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Court of Appeals
Division I
State of Washington

NO. 71749-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MITCHELL RAMM,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	2
C. <u>ARGUMENT</u>	8
1. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON THE LESSER INCLUDED CRIME OF FIRST-DEGREE CRIMINAL TRESPASS	8
2. RAMM'S RIGHT TO A PUBLIC TRIAL WAS NOT VIOLATED	15
D. <u>CONCLUSION</u>	25

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Presley v. Georgia, 558 U.S. 209,
130 S. Ct. 721, 175 L. Ed. 2d 675 (2010)..... 16

Press-Enterprise Co. v. Superior Court, 464 U.S. 501,
104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)..... 17

Press-Enterprise Co. v. Superior Court, 478 U.S. 1,
106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)..... 17

Washington State:

State ex rel. Carroll v. Junker, 79 Wn.2d 12,
482 P.2d 775 (1971)..... 10, 15

State v. Acosta, 101 Wn.2d 612,
683 P.2d 1069 (1984)..... 10

State v. Atsbeha, 142 Wn.2d 904,
16 P.3d 626 (2001)..... 13

State v. Beskurt, 176 Wn.2d 441,
293 P.3d 1159 (2013)..... 21

State v. Blair, 117 Wn.2d 479,
816 P.2d 718 (1991)..... 9

State v. Bone-Club, 128 Wn.2d 254,
906 P.2d 325 (1995)..... 18

State v. Brightman, 155 Wn.2d 506,
122 P.3d 150 (2005)..... 21

State v. Dunn, 180 Wn. App. 570,
321 P.3d 1283 (2014), review denied,
181 Wn.2d 1030 (2015)..... 20, 21

<u>State v. Fernandez-Medina</u> , 141 Wn.2d 448, 6 P.3d 1150 (2000).....	7, 9, 12
<u>State v. Filitaula</u> , __ Wn. App. __, 339 P.3d 221 (2014).....	19
<u>State v. Fowler</u> , 114 Wn.2d 59, 785 P.2d 808 (1990).....	9
<u>State v. Henderson</u> , __ Wn.2d __, __ P.3d __, 2015 WL 847427 (Feb. 26, 2015)	8
<u>State v. Lormor</u> , 172 Wn.2d 85, 257 P.3d 624 (2011).....	16, 17, 18, 23, 24
<u>State v. Love</u> , 176 Wn. App. 911, 309 P.3d 1209 (2013), <u>review granted in part</u> , 181 Wn.2d 1029 (2015).....	20, 21
<u>State v. Marks</u> , __ Wn. App. __, 339 P.3d 196 (2014).....	19, 21
<u>State v. Momah</u> , 167 Wn.2d 140, 217 P.3d 321 (2009).....	16
<u>State v. Njonge</u> , 181 Wn.2d 546, 334 P.3d 1068 (2014).....	18, 24
<u>State v. Paumier</u> , 176 Wn.2d 29, 288 P.3d 1126 (2012).....	21
<u>State v. Peterson</u> , 133 Wn.2d 885, 948 P.2d 381 (1997).....	8
<u>State v. Slerf</u> , 181 Wn.2d 598, 334 P.3d 1088 (2014).....	21, 22, 23
<u>State v. Smith</u> , 181 Wn.2d 508, 334 P.3d 1049 (2014).....	16, 18
<u>State v. Soto</u> , 45 Wn. App. 839, 727 P.2d 999 (1986).....	10

<u>State v. Strobe</u> , 167 Wn.2d 222, 217 P.3d 310 (2009).....	21
<u>State v. Sublett</u> , 176 Wn.2d 58, 292 P.3d 715 (2012).....	16, 17, 23
<u>State v. Walker</u> , 136 Wn.2d 767, 966 P.2d 883 (1998).....	9
<u>State v. Wilson</u> , 174 Wn. App. 328, 298 P.3d 148 (2013).....	22
<u>State v. Wise</u> , 176 Wn.2d 1, 288 P.3d 1113 (2012).....	21
<u>State v. Workman</u> , 90 Wn.2d 443, 584 P.2d 382 (1978).....	8

Constitutional Provisions

Federal:

U.S. Const. amend. VI	16
-----------------------------	----

Washington State:

Const. art. I, § 10.....	16
Const. art. I, § 22.....	8, 16

Statutes

Washington State:

RCW 9A.08.010 10, 14
RCW 9A.52.030 10
RCW 9A.52.070 10
RCW 10.61.006..... 8

Rules and Regulations

Washington State:

CrR 6.4..... 22, 23

Other Authorities

Black's Law Dictionary (6th ed. 1990) 20
WPIC 18.20..... 13

A. ISSUES

1. Whether Ramm was entitled to an instruction on first-degree criminal trespass, a lesser included offense of second-degree burglary, where the evidence established that Ramm had committed a crime while unlawfully remaining in a building.

