NO. 45532-3

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

WILLIAM MANUS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 13-1-03185-1

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to show that his public trial right was violated where voir dire was done in open court and peremptory challenges were done in writing at sidebar without objection?

2. Has defendant failed to show the trial court abused its discretion for refusing to remove a juror where the juror recognized a witness as an acquaintance at his gym when the juror indicated that he could still be fair and impartial?

B. STATEMENT OF THE CASE.

1. Procedure

On August 14, 2013, the Pierce County Prosecutor's Office charged appellant, William Alexander Manus ("defendant"), by information with the crime of failure to register as a sex offender. CP 1. On October 21, 2013, the State filed an amended information, amending the charging period to July 20 through August 9 of 2013, but not altering the number or nature of the crime charged. CP 4.

On October 22, 2013, the case proceeded to a jury trial before the Honorable James Orlando. 1 RP 32.[1]

[1] The State will refer to the Verbatim Report of Proceedings as follows: 1 RP October 22-24, 2014 and November 4, 2013 and 2 RP October 21, 2013.

After the jury had been excused on the first day of defendant's trial, Juror 11 approached the judicial assistant and informed her that he recognized a witness. 1 RP 215, 263. Juror 11 had not previously stated that he knew any of the witnesses, but recognized Officer Meeds when he took the stand, as an acquaintance from the gym. 1 RP 263; 2 RP 5. After the parties had the opportunity to question Juror 11, the Court determined that the jury could "maintain an open mind" and be fair and impartial, and declined to grant defense's motion to excuse him. 1 RP 268-269.

The jury convicted defendant as charged of failure to register. 1 RP 412. CP 8.

On November 1, 2013, the court sentenced defendant to 57 months in confinement and 3 months of community custody. CP 32. The standard range was 43 to 57 months. CP 29. Defendant's offender score was 9+. *Id.*

Defendant timely filed his notice of appeal on November 1, 2013. CP 25. Defendant does not challenge the sufficiency of the evidence to support the conviction.

2. Facts

When a sex offender moves to Pierce County, he or she must register within three business days. 1 RP 87-88. The sex offender and

felony offender registration unit of the Pierce County Sheriff's Department registers sex offenders in local and national databases, so as to comply with state law. 1 RP 86-87. Additionally, an offender must submit a change of address form if he or she changes residence. 1 RP 89. The sheriff's office is required by state law to verify the address of level 3 offenders, such as defendant, every 90 days. 1 RP 103-04, 120. This verification is carried out by the Tacoma Police for offenders living within Tacoma city limits. 1 RP 104. Additionally, the Department of Corrections supervises offenders on community custody which includes approving the residence where they are registered, meeting with offenders, and conducting home visits. 1 RP 114, 118-20.

The jury heard evidence via stipulation that prior to July 20, 2013 defendant had been convicted of a felony sex offense giving rise to a duty to register as a sex offender and that defendant had an ongoing duty to register as a sex offender during the period of July 20, 2013 to August 9, 2013. 1 RP 4, 84-85. CP 5.

Starting in 2012, defendant was on community supervision under the William Sheppard, a community corrections officer for the Washington department of corrections ("DOC"). 1 RP 118. Mr. Sheppard testified that defendant was required to report directly to Mr. Sheppard, remain in Pierce County, do polygraph and urinalysis testing, seek

employment, work or education, and complete chemical dependency treatment. 1 RP 119.

Defendant registered to live at the residence of his mother, Lizzie Manus, on October 11, 2012. 1 RP 94. Subsequently, defendant was in custody at multiple times, and registered at the same address each time he was released, including on January 10, January 15, and April 11 of 2013. 1 RP 112, 116.

In May, 2013, defendant was admitted to an inpatient chemical dependency treatment program. 1 RP 302. On June 3, 2013, he was released from the program. 1 RP 149-50. Mr. Sheppard went to Ms. Manus's residence on June 7, but was unable to locate defendant. 1 RP 150. Defendant failed to report for a meeting with Mr. Sheppard on June 18, which constituted a violation of his community custody. 1 RP 150-51. The next day, Mr. Sheppard tried to reach defendant by telephone, but was unable to make contact. 1 RP 149. Mr. Sheppard issued a departmental warrant on June 20 as a result of defendant's DOC violation for failure to report for a meeting. 1 RP 151.

