the sake of argument that the exercise of challenges is *not* an integral part of jury selection, it would be necessary to apply the "experience and logic" test to determine whether the public trial right applies to a portion of the trial process. This Court examines (1) whether

the place and process have historically been open and (2) whether public access plays a significant positive role in the functioning of the process. Sublett, 176 Wn.2d at 73 (citing Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)).

But the result of analysis under the experience and logic test is no different than the result dictated by Strode and Wilson. First, Marks can satisfy the "logic" prong because meaningful public scrutiny plays a significant positive role in the exercise of peremptory challenges. The right of an accused to a public trial "keep[s] his triers keenly alive to a sense of their responsibility" and "encourages witnesses to come forward and discourages perjury." Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). "[J]udges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." Estes v. Texas, 381 U.S. 532, 588, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965) (Harlan, J., concurring). The openness of jury selection (including which side exercises which challenge) enhances core values of the public trial right, "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Sublett, 176 Wn.2d at 75; see Orange, 152 Wn.2d at 804 (process of jury selection "is itself a matter of importance, not simply to the adversaries but to the criminal justice system"). While peremptory

challenges may be made for almost any reason, openness still fosters core values of the public trial right to ensure that there is no inappropriate discrimination. This protection can only be accomplished if peremptory challenges are made in open court in a manner allowing the public to determine whether a party is targeting and eliminating jurors for impermissible reasons. See State v. Sadler, 147 Wn. App. 97, 107, 109-118, 193 P.3d 1108 (2008) (private Batson[5] hearing following State's use of peremptory challenges to remove only African-American jurors from panel denied defendant his right to public trial), review denied, 176 Wn.2d 1032, 299 P.3d 19 (2013), overruled on other grounds, Sublett, 176 Wn.2d at 71-73; see also State v. Saintcalle, 178 Wn.2d 34, 46, 88-95, 118-19, 309 P.3d 326 (2013) (opinions highlighting difficulty of obtaining appellate relief for discriminatory acts even where discriminatory exercise may have occurred).

Regarding the historic practice, Love, the Division Three case relied on by Division Two in Dunn, appears to have reached an incorrect conclusion based on the available evidence. Love cites to one case, State v. Thomas, 16 Wn. App. 1, 553 P.2d 1357 (1976), as "strong evidence that peremptory challenges can be conducted in private." Love, 176 Wn. App.

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

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. Notably, Thomas predates Bone-Club by nearly 20 years. But most significantly, the fact that Thomas challenged the practice suggests it was atypical even at the time. In summary, both prongs of the experience and logic test support that the public trial right was implicated in this case.

Although the Court's opinion does not address the matter, the mere opportunity to find out, sometime after the process, which side eliminated which jurors cannot satisfy this right. Thus, a written record of peremptory challenges does not cure the error or insulate the procedure from Marks's challenge. For example, 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, even if members of the public could recall which juror name or number was associated with which individual, they also would have to recall the identity, gender, and race of those individuals to determine whether protected group members had been improperly targeted. In Marks's case, this would have required members of the public to recall the specific features of 13 individuals. See CP 80 (list of five peremptories by State and eight by defense). This is not

realistic, and public access to a sheet of paper after the fact is simply inadequate to protect the right to a public trial. But see State v. Filitaula, __ Wn. App. ___, __ P. 3d ___, 2014 WL 6896867, at *2 (Dec. 8, 2014) (Division One opinion holding it is sufficient to file written form containing names and numbers of the prospective jurors who were removed by peremptory challenge, listing the order in which the challenges were made, and identifying the party who made them).

In addition, Wise holds individual questioning of jurors in chambers, even when questioning was recorded and transcribed, violates the public trial right. 176 Wn.2d 1. By analogy, filing a juror information sheet or similar document is also insufficient to protect the public trial right.

Because the Court of Appeals' opinion conflicts with this Court's decisions, involves a significant question of constitutional law, and is a matter of substantial public interest, this Court should accept review. RAP 13.4(b)(1), (3), and (4).

2. THIS COURT SHOULD ACCEPT REVIEW OF THE LEGAL FINANCIAL OBLIGATION ISSUE, REVERSE THE TRIAL COURT'S DECISION, AND REMAND FOR RESENTENCING CONSISTENT WITH THIS COURT'S FORTHCOMING OPINION IN STATE V. BLAZINA.[6]

The judgment and sentence in this case contains the following boilerplate language:

> 2.5 **ABILITY TO PAY LEGAL FINCINCIAL OBLIGATIONS**. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. . . .