2. Whether Ramm's right to a public trial was violated, where the court took peremptory challenges in open court and excused jurors in open court, but the challenges were exercised in writing and the party who exercised them was later memorialized in the clerk's notes and placed on the record.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Mitchell Ramm with Burglary in the Second Degree, Obstruction, and Malicious Mischief in the Third Degree. CP 32-33. A jury convicted Ramm as charged. CP 74-76; 9RP 4.¹ The court imposed a standard-range sentence on the second-degree burglary conviction, concurrent to 364 days on the obstruction conviction, and 6 months on the third-degree malicious mischief conviction. CP 80-95; 10RP 23-24. Given Ramm's

¹ The Verbatim Report of Proceedings consists of ten volumes designated as follows: 1RP (9/18/13), 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).

lengthy term in pretrial custody, he was released shortly after his sentencing. 10RP 24.

2. SUBSTANTIVE FACTS

On Sunday, January 27, 2013, around 10:20 p.m., police responded to a 911 call at a building under construction in Seattle's Belltown neighborhood. 7RP 74, 192. Upon arrival, the officers heard yelling, crashing, and banging noises coming from the unfinished building. 7RP 41-42; 8RP 15. An officer turned his spotlight in the direction of the yelling, and saw a white male on the seventh or eighth floor of the building. 7RP 76. At the time, the unfinished building was a "shell" with the floors in place, but no exterior walls. 8RP 17. A six feet high chain-link fence, topped with barbed wire, enclosed the construction site. 7RP 169, 191. The entrances to the site were secured by chains and padlocks, and there were signs posted every 20 feet that declared "No Trespassing," and directed people to check in at the construction office. 7RP 168-69.

Unable to detect a point of entry, the police used bolt cutters to cut a lock on one of the gate doors and enter the site. 7RP 43. A team of officers, including a K-9 officer and taser officer, scaled

the building's makeshift stairs² to reach the yelling male, later identified as Ramm. 8RP 16-17, 27. The officers climbed over debris on the stairs to reach Ramm, who was standing above them on the eighth floor landing wielding a two to three feet long piece of rebar with a metal clamp on the end. 7RP 44-45, 93; 8RP 18, 20. The officers commanded Ramm to drop the rebar, but he continued yelling at them to drop their guns while slamming the rebar down on a nearby table. 8RP 21.

Although the officers attempted to tase Ramm, the taser prongs "bounced off" Ramm's heavy coat. 7RP 46. Nonetheless, Ramm immediately dropped the rebar he was holding and ran to the building's edge, where he climbed over the safety rope and stood balancing on a four-inch ledge for the next six hours in a standoff with police. 7RP 47; 8RP 25-26. While on the ledge, Ramm engaged in mostly "paranoid rambling," waved around a pocket knife, and looked down, causing officers to worry that he might jump. 8RP 26, 44. Hostage negotiators eventually convinced Ramm to surrender around 5:30 a.m. the next morning. 7RP 47; 8RP 45.

² The stairs consisted of "rafters," and lacked proper railings, causing one officer to conclude that, "if you fell, you would more than likely be dead." 7RP 45; 8RP 17.

The building's construction superintendent, Michael Finney, testified that when he left the site on the preceding Friday night, it was clean and secure. 7RP 171, 192. When Finney arrived on the night of the incident, however, he noticed that multiple items, including toolboxes, light fixtures, rebar, and fire extinguishers, had been thrown down the building's elevator shaft and stairs. 7RP 187. Further, Finney saw that the building's elevator shaft and columns were covered in orange and pink graffiti that was mostly "gibberish," including words such as "INFADEL," "King M.G. English 007 Mi6," "Jesus 2013 Christ A.D.," "CANABLE," "Texas," and "Bush." 7RP 180-81; Ex. 6, 8. The graffiti was 20 feet long, and nine to ten feet tall. 7RP 147. Both Finney and another officer testified that the color of the graffiti matched a large, spray painted "T," or cross, on the front of Ramm's coat. 7RP 113, 138, 181.

