NO. 44725-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL NELSON,

Appellant.

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

The Honorable Beverly Grant, Judge
The Honorable John McCarthy, Judge

AMENDED 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

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. Appellant was deprived of his constitutional right to represent himself.

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

Issues Pertaining to Assignments of Error

1. Did the trial court violate appellant's constitutional right to represent himself, as guaranteed by the Sixth Amendment and article I, section 22 of the Washington Constitution, by denying his unequivocal request to proceed pro se, made after trial began, where he did not request additional time to prepare for trial?

2. 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 names 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]

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

factors before conducting this portion of jury selection in private, did the court violate appellant's constitutional right to a public trial?

B. STATEMENT OF THE CASE

1. Self Representation

The State charged appellant Michael Nelson with one count each of first degree robbery and first degree unlawful possession of a firearm for an incident that occurred on October 1, 2011. CP 3-4, 209-10; 6RP[2] 7.

At trial, Nelson was represented by his third defense attorney. 6RP 156. The first attorney was allowed to withdraw before trial because of an unspecified conflict of interest. CP 5, 26-27. Nelson's second attorney withdrew for the same reason. 3RP 1. Before jury selection, Nelson's mother disclosed to defense counsel she gave witnesses money in exchange for altering their anticipated testimony. A mistrial was declared and Nelson was appointed another attorney. 3RP 1; 4RP 4.

Nelson expressed distrust of his third attorney before trial began. In a letter to the trial court, Nelson noted his attorney had not met with him to discuss strategy and that he did not feel his attorney was

[2] This brief refers to the verbatim report of proceedings as follows: 1RP – August 28, 29, 30, 2012 and September 5, 11, 14, and 17, 2012; 2RP – September 4, 2012; 3RP – September 11, 2012 (afternoon colloquy); 4RP – January 7, 2013; 5RP – January 16, 2013; 6RP – February 21, 28, 2012 and March 4, 5, 2013; 7RP – April 5, 2013; 8RP – February 28, 2013 (Voir Dire).

interviewing necessary witnesses. CP 207-08. Nelson reiterated these concerns during a pre-trial hearing. 6RP 23-24. Defense counsel maintained that he discussed trial issues with Nelson. 6RP 24-25. Noting a continuance had previously been granted so defense counsel could review discovery with Nelson, the trial court explained jury selection would happen as scheduled. 6RP 25.

During trial, Nelson's frustration was also evident. On the second day of trial, defense counsel notified the trial court Nelson wished to address the court. 6RP 151. Nelson then explained he knew "more about my case than my attorney." 6RP 151-52. Nelson asked to personally question the remaining witnesses and conduct further cross-examination of those that had already testified. 6RP 152-56.

Responding to the trial court's questions, Nelson acknowledged he had no formal legal education and had not previously examined a witness. 6RP 152. However, Nelson explained "the questions that I have, they're specific, and I feel that they will get the truth out the witness." 6RP 152-53. The trial court cautioned Nelson that asking "the wrong question" could be harmful. 6RP 153. The court then declined to allow Nelson to question witnesses, explaining, "I am going to ask you to confer with him [defense counsel] and let him make the decision as to what would be an appropriate question to ask." 6RP 153.

Nelson reiterated he did not believe defense counsel was asking appropriate questions. Nelson stated, "And I feel that – honestly, I feel better going pro se, but I am just asking, could I at least cross-examine the witnesses?" 6RP 153. The trial court maintained defense counsel's failure to question witnesses as Nelson desired was not necessarily "a bad thing." 6RP 154. The court again declined to allow Nelson to question witnesses. 6RP 155.

When Nelson reiterated his concerns with defense counsel a third time, the trial court noted an accused has the right to represent himself. 6RP 155-56. The following exchange then occurred:

> Court: At this point in time, if you are asking me to represent yourself in this proceeding entirely, examine witnesses –
>
> Nelson: Yes
>
> Court: -- prepare jury instructions, argue the law and the facts to the jury and entirely take over the case?
>
> Nelson: Yes
>
> Court: Well, at this point in time, I think, you know, based on everything I have seen and heard, that is not in your best interest. You are not sufficiently trained in the law. You have a very experienced attorney. Like I say, maybe he's giving you some advice that you don't want to hear. Sometimes attorneys can't do anything to alter evidence that's presented. That doesn't necessarily mean that you can proceed on your own.

6RP 156-57.

