NO. 32248-3-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DONALD DYSON, JR.,

Appellant.

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

APPELLANT'S OPENING BRIEF

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2. The court's instruction defining a deadly weapon as applied to the special verdict misstated the law, caused confusion, and diluted the State's burden of proof.

3. The court's instruction on transferred intent misstated the law and diluted the State's burden of proof.

4. Mr. Dyson's and the public's rights to an open trial were violated when for-cause challenges and conferences were conducted at sidebar.

5. Mr. Dyson and the public's rights to an open trial were violated when peremptory strikes were made on paper, outside the public specter.

6. Mr. Dyson's and the public's rights to an open trial were violated when evidentiary matters were discussed at sidebar.

7. The court violated Mr. Dyson's right to a jury trial by finding Mr. Dyson used force or means likely to result in death or intended to

kill and by imposing a five-year mandatory minimum sentence for each count.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused has the due process right to jury instructions that accurately and clearly state the law, including by holding the State to its burden of proof. Did the court's instructions misstate the law, cause confusion, and dilute the State's burden where the deadly weapon instructions allowed the jury to supply its own unspecified definition for the term?

2. Did the court's instruction on transferred intent misstate the law and dilute the State's burden where assault in the first degree is not based on the doctrine of transferred intent?

3. The federal and state constitutions guarantee the public and an accused the right to open and public trials. Accordingly, criminal proceedings, including jury selection and trial, may be closed to the public only when the trial court performs an on-the-record weighing test, as outlined in *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995), and finds closure favored. Violation of the right to a public trial is presumptively prejudicial. Where peremptory challenges were conducted in written form, for-cause challenges at sidebar, and

evidentiary matters heard at sidebar, all removed from public scrutiny, without considering the *Bone-Club* factors, was Dyson's and the public's right to an open trial violated, requiring reversal?

4. The Sixth and Fourteenth Amendments require any fact that, if found, would increase the mandatory minimum sentence be found by a jury. Should this Court strike the finding that imposed a mandatory minimum term of confinement on each count because that finding was found by the court, not a jury?

C. STATEMENT OF THE CASE

Donald Dyson was planning on having a quiet night with his daughter and grandson when he was invited out by a female friend, Julie Rodriguez-Reeves. IVRP 663-64.[1] He accepted her invitation to join her and some friends for drinks. IVRP 665-67. They met at the Corner Club bar in Spokane and progressed to the Special K bar about an hour later. IVRP 664-66. Ms. Rodriguez-Reeves brought her roommate, Jodi Morphis, and her son's girlfriend, Alyssa Bishop, with her. IIRP 335-36; IVRP 665.

[1] The four consecutively paginated volumes of the verbatim report of proceedings are referred to as IRP, IIRP, IIIRP and IVRP. The remaining volume of pretrial hearings is referred to as 5/16/13 RP.

At the Special K, Mr. Dyson socialized with other patrons, including Arthur Ward, and his group continued to drink and stayed until the bar closed in the early morning hours. IIRP 286; IVRP 667-70. The bar was not too crowded and everyone got along. IIRP 339, 356-57; IIIRP 442, 460-61; IVRP 667. Ms. Morphis felt that everyone she was with was intoxicated. IIRP 342-43.

When closing time was announced, Mr. Dyson went outside to the parking lot with Ms. Rodriguez-Reeves. IVRP 669-70. Arthur Ward and Alyssa Bishop were already outside. IIRP 286-89; IVRP 669-70. Spencer Schwartzenberger, who had also been drinking at the Special K and elsewhere beforehand, was sitting in his Ford Explorer in the parking lot, playing music from an after-market stereo system. IIRP 216-18, 220, 241-44; IVRP 671; *see* IIRP 344 (Schwartzenberger seemed upset). Mr. Dyson liked the sound and started chatting with Mr. Schwartzenberger, who let him into the passenger's seat. IIRP 221; IVRP 671.

Eventually, Mr. Schwartzenberger decided it was time to leave and told his friend, Chris Dailey, who was "pretty drunk," that it was time to go. IIRP 218-19, 223, 408, 429; IVRP 672. According to Mr. Dyson, Mr. Dailey resisted the call to leave because he was conversing

with two women, Ms. Rodriguez-Reeves and Ms. Morphis. IVRP 672-74; *see* IIRP 223-24. Mr. Dyson overheard Mr. Dailey ask Ms. Rodriguez-Reeves to go home with him and overheard Mr. Dailey refer to her crassly when she turned him down. IVRP 674; *see* IIRP 244 (Schwartzenberger confirmed comments were made). Mr. Dyson took offense and "the next thing I know is, we're in a shoving match; turned into a punching match." IVRP 675.

