

NO. 45541-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RICKY KITCHENS,

Appellant.

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

The Honorable James Orlando, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's constitutional right to a public trial.

2. The court's admission of testimonial hearsay over defense counsel's objection violated appellant's constitutional right to confront his accusers.

3. To the extent defense counsel may have contributed to the error by failing to continually object after receiving an unfavorable ruling, appellate received ineffective assistance of counsel.

Issues Pertaining to Assignments of Error

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

2. In the state's prosecution of appellant for felony driving under the influence, appellant asserted he was not actually driving. Rather, his wife – who was not impaired – had been driving the car immediately preceding the accident that prompted the police investigation. Over defense counsel's objection, a police officer was allowed to testify that he determined appellant was the

driver after speaking with witnesses at the accident scene. After defense counsel's hearsay objection was overruled, the prosecutor elicited further testimony from both officers who responded that they determined appellant was driving by talking to witnesses at the scene.

(i) Did this testimony violate appellant's right to confront his accusers?

(ii) Where further objection would have been a useless endeavor in light of the court's initial ruling, is the confrontation clause issue preserved for review?

(iii) To the extent defense counsel contributed to the error by failing to continually object to the hearsay testimony, did appellant receive ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural Facts

Following a jury trial in Pierce County Superior Court, appellant Rickey Lee Kitchens was convicted of felony driving under the influence (DUI).<sup>1</sup> CP 18. Kitchens was sentenced to a 22-month standard range sentence and 12 months of community custody. CP 39-52. This appeal follows. CP 56.

2. Voir Dire<sup>2</sup>

Voir dire occurred on the morning of October 8. RP 138; 1RP 2. After general questioning, the court asked: "Counsel, can I see you up at sidebar?" 1RP 2. The record indicates a sidebar was held but not transcribed. 1RP 2. The court thereafter instructed the jurors "we're going to let the attorneys do their final selection in writing." 1RP 2. The court invited jurors to talk amongst themselves, stand up and stretch or use the restroom, if needed. 1RP 2. But if using the restroom, the court instructed jurors to "come right back to your same seat, so the lawyers can match up your number and your face when they're doing their final selections." 1RP 2.

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<sup>1</sup> At trial, Kitchens stipulated to four prior qualifying offenses, which elevated the offense to a felony. RP 204, 299.

<sup>2</sup> "RP" – refers to the verbatim report of proceedings for the jury trial held on October 7-10, and sentencing held on November 1, 2013. "1RP" – refers to the verbatim report of proceedings during which peremptory challenges were exercised on October 8, 2013.

The record indicates that once the attorneys finished their selections, the court called them up for another sidebar:

(Attorneys doing their peremptory challenges)

THE COURT: Counsel.

(Sidebar held, but not reported).

1RP 3.

The court then directed which of the jurors would be sitting in which seat, (including the alternate). In doing so, the court referred to each juror by name, not number. 1RP 3. The peremptory challenge sheet filed in the Superior Court file indicates the state and defense each exercised 7 peremptory challenges; the sheet identifies which juror (by name and number) was excused and by which party. CP 58, Peremptory Challenge Sheet, 10/8/13. The court then excused the remainder of the venire with one fell swoop: "The rest of you I want to thank you for participating with us this morning in the jury selection process. You are excused back down to jury administration." 1RP 4.

The court gave the jury general instructions before excusing them for the noon recess. RP 131-138. The court thereafter put one of its sidebars on the record:

THE COURT: We did have a discussion at sidebar regarding challenges for cause. The defense asked to excuse No. 5 and No. 18. I indicated that I believed that both of those jurors had rehabilitated themselves sufficiently so that they could remain on the case, and I denied those challenges.

There was also an agreed challenge to Juror No. – an agreed excusal of Juror No. 29, and we excused her.

RP 138.

3. Trial Testimony

Around 1:30 p.m. in the afternoon, Trooper Raymond Seaburg was driving northbound on SR 167 from Pierce County to his Bellevue office. RP 178. He received a radio communication of a one-car rollover accident with a travel trailer blocking all southbound lanes of SR 167 in Pierce County near 8<sup>th</sup> Avenue. RP 179.

Seaburg exited and got back on SR 167 heading south to respond. RP 179. Seaburg testified there were 20 or more people assisting and cars everywhere when he arrived. RP 179. A Jeep Cherokee and travel trailer were upside-down on their roofs facing northbound and blocking traffic. RP 179, 206.

