NO. 44588-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

DRAKE MCDANIEL,

Appellant.

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

The Honorable Kathryn J. Nelson, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

JARED B. STEED
Attorney for Appellant

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

A. SUPPLEMENTAL ASSIGNMENT OF ERROR

The trial court denied appellant his constitutional right to a public trial.

Issue Pertaining to Supplemental Assignment of Error

The trial court took peremptory challenges by having the parties note on a chart which prospective juror they wanted to excuse. The peremptory challenges were made outside the hearing of those in the courtroom. The court announced the numbers of the prospective jurors chosen to sit on the venire, but did not state which party had excused other prospective jurors. Later that day, the court filed the peremptory challenges chart. Where the trial court did not analyze the Bone-Club[1] factors before conducting this portion of jury selection in private, did the court violate appellant's constitutional right to a public trial?

B. SUPPLEMENTAL STATEMENT OF THE CASE

After the trial court announced the charges against appellant Drake McDaniel, and explained the process of jury selection, the trial court swore in the venire. RP[2] 18-21. The trial court asked prospective jurors if

[1] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

[2] This brief refers to the verbatim report of proceedings as follows: RPVD refers to the verbatim report of void dire occurring January 8, 2013; RP – refers to the verbatim report of proceedings occurring January 8, 9, 14, 15, 16, 17, 22, 23, 24, 2013 and February 15, 2013.

personal acquaintances or experiences would cause any of them to doubt whether they could remain fair and impartial on a case involving robbery and unlawful possession of a firearm. RPVD 3-8. In open court, the judge asked the potential jurors to explain their concerns about personal acquaintances or experiences affecting their ability to remain fair and impartial. RPVD 8-32. One juror affirmed he did not believe they could be fair and impartial to both sides and was excused for cause. RPVD 29. After further questioning, other jurors were also excused for cause. RPVD 51.

After further questioning by both parties, the court explained the peremptory challenge process. RP 24. Unrecorded peremptory challenges were then exercised, followed by an unreported "sidebar" discussion between counsel and the court. RP 25. The trial court did not first consider the Bone-Club factors before deciding the live peremptory challenge process should be shielded from public sight and hearing. Neither party objected to this portion of jury selection.

After the unrecorded sidebar the court explained, "Ladies and gentlemen, I am now going to seat the twelve jurors and the alternate, and what I'm going to do is I'm going to make the assignments[.]." RP 25. The court then called out 14 juror numbers and excused the remaining jurors so they could return to Jury Administration. RP 25-26. Neither the

prosecutor nor defense counsel had anything to add after the jury was selected. RP 39. Later that same day, the court filed a chart showing which party excused which prospective juror. CP 109-112.

C. SUPPLEMENTAL ARGUMENT

THE TRIAL COURT VIOLATED MCDANIEL's RIGHT TO A PUBLIC TRIAL BY TAKING PEREMPTORY CHALLENGES IN PRIVATE.

The trial court took peremptory challenges of prospective jurors at sidebar. Because exercising peremptory challenges is part of voir dire, and because the trial court failed to apply the Bone-Club[3] factors, the court violated McDaniel's constitutional right to a public trial.

The Sixth Amendment and article I, section 22 guarantee the accused a public trial by an impartial jury. Presley v. Georgia, 558 U.S. 209, 213, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); Bone-Club, 128 Wn.2d at 261-62. There is a strong presumption courts must be open at all stages of the trial. State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

Whether a trial court has violated the defendant's public trial right violation is a question of law this Court reviews de novo. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). A trial court may restrict the right only "under the most unusual circumstances." Bone-

[3] Bone–Club, 128 Wn.2d at 906.

Club, 128 Wn.2d at 259. Before a court can close any part of a trial, it must first apply 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). Violation of this right is presumed prejudicial even when not preserved by objection. State v. Wise, 176 Wn.2d 1, 16, 288 P.3d 1113 (2012).