On July 19, 2013, Ms. Manus filed a petition for order of protection against defendant, which was issued on July 22. 1 RP 44, 48-49. Ms. Manus testified that defendant had not returned to her residence since the restraining order was issued. 1 RP 43, 46, 80. On July 31,

Douglas Fuller, a detective with the Tacoma Police Department, who is responsible for sex offender registration, went to Ms. Manus's residence to investigate whether defendant actually lived there. 1 RP 165-66. Mr. Fuller testified that Ms. Manus told him that defendant was not a resident at her home and was not welcome there. 1 RP 166-67.

On August 9, 2013, Tyler Meeds and Daniel Bortle, patrol officers with the Tacoma Police Department, searched for defendant in response to an outstanding warrant, unrelated to the DOC warrant. 1 RP 196, 237. The officers located defendant exiting a tent in an overgrown vacant lot in Tacoma. 1 RP 216-220, 240-242. Officer Meeds and Officer Bortle testified that it appeared someone had been living in the tent because they located a fire pit with coals, personal possessions, needles, and a vase that was being used as a urinal. 1 RP 220, 243. Defendant looked disheveled, "not very clean," and had a strong, unpleasant odor. 1 RP 244. The officers arrested defendant and transported him to the Pierce County Jail for booking. 1 RP 229, 242.

Ronald Bone, a private investigator hired by the Department of Assigned Counsel, and defendant testified on behalf of the defense. Mr. Bone testified that on September 17, 2013, Ms. Manus told him that defendant lived at her residence. 1 RP 275. Defendant testified that he lived at Ms. Manus's residence between July 22 and August 9 of 2013, and

was unaware that she had obtained a restraining order against him until August 10, 2013. 1 RP 293, 312.

C. ARGUMENT.

1. EXERCISING PEREMPTORY CHALLENGES IN WRITING IN AN OPEN COURT ROOM DID NOT VIOLATE DEFENDANT'S RIGHT TO A PUBLIC TRIAL.

A criminal defendant's right to a public trial is found in article I, section 22 of the Washington constitution, and the Sixth Amendment to the United States Constitution. Both provide a criminal defendant the right to a "public trial by an impartial jury." The state constitution also provides that "[j]ustice in all cases shall be administered openly," which grants the public an interest in open, accessible proceedings, similar to rights granted in the First Amendment of the federal constitution. Wash. Const. article I, section 10; ***State v. Lormor***, 172 Wn.2d 85, 91, 257 P.3d 624 (2011); ***Seattle Times Co. v. Ishikawa***, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); ***Press–Enter. Co. v. Superior Court***, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). While a defendant's public trial right and the public's right to an open trial are complementary, a defendant may lack standing to assert a violation of the public's right to an open trial. ***State v. Wise***, 148 Wn. App. 425, 200 P.3d (2009). The public trial right "serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the

accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." ***State v. Sublett***, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). "There is a strong presumption that courts are to be open at all trial stages." ***Lormor***, 172 Wn.2d at 90. The right to a public trial includes voir dire. ***In re Pers. Restraint of Orange***, 152 Wn.2d 795, 804, 100 P.3d 291 (2004); ***Presley v. Georgia***, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010).