At trial, Ramm claimed general denial as his defense. 4RP 10. Ramm did not present any evidence or expert testimony regarding his mental health. Although Ramm appeared for voir dire, he refused to attend the rest of the trial, despite multiple invitations from the court and defense counsel. 6RP 133-34; 7RP 4; 8RP 64; 9RP 3.

During jury selection, the parties questioned the venire in open court and on the record. 5RP 15-37, 49-77; 6RP 3-125. After the questioning ended, the court instructed the jury that the attorneys would exercise their peremptory challenges by writing down a specific juror's number, and then giving the paper to the court to excuse two jurors at a time in numerical order. 6RP 146-47. The court explained that it relied on this procedure to prevent jurors from determining who had excused them, while acknowledging that the jurors could "try to figure it out" if they wanted. 6RP 147.

The court followed its procedure, soliciting the parties' peremptory challenges in writing and excusing the selected jurors on the record. 6RP 147-50. The clerk's minutes describe the parties' peremptory challenges as follows: "The State thanks and excuses Jurors #1, 7, 9, 10, 12, 27, 53 by way of peremptory challenge. The Defense thanks and excuses Jurors #34, 35, 43, 46, 51, 54, 55 by way of peremptory challenge." Supp CP __ (sub. 72A).

The next morning, outside the jury's presence, the prosecutor asked to read the peremptory challenges into the

record. 7RP 18. The court granted the prosecutor's request, and the prosecutor provided the following detail:

The State's strikes in order were No. 7, No. 1, No. 10, No. 12, No. 9, No. 27. The State then passed, the State passed again, and then struck No. 53. The defendant passed their first strike and struck No. 34, No. 35, passed, defendant passed again, and struck No. 43, No. 46, No. 51, No. 54, and No. 55.

7RP 67.

At the close of the evidence, Ramm submitted jury instructions proposing to have the jury instructed on the lesser-included offense of first-degree criminal trespass. CP 36-39. The prosecutor initially did not object to the instruction "in an abundance of caution," although she noted that the amount of destruction inside the building likely precluded giving the instruction as "a factual lesser." 8RP 75. The court agreed, stating "I don't know that there is a basis for giving the lesser factually," and questioned how Ramm could be found guilty of first-degree criminal trespass if his defense was that he did not have the mental capacity to form the requisite intent for second-degree burglary. 8RP 75-76.

Defense counsel responded by pointing out that the two crimes require different levels of mens rea, specifically that first-

degree criminal trespass requires knowledge, while second-degree burglary requires the intent to commit a crime. 8RP 76-77.

Defense counsel argued that Ramm might have known that he should not enter the site, but lacked the intent to commit a crime once inside. 8RP 76.

Following this exchange, and after having a moment to review the relevant case law, the prosecutor changed her position and objected to the lesser included instruction, arguing that the evidence did not raise the inference that only first-degree criminal trespass was committed to the exclusion of second-degree burglary. 8RP 78-79 (citing State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000)). The court agreed, reasoning that if Ramm was “so disconnected with reality” that he had no “sense of what he was up to,” then he was “not guilty of anything.” 8RP 79. The court concluded, “I don’t see that as only the lesser was committed,” and refused to give the instruction, stating “I don’t think it’s a factual lesser.” 8RP 79-81.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON THE LESSER INCLUDED CRIME OF FIRST-DEGREE CRIMINAL TRESPASS.

Ramm argues that he was entitled to have the jury instructed on the lesser included offense of first-degree criminal trespass. Ramm's claim fails. Viewing the evidence in the light most favorable to Ramm, the trial court properly exercised its discretion to not instruct the jury on the lesser included offense.

A defendant may be tried only for the offenses charged. Wash. Const. art. I, § 22. A defendant, however, may be tried for an offense that is a lesser included offense of the crime charged. RCW 10.61.006; State v. Peterson, 133 Wn.2d 885, 889, 948 P.2d 381 (1997). A defendant is entitled to an instruction on a lesser included offense if (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 the lesser offense (factual prong). State v. Henderson, ___ Wn.2d ___, ___ P.3d ___, 2015 WL 847427 at *4 (Feb. 26, 2015) (citing State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)).

