

NO. 71749-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

MITCHELL RAMM,

Appellant.

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

The Honorable Jeffrey Ramsdell, Judge

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Where the appellant was charged with second degree burglary, the court erred in denying appellant's request that the jury be instructed on the lesser offense of first degree criminal trespass.

2. The procedure by which the court took peremptory challenges violated the appellant's right to a public trial and the public's right to open proceedings.

Issues Pertaining to Assignment of Error

1. The appellant was charged with second degree burglary and requested a lesser included offense instruction on first degree criminal trespass. Viewed in the light most favorable to the defense, did the facts warrant instructing the jury on the lesser offense?

2. During jury selection, the trial court employed a procedure that prevented the public from scrutinizing the parties' peremptory challenges. Did this procedure violate appellant's constitutional right to a public trial and the public's right to open proceedings?¹

¹ The facts as to this issue are set forth in the Argument section below.

B. STATEMENT OF THE CASE²

1. Charges, verdicts, and sentences

The State charged Mitchell Ramm with second degree burglary, a felony, as well as obstructing a law enforcement officer and third degree malicious mischief, both gross misdemeanors, for events occurring the evening of January 27 and early morning hours of January 28, 2013. The incident in question occurred at a high rise building under construction in downtown Seattle. CP 32-33.

Ramm was adjudicated competent before trial after a lengthy period of competency restoration at Western State Hospital. CP 9-20. He attended part of jury selection³ but refused to attend his trial again until the sentencing hearing. 6RP 129-38; 7RP 16, 66; 9RP 3; 10RP 2.

² This brief refers to the verbatim reports as follows: 1RP – 9/8/13; 2RP – 1/24/14; 3RP – 2/21/14; 4RP – 3/10/14; 5RP – 3/11/14; 6RP – 3/12/14; 7RP – 3/13/14; 8RP – 3/17/14; 9RP – 3/18/14; and 10RP – 3/24/14.

³ The jury selection transcripts indicate Ramm made some comments directly to prospective jurors, prompting defense counsel to admonish Ramm. 5RP 24 (Ramm’s statement congratulating prospective juror on being a stay-at-home mom and commenting that his niece had a child); 5RP 32 (commenting directly to juror describing hardship that “the American economy seems like it’s on the razor’s edge”); 6RP 124 (comments by prospective juror during individual questioning regarding Ramm’s previously-described interjections); 7RP 32-35 (in context of overruling prosecutor’s objection to defense opening statement on the grounds that it inappropriately asserted a mental health defense, court’s summary of Ramm’s odd behavior during jury selection).

As to the second degree burglary charge, the court rejected Ramm's request to instruct the jury on the lesser offense of first degree criminal trespass. 8RP 74-72; CP 36-37, 39 (defense proposed instructions). A jury convicted Ramm as charged. CP 74-76.

The court sentenced Ramm to three months on the felony and a total of 18 months on the two gross misdemeanors. The court ran the felony sentence concurrent to the misdemeanor sentences. CP 83, 94. Ramm, who served a lengthy pretrial incarceration, was released shortly after the sentencing hearing based on credit for time served. CP 9-20; 10RP 24.

Ramm timely appeals. CP 90.

2. Trial testimony

Around 10:00 p.m., Seattle police officers were dispatched to 1915 Second Avenue to a high-rise building under construction. 7RP 46-47, 74, 87-88, 135-36, 166. The upper levels had not yet been walled in. 7RP 75.

Officers heard yelling and what sounded like items being thrown. 7RP 42, 84, 88. Using their spotlights, police saw a white male on the seventh or eighth floor, which was open to the elements. 7RP 76. Officers were unable to locate an obvious means to enter the fenced

construction site and eventually cut a padlock off a gate.⁴ 7RP 41, 51, 88-89. A group of six officers, including a “canine” officer and a specially designated “Taser” officer, walked up ramps in the building’s parking garage before reaching a makeshift staircase at the center of the building. 7RP 43, 54, 89-90, 150.