Seaburg contacted the Cherokee's occupants after witnesses pointed them out. RP 180. Marcia Howard<sup>3</sup> and Rickey Lee Kitchens were sitting next to each other on the shoulder of the road. RP 182. Howard told Seaburg she had been driving and the wind blew her off the road. RP 181. Kitchens said he had been drinking and wasn't driving. RP 181.

Seaburg testified he smelled an overwhelming odor of alcohol and asked if Howard would consent to field sobriety tests, which he conducted up the road about twenty feet. RP 182-83. Seaburg found Howard was not impaired, sat her back down and began gathering statements. RP 184.

Seaburg testified that "[t]hrough the investigation further I determined that the male was the driver." RP 184. Seaburg returned to Kitchens and explained his investigation results. Kitchens protested, but Seaburg maintained he had indicators that Kitchens had been driving and took him into custody for DUI. RP 184.

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<sup>3</sup> Howard and Kitchens have since married and Howard has changed her last name to Kitchens. RP 300. To avoid confusion, this brief will refer to her as Howard.

According to Seaburg, "Just by looking at him, it was obvious to me that he had had far too many." RP 185. After a brief struggle, Seaburg got Kitchens into his patrol car. RP 187.

Seaburg helped trooper Kyle Burgess pass out statement forms to the witnesses. RP 188. At this point, the prosecutor asked: "Did the information that you collected support your belief about who was driving and what happened?" RP 189. Defense counsel immediately objected on hearsay grounds, but the court overruled the objection, stating: "He can answer that yes or no." RP 189. The trooper answered: "Yes." RP 189.

The troopers decided that Seaburg would handle the DUI portion of the incident while the other responders would handle the accident portion. RP 189. Accordingly, Seaburg left to take Kitchens to jail. Reportedly, Kitchens was insulting on the way, but maintained he had not been driving. RP 189, 213.

Trooper Burgess testified he arrived as Seaburg was attempting to get Kitchens into the back of the patrol car. Burgess was prepared to help, but Seaburg managed it on his own. RP 278, 280. Burgess agreed it was readily apparent Kitchens was intoxicated. RP 279.

Burgess testified it was his job to get witness statements.

RP 280. About those statements, the prosecutor elicited the following:

Q. [prosecutor] You provided or wanted to make sure one of the troopers provided these witnesses with the forms for completing those statements; is that correct?

A. [Burgess] Yes, sir.

Q. Did your interaction with the witnesses assist you in determining how the accident was caused?

A. Yes, it did.

Q. Did your interactions with the witnesses assist you in determining who the driver of the vehicle was?

A. Yes, it did.

RP 280-81. The trooper had earlier indicated he made a determination Kitchens was the driver. RP 278-79.

Burgess testified he also looked at the positioning of the seats in the Cherokee as part of his investigation. RP 282. In his opinion, the driver's seat was positioned for a taller person than the passenger seat; Kitchens is 5'11" while his wife is 5'6". RP 282. But the car's registered owner was Howard. RP 282.

On cross-examination, Burgess conceded that none of the witnesses actually saw Kitchens driving. RP 289. He also conceded that seat positioning is not necessarily determinative of who was driving and that he did not see a deployed airbag, whereas one of the witnesses had. RP 290, 294.

On redirect, the prosecutor re-addressed the witness statements:

Q. Without saying the specific statements, did you learn information to help you determine that Mr. Kitchens was the driver of the vehicle?

A. Yes, I did.

Q. Was it also influenced by what you previously testified about with regards to seat settings?

A. Yes, that's correct.

Q. Was it solely the seat settings that influenced your determination that Mr. Kitchens was –

MR. EVANS [defense counsel]: Objection, Your Honor, leading.

THE COURT: Sustained to the initial form of the question. Rephrase your question.

Q. (By Mr. Macejunas) [the prosecutor] How did you come to the conclusion Mr. Kitchens was the driver?

A. Well, it's a preponderance of the evidence. Talking to the witnesses and the seat positions was a big part of it.

RP 295-96.

The state called three of the witnesses to testify: Brenda Peterson, Gary Hillin and Tiffany Stewart. RP 141, 217, 237. Brenda Peterson was driving southbound right behind the Cherokee and travel trailer in the fast lane when the accident happened. RP 143. The Cherokee was travelling in the slow lane on the right. RP 143-44.

Peterson saw the trailer go off the side of the road, fishtail and then flip. RP 144. The Cherokee landed in the middle of the road and the camper was off to the side, both upside-down. RP 145. Peterson stopped and got out of her car. RP 147. While Peterson remembered seeing the occupants pulled from the car, she could not remember in what order or from which side. RP 147-148, 167.