Whether the right to a public trial has been violated is a question of law reviewed de novo. ***State v. Wise***, 176 Wn.2d 1, 9, 288 P.3d 1113, 1116 (2012). The right to a public trial is violated when: 1) the public is fully excluded from proceedings within a courtroom, ***State v. Bone–Club***, 128 Wn.2d 254, 257, 906 P.2d 325 (1995) (no spectators allowed in courtroom during a suppression hearing), and ***State v. Easterling***, 157 Wn.2d 167, 172, 137 P.3d 825 (2006) (all spectators, including codefendant and his counsel, excluded from the courtroom while codefendant plea-bargained); 2) the entire voir dire is closed to all spectators, ***State v. Brightman***, 155 Wn.2d 506, 511, 122 P.3d 150 (2005); 3) and is implicated when individual jurors are privately questioned in chambers, *see* ***State v. Momah***, 167 Wn.2d 14, 146, 217 P.3d 321 (2009) and ***State v. Strode***, 167 Wn.2d 222, 224, 217 P.3d 310 (2009) (jury selection is conducted in chambers rather than in an open courtroom

without consideration of the ***Bone–Club*** factors). In contrast, conducting individual voir dire in an open courtroom without the rest of the venire present does not constitute a closure. ***State v. Erickson***, 146 Wn. App. 200, 189 P.3d 245 (2008).

On appeal, defendant argues that part of the jury selection process conducted in his case constituted a court room closure.

Prior to voir dire, the Court discussed the procedure for jury selection with the prosecution and defense and asked the attorneys to bring any challenges for cause to its attention at sidebar. 1 RP 18. Concerning peremptory challenges, the Court stated the following: "[p]eremptory challenges are done in writing. You will have the sheet. I would impanel two alternates, so there would be eight challenges per side." 1 RP 19. Neither party objected to the Court's proposed procedure. 1 RP 19-22.

The attorneys finished voir dire and completed the for cause challenges at sidebar, which was not reported. 1 RP 66. Both parties agreed to excuse four jurors for cause. 1 RP 30. The Court later made a record of the challenges. 1 RP 30.

After the attorneys made the "for cause" challenges, the Court announced:

> THE COURT: The attorneys are going to be doing their final selection here in writing. It will take a few minutes for that to be accomplished. If you have a need to use the

> restroom, there is a men's room on the left side of the elevators on this floor and a ladies' room on the right side. We ask that you confine yourself to the fourth floor, that you not talk to anybody about the case, that you not allow anyone to talk about it in your presence, that you not seek out any evidence on our own, that would include doing any kind of internet research, Google, or any kind of posting regarding this case or any aspect of this case. So if you need to use the restroom, go out and use the restroom. Come back to your same seat position as quickly as possible, because it's important for the attorneys to be able to match up your number with your face. If you just want to stand up and stretch, feel free to do that as well.
>
> (Attorneys doing their peremptory challenges.)
>
> (Sidebar held but not reported.)

2 RP 66-67.

The State and the defense each exercised seven peremptory challenges. CP 43. There is no record of the sidebar held after the attorneys exercised their peremptory challenges. The Court announced the individuals selected for the jury and excused the rest from the courtroom. 2 RP 67.

The record indicates that all voir dire was conducted in open court. 2 RP. The attorneys made peremptory challenges in open court using a form provided by the trial court. This form was filed by the court on October 21, 2013, and made available for public inspection. CP 43.

The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being

subject to the court's control. ***State v. Salinas***, 87 Wn.2d 112, 549 P.2d 712 (1976). Yet, due process and equal protection issues may be raised where the prosecution or defendant uses its peremptory challenges to eliminate jurors because of gender, race or ethnicity. ***Batson v. Kentucky***, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); ***Georgia v. McCollum***, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992); ***State v. Vreen***, 143 Wn.2d 923, 26 P.3d 236 (2001). Any party or the court sua sponte may make a ***Batson*** challenge that a peremptory challenge is a prima facie case of purposeful discrimination. ***Batson***, 476 U.S. at 96. If a prima facie case is established, the burden shifts to the party exercising the peremptory challenge to give a neutral explanation related to the particular case to be tried. *Id.*; ***State v. Thomas***, 166 Wn.2d 380, 208 P.3d 1107 (2010) (State offered race-neutral explanation for striking the sole African-American juror).