The first out-of-place item the officers came upon was a five-gallon propane container with an open valve. The container was hissing and smelled of propane. 7RP 89. The officers soon began to notice construction debris, including cable and pipe, covering the staircase, which made the officers’ passage difficult given the lack of railings. 7RP 44-45, 89, 93.

As they approached the eighth floor, the officers at the front of the pack saw Ramm standing near the eight floor landing. 7RP 90. He was holding a three-foot length of rebar with a large hook on the end. 7RP 45.

A number of officers shone their flashlights at Ramm and ordered him to drop the rebar. 7RP 45, 95, 152. Many had guns drawn. 7RP 45, 54-55, 151. Ramm did not drop the rebar. Rather, he slammed it on a drafting table and screamed unintelligibly. 7RP 46, 95. Sergeant William Edwards heard Ramm tell him and the other officers to drop their guns.

⁴ It was never determined how Ramm entered the site. 7RP 94.

7RP 139. This resulted in a temporary stalemate, as the officers hoped to take Ramm into custody but wished to avoid shooting him. 7RP 139.

Sergeant Joseph Maccarone and the designated Taser officer, Rebecca Miller, pushed past the others. 7RP 46. Officer Miller fired the Taser at Ramm while Maccarone “covered” Officer Miller with his gun. 7RP 46; 8RP 23.

The Taser did not have the intended effect of immobilizing Ramm. 8RP 38. The officers believed it did not function as intended because the probes were unable to penetrate Ramm’s heavy winter jacket.⁵ 7RP 46, 96, 140; 8RP 23-24, 37. The Taser attempt nonetheless startled Ramm. 7RP 46-47. He raised the re-bar over his head, spun around, dropped the rebar, and ran toward the open edge of the building. 8RP 25. Maccarone feared Ramm would jump to his death. 8RP 25-26.

Instead, Ramm climbed over a safety fence consisting of two cables, then stood on the narrow exposed ledge. 6RP 46-47, 140. While on the ledge, he rambled nonsensically on subjects as diverse as California biker gangs, conspiracies, and the end of the world. 7RP 190; 8RP 44-45.

Officer Miller attempted to persuade Ramm to get off the ledge. 7RP 97; 8RP 26, 43. The police eventually called in police department

⁵ Sergeant Maccarone thought one probe may have hit Ramm in the leg because he later saw Ramm pull something out of his pant leg. 8RP 24.

hostage negotiators to talk to Ramm. 7RP 59; 8RP 45. Ramm climbed back over the wire, and was eventually arrested at around 5:00 the following morning. The surrender occurred shortly after new officers came on shift, replacing officers who had originally confronted Ramm. 7RP 98, 113; 8RP 28. Those officers had to reassure Ramm they would not hurt him to persuade him to surrender. 8RP 45.

The officers who had contact with Ramm that night believed he was enduring a mental health crisis and may have been suicidal. 7RP 62, 155; 8RP 30, 42. At the time of his surrender and arrest, Ramm seemed to have “come down” from the crisis, although he was still far from lucid. 8RP 47, 50.

Sergeant Maccarone believed Ramm may have been trying to get the officers to shoot him. 8RP 42. Maccarone was not sure if Ramm’s behavior was mental health- or drug- related, or both, but he acknowledged no drugs were found on Ramm’s person or in his backpack. 8RP 27, 47, 49-50.

Michael Finney, the construction company’s site manager, was called to the scene during the early morning hours of January 28. 7RP 174. He activated an elevator so the officers could reach the eighth floor without climbing the debris-filled stairs. 7RP 77, 175.

Finney testified Ramm did not have permission to be on the site. 7RP 167-69. In addition, the fence enclosing the site had a number of “no trespassing” signs, as well as signs indicating that visitors were required to check in at the construction office. 7RP 168.

