

NO. 69159-7-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JEANETTE HOPKINS,

Appellant.

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

The Honorable Michael E. Rickert, Judge

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REPLY BRIEF OF APPELLANT

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ANDREW P. ZINNER  
Attorney for Appellant

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

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**TABLE OF CONTENTS**

	Page
A. <u>ARGUMENTS IN REPLY</u> .....	1
1. THE TRIAL COURT VIOLATED HOPKINS' RIGHT TO A PUBLIC TRIAL. ....	1
2. PROSECUTORIAL MISCONDUCT DURING CROSS- EXAMINATION DENIED HOPKINS A FAIR TRIAL. ....	8
B. <u>CONCLUSION</u> .....	10

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Press-Enterprise Co. v. Superior Court</u> 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986).....	4
<u>State v. Bone-Club</u> 128 Wn.2d 254, 906 P.2d 325 (1995).....	3, 7
<u>State v. Jones</u> __ Wn. App. __, 303 P.3d 1084 (2013).....	1, 2, 3, 4
<u>State v. Martz</u> 8 Wn. App. 192, 504 P.2d 1174 <u>review denied</u> , 82 Wn.2d 1002 (1973) .....	8, 9
<u>State v. Rivera</u> 108 Wn. App. 645, 32 P.3d 292 (2001) <u>review denied</u> , 146 Wn.2d 1006 (2002) .....	3, 5
<u>State v. Rutten</u> 13 Wash. 203, 43 P. 30 (1895) .....	3
<u>State v. Slert</u> 169 Wn. App. 766, 282 P.3d 101 (2012) <u>review granted</u> , 176 Wn2d 1031, 299 P.3d 20 (2013).....	6
<u>State v. Smith</u> 189 Wash. 422, 65 P.2d 1075 (1937). .....	9
<u>State v. Sublett</u> 176 Wn.2d 58, 292 P.3d 715 (2012).....	2, 3, 4, 7
<u>State v. Wise</u> 176 Wn. 2d 1, 288 P.3d 1113 (2012).....	3, 5, 7
<u>White v. Territory</u> 3 Wash. Terr. 397, 19 P. 37 (1888).....	3

**TABLE OF AUTHORITIES (CONT'D)**

Page

FEDERAL CASES

Rivera v. Illinois  
556 U.S. 148, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009)..... 5

United States v. Annigoni  
96 F.3d 1132 (1996)..... 5

A. ARGUMENTS IN REPLY<sup>1</sup>

1. THE TRIAL COURT VIOLATED HOPKINS' RIGHT TO A PUBLIC TRIAL.

The State asserts that taking peremptory challenges at the bench by secret ballot did not constitute a closure. BOR at 16-22. The State compares the proceedings that were closed in other oft-cited Supreme Court public trial cases with the exercise of peremptory challenges here. BOR at 16-17. It then notes "the courtroom was never closed at all, nor was anyone excluded and all substantive matters were discussed in open court." BOR at 17-18. It then declares, "[T]he sidebar conference at issue here is not a 'proceeding' that implicate[s] the public trial right." BOR at 16-18.

State v. Jones<sup>2</sup> 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, 303 P.3d at 1089. The

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<sup>1</sup> Hopkins stands on the Supplemental Brief of Appellant at 8-11 for her claim the trial court violated her right to be present by taking peremptory challenges at the bench. She stands on the Brief of Appellant (BOA) at 14-18 for her assertion the prosecutor's closing argument caused reversible prejudice.

<sup>2</sup> \_\_ Wn. App. \_\_, 303 P.3d 1084 (2013).

alternate juror drawing happened off the record and outside of the trial proceedings. Jones, 303 P.3d at 1092.

Jones challenged this process on appeal. Following State v. Sublett,<sup>3</sup> the court first determined whether a closure occurred by applying the "experience and logic" test. Jones, 303 P.3d at 1089. The Court concluded "that the Washington experience of alternate juror selection is one connected to the voir dire process for jury selection. Therefore, alternate juror selection, under our experience, has been and continues to be publicly open." Jones, 303 P.3d at 1092.

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, 303 P.3d at 1092. 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.

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<sup>3</sup> State v. Sublett 176 Wn.2d 58, 75, 292 P.3d 715 (2012).

Finally, the court held that because the trial court did not apply the Bone-Club<sup>4</sup> factors, it violated Jones' public trial right. Because such error is presumed prejudicial, a new trial was required. Id. at 1192-93.

The State did not cite Jones. Applying the Jones reasoning to Ms. Hopkins' case dictates the same result. 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."), review denied, 146 Wn.2d 1006 (2002), overruled on other grounds, Sublett, 176 Wn.2d at 71-72.

Voir dire must be open to the public. State v. Wise, 176 Wn. 2d 1, 11, 288 P.3d 1113 (2012). It follows that the exercise of peremptory

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<sup>4</sup> State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

challenges, a traditional component of voir dire, must also take place before public eyes and ears.

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 Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). 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.

Just as did the secret random alternate juror selection in Jones, the secret peremptory challenge process used at Hopkins' trial involved the first two purposes. The public lacked the assurance that Hopkins 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 (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, 467 U.S. at 46 n.4). The peremptory challenge process squarely implicates those values.

