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December 22, 2014
Court of Appeals
Division I
State of Washington

SUPREME COURT NO. ________

NO. 72430-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DRAKE MCDANIEL,

Petitioner.

FILED
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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
CRF

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

The Honorable Kathryn Nelson, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Drake McDaniel requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. McDaniel, No. 72430-4-I, filed November 24, 2014.[1] A copy of the opinion is attached as an appendix.

B. ISSUE PRESENTED FOR REVIEW

During jury selection, the parties exercised peremptory challenges silently on paper. Because the trial court did not analyze the Bone-Club[2] factors before conducting this important portion of jury selection privately, did the court violate petitioner's constitutional right to a public trial?[3]

C. STATEMENT OF THE CASE

The Pierce County prosecutor charged appellant Drake McDaniel with two counts of first degree robbery and one count of first degree unlawful possession of a firearm.

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[1] The case was transferred from Division II to Division I by order dated September 5, 2014.

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

[3] Petitions for review raising this issue are currently pending before the Court in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013) (Supreme Ct. No. 89619-4), State v. Dunn, 180 Wn. App. 570, 321 P. 3d 1283 (2014) (Supreme Ct. No. 90238-1), and State v. Webb, ____ Wn. App. ____, 333 P.3d 470 (2014) (Supreme Ct. No. 90840-1).

During jury selection, the court and the attorneys for each side questioned the potential jurors in open court. RP[4] 18-21; RPVD 3-32, 51. The court then 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.

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[4] The verbatim report of proceedings are identified 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.

A jury found McDaniel guilty of first degree robbery as charged in count one and first degree unlawful possession of a firearm. CP 35, 39; RP 862-63. The jury found McDaniel not guilty of first degree robbery as charged in count two. CP 37; RP 862-63. The jury declined to find McDaniel was armed with a firearm during either alleged robbery. CP 36, 38. The trial court sentenced McDaniel to standard range. On appeal, McDaniel argued the silent exercise of peremptory challenges violated his right to a public trial. The Court of Appeals affirmed. McDaniel asks this Court to grant review.

D. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

THIS COURT SHOULD GRANT REVIEW OF THE PUBLIC TRIAL ISSUE BECAUSE DIVISION II'S DECISION CONFLICTS WITH STATE V. STRODE AND STATE V. WISE AND INVOLVES A SIGNIFICANT QUESTION OF CONSTITIONAL LAW THAT SHOULD BE RESOLVED AS A MATTER OF SUBSTANTIAL PUBLIC INTEREST.

Selecting the jury is a critical part of the public trial right and must be open to the public. State v. Wise, 176 Wn.2d 1, 11, 288 P.3d 1113, 1118 (2012); State v. Strode, 167 Wn.2d 222, 227, 217 P.3d 310 (2009). Even if it were not already clear that the public trial right applies to prohibit 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).

However, relying on decisions in State v. Webb, ___ Wn. App. ___, 333 P.3d 470 (2014), as well as prior decisions in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013) and State v. Dunn, 180 Wn. App. 570, 321 P. 3d 1283 (2014), the Court of Appeals held that silent, on-paper exercise of peremptory challenges does not implicate the public trial right. McDaniel, slip op. at 6. McDaniel asks this Court to grant review because that decision conflicts with this Court's decisions in Strode and Wise as well as Division II's decision in State v. Wilson, 174 Wn. App. 328, 337, 298 P.3d 148 (2013), petition for review pending (Supreme Ct. No. 88818-3). RAP 13.4(b)(1), (2). Additionally, the application of the public trial right in this instance raises significant constitutional questions of substantial public interest. RAP 13.4(b)(3), (4).

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.[5] 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

[5] 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 . . . ."

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).

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 trial judge can close any part of a trial, it 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 Strode, jurors were questioned, and for-cause challenges were conducted, in chambers. 167 Wn.2d at 224. This Court treated the for-cause challenges in the same manner as individual questioning and held their

occurrence in chambers violated the public trial right. Id. at 224, 227, 231. Review is warranted because the Court of Appeals' holding that peremptory challenges may permissibly be exercised out of the public's view without consideration of the Bone-Club factors is in conflict with this Court's holdings in Wise and Strode. RAP 13.4(b)(1).