The incident began on a Sunday night and concluded early the following Monday. 7RP 193. Finney believed he was the last person on the site previous Friday, the last day the site was open. 7RP 192-94. According to Finley, between Friday and Monday morning, a number of construction-related items had been moved or thrown down the stairs or off the side of the building. 7RP 171-72, 192-94. In addition, someone had used bright pink marking paint to write words on the building’s elevator core.⁶ 7RP 112, 139. Inscriptions included King, English, MI6, Jesus, 2013, AD, Infidel, Cannibal, Texas, and Bush. 7RP 145-47, 185-86. A cross or “T” in a similar color was painted on the front of Ramm’s brown Carhartt-style jacket. 7RP 112-13, 139, 143.

Finney saw Ramm on the ledge when he arrived and overheard him threatening to jump and ranting about conspiracies and the end of the world. 7RP 190.

⁶ The design called for exposed concrete in that area so the construction company had to pay a subcontractor to remove the paint. 7RP 180-84.

3. Refusal to instruct on lesser offense

Following the close of evidence, the defense requested a lesser included offense instruction on first degree criminal trespass. 8RP 74-82; CP 36-37, 39 (defense proposed instructions). Defense counsel pointed out that burglary required a “higher” mental state, intent, than did trespassing, which required only knowledge. 8RP 77.⁷ Counsel argued that, based on the evidence of prominent no-trespassing and other signs warning Ramm he was not welcome, the evidence supported that Ramm could have known his entry onto the site was unlawful. 8RP 78, 80-81. But considering the evidence of Ramm’s bizarre behavior and statements, as well as the possible lengthy period between entry and Ramm’s ultimate discovery by police, there was evidence to support that Ramm did not have the mental wherewithal to intend to commit any crime. 8RP 78. In effect, based on the evidence, Ramm could have known at some point he should not be in construction site, but never formed the intent to commit a crime. 8RP 77. Or, as the court observed, he could have entered the site without intending to commit a crime, and then decompensated, leading to the series of bizarre acts discovered by police. 8RP 77.

⁷ See State v. Soto, 45 Wn. App. 839, 841, 727 P.2d 999, 1000 (1986) (“intent” and “knowledge” are culpable mental states in a hierarchy) (citing RCW 9A.08.010(2)).

The court ruled, however, that if Ramm was indeed truly “disconnected” from reality, he was guilty of neither second degree burglary nor first degree criminal trespass. The court therefore refused to give the instruction. 8RP 79, 81.

C. ARGUMENT

1. RAMM WAS ENTITLED TO HAVE THE JURY INSTRUCTED ON THE LESSER INCLUDED OFFENSE OF FIRST DEGREE CRIMINAL TRESPASS.

A defendant is entitled to have the jury fully instructed on the defense theory of the case whenever there is evidence to support it. State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000). This is a due process requirement. State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287 (2010), review denied, 170 Wn.2d 1022 (2011); U. S. Const. amend. XIV; Const. art I, § 3.

When an element of the offense remains in doubt, but an accused appears guilty of some wrongdoing, the jury is likely to resolve its doubts in favor of conviction. Keeble v. United States, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973); see also Kyron Huigens, The Doctrine of Lesser Included Offenses, 16 U. Puget Sound L. Rev. 185, 193 (1992) (“When faced with a choice between acquittal and conviction of a crime not quite proved by the evidence, a jury can be expected, if some sort of wrongdoing is evident, to opt for conviction.”).

This distortion of the fact-finding process is part of the rationale behind the common law rule, codified in every state and under the Federal Rules of Criminal Procedure, that an accused is entitled to have the jury instructed on lesser included offenses. Beck v. Alabama, 447 U.S. 625, 633-36, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). Providing the jury with a third option, conviction of a lesser included offense, “ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard.” Id. at 634.

A trial court’s refusal to give a jury instruction based on the law is reviewed de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). When an otherwise discretionary decision is based solely on application of a court rule or statute to particular facts, the issue is also one of law reviewed de novo. See Fernandez-Medina, 141 Wn.2d at 454 (test to be employed includes legal and factual components); State v. Dearbone, 125 Wn.2d 173, 178, 883 P.2d 303 (1994) (noting that mixed questions of law and fact are reviewed de novo).