No one was aware who started the physical altercation but Mr. Schwartzenberger saw both Mr. Dailey and Mr. Dyson getting into it and Mr. Schwartzenberger got out of his vehicle and physically entrenched himself in the fight, purportedly to try to break it up. IIRP 224, 226-27, 236-37, 246, 261-63, 293-96; IIIRP 449, 464-65; IVRP 676. Next thing Mr. Dyson knew, he was being attacked from behind by this second man. IVRP 677-78; *see* IIRP 362. Mr. Dyson backed up and pulled out a knife to protect himself and to warn the two men fighting him. IVRP 678-80, 702-03. A fourth man, Arthur Ward, "Ramboed in" and tackled Mr. Dyson. IIRP 263-64, 364-65, 368; IVRP 680-81, 689-90, 698-701. Mr. Dyson was brought to the ground; Mr. Ward and Mr. Schwartzenberger were also injured; and Mr. Dyson quickly got up and walked away. IVRP 681-83, 704-05. He was

arrested nearby and charged with two counts of assault in the first degree—one count as to Spencer Schwartzenberger and one as to Arthur Ward. CP 6-7; IVRP 683-84; IIIRP 503. As to both counts, the State charged the assault was committed with specific intent to inflict great bodily harm and with a firearm or deadly weapon or by any force or means likely to produce great bodily harm or death. CP 6-7, 11-12 (citing RCW 9A.36.011(1)(a)). The State also charged a deadly weapon sentencing enhancement for each count. *Id.*

At trial, Mr. Schwartzenberger recounted that Mr. Dyson stabbed him in the throat after making "a roundhouse-type motion." IIRP 227-29. Mr. Ward received a cut near his temple. IIRP 267-69, 278, 321-22. Mr. Dyson testified at trial and asserted self-defense. CP 56-58; IVRP 770-73. The State argued Mr. Dyson could be guilty of assaulting Mr. Ward through the doctrine of transferred intent, and secured a jury instruction on transferred intent. CP 81; IVRP 759-60. The jury convicted him as charged. CP 96-99. At sentencing, the court checked a finding that Mr. Dyson used force or means likely to result in death or intended to kill and imposed the resulting mandatory minimum term of 60 months incarceration for each count. CP 109 (citing RCW

9.94A.540), 111. Mr. Dyson was sentenced to 296 months, including the two deadly weapon enhancements. CP 111-12.

D. ARGUMENT

1. **The court's instructions diluted the State's burden of proof, misstated the law and were confusing.**

A criminal defendant has the due process right to instructions that clearly and accurately charge the jury regarding the law to be applied in a given case. U.S. Const. amends. V, XIV; Const. art. I, § 3; *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975); *State v. Roberts*, 88 Wn.2d 337, 562 P.2d 1259 (1977). The standard for clarity in jury instructions is high. In fact, more onerous clarity is required of instructions than is required of statutes because while a court can resolve an ambiguously-worded statute through interpretive tools and an understanding of the law, "a jury lacks such interpretive tools and thus requires a manifestly clear instruction." *State v. LeFaber*, 128 Wn.2d 896, 902, 913 P.2d 369 (1996), *abrogated on other grounds by State v. O'Hara*, 128 Wn.2d 896, 913 P.2d 369 (1996). Instructions which relieve the State of its burden or fail to correctly inform the jury of an essential ingredient of the crime prejudicially deny a defendant due process of law. *Id.* at 903.

a. The two instructions that defined a deadly weapon improperly contained the word "also," authorizing the jury to use other, unstated definitions to convict Mr. Dyson thereby diluting the State's burden, misstating the law and causing confusion.

The jury could convict Mr. Dyson of first degree assault by a deadly weapon only if the evidence showed beyond a reasonable doubt that the knife (or any weapon, device or instrument) "under the circumstances in which it [was] used, attempted to be used, or threatened to be used, [was] readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6); *see* RCW 9A.36.011(1)(a). However the court did not provide the jury this singular instruction. Rather, the court instructed the jury that "Deadly weapon also means any weapon, device, instrument or article which under the circumstances in which it is used, attempted to be used, or threatened to be used is readily capable of causing death or substantial bodily harm." CP 82 (instruction 13) (emphasis added). By using the word "also," the instruction frees the jury to supply other, unspecified definitions for the deadly weapon element of assault. Any other definition of deadly weapon does not satisfy the statutory offense and cannot be a basis for conviction.