As the improper use of peremptory challenges can raise constitutional concerns, it is important to have a record of information as to how the peremptory challenges were exercised. The parties carefully recorded the names of the prospective jurors who were removed by peremptory challenge, as well as the order in which each challenge was made and the party who made it. CP 43. This document was signed by both parties and was made part of the court record file. This procedure

serves the purpose of providing an open record to defendant and the public of how peremptory challenges were exercised and satisfies the court's obligation to ensure the open administration of justice.

The Washington Supreme Court has observed several times recently that the right to a public trial serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. *See, e.g.*, ***State v. Brightman***, 155 Wn.2d at 514 (citing ***Peterson v. Williams***, 85 F.3d 39, 43 (2d Cir. 1996)). But not every interaction between the court, counsel, and defendants will implicate the right to a public trial. ***Sublett***, 176 Wn.2d at 71.

To determine whether a particular process must be open to the press and the general public, the ***Sublett*** court adopted 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). ***Sublett***, 176 Wn.2d at 73.

> The first part of the test, the experience prong, asks "whether the place and process have historically been open to the press and general public." The logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." If the answer to both is yes, the public trial right attaches and the Waller or Bone–Club factors must be considered before the

> proceeding may be closed to the public. We agree with this approach and adopt it in these circumstances.

Sublett, 176 Wn.2d at 73.

Applying that test, the ***Sublett*** Court held that no violation of the right to a public trial occurred when the trial court considered a jury question in chambers. *Id.*, at 74–77. "None of the values served by the public trial right is violated under the facts of this case.... The appearance of fairness is satisfied by having the question, answer, and any objections placed on the record." *Id.*, at 77. The defendant has the burden to satisfy the "experience and logic" test. *See* ***In re Personal Restraint of Yates***, 177 Wn.2d 1, 29, 296 P.3d 872 (2013).

Recently, the Court of Appeals for Division III considered and rejected the same argument made by the defendant. In ***State v. Love***, 176 Wn. App. 911, 309 P.3d 1209 (2013), The Court applied the "experience and logic" test of ***Sublett*** and held that peremptory challenges conducted in writing at sidebar did not "close" the court room. ***Love***, at 917-18. The Court found no authority to require peremptory challenges to be conducted in public. To the contrary, the Court cited ***State v. Thomas***, 16 Wn. App. 1, 13, 553 P.2d 1357 (1976), where secret written peremptory challenges did not violate the right to public trial. ***Love***, at 918. Additionally, the Court relied in part on ***Sublett***, in which the court applied the experience

and logic test and determined that jury questions had historically not been answered in open court and that logically there was no need to do so since answering the question in public did not further the purposes of the public trial guarantee. ***Sublett***, 176 Wn.2d at 75-77. The use of a written question and answer created a public record that furthered the public trial right. ***Sublett***, 176 Wn.2d at 77. ***Love*** went on to reject the notion that a sidebar violated public policy aspect of an open trial. The Court found that, because all of the jury selection was done in open court, the public's interest in the case had been protected and that all activities were conducted aboveboard, "even if not within public earshot." *Id.*, 309 P. 3d at 920.

This year, in ***State v. Dunn***, ___ Wn. App. ___, 321 P.3d 1283 (2014), this Court followed Division III's opinion in ***Love*** and held that the trial court did not violate defendant's right to a public trial by allowing the attorneys to exercise peremptory challenges during side bar. In ***Dunn***, jury voir dire was conducted in open court with Dunn present. ***Dunn***, 321 P.3d at 1284. Subsequently, the attorneys exercised peremptory challenges at sidebar. *Id.* The Court held that the experience and logic do not suggest that exercising peremptory challenges at the clerk's station implicates the public trial right.

In this case, anyone present in the courtroom could observe how the process was being conducted. The court explained to all present what was occurring. 2 RP 66-67. The only thing that did not occur in open court was the vocal announcement of each peremptory challenge as it was made. Yet, any prospective juror who felt that he or she was being improperly removed from the jury could discover which party made the challenge and raise his or her concern with the trial court.