De novo review is appropriate in this case because the court refused to give the lesser offense instruction based on an error of law – in this case, a misapplication of the law regarding the hierarchy of mental states. The court also erroneously applied the law to the facts. In doing

so, the court violated Ramm's constitutional rights by refusing to instruct the jury in such a way as to reflect his theory of the case.

By Washington statute, an accused is entitled to have the jury instructed not only on the charged offense, but also on all lesser-included offenses. RCW 10.61.006. The accused is entitled to a lesser offense instruction when (1) each element of the lesser offense is a necessary element of the charged offense (legal prong) and (2) the evidence supports an inference that the defendant committed only the lesser offense (factual prong). State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

Workman's legal prong is satisfied if it is impossible to commit the greater offense without also committing the lesser. State v. Porter, 150 Wn.2d 732, 736-737, 82 P.3d 234 (2004). The elements of second degree burglary are (1) entering or remaining unlawfully in a building other than a vehicle or a dwelling with (2) intent to commit a crime against a person or property therein. RCW 9A.52.030. A "building" includes a fenced area. RCW 9A.04.110(5).

The elements of first degree criminal trespass are: (1) knowingly entering or remaining unlawfully in a building. RCW 9A.52.070. First degree criminal trespass in the first degree is a gross misdemeanor. RCW 9A.52.070(2).

Because the element of criminal trespass — knowingly entering or remaining unlawfully in a building — must be established every time a defendant unlawfully enters or remains with criminal intent, criminal trespass satisfies the legal prong of the Workman test. See State v. Soto, 45 Wn. App. 839, 841, 727 P.2d 999 (1986) (first degree criminal trespass is a lesser included offense for the crime of second degree burglary).

As for Workman's factual prong, a court should grant a request for a lesser included offense instruction whenever the evidence, viewed in the light most favorable to the requesting party, would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater. Fernandez-Medina, 141 Wn.2d at 455-56. It is not enough that the jury might disbelieve the evidence pointing to guilt. Id. Rather, the evidence must affirmatively establish the defendant's theory of the case. Id. When evidence in the record supports a rational inference that the accused committed only the lesser included offense, to the exclusion of the greater offense, the factual component is satisfied. Id. at 461. An accused has an unqualified right to have the jury instructed on the lesser so long as there is "[e]ven the slightest evidence" he may have committed only that offense. State v. Parker, 102 Wn.2d 161, 163-64, 683 P.2d 189 (1984) (quoting State v. Young, 22 Wash. 273, 276-77, 60 P. 650 (1900)).

Considered in the light most favorable to Ramm, the evidence would have permitted the jury to conclude Ramm committed only trespass rather than burglary. The State bears the burden of proving beyond a reasonable doubt that the defendant had the requisite mental state for the crime charged. State v. James, 47 Wn. App. 605, 609, 736 P.2d 700 (1987). As the State argued, intent to commit a crime could be inferred from the fact that Ramm threw items and painted walls once inside the site.⁸ 8RP 108. The State argued, moreover, that Ramm's bizarre behavior did not necessarily preclude him from forming intent and it would be dangerous to excuse people's behavior merely because they acted strangely. 8RP 109-10. That was the State's theory of the case, considering the facts in the light most favorable to the State. But for purposes of this analysis, the State's theory is of little consequence.

⁸ The jury was not instructed on the permissive inference under RCW 9A.52.040, which provides:

In any prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent.

RCW 9A.52.040; 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 60.05, at 15-16 (3d Ed. 2008).

Over the State's objection, the court permitted Ramm to argue that his mental state created reasonable doubt as to his mental state required for culpability. See, e.g., 4RP 11 (motions in limine); 7RP 25-30 (defense opening statement); 7RP 31- 34 (State's objection and court's overruling of State's objection). In arguing for the lesser instruction, defense counsel correctly pointed out the hierarchy of mental states involved, as well as the affirmative evidence supporting guilt of the lesser, rather than the greater, offense. See 8RP 77-78, 80-81 (argument to the court in favor of lesser instruction).