As the Washington Pattern Jury Instruction explains, the word "also" should be included in this deadly weapon instruction only in "cases involving both a firearm or explosive and a different weapon." Washington Pattern Jury Instructions: Criminal (WPIC) 2.06.01. In such cases, the "also" is included because the instruction includes an additional definition of a firearm or explosive. WPIC 2.06.01 (Note on use). Here, no firearm or explosive was at issue. The word "also" should not have been included; it could refer to nothing but the jury's ability to freely apply alternative definitions.

This erroneous instruction is complicated by a similar error in the instruction defining the term deadly weapon as applied to the special verdict. There too the court's instruction states, "A deadly weapon is also an implement or instrument that has the capacity to inflict death and, from the manner in which it is used, is likely to produce or may easily produce death." CP 95 (instruction 25) (emphasis added). Like with the assault instruction, there is no other definition of deadly weapon to which the "also" could refer. And like with the assault, the pattern instructions do not advise using the word "also" in the definition for a deadly weapon. WPIC 2.07, 2.07.01 The only reasonable conclusion is that the jury can supply its own definition

of deadly weapon for the special verdict, and a deadly weapon also includes an implement or instrument as defined.

In *LeFaber*, the trial court issued an instruction on self-defense that permitted two interpretations, one which was accurate and one which was erroneous. In holding the instruction denied the defendant due process of law, the Supreme Court remarked, "the offending sentence lacks any grammatical signal compelling [the correct] interpretation over the alternative, conflicting, and erroneous reading." *LeFaber,* 128 Wn.2d at 902-03. The risk that the jury chose the legally incorrect path among two possible interpretations of the instruction required reversal. *Id.*; *accord State v. Cowen*, 87 Wn. App. 45, 49, 939 P.2d 1249 (1997) (reversing because grammatical reading of instruction could have left jury with incorrect impression of law).

Even more egregious than the instruction in *LeFaber*, which allowed for a lawful and unlawful interpretation, the only reasonable interpretation of the court's instructions here is an unlawful one. The court instructed the jury that in addition to the definition spelled out in the instruction, it could "also" consider other definitions of a deadly weapon. The faulty instructions misstated the law because only the singular definition of deadly weapon could actually be considered by

the jury. Thus the instructions also diluted the State's burden of proof by allowing the jury to convict on bases broader than the law allows. The instructions were also grammatically and substantively confusing because they referred to other interpretations by using the word "also" where no other definition was supplied.

Although Mr. Dyson did not object to the deadly weapon definitions, the issue should be reviewed on appeal. Mr. Dyson did not propose the instructions and may raise the issue as a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3); *see* CP 45 (defense proposed instruction defining deadly weapon for purposes of assault).[2] A jury instruction that lowers the State's burden of proof is a manifest error affecting the constitutional right to due process. *State v. Deal*, 128 Wn.2d 693, 698, 911 P.2d 996 (1996); *State v. McCullum*, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983); U.S. Const. amend. XIV. Additionally, confusing jury instructions raise a due process concern because they may wash away or dilute the presumption of innocence. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007).

[2] The language was proposed by the State. CP __ (Sub # 49 at 15, 31 (plaintiff's proposed instructions)).

b. The instruction on transferred intent misstated the law and diluted the State's burden of proof.

A separate instruction misstated the law and diluted the State's burden of proof as to the element of intent. Over Mr. Dyson's objection, the State requested and the court gave an instruction on transferred intent. CP 81; CP __ (Sub # 50 (State's supplemental proposed instructions)); IVRP 642, 645. The instruction provided "If a person acts with intent to assault another, but the act harms a third person, the actor is deemed to have acted with intent to assault a third person." CP 81.

The instruction misstated the law. Assault in the first degree allows for intent to be as to one person and harm, or the assault, as to another. *State v. Wilson*, 125 Wn.2d 212, 213, 218-19, 883 P.2d 320 (1994). But this precept does not arise under the law of transferred intent.

> Under a literal interpretation of RCW 9A.36.011, once the intent to inflict great bodily harm against an intended victim is established, the statute allows the intent to transfer to unintended victims. It is RCW 9A.36.011, not the doctrine of transferred intent, which provides: intent against one is intent against all.

Id. at 213. "Assault in the first degree requires a specific intent; but it does not, under all circumstances, require that the specific intent match

a specific victim." *Id.* at 218. Rather, under the first degree assault statute, once specific intent to inflict great bodily harm on a specific person is established, the assault statute itself, "not the doctrine of transferred intent, provides that any unintended victim is assaulted if they fall within the terms and conditions of the statute." *Id.* at 219.