A second conflict with this Court's case law arises from the Court of Appeals' reliance on the fact that the paper on which the peremptory challenges were written was ultimately filed in the public record. McDaniel, slip op. at 6. In Wise, the private, in-chambers questioning was transcribed and also made part of the public record of the trial. 176 Wn.2d at 7-8. The court nonetheless held the proceedings were closed because they were held in a place not ordinarily accessible to the public. Id. at 11. The piece of paper filed in this case was no more accessible to the public at the time than the judge's chambers in Wise. This second conflict with this Court's precedent also warrants review. RAP 13.4(b)(1).

The Court of Appeals' opinion in this case also conflicts with Division II's case law supporting the conclusion that the public trial right attaches to peremptory challenges. In Wilson the court applied Sublett's experience and logic test to find that the administrative excusal of two jurors for sickness did not violate the defendant's public trial right. Wilson, 174 Wn. App. at 347. The court noted that historically, the public trial right has

not extended to administrative hardship excusals granted by the court before voir dire begins. Id. at 342. But in doing so, the court expressly differentiated between the administrative excusal at issue and a jury selection proceeding involving the exercise of for-cause and peremptory challenges, which the court said historically, occur in open court. Id. Thus, under Wilson's application of the experience prong of the experience and logic test, for-cause and peremptory challenges historically are done in open court.

In State v. Jones, 175 Wn. App. 87, 91, 303 P.3d 1084 (2013), Division II held the public trial right was violated when, during a court recess off the record, the clerk drew names to determine which jurors would serve as alternates. The court recognized, "both the historic and current practices in Washington reveal that the procedure for selecting alternate jurors, like the selection of regular jurors, generally occurs as part of voir dire in open court." Id. at 101. Like Wilson, the Jones decision refers to the exercise of peremptory challenges as a part of jury selection that must be public. Id.

In addition to the historical experience referenced in Wilson and Jones, logic dictates that public exercise of peremptory challenges serves the values of the public trial right. The right to a public trial includes circumstances where "the public's mere presence passively contributes to the fairness of the proceedings, such as deterring deviations from established

procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny." State v. Bennett, 168 Wn. App. 197, 204, 275 P.3d 1224 (2012) (citing State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); State v. Leyerle, 158 Wn. App. 474, 479, 242 P.3d 921 (2010).

The peremptory challenge process, an integral part of jury selection,[6] is one such proceeding: While peremptory challenges may be exercised based on subjective feelings and opinions, there are important constitutional limits on both parties' exercise of such challenges. Georgia v. McCollum, 505 U.S. 42, 49, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992); Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

Because of these crucial constitutional limitations, designed to prevent and remedy discrimination in jury selection, public scrutiny of the exercise of peremptory challenges is more than a procedural nicety; it is required by the constitution. Discrimination in jury selection casts doubt on the integrity of the judicial process and the fairness of criminal proceedings. Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991); State v. Saintcalle, 178 Wn.2d 34, 309 P.3d 326 (2013), cert. denied, 134 S. Ct. 831 (2013). Therefore, "It is crucial that we have meaningful and effective procedures for identifying racially

[6] People v. Harris, 10 Cal.App.4th 672, 684, 12 Cal.Rptr.2d 758 (1992).

motivated juror challenges." Id. at 41. An open peremptory process is part of that procedure. The Peremptory Challenges document lists names; it does not reveal race. CP 109-112. Without the ability to hear and see the selection of jurors as it occurs, the public has no ability to assess whether challenges are being handled fairly and within the confines of the law or, for example, in a manner that discriminates against a protected class. See Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989) (jury selection primary means to "enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice.").

Public trials are a check on the judicial system that provides for accountability and transparency. 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)). Open exercise of peremptory challenges safeguards against discrimination by discouraging both discriminatory challenges and the subsequent discriminatory removal of jurors that have been improperly challenged. The exercise of peremptory challenges directly impacts the

fairness of a trial. Both experience and logic indicate it is inappropriate to shield that process from public scrutiny.

Because Division I's decision conflicts with Strode and Wise, as well as Division II's decisions in Wilson and Jones, this Court should grant review. RAP 13.4(b)(1), (2). This Court's opinion in Saintcalle noting the importance of deterring racially motivated jury selection also demonstrates that application of the public trial right to peremptory challenges is an important constitutional issue of substantial public interest. RAP 13.4(b)(4); Saintcalle, 178 Wn.2d at 41.