Following some foundational questions, Peterson was allowed to read her statement as a past recollection recorded. RP 150-158. The statement asserted: "I watched another witness pull the driver out, which was the male. Female passenger was also pulled out from the driver's side, but after the male was taken out."

RP 160. Peterson acknowledged she did not see who was driving when the vehicle was moving, however. RP 168.

Gary Hillin was travelling northbound on SR 167 when he saw the accident happen across the median in the southbound lanes. RP 218-219. Hillin pulled over to the left lane on the shoulder roughly parallel to where the Cherokee stopped after it overturned. Hillin testified it was upside-down, pointed toward the median with the driver's side facing north. RP 220, 223.

Hillin got out to assist, along with several others. RP 220-21. Hillin said he saw a male driver and a female occupant. RP 221. However, Hillin also said he was unable to get the driver's door open and that one of the car's occupants was able to open the passenger door, at which time the witnesses assisted them in getting out of the car. RP 223. Hillin believed "it was the male driver that came out first." RP 224.

When the prosecutor asked again which door the occupants came out of, Hillin testified: "I believe it was the passenger's side door." RP 225. In response to further questioning, Hillin acceded he was not sure. RP 225-26. At this juncture, the prosecutor gave Hillin his statement to refresh his recollection. RP 226. Hillin

subsequently changed his testimony, and stated, "it was the driver's side door that was first opened." RP 226.

Hillin described the occupants as confused and bleeding from various superficial wounds. RP 227. The witnesses helped them over to the shoulder. RP 227. Hillin testified the male said he was not driving. RP 227.

Hillin, who works as a military trainer, acknowledged that people don't always remember correctly during a stressful situation. RP 231. He also testified he had concerns for his own safety while trying to assist. He was fearful the vehicle might catch fire. RP 235.

Tiffany Stewart and her fiancé were driving one car behind the Cherokee when it started to fishtail. RP 238. As the fishtail widened, the Cherokee hit the gravel on the right side, followed by the trailer. RP 239. According to Stewart, the trailer flipped "and sling-shotted the SUV on the roof, so it was laying across both lanes." RP 239. Stewart testified all traffic on the freeway stopped as soon as the Cherokee began fishtailing. RP 239.

Stewart got out and ran towards the car, which she testified was situated with the driver's side facing north. RP 241. Stewart testified she was the third person to reach the car. A man from the

other side of the freeway was hitting the window asking if anyone was in the trailer. RP 241.

Stewart testified that when the driver came out, she helped him up off the ground to stand up. RP 242. The man said he had not been driving. RP 244. According to Stewart, he was having trouble standing and appeared drunk. RP 247. Stewart testified other people helped the female get out. RP 247.

Stewart acknowledged she did not see who was driving when the Cherokee was in motion. RP 266. She also testified that she could see the steering wheel on the side from where the male got out, as well as the airbag. RP 264. However, trooper Burgess testified the airbags were not deployed during the accident. RP 294. A picture taken at the towing yard confirmed no airbag was deployed. RP 312-13.

Howard testified at trial and maintained she was the one driving the Cherokee, as it was her car. RP 302, 318. She and Kitchens were coming from Howard's mother's house, where they had been celebrating Howard's 60<sup>th</sup> birthday. RP 300-301. Kitchens had been drinking, but Howard did not pay attention to how much. RP 301, 338-39.

Howard testified that as she drove around a curve, the trailer caught some wind, causing the Cherokee and trailer to sway and eventually wreck. RP 304-305. After the accident, witnesses pulled Kitchens out first from the passenger side and she followed behind him, as the driver's doorframe had been damaged. RP 307. Howard was shocked when police arrested Kitchens. RP 308.

C. ARGUMENT

1. THE COURT VIOLATED KITCHENS' RIGHT TO A PUBLIC TRIAL WHEN IT CONDUCTED PORTIONS OF JURY SELECTION IN PRIVATE.

Under both the Washington and United States Constitutions, a defendant has a constitutional right to a speedy and public trial. Const. art. 1, § 22; U.S. Const. amend. VI. Additionally, article I, section 10 expressly guarantees to the public and press the right to open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). The First Amendment implicitly protects the same right. Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). This is a core safeguard in our system of justice. State v. Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). The

open and public judicial process helps assure fair trials, deters perjury and other misconduct by participants, and tempers biases and undue partiality. Wise, 176 Wn.2d at 6. It 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. Id. The public trial requirement also is for the benefit of the accused: "that the public may see he 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." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (quoting In re Oliver, 333 U.S. 257, 270 n. 25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)).