Under the factual prong, a defendant must produce affirmative evidence to support the inference that he committed the lesser offense. State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 486-87, 816 P.2d 718 (1991). The purpose of the factual prong is to ensure that there is evidence to support giving the requested instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). The evidence must support an inference that “*only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense.” Id. (emphasis in original). The trial court must consider all of the evidence presented, regardless of which party introduced it. Id. at 456. However, the evidence must “affirmatively establish the defendant’s theory of the case – it is not enough that the jury might disbelieve the evidence pointing to guilt.” Id.

On review, the appellate court must view the supporting evidence in the light most favorable to the defendant. Id. at 455-56. A trial court’s refusal to give a jury instruction based on the facts of a case is reviewed for an abuse of discretion, while a trial court’s refusal based on a matter of law is reviewed de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). A court

abuses its discretion only when its decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

First-degree criminal trespass is a legal lesser included offense of second-degree burglary.³ State v. Soto, 45 Wn. App. 839, 841, 727 P.2d 999 (1986). Thus, the factual prong is at issue here. Viewing the evidence in the light most favorable to Ramm, the trial court properly concluded that there was insufficient evidence to affirmatively establish that Ramm committed *only* first-degree criminal trespass.

At trial, the evidence was clear that Ramm was most likely suffering from significant mental health issues during the incident. Finney and the responding officers testified about Ramm’s largely incoherent and profanity-laced ramblings. 7RP 52 (Ramm “didn’t say a word. He was grunting, yelling, and screaming”), 95 (Ramm

³ Second-degree burglary requires proof that a defendant unlawfully entered or remained in a building with the intent to commit a crime against person or property therein, while first-degree criminal trespass requires proof only that a defendant knowingly entered or remained unlawfully in a building. RCW 9A.52.030; RCW 9A.52.070. The elements of the crimes are the same with the exception of the different *mens rea*. Because intent and knowledge are culpable mental states in a hierarchy, proof of intent, a higher mental state, is necessarily proof of knowledge, a lower mental state. RCW 9A.08.010(2); State v. Acosta, 101 Wn.2d 612, 618, 638-39, 683 P.2d 1069 (1984). Thus, first-degree criminal trespass is a lesser included offense of second-degree burglary. Soto, 45 Wn. App. at 841.

was yelling “[l]ots of swear words”), 190 (Ramm was engaging in “gibberish adult talk about the end of the world and conspiracies and things like that”). Ramm’s abnormal behavior at the site – calling attention to himself by yelling and throwing items from the eighth floor of an unfinished building at 10:20 p.m. on a Sunday, swinging rebar at responding officers with guns drawn, and then trying to escape by climbing over a safety rope and balancing on a four-inch ledge during a six-hour standoff with police – further suggested that Ramm was likely suffering from a mental health break. 7RP 41-42, 47, 74; 8RP 20-21.

The evidence, however, was equally clear that Ramm committed a crime, specifically malicious mischief, while inside the building. Ramm tossed multiple items, including toolboxes, light fixtures, rebar, and fire extinguishers, down the building’s elevator shaft and stairs. 7RP 187. Finney testified that the construction site was clean and secure when he left it a couple days before, and responding officers testified that they heard debris landing and other “crashing and banging” noises coming from the building when they arrived and found Ramm atop a makeshift staircase littered with cable, rebar, and other construction items. 7RP 41-42, 93, 171, 192; 8RP 15, 18. Additionally, Ramm spray painted orange

and pink graffiti on the building's elevator shaft and columns that was 20 feet long, and nine to ten feet tall. 7RP 147, 180-81; Ex. 6, 8. The matching, spray painted "T," or cross, on Ramm's coat established his identity as the perpetrator of the graffiti. 7RP 113, 138, 181.

Given the uncontroverted evidence that Ramm committed a crime against property while unlawfully inside the building, the trial court properly concluded that the jury could not find that Ramm committed only first-degree criminal trespass to the exclusion of second-degree burglary. If there had been no evidence that Ramm had committed a crime while inside the building, then he would have been entitled to the lesser included instruction.

A comparison to Fernandez-Medina is instructive. 141 Wn.2d at 455-57. In that case, the trial court erred by refusing to instruct the jury on the inferior degree offense of second-degree assault based on forensic expert testimony that the type of handgun used to commit the crime may make various "clicks," even when the trigger has not been pulled. Id. at 451-52. This affirmative evidence supported the inference that the defendant had not pulled the trigger, and thereby committed only second-degree assault. Id. at 456-57.