Under the State's theory, the assault statute does not deem Mr. Dyson to have intended to inflict great bodily harm on Mr. Ward. Rather, the State had to prove Mr. Dyson's intent to inflict great bodily harm on a specific victim, such as Spencer Schwartzenberger. That specific intent is sufficient for assault in the first degree under RCW 9A.36.011 even if the person whom Mr. Dyson actually assaults is different from the intended victim. *See Wilson*, 125 Wn.2d at 212-13, 218-19. The instruction given here misstated the law because it treated the necessary specific intent to assault a specific victim as an automatic presumption that there was a specific intent to assault a different person.

The instruction also diluted the State's burden because whereas the law requires the State to prove specific intent to inflict great bodily harm on a specific victim, the instructions allowed the State to prove intent as to the intended victim or the transferee.

c. The errors require reversal of Mr. Dyson's convictions.

Errors affecting jury unanimity and the right to due process are of constitutional magnitude, and as such, are reversible unless the State proves it is "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1975); *State v. Peters*, 163 Wn. App. 836, 850, 261 P.3d 199 (2011) (State must prove beyond a reasonable doubt that due process violation was harmless).

The State cannot show the instructional errors were harmless to the assault convictions beyond a reasonable doubt. The State's case was centered on a fight outside a rowdy bar after closing time. IIRP 341; IIIRP 442. Every witness to the event had imbibed during the course of the night and into the morning. *E.g.*, IIRP 217-20, 257, 340, 342-43, 429; IIIRP 443-46. No one could attest to who started the physical altercation, and the jury was provided instructions on self-defense and the lawful use of force. Moreover, the State assumed a substantial burden in proving assault in the first degree as charged. The State had to prove beyond a reasonable doubt that Mr. Dyson formulated specific intent to inflict great bodily harm on a particular person, where great bodily harm means "bodily injury which creates a

probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.36.011; RCW 9A.04.110(4)(c).

Regarding the weapon itself, the knife allegedly used in the altercation measured just about three inches long. IIIRP 496-97. The jury was free to decide whether it was a deadly weapon for purposes of each underlying offense and the special verdict. *See* RCW 9A.04.110(6); RCW 9.94A.533(4);

In light of the evidence and argument at trial, the State cannot show that these instructional errors were harmless beyond a reasonable doubt.

2. **A new trial is required on the independent basis that the proceedings were closed to the public without analysis or even recognition of the right to a public trial.**

    a. Mr. Dyson and the public were guaranteed an open, public trial by our state and federal constitutions.

Our state constitution requires that criminal proceedings be open to the public without exception. Const. art. I, § 10; Const. art. I, § 22. Two provisions guarantee this right. First, article I, section 10 requires that "Justice in all cases shall be administered openly." Additionally,

article I, section 22 provides that "In criminal prosecutions, the accused shall have the right to . . . a speedy public trial." These provisions serve "complementary and interdependent functions in assuring the fairness of our judicial system." *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). The federal constitution also guarantees the accused the right to a public trial. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."); *see* U.S. Const. amends. I, V.

While article I, section 10 clearly entitles the public and the press to openly administered justice, public access to the courts is further supported by article I, section 5, which establishes the freedom of every person to speak and publish on any topic. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); *Federated Publ'ns, Inc. v. Kurtz*, 94 Wn.2d 51, 58-60, 615 P.2d 440 (1980).

The public trial guarantee ensures "that the public may see [the accused] is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Bone-Club*, 128 Wn.2d at 259 (quoting *In re Oliver*, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)). "Be it through members of

the media, victims, the family or friends of a party, or passersby, the public can keep watch over the administration of justice when the courtroom is open." *State v. Wise*, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). "Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (*Press-Enterprise I*).

Open public access provides a check on the judicial process, which is both necessary for a healthy democracy and promotes public understanding of the legal system. *State v. Sublett*, 176 Wn.2d 58, 142 n.3, 292 P.3d 715 (2012) (Stephens, J. concurring); *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982). Openness deters perjury and other misconduct; it tempers biases and undue partiality. *Wise*, 176 Wn.2d at 5. With regard to jury selection in particular, closed proceedings "harm[] the defendant by preventing his or her family from contributing their knowledge or insight to jury selection and by preventing the venire from seeing the interested individuals." *State v.*

Brightman, 155 Wn.2d 506, 515, 122 P.3d 150 (2005) (citing *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004)); *accord* Const. art. I, § 35 (victims of crimes have right to attend trial and other court proceedings).