The right to a public trial encompasses jury selection. Presley v. Georgia, 558 U.S. 209, 723-24, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); Wise, 176 Wn.2d at 11. Before a trial judge can close any part of voir dire, it must analyze the five factors identified in State v. Bone-Club. Orange, 152 Wn.2d at 806-07, 809; see also State v. Brightman, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005) (a trial court violates a defendant's right to a public trial if the

court orders the courtroom closed during jury selection but fails to engage in the Bone-Club analysis).

Under the Bone-Club test, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-260; Wise, 176 Wn.2d at 12.

A violation of the public trial right is structural error, presumed prejudicial, and not subject to harmless error analysis. Wise, 176 Wn.2d at 13-15; State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); Easterling, 157 Wn.2d at 181; Orange, 152 Wn.2d at 814. Moreover, the error can be raised for the first time on appeal. Wise, 176 Wn.2d at 13 n.6; Strode, 167 Wn.2d at 229; Orange, 152 Wn.2d at 801-02; Brightman, 155 Wn.2d at 517-518.

At Kitchens' trial, the judge conducted portions of jury selection in private without ever considering or even articulating the Bone-Club factors. As discussed above, the court denied defense counsel's motion to excuse jurors No. 5 and No. 18 for cause during a sidebar; at that same sidebar, the court also dismissed juror 29, apparently by agreement. Because this occurred during a sidebar, any public spectators could not hear what was happening. 1RP 2; RP 138.

Although the court later put on the record the nature of the sidebar, it was cursory and did not recount defense counsel's arguments in favor of excusing No. 5 and 18. Nor did it recount the state's response to the request, if any. While the nature of the sidebar was put on the record, its substance was not.

The same is true of the court's peremptory challenge procedure and accompanying sidebar following the parties' written selections. 1RP 2-3. At no time did the court announce which party had removed which potential jurors. Instead, the court merely filed a document containing this information. CP 58.

Significantly, each side exercised 7 peremptory challenges. CP 58. As the court itself recognized when instructing jurors to hurry back from the bathroom, it would be hard for the lawyers to

“match up your name and your face when they’re doing their final selections.” 1RP 2. It would be even harder for a member of the public to do so after-the-fact when examining the sheet of paper to try to identify which party excused which juror.

Both portions of jury selection – “for cause” and peremptory challenges constitute a portion of “voir dire,” to which public trial rights attach. State v. Wilson, 174 Wn. App. 328, 342-343, 298 P.3d 148 (2013); see also People v. Harris, 10 Cal. App. 4th 672, 681-682, 684, 12 Cal. Rptr. 2d 758 (1992) (“The peremptory challenge process, precisely because it is an integral part of the voir dire/jury impanelment process, is a part of the ‘trial’ to which a criminal defendant’s constitutional right to a public trial extends”; peremptory challenges made in chambers on paper violated public trial right even where proceedings were reported and results announced publicly), review denied, (Feb. 02, 1993).

To dismiss jurors during courtroom sidebars and by passing a sheet of paper back and forth is to hold a portion of jury selection outside the public’s view. State v. Slerf, 169 Wn. App. 766, 774 n.11, 282 P.3d 101 (2012), review granted in part, 176 Wn.2d 1031, 299 P.3d 20 (2013).

In response, the state may attempt to distinguish sidebar conferences from closures in which the public is prevented from entering the courtroom for a portion of jury selection. Physical closure of the courtroom, however, is not the only situation that violates the public trial right. For example, a closure also occurs when a juror is privately questioned in an inaccessible location. State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011) (citing Momah, 167 Wn.2d at 146; Strode, 167 Wn.2d at 224); see also State v. Leyerle, 158 Wn. App. 474, 483, 242 P.3d 921 (2010) (moving questioning of juror to public hallway outside courtroom a closure despite the fact courtroom remained open to public).

Thus, whether a closure – and hence a violation of the right to public trial – has occurred does not turn strictly on whether the courtroom has been physically closed. See e.g. State v. Love, 176 Wn. App. 911, 915-16, 309 P.3d 1209 (2013) (rejecting state’s “bright line rule” that for-cause challenges conducted at sidebar in open court did not constitute a courtroom closure). Members of the public are no more able to approach the bench and listen to an intentionally private voir dire 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 impact is the same – the public is denied the opportunity to scrutinize events.