By comparison, Ramm has not pointed to any evidence that suggests he committed *only* first-degree criminal trespass. Ramm argues that the substantial evidence of his “severe mental disturbance,” could have led a trier of fact to infer he “knowingly trespassed, but did not intend to commit any crime.” Amended Br. of Appellant, at 17. Ramm’s obvious mental health issues, however, do not erase the numerous facts demonstrating that he committed a crime while inside the building.

If Ramm had pursued a diminished capacity defense, then he may have been entitled to the lesser-included offense instruction because the jury could have found that he knowingly entered the building unlawfully, but lacked the intent to commit a crime. See WPIC 18.20 (evidence of a defendant’s mental illness or disorder may be taken into account when determining whether the defendant had the capacity to form intent). Ramm, however, did not present the expert testimony required to pursue such a defense. See State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001) (a defendant seeking a diminished capacity defense must “produce expert testimony demonstrating that a mental disorder,

not amounting to insanity, impaired the defendant's ability to form the culpable mental state to commit the crime charged").⁴

Further, although Ramm may have been suffering from some type of mental health break, "[a] person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a). Ramm threw multiple items belonging to another, specifically toolboxes, light fixtures, rebar, and fire extinguishers, down an elevator shaft and stairs, and spray painted large sections of concrete with pink and orange graffiti. 7RP 147, 187; Ex. 6, 8. He committed all of these acts while inside an unfinished building that was unequivocally closed to the public as evidenced by the six feet tall, chain-link and barbed-wire fencing encircling it, and the signs posted every 20 feet declaring "No Trespassing," and directing people to check in at the construction office. 7RP 168-69, 191.

Ramm acted with the intent to commit a crime against property when he remained unlawfully in a building that was closed

⁴ Based on defense counsel's statements in closing argument, there may have been many reasons why Ramm was unable to produce expert testimony. 8RP 128 ("Maybe there was an evaluation, maybe there wasn't. Maybe there was one scheduled and he refused. Maybe he didn't. Maybe he participated and they didn't find him [sic].").

to the public, and physically damaged property inside by throwing items and spray painting graffiti. Given the many facts demonstrating that he committed malicious mischief, Ramm cannot show that the trial court's determination that first-degree criminal trespass was not a "factual lesser" was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons."⁵ Junker, 79 Wn.2d at 26. Ramm's claim fails because he cannot escape the evidence showing that he committed a crime while unlawfully remaining in the building.

2. RAMM'S RIGHT TO A PUBLIC TRIAL WAS NOT VIOLATED.

Ramm argues that conducting peremptory challenges in writing violated his and the public's right to a public trial. Ramm's claim fails in light of recent jurisprudence from all three divisions of this Court holding otherwise. Exercising peremptory challenges in writing does not implicate the public trial right where the procedure occurs in open court and a record is kept of which jurors were excused and by whom.

⁵ Ramm's claim that de novo review is appropriate in this case is puzzling given the trial court's repeated conclusion that first-degree criminal trespass was not "a factual lesser" of second-degree burglary. 8RP 75 ("I don't know that there is a basis for giving the lesser factually."), 79-80 ("I don't see that as only the lesser was committed."), 81 ("I don't see how it's a lesser included because I don't think it's a factual lesser.").

Article I, section 10 of the Washington Constitution provides, “Justice in all cases shall be administered openly.” This provision guarantees the public’s right to open, accessible proceedings. State v. Lormor, 172 Wn.2d 85, 91, 257 P.3d 624 (2011). A criminal defendant’s right to a public trial is guaranteed by both the state and federal constitutions. U.S. Const. amend. VI; Wash. Const. art. I, § 22. The presumption of openness extends to voir dire. State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009); Presley v. Georgia, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010). Whether the right to a public trial has been violated is a question of law that is reviewed *de novo*. State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

Although justice shall be administered openly, “not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public.” Id. at 71. To determine whether the public trial right was violated, courts employ a three-step framework considering: (1) whether the public trial right was implicated, (2) if so, whether a closure occurred, and (3) if so, whether the closure was justified. State v. Smith, 181 Wn.2d 508, 513-14, 334 P.3d 1049 (2014).

A defendant's public trial right is implicated when both prongs of the "experience and logic" test are met. Sublett, 176 Wn.2d at 73. The experience prong asks "whether the place and process have historically been open to the press and general public," while the logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." Id. (quoting Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press II)). The guiding principle is whether openness will enhance "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Id. (quoting Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (Press I)).