To protect this constitutional right to a public trial, our courts have repeatedly held that a trial court may not conduct secret or closed proceedings "without, first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure order." *E.g.*, *Wise*, 176 Wn.2d at 12; *State v. Paumier*, 176 Wn.2d 29, 34-35, 288 P.3d 1126 (2012); *State v. Easterling*, 157 Wn.2d 167, 175, 137 P.3d 825 (2006). The presumption of openness may be overcome only by a finding that closure is necessary to "preserve higher values" and the closure must be narrowly tailored to serve that interest. *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (quoting *Press-Enterprise I*, 464 U.S. at 510).

This Court reviews violations of the public trial right de novo, and a defendant does not waive his public trial right by failing to object to a closure during trial. *E.g.*, *Paumier*, 176 Wn.2d at 34, 36-37; *Wise*, 176 Wn.2d at 15-16.

b. Proceedings were closed without analysis during jury selection.

The right to a public trial includes the right to have public access to jury selection. *E.g.*, *Presley v. Georgia*, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); *Sublett*, 176 Wn.2d at 71-72; *Wise*, 176 Wn.2d at 11-12; *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011); *State v. Strode*, 167 Wn.2d 222, 226-27, 217 P.3d 310 (2009); *Orange*, 152 Wn.2d at 804.[3] "The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." *Press-Enterprise I*, 464 U.S. at 505.

[3] Accordingly, the Court need not apply the experience and logic test to determine whether the proceeding is subject to the open trial right. *Sublett*, 176 Wn.2d at 73 (lead opinion); *id.* at 136 (Stephens, J. concurring); *see State v. Wilson*, 174 Wn. App. 328, 298 P.3d 148 (2013) (distinguishing voir dire, to which open trial right conclusively applies, to pre-voir dire release of prospective jurors by clerk for illness, a stage to which experience and logic test must be applied). In *State v. Love*, this Court applied the experience and logic test to evaluate that appellant's claim that similarly closed proceedings violated his public trial right. *State v. Love*, 176 Wn. App. 911, 309 P.3d 1209, 1212-14 (2013). The Court did not explain why the experience and logic test must be applied to the for-cause and peremptory challenge portion of jury selection but not to other parts of that process. However, even under the experience and logic test, preliminary challenges to the venire must be held in open court absent on-the-record satisfaction of the *Bone-Club* factors. *E.g.*, *State v. Jones*, 175 Wn. App. 87, 98-99, 303 P.3d 1084 (2013) (citing Laws of 1917, ch. 37, § 1 and former RCW 10.49.070 (1950), repealed by Laws of 1984, ch. 76, § 30(6) as requiring peremptory challenges to be held in open court); *State v. Beskurt*, 176 Wn.2d 441, 446-48, 293 P.3d 1159 (2013) (no public trial violation where juror questionnaires were sealed after voir dire and for cause challenges were conducted in open court within public's purview); *see infra* (discussing importance of public scrutiny during peremptory challenges).

The process of excusing prospective jurors is a critical part of voir dire that must also be open to the public. *E.g.*, *Batson v. Kentucky*, 476 U.S. 79, 98, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986) (peremptory challenge occupies important position in trial procedures); *State v. Beskurt*, 176 Wn.2d 441, 447-48, 293 P.3d 1159 (2013) ("[T]he attorneys' for cause challenges, and the trial judge's decisions on those challenges all occurred in open court. The public had the opportunity to observe this dialogue. . . . Importantly, everything that was required to be done in open court was done."); *State v. Wilson*, 174 Wn. App. 328, 342, 298 P.3d 148 (2013) (noting peremptory and for-cause challenges are part of voir dire); *New York v. Torres*, 97 A.D.3d 1125, 1126-27, 948 N.Y.S.2d 488 (2012) (closure of courtroom to defendant's wife while initial jury selection held, including exercise of 16 peremptory challenges, is erroneous). The "interplay of challenges for cause and peremptory challenges" are an essential part of criminal trial proceedings. *State v. Vreen*, 99 Wn. App. 662, 668, 994 P.2d 905 (2000), *aff'd*, 143 Wn.2d 923 (2001).

Public scrutiny is essential because there are important limits on both parties' exercise of peremptory and for-cause challenges. *E.g.*, *Georgia v. McCollum*, 505 U.S. 42, 47-50, 112 S. Ct. 2348, 120 L. Ed.