First, as Finney's testimony established, the construction site had a number of signs alerting Ramm that his presence was unlawful. Given that knowledge is a lesser mental state under RCW 9A.08.010, the prominence of such signs was evidence that even in his addled state Ramm would have known he should not be there.

Second, the State's witnesses uniformly described bizarre behavior and statements by Ramm throughout the seven-hour ordeal. As the defense argued to the court, in the light most favorable to Ramm, this tended to establish reasonable doubt as to the necessary mental state for burglary, which was entering or remaining with intent to intent to commit a crime against person or property. 8RP 126-27; see RCW 9A.08.010 (3) ("When the grade or degree of an offense depends on whether the offense

is committed intentionally . . . [that] shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.”); see also State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002) (accused has right to present evidence in support of his or her defense provided it meets the “very low” threshold for relevance); John Q. La Fond & Kimberly A. Gaddis, Washington's Diminished Capacity Defense Under Attack, 13 U. Puget Sound L. Rev. 1, 22 (1990) (addressing right to present mental defenses) (citing Chambers v. Mississippi, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)); cf. United States v. Childress, 58 F.3d 693, 730 (D.C. Cir. 1995) (“While [the defendant's] mental capacity does not 'excuse' him from culpability for his activity . . . it may well be relevant to whether the government proved an element" of the crime); United States v. Pohlott, 827 F.2d 889, 897-99, 903-05 (3d Cir. 1987) (although federal Insanity Defense Reform Act (IDRA) prohibited the “defense” of diminished capacity, it is permissible to use evidence of mental abnormality to disprove mens rea, that is, to disprove “an element of the crime itself”), cert. denied, 484 U.S. 1011 (1988).

Moreover, as counsel argued in closing, given the bizarre behavior police observed, a trier of fact could have reasonably concluded Ramm entered for other purposes than to commit a crime. 8RP 130; see State v.

Crenshaw, 27 Wn. App. 326, 332-33, 617 P.2d 1041 (1980) (“It is well-established in Washington that a lay witness may testify concerning the sanity or mental responsibility of others, so long as the witness' opinion is based upon facts he personally observed, and the witness has testified to such facts.”). Indeed, as counsel observed, the State’s witnesses acknowledged Ramm engaged in behavior suggesting he wished to commit suicide. 8RP 131. Moreover, items had been thrown down the staircase, which led to a reasonable inference that Ramm was trying to protect himself, rather than harm property. 8RP 131. The fact that Ramm sprayed a symbol on his own body also led to reasonable doubt that he intended to commit any crime using the paint.

8RP 131.⁹ Moreover, although, according to Finney, construction plans called for the affected areas to be exposed concrete, Ramm would have no way of knowing the concrete would not be covered as other components of a building’s framework normally would.

⁹ Defense counsel also made arguments in closing that were, arguably, inconsistent with guilt of a lesser offense, but supportive of acquittal of any crime. Indeed, having been denied the opportunity to argue Ramm was guilty only of criminal trespass, counsel argued Ramm did not make his presence on the site a secret, which may have suggested he had an actual, albeit irrational, belief that he had a right to be present. 8RP 131. But an instruction requested by the defense may be warranted even if it contradicts the defense’s ultimate theory of the case. See Fernandez-Medina, 141 Wn.2d at 457-61 (rejecting State’s claim that alibi defense precluded giving lesser degree instruction).

In effect, given the substantial evidence of Ramm's severe mental disturbance, and considering the hierarchy of mental states required,¹⁰ a trier of fact could infer Ramm knowingly trespassed, but did not intend to commit any crime, and therefore did not commit burglary. This was more than the "slightest evidence" that is required to warrant the lesser degree instruction. Parker, 102 Wn.2d at 163-64.