A closure occurs when the courtroom is "completely and purposefully closed to spectators so that no one may enter and no one may leave." Lormor, 172 Wn.2d at 93. For example, the Washington Supreme Court has found that a courtroom was closed when a defendant's entire family was excluded, when the courtroom doors were closed to all spectators, when the defendant was prohibited from attending a portion of his trial, and where part of the proceeding was conducted in an inaccessible location such

as the judge's chambers. Id. (citing cases). A defendant claiming a public trial rights violation must conclusively show that a closure occurred based on the facts in the record. State v. Njonge, 181 Wn.2d 546, 556, 334 P.3d 1068 (2014). A reviewing court will not presume that a closure occurred. Id.

If no closure is demonstrated, then the case is analyzed "as a matter of courtroom operations, where the trial court judge possesses broad discretion." Id. at 558 (quoting Lormor, 172 Wn.2d at 93). Conversely, if a closure occurred, then the question is whether the trial court properly conducted a Bone-Club⁶ analysis prior to the closure. Smith, 181 Wn.2d at 1055. A closure without such an analysis will "almost never" be considered justified, while a trial court that properly conducts a Bone-Club analysis and enters findings on the record will "almost never be overturned" because such a determination is reviewed for an abuse of discretion. Id.

Here, the court's decision to conduct peremptory challenges in writing did not implicate the public trial right, and even if it did, there was no closure. The parties questioned the jury panel in open court and on the record. 5RP 15-37, 49-77; 6RP 3-125. The court then explained that the parties would exercise their

⁶ 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

peremptory challenges in writing. 6RP 146-47. The court excused the selected jurors in open court and documented, as part of the public record, the number of each juror challenged, the order of the challenges, and the party that exercised the challenge. 6RP 147-50; Supp CP ___ (sub. 72A). The next day, the prosecutor provided greater detail, reading into the record the exact order in which the parties conducted their strikes and passes. 7RP 67 (“The State’s strikes in order were No. 7, No. 1 . . . The State then passed . . . The defendant passed their first strike and struck No. 34 . . .”).

All three divisions of this Court have repeatedly held that identical or analogous procedures for peremptory challenges do not implicate the public trial right. State v. Filitaula, ___ Wn. App. ___, 339 P.3d 221, 222 (2014) (exercise of peremptory challenges in writing, rather than orally, does not implicate the public trial right where a record is kept showing which jurors were challenged and by whom) (Division One), petition for review filed; State v. Marks, ___ Wn. App. ___, 339 P.3d 196, 199-200 (2014) (exercise of peremptory challenges in writing at sidebar conference does not implicate the public trial right under the “experience and logic” test)

(Division Two), petition for review filed; State v. Dunn, 180 Wn. App. 570, 574-75, 321 P.3d 1283 (2014), review denied, 181 Wn.2d 1030 (2015) (the exercise of peremptory challenges at clerk's station does not implicate the public trial right under the "experience and logic" test) (Division Two); State v. Love, 176 Wn. App. 911, 917-20, 309 P.3d 1209 (2013), review granted in part, 181 Wn.2d 1029 (2015) (for-cause and peremptory challenges at sidebar do not implicate the public trial right under the "experience and logic" test) (Division Three).

Further, the exercise of peremptory challenges is not part of voir dire, which is defined as "the preliminary examination which the court and attorneys make of prospective jurors to determine their *qualification and suitability* to serve as jurors." Black's Law Dictionary (6th ed. 1990) at 1575 (emphasis added). Notably, "[p]eremptory challenges or challenges for cause" may result from voir dire. Id.

Although the Washington Supreme Court has repeatedly held that the public trial right applies to "jury selection," all of these

cases have involved the actual questioning of jurors. E.g., State v. Wise, 176 Wn.2d 1, 11, 288 P.3d 1113 (2012) (private questioning of jurors in chambers); State v. Paumier, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012) (same); State v. Strode, 167 Wn.2d 222, 227, 217 P.3d 310 (2009) (private questioning and for-cause challenges of jurors conducted in chambers constituted a closure); State v. Brightman, 155 Wn.2d 506, 509, 122 P.3d 150 (2005) (courtroom closed to the public during voir dire). “No Supreme Court case has held that the public trial right applies to the dismissal of jurors after the questioning is over.” Marks, 339 P.3d at 198-99. Divisions Two and Three of this Court have held that it does not. Id. (Division Two); Dunn, 180 Wn. App. at 575 (Division Two); Love, 176 Wn. App. at 920 (Division Three).