Furthermore, Washington caselaw does not support either the "experience" or "logic" prongs. This history goes back even farther than the ***Thomas*** case cited in ***Love***. For example, seven years after statehood, the Washington Supreme Court issued its opinion in ***State v. Holedger***, 15 Wn. 443, 448, 46 Pac. 652 (1896). Holedger complained that his attorney was asked in open court and in front of the jury panel whether there was any objection to the jury being allowed to separate. The Supreme Court did not find any evidence that Holedger was prejudiced by this action, but did indicate that the better practice would be for the court to ask this question in a sidebar so as to avoid incurring the displeasure of jurors who might be upset if there was an objection. The decision in ***Holedger*** was authored by Justice Dunbar and concurred in by Chief Justice Hoyt. Chief Justice Hoyt was the president of the 1889 constitutional convention, and Justice Dunbar was a delegate to the constitutional convention. *See* B.

Rosenow, The Journal of the Washington State Constitutional Convention, at 468 (1889; B. Rosenow ed. 1962); C. Sheldon, The Washington High Bench: A Biographical History of the State Supreme Court, 1889-1991, at 134-37 (1992). Thus, at least two of the justices signing this opinion had considerable expertise in the protections given under the state constitution, yet neither found certain trial functions being handled in a sidebar to be inconsistent with the public's right to open proceedings. In 1904, the Court upheld the actions of trial court that utilized the "best-practice" recommended in ***Holedger***. *See* ***State v. Stockhammer***, 34 Wash. 262, 264, 75 P. 810 (1904) (noting that consent for the jury to separate was given by defense counsel at the bench out of the hearing of the defendant and the jury).

There is some authority that the public announcement of a peremptory challenge in open court by the party exercising the challenge is not a widespread practice. When the United States Supreme Court decided that it was just as improper for a criminal defendant to excuse a potential juror for an improper reason as it was a prosecutor, the court commented that "it is common practice not to reveal the identity of the challenging party to the jurors and potential jurors[.]" ***Georgia v. McCollum***, 505 U.S. at 53 n.8, citing Underwood, Ending Race

Discrimination in Jury Selection: Whose Right Is It, Anyway?, 92 Colum.L.Rev. 725, 751, n. 117 (1992).

Because experience and logic indicate support the practice of making peremptory challenges in writing at side bar, this process is not required to be open to the press and the general public. Defendant's constitutional right to a public trial was not violated.

This Court may refuse to review this issue because defense did not object to the procedure of conducting peremptory challenges in writing at sidebar at trial. Both parties had the opportunity to challenge the peremptory challenges and ensure that the challenge had a neutral basis and did not prejudice a juror based on race, gender, or ethnicity. The record does not indicate that either party made a ***Batson*** challenge. Therefore, there was no need for the Court to make a ruling concerning the peremptory challenges. As this issue is not a manifest error affecting a constitutional right, it may not be raised for the first time on review. RAP 2.5(3).

Defendant argues that the only way to prevent discrimination is where peremptory challenges are made out loud in open court. Br.App. 13. Yet, either party or the court sua sponte may raise a ***Batson*** challenge. Defendant further claims that the Court did not consider the ***Bone-Club*** factors. Because making peremptory challenges in writing at side bar does

not constitute a violation of the right to a public trial, the Court was not required to follow the procedure for closing the courtroom to the public.

Therefore, defendant's right to a public trial was not violated when the parties exercised peremptory challenges in writing.

2. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO REMOVE JUROR.

The Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington Constitution guarantee the defendant in a criminal proceeding the right to a "public trial by an impartial jury." ***State v. Momah***, 167 Wn.2d 140, 147, 217 P.3d 321 (2009). The voir dire examination of prospective jurors enables the parties to determine whether prospective jurors are subject to challenge for cause and to decide whether to exercise a peremptory challenge. CrR 6.4(b). The trial court judge has the responsibility to excuse a juror if the judge believes the grounds for a challenge are present. RCW 2.36.110; CrR 6.4(c)(1). Then, either party has the opportunity to challenge the individual jurors for cause. RCW 4.44.130. Challenges for cause may be either general, in that the juror is disqualified from serving in any action, or particular, in that he is disqualified from serving in the action on trial. RCW 4.44.150. The three kinds of particular causes of challenge are: (1) implied bias; (2) actual bias; and (3) physical and mental impairment. RCW 4.44.170. Where

implied bias of a juror exists, it is conclusively presumed from the facts show, but where actual bias of a juror is claimed, it must be established by proof. ***State v. Noltie***, 116 Wn.2d 831, 809 P.2d 190 (1991).