The failure to instruct the jury on first degree criminal trespass prejudiced Ramm. See Parker, 102 Wn.2d at 166 (where accused has a right to lesser offense instruction, an appellate court is barred from holding he was not prejudiced by failure to submit such instruction to the jury); see also State v. Condon, ___ Wn.2d ___, ___ P.3d ___, 2015 WL 114156, at *9 (Jan. 8, 2015) (reaffirming Parker rule). Reversal of the burglary conviction is therefore required.

2. BECAUSE THE EXERCISE OF PEREMPTORY CHALLENGES VIOLATED RAMM'S CONSTITUTIONAL RIGHT TO PUBLIC JURY SELECTION, THIS COURT SHOULD REVERSE EACH OF HIS CONVICTIONS.

During jury selection, the court explained it would take the parties' peremptory challenges two at a time, so it would not be known which party excused which juror. The court described the procedure as follows:

¹⁰ RCW 9A.08.010(2), (3); Soto, 45 Wn. App. at 841.

So the next thing we will do, folks -- I don't want it to be a mystery to you -- is that the attorneys will exercise their peremptory challenges like I told you about this morning.

What they are going to do is take this notepad, and each one will have an opportunity to write down the number of the juror in the box that they wish to excuse as one of their peremptories. And after they do that, I'll get the notepad back. I'll excuse you, two people at a time, and then refill them in the box. And just so you know, I excuse the people that I excuse in numerical order. So for those of you who are determined to try and figure out which side didn't want you on the case, forget about it. I do it numerically. You can try to figure it out if you want, but you can't do it by the order that I excuse you all. Okay?

We'll go through this process so we get the jury empaneled to try the case. Again, thank you very much for your patience and your candor with us this afternoon.

So I would like to thank and excuse Juror No. 7

6RP 146-47. The court then excused the jurors two at a time. 6RP 147-50.

The following day, the prosecutor indicated she had been unable to file the Post-It note listing each party's peremptory challenges. 7RP 18. The court noted the jury was about to come in and told her the challenges could be read into the record later. 7RP 18. Later that day, outside the presence of the jury, the prosecutor read each side's strikes, in order, by jury number. 7RP 67.

In the process of making the peremptory challenges opaque to the panel, however, the court also shielded the process from public view. The procedure employed by the trial court, imposed without consideration of

the necessary factors, violated the appellant's right to a public trial and the public's right to open proceedings.

The Sixth Amendment and article I, section 22 guarantee the accused a public trial by an impartial jury. Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 629 (1995). Additionally, article I, section 10 provides that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” This latter provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

While the right to a public trial is not absolute, a trial court may restrict the right only “under the most unusual circumstances.” Bone-Club, 128 Wn.2d at 259. Before a judge can close any part of a trial, he or she must first apply on the record the five factors set forth in Bone-Club. In re Personal Restraint of Orange, 152 Wn.2d 795, 806-07, 809, 100 P.3d 291 (2004). A violation of the right to a public trial is presumed prejudicial on a direct appeal and is not subject to harmless error analysis. State v. Wise, 176 Wn.2d 1, 16-19, 288 P.3d 1113 (2012); State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006).

Jury selection in a criminal case is subject to the public trial right and is typically open to the public. Strode, 167 Wn.2d at 227 (lead opinion); Strode, 167 Wn.2d at 236 (conurrence). Strode supports the conclusion that the public trial right attaches to parties' challenges of jurors. There, jurors were questioned, and "for-cause" challenges conducted, in chambers. The state Supreme Court treated the "for-cause" challenges in the same manner as individual questioning and held exercise in chambers violated the right to a public trial. Strode, 167 Wn.2d at 224, 227, 231 (lead opinion); Strode, 167 Wn.2d at 236 (conurrence).