CP 60. There is no box for the trial court to check on the pre-printed form, and the trial court made no contemporaneous statements at sentencing regarding Marks's ability to pay. CP 60; 6RP 746-59. The court ordered Marks to pay $2,300 in legal financial obligations, including $1,500 in non-mandatory fees.[7] CP 61.

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[6] A related issue is now pending in this Court under case no. 89028-5, State v. Nicholas Peter Blazina. Oral argument was heard in that case in February of 2014.

[7] Blazina, 174 Wn. App. at 911 (court appointed attorney fees are "discretionary legal financial obligations"). As for the remaining $800, RCW 7.68.035(1)(a) requires a $500 victim assessment, RCW 43.43.7541 requires a $100 DNA collection fee, and RCW 36.18.020(2)(h) requires a $200 criminal filing fee, each regardless of the defendant's ability to pay.

This Court should accept review of the LFO issue in this case and remand to the trial court for resentencing consistent with this Court's forthcoming opinion on the matter.

F. CONCLUSION

For the foregoing reasons, this Court should accept review of both issues identified.

DATED this 22nd day of December, 2014.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DUSTIN WADE MARKS, Appellant.	No. 44919-6-II PART PUBLISHED OPINION

MAXA, J. — Dustin Marks appeals his convictions for assault, unlawful possession of a firearm, vehicle prowling, and reckless endangerment. He argues that the trial court violated his right to a public trial by allowing the parties to exercise peremptory juror challenges in writing at a sidebar conference rather than orally. We hold that the dismissal of prospective jurors with peremptory challenges does not implicate the public trial right, and therefore that the trial court's procedure did not violate that right. In the unpublished portion of this opinion we address Marks' challenge of the trial court's imposition of discretionary legal financial obligations (LFOs) as part of his sentence. We affirm Marks' convictions and sentence.

FACTS

The State charged Marks with first degree assault with a firearm enhancement, first degree unlawful possession of a firearm, second degree vehicle prowling, and reckless endangerment. The charges arose from an incident in which he fired shots at a person who confronted him while he was prowling cars. The case proceeded to a jury trial.

Following voir dire of prospective jurors, the trial court convened with counsel at a sidebar in open court to take the parties' peremptory challenges of those prospective jurors. Counsel noted their challenges in writing on a document titled "Peremptory Challenges," which later was filed in open court. Clerk's Papers at 80. After the sidebar, the trial court went back on the record and announced the selected members of the jury. Marks did not object to this process, and the jury was duly empaneled. After a three-day trial, Marks was convicted on all counts.

Marks appeals.

ANALYSIS

Marks argues that the trial court violated his public trial right by allowing counsel to make peremptory challenges in writing rather than announcing the challenges on the record. We hold that the exercise of peremptory challenges does not implicate the public trial right.

A. LEGAL PRINCIPLES

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee a defendant the right to a public trial. *State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). In general, this right requires that certain proceedings be held in open court unless application of the five-factor test set forth in *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995), supports closure of the courtroom. Whether a courtroom closure violated a defendant's right to a public trial is a question of law we review de novo. *Wise*, 176 Wn.2d at 9.[1]

[1] Marks did not object to the alleged closure below. However, "a defendant does not waive his right to a public trial by failing to object to a closure at trial." *Wise*, 176 Wn.2d at 15. In addition, the defendant need not show that the violation caused any prejudice. *Wise*, 176 Wn.2d at 16. A courtroom closure without consideration of the *Bone-Club* factors is structural error warranting a new trial. *Wise*, 176 Wn.2d at 15.