2d 33 (1992) (discussing protection from racial discrimination in jury selection, including in exercise of peremptory challenges, and critical role of public scrutiny). For example, neither may be exercised in a racially discriminatory fashion. *Id.*; *see State v. Sadler*, 147 Wn. App. 97, 193 P.3d 1108 (2008) (open trial right violated where *Batson* challenge conducted in private).[4] "Racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts, and permitting such exclusion in an official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin." *State v. Saintcalle*, 178 Wn.2d 34, 41-42, 309 P.3d 326 (2013) (discussing important public interest in proper exercise of juror challenges); *id.*, at 44 ("peremptory challenges have become a cloak for race discrimination"). Beyond the potential for discrimination, for-cause excusals require the court to determine whether a prospective juror is "disqualified." Criminal Rule (CrR) 6.4(c); RCW 4.44.150. A party may except to an adverse party's for-cause challenge, requiring the court to "try the issue and determine the law and the facts." CrR 6.4(d); *see* RCW 4.44.190 (governing trial on

[4] In *Sublett*, our Supreme Court declined to follow *Sadler* to the extent it relied on a legal/ministerial distinction. The Court did not discuss, or call into question, *Sadler*'s substantive holding. *Sublett*, 176 Wn.2d at 71 (lead opinion).

challenge for actual bias). Like the questioning of prospective jurors, such challenges to the venire must be held in open proceedings absent an on-the-record consideration of the public trial right, competing interests, alternatives to closing the proceeding and the other *Bone-Club* considerations. *See Jones*, 175 Wn. App. at 98-99 (citing Laws of 1917, ch. 37, § 1 and former RCW 10.49.070 (1950), repealed by Laws of 1984, ch. 76, § 30(6), as requiring peremptory challenges to be held in open court).

In *Wilson*, this Court recently distinguished between hardship strikes made by the clerk prior to the commencement of voir dire, which is not subject to the open trial right, and the for-cause and peremptory challenge process, which is part and parcel of voir dire. 174 Wn. App. at 343-44. This Court observed that unlike hardship strikes made by a clerk, "voir dire" under Criminal Rule 6.4 involves the trial court and counsel questioning prospective jurors to determine their ability to serve fairly and impartially, and to enable counsel to exercise informed challenges for-cause and peremptory challenges. *Id.* at 343. While a clerk may excuse jurors on limited, administrative bases, such excusals cannot interfere with the court's and parties' rights

to excuse jurors based on cause and peremptory challenges. *Id.* at 343-44.

This approach is consistent with other jurisdictions. California has long held that peremptory challenges must be exercised in open court. *People v. Harris*, 10 Cal. App.4th 672, 684, 12 Cal. Rptr. 2d 758 (1992). In *Harris*, the right to a public trial was violated where peremptory challenges were exercised in chambers based on the trial court's unilateral determination. *Id.* at 677. The violation required reversal even though the court tracked the challenges on paper, announced in open court the names of the stricken prospective jurors, and the proceedings were reported. *Id.* at 684-85, 688-89.

Our courts consider proceedings held outside the view of the public, including at the bench or at sidebar, to be closed proceedings even if not held in the judge's chambers. For example, in *State v. Slert*, Division Two reasoned that because the public cannot scrutinize the dismissal of jurors that occur during sidebar proceedings, such proceedings violate the constitutional public trial right. *State v. Slert*, 169 Wn. App. 766, 774 n. 11, 282 P.3d 101 (2012), *review granted* 176 Wn.2d 1031, 299 P.3d 20 (2013) (oral argument heard Oct. 17, 2013). Likewise, an interview of a panel member in the hallway outside the

courtroom while both the hallway and the courtroom at least arguably remained "open" and the conversation was recorded violates the accused and the public's open trial right. *State v. Leyerle*, 158 Wn. App. 474, 483-84 & n.9, 242 P.3d 921 (2010).

The trial court's use of a secret ballot and a private bench conference during Mr. Dyson's trial closed proceedings to at least the same extent as in these cases. Here, the trial court directed that for-cause challenges would be handled at the bench and peremptory strikes would be exercised silently on paper. IRP 170-74. The for-cause challenges were made at the bench, on the record, but out of the hearing of the public. IRP 171-72. The judge ruled in favor of the State's challenge for cause, making a judicial determination outside the public specter. *Id.* Moreover, the judge did not announce the for-cause removal publicly; rather, peremptory strikes were conducted on paper and then the final jury was simply announced. IRP 170-74. Although the public was allowed in the courtroom where the silent proceedings occurred, the public did not see or hear which party struck which jurors or in what order. *Cf. Leyerle*, 158 Wn. App. at 483-84 & n.9 (questioning juror in public hallway outside courtroom is a closure despite the fact courtroom remained open to public). The public had no

basis upon which to discern which jurors had been struck for cause and which by peremptory. Further, there was no public check on the non-discriminatory use of challenges to the venire or the court's rulings on such challenges. The procedure had the same effect as excluding the public from the courtroom. *See Lormor*, 172 Wn.2d at 92 (citing cases where closure found because public was excluded from the courtroom during voir dire or other proceedings). "Proceedings cloaked in secrecy foster mistrust and, potentially, misuse of power." *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004).