Upon determining the facts, the court will rule on the validity of the challenge and either dismiss or retain the juror. RCW 4.44.230; RCW 4.44.240. The Court of Appeals defers to the judge's decision in deciding whether to grant or deny a juror challenge for cause based on bias. ***State v. Jorden***, 103 Wn. App 221, 11P.3d 866 (2000). The judge considering a motion to dismiss juror for bias weighs the credibility of the challenged juror based on his or her observations. ***Hough v. Stockbridge***, 152 Wn. App. 328, 216 P.3d 1077 (2009), *review denied*, 168 Wn. 2d 1043, 234 P.3d 1173.

A trial court's decision to excuse a jury venire member is reviewed for an abuse of discretion. ***State v. Gilcrist***, 91 Wn.2d 603, 611, 590 P.2d 809 (1979). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." ***State v. C.J.***, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). A discretionary decision is manifestly unreasonable if it "is outside the range of acceptable choices, given the facts and the applicable legal standard." ***State v. Lamb***, 175 Wn.2d 121, 128, 285 P.3d 27 (2012) (*quoting* ***State v. Powell***, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). A discretionary decision "is based

on 'untenable grounds' or made for 'untenable reasons' if it rests on facts unsupported in the record or was reached in applying the wrong legal standard." ***State v. Rohrich***, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (*quoting* ***State v. Rundquist***, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)); *see also* ***State v. Dye***, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

On appeal, defendant claims that the trial court erred when it refused to remove Juror 11 for cause. Br.App 2.

During jury selection, the Court read a list of nine potential witnesses, including Tyler Meeds, who might testify during trial and asked jurors to indicate if any of the names sounded familiar. 2 RP 5-6. Jurors were also instructed to make it known if during the trial they recognize a witness. 2 RP 43. The record shows that no jurors recognized any of the names of potential witnesses. 2 RP 5. After the first day of defendant's trial concluded, Juror 11 indicated to the judicial assistant that he recognized Officer Meeds, one of the State's witnesses, but only knew him by his first name. 1 RP 264, 269. The next day, the Court questioned Juror 11 away from the presence of the rest of the jury. 1 RP 263. Juror 11 stated that he met Officer Meeds five years before at the gym where he works out. *Id.* He told the Court that "our relationship is not like a friend type of relationship," only that they "talk on occasion" when exercising about subjects such as sports and home protection. 1 RP 264-65. They do

not get together outside of the gym. 1 RP 265. Juror 11 indicated that he had not spoken with Officer Meeds about this particular case. 1 RP 264. When the Court asked if there was "[a]ny reason why your knowledge of him or your relationship with him would affect your ability to be a fair juror in this case?" Juror 11 responded "[n]o, it would not." *Id.*

Although the defense had the opportunity to ask Juror 11 questions, he declined to do so. 1 RP 265. The prosecutor asked Juror 11 three questions. *Id.*

The defense asked the Court to remove Juror 11 from the jury. 1 RP 255-56. Defense argued that it would be "very difficult" for Juror 11 to be impartial in this case because of their five-year friendship, and that if defendant were acquitted, it would create a very uncomfortable situation for one of both of them, which could factor into his deliberation. 1 RP 267-68. The State argued that there was no reason to doubt that Juror 11 could be fair and impartial, and that Officer Meets was solely the arresting officer, and had no vested interest in the defendant. 1 RP 266-68. The Court ruled to not excuse Juror 11, stating:

> I don't think there is a degree of potential prejudice with this juror that would cause him to be excused for cause. He didn't even know the officer's name. I don't think that that's the type of affinity with a witness and a juror that would justify excusing him at this point in the trial. So I'll not excuse him. I think he can maintain an open mind and participate and make his decision based on the facts

> presented and on the law given to him. I also agree with the state somewhat that the arrest of Mr. Manus was based upon an outstanding warrant. It wasn't based upon the allegations of failure to register, and the officer's testimony was only at the very end of this case. It didn't have anything to do with, I guess, the underlying significant issue in the case.