Nelson then asked if he could cross-examine witnesses outside the presence of the jury to demonstrate the type of questions he was prepared to ask. 6RP 157-58. After Nelson's offer of proof, the court again maintained Nelson was "not prepared through education, training or experience to represent yourself or cross-examine the witness." 6RP 159. The court concluded by stating, "I am not going to have this conversation further with you. I had it with you last week. I have had it with you today. And so you have appointed counsel. He is representing you." 6RP 160.

Nelson's trial continued and a Pierce County jury found him guilty as charged. 6RP 334; CP 289, 290-91. The jury also found Nelson was armed with a firearm during the robbery. CP 290. The trial court sentenced Nelson to standard range concurrent prison sentences of 108 months for the robbery and 102 months for the unlawful possession. The court also imposed a consecutive 60-month firearm enhancement. 7RP 12-13; CP 298-311. Nelson timely appeals. CP 312-13.

2. Jury Selection

After swearing in the venire, the trial court announced the charges against Nelson, and explained the process of jury selection. 8RP 7-13. The trial court asked prospective jurors if personal 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. In open court, the judge asked the potential jurors to explain their concerns about remaining fair and impartial in a case of this type and they did so. 8RP 38-46. After further questioning, the trial court excused one juror for stated concerns about impartiality. 8RP 87.

After further questioning by both parties, the court explained the peremptory challenge process:

> They [parties] have a piece of paper. They will write down their peremptory challenges, and they will pass that piece of paper back and forth. And when they exercise up to the number that they are allowed, then they will bring a sheet of paper forward to me. I will go through their work and I will announce the names of people that will serve as jurors and alternate jurors in this case.

8RP 127.

An unrecorded "sidebar conference" between counsel and the court then occurred. 8RP 127. 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 sidebar the court called out 14 juror names and excused the remaining jurors so they could return to Jury Administration. 8RP 128. Neither the prosecutor nor defense counsel had anything to add after the jury was selected. Later that same day, the court filed a chart showing which party excused which prospective juror. CP 388-91.

C. ARGUMENT

1. THE COURT ABUSED ITS DISCRETION IN DENYING NELSON'S UNEQUIVOCAL REQUEST TO REPRESENT HIMSELF

A criminal defendant has a constitutional right to self-representation. U.S. Const., amend. VI and XIV; Wash. Const., art. I § 22. Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Bolar, 118 Wn. App. 490, 516, 78 P.3d 1012 (2003), rev. denied, 151 Wn.2d 1027 (2004). The state constitutional right is absolute and its violation is reversible error. In re Detention of J.S., 138 Wn. App. 882, 890-91, 159 P.3d 435 (2007). The trial court in Nelson's case committed reversible error by denying Nelson's motion to represent himself because (1) the request was unequivocal; (2) the request was not designed to delay trial, and (3) the trial court's basis for denying the motion was an abuse of discretion.

The controlling factors in deciding a defendant's motion to represent himself are whether the motion is knowing, unequivocal, and timely; that is, not exercised merely for a dilatory purpose. State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995).

A trial court's denial of a request for self-representation is reviewed for abuse of discretion. Breedlove, 79 Wn. App. at106. Discretion is abused if the trial court's decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. State v. Woods, 143 Wn.2d 561, 626, 23 P.3d 1046 (2001), cert. denied, 534 U.S. 964 (2001).

a. Nelson's Request was Unwavering.

Nelson's request was unequivocal. He expressed his dissatisfaction with counsel and announced he would rather present his case himself than proceed with counsel with whom he did not communicate. Nelson unequivocally stated he was prepared to represent himself "in this proceeding entirely," including preparing jury instructions and arguing the law and facts to the jury. 6RP 156-57.

That Nelson may have been motivated to represent himself by dissatisfaction with counsel makes his request no less unequivocal. A clear request to proceed pro se does not become equivocal simply because the defendant is motivated by more than the single desire to present his

own defense. State v. Modica, 136 Wn. App. 434, 442, 149 P.3d 446 (2006), aff'd. on other grounds, 164 Wn.2d 83 (2008); see State v. DeWeese, 117 Wn.2d 369, 378, 816 P.2d 1 (1991) ("Mr. DeWeese's remarks that he had no choice but to represent himself rather than remain with appointed counsel, and his claims on the record that he was forced to represent himself at trial, do not amount to equivocation or taint the validity of his Faretta waiver.").