The subsequently-available record of the challenges does not absolve the constitutional violation. *See* IRP 171-72; CP __ (Sub # 58 (record of jurors)); *Paumier*, 176 Wn.2d at 32-33 (public trial violation even where in-chambers questioning of prospective jurors "was recorded and transcribed by the court"); *Sublett*, 176 Wn.2d at 142 n.3 (Stephens, J. concurring); *Leyerle*, 158 Wn. App. at 484 n.9 (citing *Strode*, 167 Wn.2d at 223-24 & n. 1); *Harris*, 10 Cal. App. 4th at 684-85, 688-89. "[T]he mere existence of such recordings, and thus the public's potential ability to access those recordings through determined effort, plays no role in deciding whether a trial court has observed proper courtroom closure procedures." *Leyerle*, 158 Wn. App. at 484

n.9. Moreover, the existence of records does not dispel the likelihood that different jurors would have been stricken if the parties had to face the public scrutiny of open proceedings. *Globe Newspaper*, 457 U.S. at 606 ("Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process."); *Wise*, 176 Wn.2d at 5-6 (openness deters misconduct, tempers bias, mitigates undue partiality). "[P]ublic trials embody a 'view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings.'" *Strode*, 167 Wn.2d at 226 (quoting *Waller*, 467 U.S. at 46 n.4 (internal quotation omitted)).

c. Proceedings were closed during the evidentiary phase without analysis.

In addition to challenges for cause, during the evidentiary phase of the trial, the court heard argument and ruled on evidentiary matters at sidebar. IVRP 688-89 (argument followed by ruling at sidebar that Dyson had not opened door to ER 404(b) evidence); IIIRP 606-08 (discussion and ruling at sidebar as to what questions the State could ask a police witness). Experience and logic dictates that argument and rulings on what evidence the jury will be allowed to consider is directly connected with trial testimony, the evidentiary phase of the trial. *See*

Bone-Club, 128 Wn.2d at 257 (motion to suppress evidence at trial must be held in public). The public's trust in the process is fostered by holding such an adversarial argument in public, and ruling in public. Moreover, the public provides a judicial check on the process, which was removed when the trial court heard argument and made rulings in private. *See Wise*, 176 Wn.2d at 17 (quoting *Waller*, 467 U.S. at 46 n.4).[5]

d. These errors require reversal and remand for a new trial.

When the record "lacks any hint that the trial court considered [the] public trial right as required by *Bone-Club*, [an appellate court] cannot determine whether the closure was warranted" and reversal is required. *Brightman*, 155 Wn.2d at 515-16; *accord Easterling*, 157 Wn.2d at 181. If the trial court fails to conduct a *Bone-Club* inquiry, "a 'per se prejudicial' public trial violation has occurred 'even where the defendant failed to object at trial.'" *Jones*, 175 Wn. App. at 96 (quoting *Wise*, 176 Wn.2d at 18).

[5] The Washington Supreme Court has heard argument on whether evidentiary challenges during trial may be heard outside the presence of the public, in that case, in a hallway. *State v. Smith*, No. 85809-8 (oral arg. heard Oct. 15, 2013). The Court's forthcoming ruling in *Smith* may be relevant to the argument made here.

In Mr. Dyson's trial, the court provided no compelling interest that required peremptory strikes, for-cause challenges, and evidentiary discussions to be conducted in secret. Further, the court failed to consider any of the *Bone-Club* factors on the record. Allowing the error to "go unchecked 'would erode our open, public system of justice and could ultimately result in unjust and secret trial proceedings.'" *Jones*, 175 Wn. App. at 96 (quoting *Wise*, 176 Wn.2d at 18). Mr. Dyson's convictions should be reversed and the matter remanded for a new, public trial.

3. **The finding supporting a mandatory minimum term of confinement on each count should be stricken because it was found by the sentencing court rather than a jury.**

The Due Process Clause and right to a jury trial together guarantee the right to have a jury find, beyond a reasonable doubt, every fact essential to punishment—whether or not the fact is labeled an "element." U.S. Const. amends.VI, XIV; *Blakely v. Washington*, 542 U.S. 296, 298, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). It violates the constitution "for a legislature to remove from the jury the assessment of facts that increase the

prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 490. The government must submit to a jury and prove beyond a reasonable doubt any "fact" upon which it seeks to rely to increase punishment. *Alleyne v. United States*, __ U.S. __, 133 S. Ct. 2151, 2155, __ L. Ed. 2d __ (2013).