E. CONCLUSION

The Court of Appeals opinion conflicts with decisions of this Court and the Court of Appeals and presents significant questions of constitutional law and public interest. McDaniel requests this Court grant review under RAP 13.4 (b)(1), (2), (3), and (4).

DATED this 22nd day of December, 2014.

Respectfully submitted,

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APPENDIX

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2014 NOV 24 AM 9:33

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 72430-4-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
DRAKE MICHAEL MCDANIEL,	)	
	)	
Appellant.	)	FILED: November 24, 2014

TRICKEY, J. — Drake McDaniel appeals from the judgment entered on a jury's verdict finding him guilty of first degree robbery and first degree unlawful possession of a firearm. He contends that (1) the trial court erred by declining to instruct the jury on a lesser included offense to first degree robbery and (2) his constitutional right to a public trial was violated. Finding no error, we affirm.

FACTS

On April 24, 2012, Jazmyne Montgomery drove Donteise Mosely to a Walgreen's parking lot and parked next to a Cadillac. Mosely had arranged to sell marijuana to a man named Budha. He stored the marijuana in a lunch box in the trunk of Montgomery's vehicle. Mosely also placed a smaller bag of marijuana in the glove compartment.

McDaniel exited the Cadillac and entered the rear passenger's side of Montgomery's vehicle. Mosely did not recognize McDaniel, who had identified himself as "YB."[1] Mosely and McDaniel shared a marijuana cigarette.

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[1] 3 Report of Proceedings (RP) at 239.

Mosely showed McDaniel the small bag of marijuana from the glove compartment. Shortly thereafter, McDaniel pointed a gun at Mosely and said that he was robbing him.

At around the same time, another man—later identified as Jonathan Williams—emerged from the passenger's side of the Cadillac. Williams opened the driver's side door where Montgomery was sitting and pressed what Montgomery believed to be a gun against her hip. Williams ordered Montgomery to look away from him. Mosely testified he could see Williams pushing Montgomery against the car frame and holding what appeared to be a black pistol.

Mosely gave McDaniel the bag of marijuana and unlatched the trunk from the inside of the vehicle. McDaniel removed the keys from the vehicle's ignition and took Montgomery's purse. McDaniel then went to the trunk to remove the lunch box containing marijuana. McDaniel and Williams drove away in the Cadillac.

McDaniel was soon arrested, and the State charged him with two counts of robbery in the first degree (counts I and II) and unlawful possession of a firearm in the first degree (count III). Count I concerned the robbery of Montgomery's property.

McDaniel testified at trial. When asked why Williams was standing next to the driver's side window during the incident, McDaniel responded that Williams was simply greeting Mosely and Montgomery. McDaniel also testified that Mosely pointed a gun at him after discovering that he had used counterfeit bills to pay for the marijuana. According to McDaniel, at that point, Williams went to the driver's side window to ascertain what was occurring inside the vehicle. When he saw Mosely with a gun in hand, Williams made a gesture intimating that he had a gun. McDaniel denied seeing Williams with a firearm, however, during the incident. He also denied using force to take Montgomery's purse.

Defense counsel presented the theory that McDaniel committed theft, and not first degree robbery, because McDaniel did not use or threaten to use force when taking Montgomery's property. Accordingly, defense counsel proposed that the jury be instructed on third degree theft as a lesser offense of first degree robbery as charged in count I. The trial court denied defense counsel's request.

A jury convicted McDaniel of first degree robbery, as charged in count I, and first degree unlawful possession of a firearm, as charged in count III. The jury found McDaniel not guilty of first degree robbery of marijuana as charged in count II.

McDaniel appeals.

ANALYSIS

Jury Instructions

McDaniel first contends that the trial court erroneously declined to instruct the jury on third degree theft as a lesser included offense of first degree robbery. We disagree.

Washington statutes provide that a defendant charged with an offense has an "'unqualified right'" to have the jury pass on a lesser included offense if there is "'even the slightest evidence'" that he may have committed only that offense. State v. Parker, 102 Wn.2d 161, 163-64, 683 P.2d 189 (1984) (quoting State v. Young, 22 Wash. 273, 276-77, 60 P. 650 (1900)). A two-pronged test is applied to determine when a lesser included offense instruction must be given: First, each element of the lesser included offense must be a necessary element of the offense charged (the legal prong) and, second, the evidence in the case must support an inference that the lesser included crime was committed (the factual prong). State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

Here, there is no dispute as to the legal prong. The State contends, however, that the evidence does not support the factual prong. Consequently, only the factual prong is at issue here.