The threshold determination when addressing an alleged violation of the public trial right is whether the proceeding at issue even implicates the right. *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). "[N]ot every interaction between the court, counsel, and defendants will implicate the right to a public trial or constitute a closure if closed to the public." *Sublett*, 176 Wn.2d at 71. To make this determination, our Supreme Court in *Sublett* adopted an "experience and logic" test. 176 Wn.2d at 73.[2]

To address whether there was a court closure implicating the public trial right, we employ a two-step process. *State v. Wilson*, 174 Wn. App. 328, 335-37, 298 P.3d 148 (2013). First, we consider whether the particular proceeding at issue "falls within a category of proceedings that our Supreme Court has already acknowledged implicates a defendant's public trial right."[3] *Wilson*, 174 Wn. App. at 337; *see also Wise*, 176 Wn.2d at 11. Second, if the proceeding at issue does not fall within a specific protected category, we determine whether the proceeding implicates the public trial right using the *Sublett* experience and logic test. *Wilson*, 174 Wn. App. at 335.

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[2] Arguably, the preliminary question is whether or not the proceeding at issue ever was closed to the public. Here, the exercise of peremptory challenges occurred in open court and was recorded on a document that was filed in open court. The State suggests on this basis that there was no closure of the courtroom at all and therefore that *Bone-Club* does not even apply. We decline to address this issue because we affirm on other grounds.

[3] Our Supreme Court recently stated in *State v. Smith* that "sidebars do not implicate the public trial right." ___ Wn.2d ___, 334 P.3d 1049, 1051 (2014). And the court concluded after conducting the experience and logic test that a sidebar conference does not implicate the public trial right. *Smith*, 334 P.3d at 1055. However, *Smith* involved legal argument on evidentiary issues at sidebar. 334 P.3d at 1051. The court framed the case issue as whether "sidebar conferences *on evidentiary matters*" implicate the right. 334 P.3d at 1052 (emphasis added). As a result, we discern that the court's holding is limited to that issue.

B. PUBLIC TRIAL RIGHT AND PEREMPTORY CHALLENGES

Marks argues that his public trial right was violated because the right attaches to voir dire, and the exercise of peremptory challenges is part of voir dire. We disagree that the exercise of peremptory challenges is a part of voir dire.

Our Supreme Court repeatedly has held that the public trial right applies to "jury selection." *E.g.*, *Wise*, 176 Wn.2d at 11; *State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005). However, all of the Supreme Court's public trial right cases regarding jury selection have involved the actual questioning of jurors. *E.g.*, *Wise*, 176 Wn.2d at 11-12; *State v. Paumier*, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012). No Supreme Court case has held that the public trial right applies to the dismissal of jurors after the questioning is over.

In *Wilson*, we held that only the voir dire aspect of jury selection automatically implicates the public trial right. 174 Wn. App. at 338-40. We used the term "voir dire" as synonymous with the actual questioning of jurors, referring to the " 'voir dire' of prospective jurors who form the venire." *Wilson*, 174 Wn. App. at 338. The plurality opinion of our Supreme Court in *State v. Slert* quoted this statement with approval. ___Wn.2d ___, 334 P.3d 1088, 1092 (2014).[4] This usage is not consistent with including the exercise of peremptory juror challenges in the meaning of "voir dire."

[4] Justice Gonzalez's lead opinion in *Slert* was only joined by three other justices. 334 P.3d at 1094. However, in her dissent Justice Stephens agreed that voir dire "encompasses the individual examination of jurors concerning their fitness to serve in a particular case." 334 P.3d at 1095 (Stephens, J., dissenting). Justice Stephens disagreed with the plurality opinion in part because she believed that the consideration of jury questionnaires constituted an "examination" of those jurors and therefore was voir dire. 334 P.3d at 1095-96 (Stephens, J., dissenting).

In addition, CrR 6.4 distinguishes between voir dire and the exercise of peremptory challenges. CrR 6.4(b) states: "A voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable the intelligent exercise of peremptory challenges." Significantly, CrR 6.4(b) refers to the voir dire *examination*. The term "examination" necessarily refers only to the questioning of jurors, not to their dismissal. And CrR 6.4(b) states that voir dire is for the *purpose* of exercising peremptory challenges, which shows that the questioning of jurors and the exercise of peremptory challenges are separate phases in the jury selection process.

Based on *Wilson* and CrR 6.4(b), we hold that the exercise of peremptory challenges is not part of voir dire. Therefore, we hold that the exercise of peremptory challenges does not fall within the category of proceedings that automatically implicates a defendant's public trial right.