"Mandatory minimum sentences increase the penalty for a crime." *Alleyne*, 133 S. Ct. at 2155. Facts that increase the minimum sentence, like facts that increase the maximum punishment, "alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment." *Id.* at 2158. "It follows, then, that any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury. *Id.* at 2155.

At sentencing, the court found Mr. Dyson used force or means likely to result in death or intended to kill and should be subject to the five-year mandatory minimum. CP 109, 111; RCW 9.94A.540(1)(b). In determining Mr. Dyson's sentence, the court was constrained by a 60-month mandatory minimum term of confinement for each count. *See* RCW 9.94A.540(1)(b). Beyond increasing the floor of the proscribed sentencing range, the finding requires that during the first 60

months of Mr. Dyson's confinement on each count, he is not eligible for earned early release time. RCW 9.94A.540(2).

Whether Mr. Dyson used force or means likely to result in death or intended to kill was not submitted to the jury. *See* CP 67-95. In convicting Mr. Dyson, the jury found that Mr. Dyson assaulted another with a deadly weapon or by force or means likely to produce great bodily harm or death. CP 78, 85-86, 96-99. The jury verdict does not specify among the alternative means of committing first degree assault. CP 96-99. The judge, not the jury, made this finding at sentencing. CP 109, 111. Such judicial factfinding is prohibited under *Alleyne* because it violates the Sixth Amendment and Mr. Dyson's Fourteenth Amendment right to due process. 133 S. Ct. at 2155, 2158, 2164.

Although Mr. Dyson's trial counsel discussed application of the mandatory minimum term at sentencing, trial counsel's mention of it does not waive Mr. Dyson's constitutional rights. IVRP 817-18. A defendant may waive a constitutional right, but that waiver must be knowing, intelligent and voluntary and cannot be undertaken by counsel unilaterally. *E.g.*, *State v. Myers*, 86 Wn.2d 419, 426,-27 545 P.2d 538 (1976); *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). Nothing in the record here supports a finding

that Mr. Dyson waived the right to a jury trial on the factual predicate for a mandatory minimum sentence.

Moreover, while a defendant can stipulate to a finding that increases the statutory minimum, such stipulation survives the Sixth Amendment requirements only if the defendant stipulates specifically to the aggravating factor at issue and agrees the record supports that factor. *In re Beito*, 167 Wn.2d 497, 220 P.3d 489 (2009); *State v. Suleiman*, 158 Wn.2d 280, 292, 143 P.3d 795 (2006). Unless the defendant enters into precisely such a specific stipulation, the court engages in its own factfinding in imposing an aggravating factor. *Suleiman*, 158 Wn.2d at 292. In *Suleiman*, our Supreme Court vacated an exceptional sentence where the defendant stipulated to real and material facts in the probable cause certification and prosecutor's summary that supported the particular vulnerability finding, but the defendant did not stipulate specifically that he knew or should have known of the victim's vulnerabilities, that the record supported the aggravating factor, or that it was a substantial factor in the crime. *Id.* at 293. Likewise, here trial counsel at most agreed there was a factual basis for the mandatory minimum finding, but Mr. Dyson did not stipulate specifically that he used force or means likely to produce

death or intended to kill. IVRP 817-18. Trial counsel's sentencing recommendation statements were not specific enough to constitute a stipulation to the finding. To impose the mandatory minimum, the court engaged in judicial factfinding prohibited by the Sixth and Fourteenth Amendments.

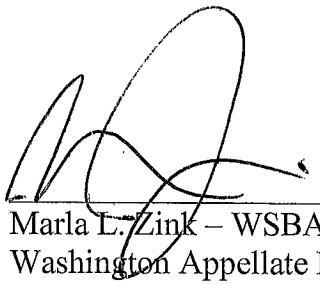
Because the court, not a jury, found the facts necessary to impose a mandatory minimum term of confinement, the sentence should be vacated and the matter remanded for resentencing. *See Alleyne*, 133 S. Ct. at 2164.

E. CONCLUSION

Mr. Dyson's convictions should be reversed and remanded for a new trial because the court's instructions misstated the law, diluted the State's burden, and were confusing. Furthermore, a new trial is required because portions of jury selection and the trial were closed to the public. In the alternative, the Court should vacate the sentence and remand for resentencing because the sentence is premised on judicial factfinding in violation of the Sixth and Fourteenth Amendments.

DATED this 17th day of September, 2014.

Respectfully submitted,



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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 32248-3-III
	)	
DONALD DYSON,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF SEPTEMBER, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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