"The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (Press-Enterprise I). Washington courts have repeatedly held that jury voir dire conducted in private violates the right to public trial. See, e.g., Wise, 176 Wn.2d at 15; State v. Paumier, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012); State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009) (Alexander, C.J., lead opinion); 167 Wn.2d at 231-36 (Fairhurst, J., concurring); State v. Erickson, 146 Wn. App. 200, 211, 189 P.3d 245 (2008), rev. denied, 176 Wn.2d 1031 (2013).

In McDaniel's case, the parties exercised peremptory challenges in the jury's presence but outside of their hearing and off the record. RP 24-26. The trial court did not first consider the Bone-Club factors before deciding the live peremptory challenge process should be shielded from public sight and hearing.

This Court must first determine whether a criminal defendant's public trial right applies to the exercise of peremptory challenges. To decide whether a particular process must be open, this Court uses the "experience and logic" test formulated by the United States Supreme Court in Press–Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press-Enterprise II). Sublett, 176 Wn.2d at 73.

State v. Jones[4] is illuminating in this regard. In that case, during a trial recess, the court clerk randomly pulled names of four sitting jurors from a rotating cylinder to determine which would be alternates. The court announced the names of the four alternate jurors following closing arguments and excused these jurors. Jones, 175 Wn. App. at 95. The alternate juror drawing happened off the record and outside of the trial proceedings. Jones, 175 Wn. App. at 96.

Jones challenged this process on appeal. Following Sublett, the court concluded that the Washington experience of alternate juror selection is connected to voir dire. Alternate juror selection, the court held, must be open to the public. Jones, 175 Wn. App. at 101.

---

[4] State v. Jones 175 Wn. App. 87, 303 P.3d 1084, petition for review pending, No. 89321-7 (2013).

As for the logic prong, the court wrote, "The issue is not that the drawing in this case was a result of manipulation or chicanery on the part of the court staff member who performed the task, but that the drawing could have been." Jones, 175 Wn. App. at 102. The court found that two of the purposes for the public trial right – basic fairness to the defendant and reminding the trial court of the importance of its functions – were implicated. Id. The court held the secret random drawing raised important questions about "the overall fairness of the trial, and indicates that court personnel should be reminded of the importance of their duties." Id. The court therefore concluded that under the experience and logic test, a closure occurred. Id.

Finally, the court held that because the trial court did not apply the Bone-Club factors, it violated Jones' public trial right. Because such error is presumed prejudicial, a new trial was required. Id. at 1192-93.

Applying the Jones reasoning to McDaniel's case dictates the same result. Under the "experience" prong, the court asks whether the process has historically been open to the press and general public. Sublett, 176 Wn.2d at 73. Washington's experience of providing for and exercising peremptory challenges is one "connected to the voir dire process for jury selection." See White v. Territory, 3 Wash. Terr. 397, 406, 19 P. 37 (1888) ("Our system provides for examination of persons called into the

jury-box as to their qualifications to serve as such. The evidence is heard by the court, and the question of fact is decided by the court."); State v. Rutten, 13 Wash. 203, 204, 43 P. 30 (1895) (discussing remedy if trial court wrongfully compelled accused to exhaust peremptory challenges on prospective jurors who should have been dismissed for cause); State v. Rivera, 108 Wn. App. 645, 649-50, 32 P.3d 292 (2001) ("[P]eremptory challenge is a part of our common law heritage, and one that was already venerable in Blackstone's time."), rev. denied, 146 Wn.2d 1006 (2002), overruled on other grounds, Sublett, 176 Wn.2d at 71-72.

The exercise of peremptory challenges, like "for cause" challenges, is a traditional component of voir dire to which public trial rights attach. Wise, 176 Wn.2d at 11; State v. Wilson, 174 Wn. App. 328, 342-343, 298 P.3d 148 (2013).

Under the logic prong, courts consider the values served by open court proceedings, and ask "'whether public access plays a significant positive role in the functioning of the particular process in question.'" Sublett, 176 Wn.2d at 73 (quoting Press–Enterprise, 478 U.S. at 8). Open proceedings serve to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the defendant and the importance of their duties, to encourage witnesses to come forward, and to discourage perjury. Brightman, 155 Wn.2d at 514.