We review a decision on the factual prong for abuse of discretion. State v. LaPlant, 157 Wn. App. 685, 687, 239 P.3d 366 (2010). To satisfy the factual prong, some evidence must be presented that affirmatively establishes the defendant's theory on the lesser included offense. State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990) (citing State v. Rodriguez, 48 Wn. App. 815, 820, 740 P.2d 904, review denied, 109 Wn.2d 1016 (1987)), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991). When determining whether the evidence at trial supported the giving of an instruction, we view the supporting evidence in the light most favorable to the party that requested the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

As previously mentioned, McDaniel asserted the theory at trial that he committed theft, not robbery, because he did not use or threaten to use force when taking Montgomery's property. "Theft" means "[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." RCW 9A.56.020(1)(a). A person is guilty of third degree theft if he or she commits theft of property that does not exceed $750 in value. RCW 9A.56.050(1)(a).

The essential elements of first degree robbery, under the to-convict instructions provided here, included: (1) unlawfully taking property from Montgomery; (2) acting with intent to commit theft of the property; (3) committing the taking "against the person's will

by the defendant's or an accomplice's use or threatened use of immediate force, violence or fear of injury to that person;" (4) and using "force or fear . . . to obtain or retain possession of the property or to prevent or overcome resistance to the taking" of that property.[2] Thus, the primary distinction between third degree theft and first degree robbery as charged here was whether McDaniel or Williams used or threatened to use force during the commission of the crime.

Here, McDaniel has failed to demonstrate that the evidence affirmatively supported the inference that he committed third degree theft. To support his argument, he relies on his own testimony at trial, where he denied possessing a gun, denied seeing Williams with a gun, and denied using force while taking Montgomery's purse. But additional evidence adduced at trial showed that Williams, as an accomplice, threatened to use force during the crime. Montgomery testified that Williams had pressed a gun against her while McDaniel seized her purse and keys. Mosely corroborated Montgomery's testimony by describing his observation of Williams holding a gun against Montgomery during the robbery. Indeed, McDaniel testified that when he saw Williams gesture toward his waist, he "believed that either [Williams] had a gun or he was trying to make the impression that he had a gun."[3] The evidence did not affirmatively establish that no force or threat of force was used during the commission of the crime. McDaniel fails to establish that a lesser included offense instruction was appropriate. The trial court did not abuse its discretion.

[2] Clerk's Papers at 62; RCW 9A.56.190.
[3] 6 RP at 636.

Public Trial Right

McDaniel next contends that his constitutional right to a public trial was violated[4] when the trial court failed to conduct a Bone-Club[5] analysis before directing trial counsel to exercise peremptory challenges in writing and during a side bar discussion, which, he argues, constituted a closure.

During jury selection, counsel exercised their peremptory challenges by indicating the jurors they wished to excuse on a written form. This process was not reported by the court reporter, as the record indicates:

> (Peremptory challenges exercised.)
>
> THE COURT: Counsel.
> (Side bar held which was not reported.)[6]

However, the peremptory challenges were held while court was in session and while the courtroom was accessible to the public. After receiving the written form, the trial court announced, and the reporter recorded, the selected jurors and excused the remaining prospective jurors. Later that day, the trial court filed the written form listing the jurors excused by counsel's peremptory challenges.

Washington appellate courts have repeatedly rejected this argument and similar ones. State v. Webb, ___ Wn. App. ___, 333 P.3d 470 (2014); State v. Dunn, 180 Wn. App. 570, 321 P.3d 1283 (2014); State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), petition for review filed, No. 89619-4 (Wash. Nov. 21, 2013). We decline to depart from those decisions here. The trial court committed no error.

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[4] The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee a defendant's right to a public trial.
[5] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).
[6] RP (Jury Voir Dire) at 26.

No. 72430-4 / 7

Affirmed.

Trickey, J.

WE CONCUR:

Schindler, J.

Cox, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	NO. ______
v.	)	COA NO. 72430-4-I
	)	
DRAKE MCDANIEL,	)	
	)	
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 EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DRAKE MCDANIEL
DOC NO. 326127
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

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

x Patrick Mayovsky

Sanders, Laurie

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