Indeed, our state supreme court has recognized that not every activity or discussion involving jury selection implicates the public trial right. State v. Slert, 181 Wn.2d 598, 600, 334 P.3d 1088 (2014) (plurality) (pre-voir-dire in-chambers discussion of potential jurors’ questionnaire answers, and dismissal of four prospective jurors, did not violate the public trial right); State v. Beskurt, 176 Wn.2d 441, 447-48, 293 P.3d 1159 (2013) (sealing juror questionnaires did not constitute a closure, or violate the public trial

right). “[E]xisting case law does not hold that a defendant’s public trial right applies to every component of the broad ‘jury selection’ process.” Slert, 181 Wn.2d at 605 (quoting State v. Wilson, 174 Wn. App. 328, 338, 298 P.3d 148 (2013)).

Nonetheless, Ramm argues that exercising peremptory challenges in writing violated his right to a public trial and the public’s right to open proceedings. Ramm’s claim fails in light of the jurisprudence discussed above, which Ramm acknowledges only briefly in passing.

Ramm primarily rests his argument on dicta in State v. Wilson, which held that the bailiff’s pre-voir dire, administrative excusal of two ill jurors did not implicate the defendant’s public trial right. 174 Wn. App. at 333. In applying the “experience and logic” test, the Wilson court drew a distinction between “jury selection” and “voir dire,” and noted in a parenthetical citation that CrR 6.4 described “juror voir dire as involving peremptory and for cause juror challenges.” Id. at 342. A closer read of CrR 6.4, however, reveals that “voir dire” and “peremptory challenges” are discussed in different subsections of the rule, and neither subsection attempts

to categorize peremptory challenges as part of voir dire.⁷ Further, the Washington Supreme Court has repeatedly affirmed that the “mere label of a proceeding is not determinative” in this context. Slerf, 181 Wn.2d at 604 (citing Sublett, 176 Wn.2d at 72-73).

Moreover, even if the trial court’s procedure of exercising peremptory challenges in writing implicated the public trial right, a closure did not occur. The courtroom was not “completely and purposefully closed to spectators” so that no one could enter or leave. Lormor, 172 Wn.2d at 93. Rather, the peremptory challenges were conducted on the record and in open court where anyone present could observe which jurors were excused. 6RP 147-50. The clerk’s minutes memorialized which party excused which juror, were made part of the court record, and were available for public inspection. Supp CP ___ (sub. 72A). Further, the next

⁷ CrR 6.4 provides in relevant part:

(b) Voir Dire. A voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges. The judge shall initiate the voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge and counsel may then ask the prospective jurors questions touching their qualifications to serve as jurors in the case, subject to the supervision of the court as appropriate to the facts of the case. . . .

(e) Peremptory Challenges.

(1) *Peremptory Challenges Defined.* A peremptory challenge is an objection to a juror for which there is no reason given, but upon which the court shall exclude the juror.

day, the prosecutor read the parties' challenges and the order in which they were exercised into the record. 7RP 18. Temporarily shielding the identity of the party who exercised a peremptory challenge does not rise to the same level as other incidents recognized as closures, specifically excluding the defendant's family from the courtroom, closing the courtroom doors to all spectators, prohibiting the defendant from attending a portion of his trial, or conducting a proceeding in chambers. Lormor, 172 Wn.2d at 93.

Ramm does not even seriously argue that a closure occurred. Instead, he claims in a conclusory fashion that "peremptory challenges were not conducted openly," without any acknowledgement that the entire process occurred in open court and on the record. Amended Br. of Appellant at 21. Ramm has not carried his burden of conclusively showing that a closure occurred. See Njonge, 181 Wn.2d at 556 (refusing to presume a closure occurred where the record was silent on whether spectators were totally excluded from the juror excusals). Ramm's claim should be rejected.

D. CONCLUSION

For the foregoing reasons, the Court should affirm Ramm's convictions.

DATED this 18th day of March, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jennifer Winkler, the attorney for the appellant, at Winklerj@nwattorney.net, containing a copy of the BRIEF OF RESPONDENT, in State v. Mitchell Henry Ramm, Cause No. 71749-9, 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.

Dated this 18 day of March, 2015.



Name:
Done in Seattle, Washington