Nelson's statements are distinguishable from cases in which defendants were found to have been equivocal in their alleged pro se motions. See, e.g., Woods, 143 Wn.2d at 587 (telling a trial judge he "will be prepared to proceed without counsel" in frustration with counsel's request for an eight-month trial continuance found to be mere expression of displeasure with his lawyer's request for a lengthy continuance); State v. Luvene, 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995) (accused's statements that he was prepared to proceed himself, was unprepared to do everything, and acknowledged he also stated, "'I'm not even prepared about that,'" and "'[t]his is out of my league for doing that'" established frustration with delay in trial rather than an unequivocal assertion of his right to self-representation); State v. Garcia, 92 Wn.2d 647, 653, 600 P.2d 1010 (1979) (defendant who complained about attorney's performance

and stated he did not want the attorney he had was found to have asked for a new lawyer, not to proceed pro se).

b. Nelson Knowingly Sought to Proceed Pro Se.

A valid waiver of the constitutional right to counsel must be made knowingly, voluntarily, and intelligently. City of Tacoma v. Bishop, 82 Wn. App. 850, 855, 920 P.2d 214 (1996). The validity of the defendant's waiver depends on the facts and circumstances of each case; "there is no checklist of the particular legal risks and disadvantages attendant to waiver which must be recited to the defendant." DeWeese, 117 Wn.2d at 378.

However, the favored method for determining whether a defendant validly waives the right to counsel is for the trial judge to question the defendant on the record to ensure he knows the risks of self-representation, the seriousness of the charges, the rules to be applied to the presentation of evidence and argument, and the maximum possible punishment upon conviction. State v. Lillard, 122 Wn. App. 422, 427-28, 93 P.3d 969 (2004), rev. denied, 154 Wn.2d 1002 (2005). The onus is on the trial court to make the necessary record:

> [T]he court cannot stack the deck against a defendant by not conducting a proper colloquy to determine whether the requirements for waiver are sufficiently met. As the court failed to ask further questions and there is no evidence to the contrary, the only permissible conclusion is that Madsen's request was voluntary, knowing, and intelligent.

State v. Madsen, 168 Wn.2d 496, 506, 229 P.3d 714 (2010).

Applying this authority to Nelson's attempted invocation of his right to proceed pro se indicates reversal is warranted. Nelson made it clear he did not want to proceed with his assigned counsel. The trial judge twice cautioned Nelson that asking the wrong questions of witness could be detrimental to his case. Nelson's answers and continued requests to proceed pro se and question witnesses himself established he was willing to take the necessary risk.

Furthermore, Nelson was aware of the nature of the charges and the penalty when the prosecutor detailed the rejected plea offer, explaining the standard range sentence for the robbery charge was "108 to 144 months, plus 60 months flat time," and the unlawful possession range was "86 to 114 or 116." 2RP 73-74; 6RP 15-17.

Less clear is whether Nelson recognized the need to know technical rules for the conduct of a trial. It may be reasonably inferred Nelson was generally aware of the justice system in Washington given his criminal history. CP 317-82. At the very least, the trial court was made aware of Nelson's prior forgery conviction when the parties stipulated it would be admissible if Nelson testified. 2RP 73-74; 6RP 19-20, 85-86; See State v. Hahn, 106 Wn.2d 885, 900, 726 P.2d 25 (1986) ("Whether there has been an intelligent waiver of counsel is an ad hoc determination

which depends upon the particular facts and circumstances of the case, including the background, experience and conduct of the accused."); State v. Vermillion, 112 Wn. App. 844, 857, 51 P.3d 188 (2002) (purpose of asking defendant about rules of evidence and other aspects of courtroom procedure "is not to determine whether he has sufficient technical skill to represent himself. Rather, the purpose is to determine whether he fully understands the risks he faces by waiving the right to be represented by counsel . . . ."), rev. denied, 148 Wn.2d 1022 (2003).

The court was also aware of Nelson's earlier letter detailing his dissatisfaction with counsel. This indicates Nelson knew how to assert his rights in court and to speak up for them. Most importantly, Nelson made clear he planed to "prepare jury instructions, argue the law and the facts to the jury and entirely take over the case." 6RP 156-57.

Nonetheless, the trial court concluded it was not in Nelson's "best interest" to represent himself because he was "not prepared through education, training or experience to represent yourself or cross-examine the witness." 6RP 157, 159. This finding is untenable. A trial judge may not base a denial of a motion for self-representation on a finding that such self-representation "would be detrimental to the defendant's ability to present his case or concerns that courtroom proceedings will be less efficient and orderly than if the defendant were represented by counsel."

Madsen, 168 Wn.2d at 505. Indeed, a defendant who desires to proceed pro se "need not demonstrate technical knowledge of the law and the rules of evidence." Vermillion, 112 Wn. App. at 851. "The value of respecting this right [to self-representation] outweighs any resulting difficulty in the administration of justice." Madsen, 168 Wn.2d at 509.