State v. Wilson also supports a conclusion that the public trial right attaches not only to "for-cause," but also to peremptory challenges. 174 Wn. App. 328, 335-37, 298 P.3d 148 (2013). There, the Court applied the "experience and logic" test adopted by the court in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012), to find that the administrative excusal of two jurors for illness did not violate Wilson's public trial rights. The Court noted that, historically, the public trial right has not extended to excusals for hardship before voir dire begins. But in doing so, Division Two expressly differentiated between those excusals and "for-cause" and peremptory challenges, which must occur openly. Wilson, 174 Wn. App. at 342 (unlike potential juror excusals governed by CrR 6.3, exercise of

peremptory challenges, governed by CrR 6.4, constitutes part of “voir dire,” to which the public trial right attaches).

Thus, in Wilson, Division Two appeared to recognize, correctly, that “for-cause” and peremptory challenges are part of voir dire, which must be conducted openly, to be distinguished from the broader concept of “jury selection,” which may encompass proceedings that need not. Wilson, 139 Wn. App. at 339-40. Because preemptory challenges were not conducted openly, and because the court failed to consider the necessary factors before employing its procedure, the trial court violated Ramm’s public trial rights.

In response, the State may point to State v. Marks, ___ Wn. App. ___, 339 P.3d 196, 199 (2014),¹¹ in which the Division Two appeared to reverse course and hold that peremptory challenges are not part of voir dire. But the Court’s attempt in Marks to reframe its prior consideration of the matter makes little sense. There, the Court observes that CrR 6.4(b) refers to “voir dire examination.” Marks, 339 P.3d at 199. But, contrary to the Court’s reasoning, the court rule’s inclusion of the term “examination” instead indicates that the “examination” portion should be differentiated from “voir dire” as a whole. Court rules are interpreted in

¹¹ A petition for review is pending in that case under Supreme Court case no. 91148-7.

the same manner as statutes, Jafar v. Webb, 177 Wn. 2d 520, 526, 303 P.3d 1042 (2013), and courts presume statutes do not include superfluous language. State v. Roggenkamp, 153 Wn.2d 614, 624-25, 106 P. 106 P.3d 196 (2005). Division Two’s reframing of its discussion of the matter in Wilson violates this principle.

Moreover, if “voir dire examination” enables the intelligent exercise of peremptory challenges, then it follows that peremptory challenges themselves are an integral part of “voir dire.” Contrary to the opinion of Division Two in Marks, and consistent with that Court’s decision in Wilson, such challenges are part of that portion of jury selection that must be conducted openly, and are subject to existing law clearly establishing that the public trial right applies.

Assuming for the sake of argument that the exercise of preemptory challenges is not an integral part of jury selection, however, it would be necessary to apply the “experience and logic” test to determine whether the public trial right applies to a portion of the trial process. This Court examines (1) whether the place and process have historically been open and (2) whether public access plays a significant positive role in the functioning of the process. Sublett, 176 Wn.2d at 73 (citing Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)).

The result of analysis under the experience and logic test is no different than the result dictated by Strode and Wilson. First, Ramm can satisfy the “logic” prong because meaningful public scrutiny plays a significant positive role in the exercise of peremptory challenges. The right of an accused to a public trial “keep[s] his triers keenly alive to a sense of their responsibility” and “encourages witnesses to come forward and discourages perjury.” Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). “[J]udges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings.” Estes v. Texas, 381 U.S. 532, 588, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965) (Harlan, J., concurring). The openness of jury selection (including which side exercises which challenge) enhances core values of the public trial right, “both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” Sublett, 176 Wn.2d at 75; see Orange, 152 Wn.2d at 804 (process of jury selection “is itself a matter of importance, not simply to the adversaries but to the criminal justice system”).

While peremptory challenges may be made for almost any reason, openness still fosters core values of the public trial right to ensure that there is no inappropriate discrimination. This protection can only be accomplished if peremptory challenges are made in open court in a

manner allowing the public to determine whether a party is targeting and eliminating jurors for impermissible reasons. See State v. Sadler, 147 Wn. App. 97, 107, 109-118, 193 P.3d 1108 (2008) (private Batson¹² hearing following State's use of peremptory challenges to remove only African-American jurors from panel denied defendant his right to public trial), review denied, 176 Wn.2d 1032 (2013), overruled on other grounds, Sublett, 176 Wn.2d at 71-73; see also State v. Saintcalle, 178 Wn.2d 34, 46, 88-95, 118-19, 309 P.3d 326 (2013) (opinions highlighting difficulty of obtaining appellate relief for discriminatory acts even where discriminatory exercise may have occurred).