C. EXPERIENCE AND LOGIC TEST

Because we hold that the exercise of peremptory challenges does not fall within a category that our Supreme Court has recognized for application of the public trial right, we next must apply the experience and logic test to determine whether the public trial right is implicated. We hold that the exercise of peremptory challenges does not satisfy the experience and logic test and therefore does not implicate Marks' public trial right.

The experience and logic test requires us to consider (1) whether the process and place of a proceeding historically have been open to the press and general public (experience prong), and (2) whether access to the public plays a significant positive role in the functioning of the proceeding (logic prong). *Sublett*, 176 Wn.2d at 72-73. If the answer to both prongs is yes, then the defendant's public trial right attaches and a trial court must apply the *Bone-Club* factors before closing the proceeding to the public. *Sublett*, 176 Wn.2d at 72-73.

The issue of whether peremptory challenges made during a sidebar conference implicate the public trial right under the experience and logic test is controlled by our decision in *State v. Dunn*, 180 Wn. App. 570, 321 P.3d 1283 (2014). In *Dunn*, we held that the exercise of peremptory challenges did not satisfy either prong of the test. 180 Wn. App. at 575. In deciding this issue, we adopted the reasoning used by Division Three of this court in *State v. Love*, 176 Wn. App. 911, 309 P.3d 1209 (2013).

The court in *Love* noted the absence of any authority suggesting that historical practices required that peremptory challenges be exercised in public. 176 Wn. App. at 918-19. The court in *Love* cited *State v. Thomas*, 16 Wn. App. 1, 13, 553 P.2d 1357 (1976), in which this court suggested that peremptory challenges could be made in private. 176 Wn. App. at 918. The court in *Love* also stated that there is no need for public oversight of peremptory challenges, and that the written record of juror challenges satisfies the public interest. 176 Wn. App. at 919-20. We agree with this analysis.

Under *Dunn* and *Love*, exercising peremptory challenges does not implicate a defendant's public trial right under the experience and logic test. Accordingly, we hold that the trial court's procedure for exercising peremptory challenges in writing did not violate Marks' public trial right. We therefore affirm Marks' convictions.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Marks appeals his sentence on grounds that the trial court did not comply with statutory requirements by failing to consider his ability to pay the legal financial obligations (LFOs) it assessed against him. Marks argues that the evidence does not support the trial court's finding

that he had the ability to pay discretionary LFOs. However, Marks did not raise this issue below and therefore, we decline to consider it for the first time on appeal.

At Marks' sentencing, the court imposed both mandatory and discretionary LFOs amounting to $2,300. The trial court found that Marks had the ability or likely future ability to pay the LFOs. Marks did not object to this finding, or to the imposition of the LFOs generally. We generally will not consider a challenge to such a finding for the first time on appeal. *State v. Blazina*, 174 Wn. App. 906, 911-12, 301 P.3d 492, *review granted*, 178 Wn.2d 1010 (2013); RAP 2.5(a).

We have discretion under RAP 2.5(a) to consider unpreserved challenges to findings on a defendant's ability to pay LFOs where the reasons for the challenge are particularly compelling. *See Blazina*, 174 Wn. App. at 911; *State v. Bertrand*, 165 Wn. App. 393, 398, 404, 267 P.3d 511 (2011) (considering such a challenge even though the defendant failed to object below when the facts showed that the defendant was disabled and unable to work and she was required to begin paying within 60 days of sentencing). But Marks has not shown any compelling reason to consider the issue in this case. *See Blazina*, 174 Wn. App. at 911 (refusing to consider the defendant's challenge for the first time on appeal because the facts were not similar to those in *Bertrand*). Moreover, Marks can contest his ability to pay if the State attempts to enforce the LFOs. *See Bertrand*, 165 Wn. App. at 405.

We decline to reach Marks' challenge to the trial court's finding that he had the ability to pay LFOs. Therefore, we affirm the trial court's imposition of discretionary LFOs.

We affirm Marks' convictions and sentence.

MAXA, J.

We concur:

BJORGEN, A.C.J.

MELNICK, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	SUPREME COURT NO. _____
vs.	)	COA NO. 44919-6-II
	)	
DUSTIN MARKS,	)	
	)	
Petitioner.	)	

DECLARATION 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 22ND DAY OF DECEMBER, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DUSTIN MARKS
DOC NO. 815196
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF DECEMBER, 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

December 22, 2014 - 3:42 PM

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