1 RP 268-69.

A challenge of a juror for implied bias will not lie simply because the juror is acquainted with a party to the case. ***State v. Tingdale***, 117 Wn.2d 595, 817 P.2d 850 (1991); ***Kagele v. Frederick***, 43 Wn.2d 410, 261 P.2d 699 (1953) (trial court's denial of dismissal of prospective juror who had discussed the preparation of a will with one of the lawyers for respondent but there was no unfinished business between them was not an abuse of discretion). For example, in ***State v. Tingdale***, the Supreme Court held that the court's practice of excluding potential jurors prior to voir dire, based on the clerk's subjective knowledge of the jurors' acquaintance with the defendant, was an abuse of discretion. In ***Tingdale***, the court clerk excused three individuals, including a person who had attended high school with petitioner and another person who was the brother of a friend of petitioner, from the jury panel on the grounds that they were acquainted with petitioner. ***Tingdale***, 117 Wn.2d at 597. The Court noted that the trial court had no factual basis on which to base a finding of actual or implied bias on the part of the jurors and that there was nothing in the record to

establish that these jurors could not try the case impartially and without prejudice. ***Tingdale***, 117 Wn.2d at 601-602.

Under federal law, in accordance with Washington law, merely knowing a witness is not a valid basis for striking a juror for cause. ***Mendoza v. Gates***, 19 Fed. appx 514 (9th Cir. 2001); ***Image Technical Services Inc. V. Eastman Kodak Co.***, 125 F.3d 1195 (9th Cir. 1997) (holding that district court did not abuse its discretion by refusing to strike juror who had a 10 year prior business relationship with the defendant). In ***Mendoza v. Gates***, the 9th Circuit held that the district court did not abuse its discretion in failing to strike juror for cause based on the fact that she knew the detective only in context of infrequent, superficial, and purely telephonic business relationship and was not dishonest in responding to questions on voir dire. Similarly, in this case, Juror 11 had infrequent and superficial interactions at the gym with Officer Meeds over a period of five years. The trial court weighed the credibility of Juror 11's statements and determined that he could be fair and impartial.

The record does not support defendant's claim that juror 11's acquaintance with Officer Meeds was evidence of actual or implied bias. Br.App. 21. A prospective juror must be excused for cause if the trial court determines the juror is actually or impliedly biased. RCW 4.44.170; ***State v. Gosser***, 33 Wn. App. 428, 656 P.2d 514 (1982).

To determine whether a prospective juror may have an implied bias, the inquiry is as to whether there exists any relationship between the juror and the parties close enough to create in the juror, consciously or unconsciously, a special interest in the success of either party. RCW 4.44.170; RCW 4.44.180. RCW 4.44.180 lists the four relationships which have this effect: (1) consanguinity or affinity within the fourth degree to either party; (2) any close business relationship; (3) having served on an earlier jury trying a case on substantially similar issues; and (4) a financial interest in the outcome of the suit.

In limited situations, the courts have held that bias may be implied by other circumstances outside the scope of RCW 4.44.180. ***State v. Cho***, 108 Wn. App. 315, 30 P.3d 496 (2014) (holding bias may be implied if a prospective juror deliberately withholds information during voir dire, hoping to increase his or her chances of being seated on the jury).