Regarding the historic practice, State v. Love,¹³ a Division Three case later relied on by Division Two to reject a public trial challenge,¹⁴ appears to have reached an incorrect conclusion based on the available evidence. Love cites to one case, State v. Thomas, 16 Wn. App. 1, 553 P.2d 1357 (1976), as "strong evidence that peremptory challenges can be conducted in private." Love, 176 Wn. App. at 918. Thomas rejected the

¹² Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

¹³ State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), review granted, ___ Wn. 2d ___ (Jan. 07, 2015).

¹⁴ E.g. State v. Dunn, 180 Wn. App. 570, 321 P.3d 1283 (2014), review denied, ___ Wn. 2d ___ (Jan. 07, 2015). Mr. Dunn passed away while the petition for review was pending. See Supreme Court case no. 90238-1.

argument that “Kitsap County’s use of secret — written — peremptory jury challenges” violated the defendant’s right to a fair and public trial where the defendant had failed to cite to any supporting authority. Thomas, 16 Wn. App. at 13. Notably, Thomas predates Bone-Club by nearly 20 years. But most significantly, the fact that the Thomas appellant challenged the practice suggests it was atypical even at the time.

In summary, both prongs of the experience and logic test support that the public trial right was implicated in this case.

In response, the State may also argue the opportunity to find out, sometime after the process, which side eliminated which jurors serves to satisfy the public trial right. In other words, the State may argue that reading the jury numbers into the record the following day obviated any error. 7RP 18, 67.

Any such argument should be rejected. Even if members of the public could recall which juror name or number was associated with which individual, they also would have to recall the identity, gender, and race of those individuals to determine whether protected group members had been improperly targeted. In Ramm’s case, this would have required members of the public to recall the specific features of 14 individuals a day later. This is not realistic. Cf. State v. Filitaula, __ Wn. App. ___, 339 P.3d 221, 223 (2014) (opinion of this Court holding it is sufficient to

file written form containing names and numbers of the prospective jurors who were removed by peremptory challenge, listing the order in which the challenges were made, and identifying the party who made them).

In addition, Wise holds individual questioning of jurors in chambers, even when questioning was recorded and transcribed, violates the public trial right. 176 Wn.2d 1. By analogy, announcing the challenges after-the-fact is inadequate as well.

In summary, Ramm's right to a public trial and the public's right to open proceedings were violated by the manner in which the court took peremptory challenges, where the court shielded from public view which side exercised which challenge. This Court should, accordingly, reverse each of Ramm's convictions.

D. CONCLUSION

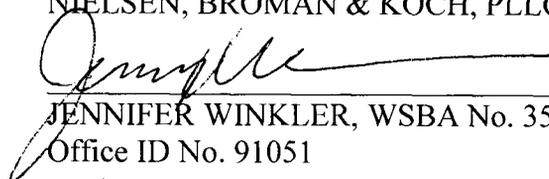
The trial court denied Ramm a fair trial on the burglary charge when it refused to instruct the jury on the lesser crime of first degree criminal trespass. This Court should reverse and remand for a new trial on the burglary charge.

The peremptory challenge procedure also violated Ramm's right to a public trial and the public's right to open proceedings. For this reason, this Court should reverse each of Ramm's convictions.

DATED this 13th day of January, 2015.

Respectfully submitted,

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No. 71749-9-I

Certificate of Service

On January 14, 2015, I E-served and or mailed a copy of the amended opening brief, directed to:

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STATE OF WASHINGTON

Containing, re Mitchell Ramm
Cause No. 71749-9-I, in the Court of Appeals, Division I, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



John Sloane
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01-14-2014
Date
Done in Seattle, Washington