Just as did the secret random alternate juror selection in Jones, the secret peremptory challenge process used at McDaniel's trial involved the first two purposes. The public lacked the assurance that McDaniel and the excused prospective jurors were treated fairly. As well, requiring the parties to voice their peremptory challenges in public at the time they are made reminds them of the importance of the process and its effect on the panel chosen to sit in judgment.

Peremptory challenges permit the parties to strike prospective jurors "who are not challengeable for cause but in whom the parties may perceive bias or hostility-thereby eliminating extremes of partiality on both sides-and to assure the parties that the jury will decide on the basis of the evidence at trial and not otherwise." Rivera, 108 Wn. App. at 649-50 (citing United States v. Annigoni, 96 F.3d 1132, 1137 (9th Cir. 1996), overruled on other grounds, Rivera v. Illinois, 556 U.S. 148, 161-62, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009)). Regardless whether there are objections that require making a record, a transparent peremptory challenge process guards against arbitrary use of challenges for nefarious reasons that are not necessarily race or gender-based, such as age or educational level.

The public nature of trials is a check on the judicial system, provides for accountability and transparency, and assures that whatever

transpires in court will not be secret or unscrutinized. Wise, 176 Wn.2d at 6. "'Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges [and] lawyers . . . will perform their respective functions more responsibly in an open court than in secret proceedings.'" Id. at 17 (quoting Waller v. Georgia, 467 U.S. 39, 46 n.4, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). The peremptory challenge process squarely implicates those values.

Under the "experience and logic" test, therefore, the secret ballot method of exercising peremptory jurors in McDaniel's case implicated his right to a public trial and constituted an unlawful closure.

McDaniel anticipates the State may assert the proceeding was not closed because it occurred in the open courtroom. This reasoning ignores the purposes of the public trial right.

Though the courtroom itself remained open, the proceedings were not. Jurors were allowed to remain in the courtroom while the peremptory challenges were exercised, which demonstrates they were done in a way that those present would not be able to overhear. RP 24-25. A proceeding the public can see but not hear adds nothing to its fairness. If the participants can communicate in code, by whispering, or under the cone of silence, the "public" nature of the proceeding is rendered a farce.

Furthermore, a closure occurs even when the courtroom is not physically closed if the proceeding at issue takes place in a manner that renders it inaccessible to public scrutiny. See State v. Slert, 169 Wn. App. 766, 774 n.11, 282 P.3d 101 (2012) ("if a side-bar conference was used to dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reasons and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview."), rev. granted, 176 Wn.2d 1031 (2013); State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011) (closure occurs when a juror is privately questioned in an inaccessible location); State v. Leyerle, 158 Wn. App. 474, 483, 242 P.3d 921 (2010) (moving questioning of juror to public hallway outside courtroom a closure even though courtroom remained open to public). Members of the public are no more able to approach the bench and listen to an intentionally private jury selection process than they are able to enter a locked courtroom, access the judge's chambers, or participate in a private hearing in a hallway. The practical effect is the same — the public is denied the opportunity to scrutinize events.

The State will also likely argue this Court should follow State v. Love,[5] which held exercising peremptory challenges outside the public

[5] 176 Wn. App. 911, 309 P.3d 1209, 1214, petition for review pending, No. 89619-4 (2013).

view does not violate the right to public trial. This decision is poorly reasoned.

With respect to the experience prong, the Love court noted the absence of evidence that peremptory challenges were historically made in open court. Love, 309 P.3d at 1213. But history would not necessarily reveal common practice unless the parties made an issue of the employed practice. History does not tell us these challenges were commonly done in private, either. Moreover, before Bone-Club, there were likely many common, but unconstitutional, practices that ended with issuance of that decision.