Actual bias arises when the juror's state of mind relative to the case satisfies the trial judge that the challenged person cannot try the issues impartially and without prejudice to the substantial rights of the challenging party. RCW 4.44.190; ***Ottis v. Stevenson-Carson Sch. Dist. No. 303***, 61 Wn. App. 747, 752, 812 P.2d 133 (1991); RCW 4.44.170(2). Therefore, when a challenge for actual bias is made, the trial court must assess the prospective juror's state of mind. ***State v. Jackson***, 75 Wn. App.

537, 542-43, 879 P.2d 307 (1994), *review denied*, 126 Wn.2d 1003, 891 P.2d 37 (1995). This involves a question of preliminary fact, and the party challenging the juror on the ground of actual bias bears the burden of demonstrating the facts necessary to sustain the challenge by a preponderance of the evidence. ***Ottis***, 61 Wn. App at 752-53.

Furthermore, the appellate court defers to the trial judge's choice of reasonable inferences. ***State v. Noltie***, 116 Wn.2d at 839; ***Ottis***, 61 Wn. App. at 756-57 (no abuse of discretion where prospective juror had long-term contact with various persons involved in the case but his testimony supported the reasonable inference that he could try the case fairly and impartially). According to the statute:

> "on the trial of such challenge [for actual bias], although it should appear that the juror challenged has formed or expressed an opinion upon what he or she hay have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially."

RCW 4.44.190.

The evidence does not indicate that Juror 11 was impliedly or actually biased because of his acquaintance with Officer Meeds. First, defendant has not provided any evidence that their relationship does fit into any of the four categories of relationship enumerated in the statute that provide the basis for implied bias. The Court stated, "[he] didn't even

know the officer's name. I don't think that's the type of affinity with a witness and a juror that would justify excusing him at this point in the trial." 1 RP 268.

Second, there is no evidence that Juror 11 deliberately withheld information about his acquaintance with Officer Meeds during jury selection. Rather, the record shows that as soon as Juror 11 realized that he knew Officer Meeds, he approached a member of the court, as the jury had been instructed to do, and was forthcoming when answering the questions of the Court and the prosecution.

Finally, the evidence supported the Court's reasonable inference that Juror 11 could be fair and impartial. Juror 11 stated that he and Officer Meeds are acquaintances from the gym, who occasionally have casual conversations about impersonal topics. Juror 11 answered negatively to the Court's questions of whether he had spoken with Officer Meeds about this case and if there existed any reason why knowing Officer Meeds would affect his ability to be a fair juror. In addition, the Court weighed the fact that Officer Meeds arrested defendant on an outstanding warrant that wasn't directly related to the underlying significant issue of the case in determining that there was no basis for actual bias.

Defendant claims that Juror 11 "would naturally have felt additional pressure to supporting his friend from the gym and find Manus guilty." Br.App. 20. Yet, as the party challenging the juror on the ground of actual bias, defendant bears the burden of demonstrating the facts necessary to sustain the challenge by a preponderance of the evidence. Although the defense had the opportunity to question Juror 11 and directly address the pressure Juror 11 might feel, defense did not ask any questions. Defendant's speculation is not supported by evidence from the record that would suggest that Juror 11's acquaintance with Officer Meeds would affect his deliberation.

It is not sufficient that a reasonable person could have inferred that the five year acquaintance was sufficient basis for actual bias. The trial court judge was in the best position to assess Juror 11's state of mind and determine whether sufficient bias existed. As a reasonable person could infer that Juror 11 could be fair and impartial, the Court did not abuse its discretion in refusing to excuse Juror 11 for cause.

D. CONCLUSION.

Defendant failed to show that his public trial right was violated because the "experience and logic" test shows that exercising peremptory challenges in writing in an open court room does not constitute a closure

of the courtroom. In addition, the Court properly refused to remove Juror 11 because defendant did not present evidence of implied or actual bias. The Court did not abuse its discretion because a reasonable person could infer that Juror 11 could be fair and impartial. The State respectfully requests that the conviction be affirmed.

DATED: JULY 21, 2014.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

Maria Hoisington
Appellate Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/21/14
Date Signature

PIERCE COUNTY PROSECUTOR

July 21, 2014 - 9:32 AM

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