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

The State asserts the proceeding did not implicate the public trial right because it occurred in the open courtroom, "but [was] just

communicated between counsel and the trial court." BOR at 18. 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, by speaking a foreign language, 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."), review granted, 176 Wn2d 1031, 299 P.3d 20 (2013). 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 also notes that because none of the peremptory challenges was contested, there was no need for the trial court to make any decisions. BOR at 20. In this respect, the State essentially argues the exercise of the peremptories was ministerial. But in Sublett, the Court rejected such characterizations. It held, "We decline to draw the line with legal and ministerial issues on one side, and the resolution of disputed facts and other adversarial proceedings on the other[.]" because such a distinction "will not adequately serve to protect defendants' and the public's right to an open trial." 176 Wn.2d at 72.

There is no indication the court considered the Bone-Club factors before conducting the private jury selection process at issue here. The 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 Hopkins' public trial right, which requires automatic reversal because it affects the framework within which the trial proceeds. Id. at 6, 13-14.

2. PROSECUTORIAL MISCONDUCT DURING CROSS-EXAMINATION DENIED HOPKINS A FAIR TRIAL.

Hopkins argues the prosecutor violated an order in limine by asking her whether she had a methamphetamine abuse issue around the time of the incident giving rise to the instant charge and if she was using the drug the day of the incident. Brief of Appellant (BOA) at 5-14. Hopkins did not answer the questions because of prompt objections by defense counsel. BOA at 5. Hopkins asserts that asking the questions themselves caused prejudice because the insinuation was she was a methamphetamine user. BOA at 7-8.

The State responds that by failing to move for mistrial, Hopkins deprived the prosecutor of an opportunity to explain why the question was permissible. The State cites State v. Martz, which held, "It is only when the prosecutor is unable or unwilling to substantiate his accusations in the face of defendant's sworn denial that error is committed." 8 Wn. App. 192, 196, 504 P.2d 1174, review denied, 82 Wn.2d 1002 (1973).

The quoted language is dicta. In Martz, the prosecutor, without producing proof of conviction, asked the accused "whether he had been convicted of assaulting a woman" while in the military. 8 Wn. App. at 195. The accused answered affirmatively. Id. at 195-96. He challenged the prosecutor's method of cross examination on appeal. The appellate

court noted the prosecutor "risked reversible error when in the context of a prosecution for rape he inquired regarding prior conviction of assaulting a woman[,]" but was taken off the hook because the accused answered affirmatively. *Id.* at 196. Had the defendant instead denied the conviction and demanded an offer of proof, the prosecutor would have risked reversal if "unable or unwilling to substantiate his accusations." Because that did not happen, the language is dicta.

The prosecutor's question in Martz is also distinguishable from the prosecutor's first challenged question in this case. The prosecutor in Martz asked *whether* the accused had been convicted. The question itself did not assume the conviction's existence. The question put to Hopkins' was, "Ms. Hopkins, at the time that this occurred in August, you were – you had a methamphetamine abuse issue, didn't you?" IRP 97. The leading nature of the question presumes Hopkins abused methamphetamine. As discussed in the BOA, the "prejudice largely consists in the mere asking of the question." BOA at 6-8, quoting State v. Smith, 189 Wash. 422, 428-29, 65 P.2d 1075 (1937).

Furthermore, the trial court in Martz did not – as it did in Hopkins' case – prohibit reference to military convictions in a pretrial ruling. The prosecutor's disregard of the court's ruling here should not be condoned.

The prosecutor committed misconduct. Defense counsel timely objected. There was no need for a mistrial motion. This Court should reject the State's argument. And, for the reasons set forth in the BOA, Hopkins' was prejudiced by the prosecutor's insinuation. Her conviction should be reversed.

B. CONCLUSION

For the reasons cited herein and in her Brief of Appellant and Supplemental Brief of Appellant, this Court should reverse Hopkins' conviction and remand for a new trial.

DATED this 29 day of August, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

  
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ANDREW P. ZINNER  
WSBA No. 18631  
Office ID No. 91051

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Respondent,	)	
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v.	)	COA NO. 69159-7-1
	)	
JEANETTE HOPKINS,	)	
	)	
Appellant.	)	

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**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 29<sup>TH</sup> DAY OF AUGUST 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

- [X] SKAGIT COUNTY PROSECUTOR'S OFFICE  
COURTHOUSE ANNEX  
605 S. THIRD  
MOUNT VERNON, WA 98273  
[karenw@co.skagit.wa.us](mailto:karenw@co.skagit.wa.us)  
[criminalappeals@co.skagit.wa.us](mailto:criminalappeals@co.skagit.wa.us)
  
- [X] JEANETTE HOPKINS  
26684 S SKAGIT HIGHWAY  
SEDRO WOOLEY, WA 98284

**SIGNED** IN SEATTLE WASHINGTON, THIS 29<sup>TH</sup> DAY OF AUGUST 2013.

X *Patrick Mayovsky*

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DIVISION ONE  
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