The facts and circumstances here support a conclusion that Nelson knowingly and intelligently waived counsel and sought to proceed pro se. Even if this Court is unwilling to infer a knowing waiver on these facts, Nelson should not be punished, for the absence of a more thorough record is attributable solely to the trial court's refusal to engage Nelson in the preferred colloquy.

c. Nelson's Request was Sufficiently Timely and not Offered for Dilatory Purposes.

In addition to being unequivocal, knowing, and voluntary, motions to proceed pro se must be timely made. In determining whether a request is timely, the trial court's discretion lies along a continuum corresponding to the time between the request and the start of trial. If a request is made (a) well before trial and without an accompanying request to continue, the right of self-representation stands as a matter of law; (b) as the trial is about to begin or shortly before, the trial court retains a measure of discretion to be exercised after considering the particular circumstances of

the case; and (c) during trial, the right to proceed pro se rests largely in the informed discretion of the trial court. State v. Fritz, 21 Wn. App. 354, 361, 585 P.2d 173 (1978), rev. denied, 92 Wn.2d 1002 (1979).

Factors to be considered in assessing a motion to proceed pro se made during trial include:

> [T]he quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion.

State v. Jordan, 39 Wn.App. 530, 541, 694 P.3d 47 (1985), rev. denied, 106 Wn.2d 1011 (1986) (quoting Fritz, 21 Wn.App. 354, 363, 585 P.2d 173 (1978)). "Washington courts have recognized that the timeliness requirement should not operate as a bar to a defendant's right to defend pro se[.]" Breedlove, 79 Wn. App. at 109.

Furthermore, the timeliness analysis is tied to the question of whether the defendant sought to exercise his right for the purpose of delaying the court proceedings. The right to proceed pro se may not be used for the purposes of delay or obstructing justice. Vermillion, 112 Wn. App. at 851.

Nelson made his request during the second day of trial testimony. Importantly, Nelson requested no additional time to prepare for trial, and

the trial court did not find Nelson's request was untimely. See State v. Stenson, 132 Wn.2d 668, 770, 940 P.2d 1239 (1997) (strong evidence request to proceed pro se is made for dilatory purposes when it is accompanied by a motion to continue), cert. denied, 523 U.S. 1008 (1998); State v. Paumier, 155 Wn. App. 673, 687, 230 P.3d 212 (2010) (denial of request to proceed pro se, made after jury was selected but before it was sworn and without an accompanying motion for continuance, was reversible error), aff'd. on other grounds, 176 Wn.2d 29 (2012); Vermillion, 112 Wn. App. at 856 (in reversing trial court's denial of defendant's request to present his own case, appellate court noted defendant "did not request that the trial be continued on any of the occasions that he renewed his motion. There is no indication in the record that Vermillion made his request for the purpose of delaying trial."); United States v. Price, 474 F.2d 1223, 1227 (9th Cir. 1973) (trial court abused discretion by refusing to permit defendant to proceed pro se where the jury had not yet been sworn, there was no attempt to delay trial, and granting the request would not have caused delay.)

Rather, Nelson's offer of proof as to what questions he would ask the witnesses, confirmation he would prepare jury instructions, and assurance he would argue the law and facts, demonstrate he was prepared to continue immediately with the trial.

In summary, considering all the factors set forth above, the trial court's denial of Nelson's motion to proceed pro se was an abuse of discretion and requires reversal of his conviction. Paumier, 155 Wn. App. at 687-88.

2. THE TRIAL COURT VIOLATED NELSON'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 Nelson'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; Paumier, 176 Wn.2d at 35; 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 Nelson's case, the parties exercised peremptory challenges in the jury's presence but outside of their hearing and off the record. 8RP 126-28. 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 Nelson'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 Nelson's trial involved the first two purposes. The public lacked the assurance that Nelson 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 Nelson's case implicated his right to a public trial and constituted an unlawful closure.

Nelson 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. 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 Nelson' 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 Nelson' 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, this Court should reverse Nelson's convictions and remand for a new trial.

DATED this 5th day of February, 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. 44725-8-II
	)	
MICHAEL NESLON,	)	
	)	
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 6TH DAY OF FEBRUARY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL NELSON
DOC NO. 898806
AIRWAY HEIGHTS CORRECTION CENTER
P.O. BOX 2049
AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF FEBRUARY 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

February 06, 2014 - 1:20 PM

Transmittal Letter

Document Uploaded: 447258-Amended Appellant's Brief.pdf

Case Name: Michael Nelson
Court of Appeals Case Number: 44725-8

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: __Amended Appellant's__

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