The Love court cites to one case, State v. Thomas,[6] as "strong evidence that peremptory challenges can be conducted in private." Love, 309 P.3d at 1213. Thomas rejected the argument that Kitsap County's use of secret peremptory challenges violated the defendant's right to a 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. Moreover, the fact Thomas challenged the practice suggests it was atypical even at the time. Until Love, Thomas had never been cited in a published Washington opinion for its holding regarding the

---

[6] 16 Wn. App. 1, 553 P.2d 1357 (1976).

secret exercise of peremptory challenges. Calling Thomas "strong evidence" is a misleading overstatement.

Regarding logic, the Love court could think of no way in which exercising peremptory challenges in public furthered the right to fair trial, concluding instead a written record of the challenges sufficed. Love, 309 P.3d at 1214. The court failed, however, to mention or consider the increased risk of discrimination against protected classes of jurors resulting from non-disclosure.

The court also held the written record protected the public's interest in peremptory challenges. Love, 309 Wn. App. at 1214. It appears from the court's description the parties used a chart similar to the one filed in McDaniel's trial. Love, 309 Wn. App. at 1211 n.1.

But the later filing of a written document from which the source of peremptory challenges might be deciphered is not an adequate substitute for simultaneous public oversight. See State v. Sadler, 147 Wn. App. 97, 116, 193 P.3d 1108 (2008) ("Few aspects of a trial can be more important . . . than whether the prosecutor has excused jurors because of their race, an issue in which the public has a vital interest."), rev. denied, 176 Wn.2d 1032 (2013), overruled on other grounds, Sublett, 176 Wn.2d at 71-73.

While members of the public could discern after the fact which prospective jurors had been removed and by whom (assuming they knew

to look in the court file), the public could not tell at the time the challenges were made which party had removed any particular juror, making it impossible to determine whether a particular side had improperly targeted any protected group. See State v. Burch, 65 Wn. App. 828, 833-834, 830 P.2d 357 (1992) (identifying race and gender as protected classes); see also State v. Saintcalle, 178 Wn.2d 34, 41-42, 69, 85-88, 118-19, 309 P.3d 326 (2013) (lead opinion, concurrence, and dissent underscore harm resulting from improper race-based exercises of peremptory challenges and difficulty of prevention).

The mere opportunity to find out, sometime after the process, which side eliminated which jurors cannot satisfy the right to a public trial. Members of the public would have to know the chart 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 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. This is not realistic.

The trial court did not consider the Bone-Club factors before conducting the private jury selection process at issue here. A trial court errs when it fails to conduct the Bone-Club test before closing a court

proceeding to the public. Wise, 176 Wn.2d at 5, 12. The error violated McDaniel's public trial right, which requires automatic reversal because it affects the framework within which the trial proceeds. Id. at 6, 13-14.

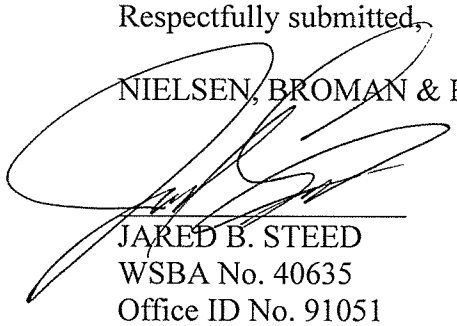
D. CONCLUSION

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

DATED this 15TH day of January, 2014

Respectfully submitted,

NIELSEN, BROMAN & KOCH



JARED B. STEED
WSBA No. 40635
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 44588-3-II
	)	
DRAKE MCDANIEL,	)	
	)	
Appellant.	)	

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 14TH DAY OF JANUARY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DRAKE MCDANIEL
DOC NO. 326127
COYOTE RIDGE CORRECTIONS CENTER
P.O BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF JANUARY 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

January 15, 2014 - 2:18 PM

Transmittal Letter

Document Uploaded: 445883-Supplemental Brief.pdf

Case Name: Drake McDaniel
Court of Appeals Case Number: 44588-3

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Supplemental__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Patrick P Mayavsky - Email: **mayovskyp@nwattorney.net**

A copy of this document has been emailed to the following addresses:
PCpatcecf@co.pierce.wa.us