In response, the state may also cite to Division Three’s recent decision in State v. Love, 176 Wn. App. 911. There, the court applied the “experience and logic” test<sup>4</sup> and concluded the public trial right does not attach to for-cause and peremptory challenges. Love, 176 Wn. App. at 918. However, this Court has stated otherwise. Wilson, 174 Wn. App. at 342 (unlike potential juror excusals governed by CrR 6.3, exercise of for-cause and peremptory challenges, governed by CrR 6.4, constitutes part of “voir dire,” to which the public trial right attaches).

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<sup>4</sup> The “experience and logic” test requires courts to assess the necessity for closure by consideration of both history (experience) and the purposes of the open trial provision (logic). Sublett, 176 Wash.2d at 73, 292 P.3d 715. The experience prong asks whether the practice in question historically has been open to the public, while the logic prong asks whether public access is significant to the functioning of the right. Id. If both prongs are answered affirmatively, then the Bone-Club test must be applied before the court can close the courtroom. Id.

Moreover, The Love decision is poorly reasoned.<sup>5</sup> First, it is well established that the right to a public trial extends to jury selection. See, e.g., Sublett, 176 Wn.2d at 71; State v. Strode, 167 Wn.2d at 226-227. This includes “the process of juror selection.” Orange, 152 Wn.2d at 804 (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). “For-cause” and peremptory challenges are an integral part of this process. Strode, 167 Wn.2d at 230 (for-cause challenges of six jurors in chambers not de minimus violation of public trial right); Wilson, 174 Wn. App. at 342, supra. There is nothing to indicate the identity of the attorneys exercising challenges – and their reasons for doing so (with respect to for-cause challenges) has historically been excluded from this right.

Moreover, logically, openness of jury selection (including which side exercises which challenge) clearly 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 also Orange, 152 Wn.2d at 804 (the process of jury selection “is itself a

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<sup>5</sup> A petition for review is pending in Love. State v. Unters Love, Supreme Ct. No. 89619-4.

matter of importance, not simply to the adversaries but to the criminal justice system”).

Indeed, the openness of peremptory challenges is particularly integral to the fairness of the proceeding to protect against inappropriate discrimination. This can only be accomplished if peremptory challenges are made in open court in a manner allowing the public to determine whether one side or the other 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 Batson<sup>6</sup> 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, 299 P.3d 19 (2013), overruled on other grounds Sublett, 176 Wn.2d at 71-73. The mere opportunity to find out, sometime after the process, which side eliminated which jurors cannot satisfy this right.<sup>7</sup>

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<sup>6</sup> Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

<sup>7</sup> Members of the public would have to know the sheet documenting peremptory challenges had been filed *and* that it was subject to public viewing. Moreover, even if members of the public could recall which juror name and/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. With regard to peremptories, this would have required members of the public to recall the specific features of 14 individuals in Kitchen’s case. CP 58.

As support for its contrary conclusion regarding “experience,” the Love court noted the absence of evidence that, historically, for-cause and peremptory challenges were made in open court. Love, 176 Wn. App. at 918. But history would not necessarily reveal common practice unless the parties made an issue of the employed practice. History does not tell us these challenges were commonly done in private, either. Moreover, prior to Bone-Club, there were likely many common, but unconstitutional, practices that ceased with issuance of that decision.

The Love court 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 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. Moreover, the fact Thomas challenged the practice

suggests it was atypical even at the time.<sup>8</sup> Labeling Thomas “strong evidence” is a vast overstatement.

Regarding “logic,” the Love court could think of no manner in which exercising peremptory challenges in public furthered the right to fair trial, concluding instead that a written record of the challenges sufficed. Love, 176 Wn. App. at 919. The court failed, however, to mention or consider the increased risk of discrimination against protected classes of jurors resulting from non-disclosure. As discussed above, the subsequent filing of a written document from which the source of peremptory challenges might be deciphered is not an adequate substitute for simultaneous public oversight. See also Sadler, 147 Wn. App. at 116 (“Few aspects of a trial can be more important . . . than whether the prosecutor has excused jurors because of their race, an issue in which the public has a vital interest.”).

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<sup>8</sup> Citing to a Bar Association directory, the Thomas court noted that “several counties” had employed Kitsap County’s practice. Thomas, 16 Wn. App. at 13 n.2. Even ignoring the questionable methodology of what appears to be some type of informal poll, that only “several counties” had used the method certainly leaves open the possibility a majority of Washington’s 39 counties did not even before Bone-Club and subsequent cases requiring an open process.

At Kitchens' trial, the public was unable to see or hear what was happening when for-cause challenges were made of jurors 5, 18 and 29. Although the court addressed the nature of the sidebar on the record, the court did not report counsel's arguments in favor of excusal or the prosecutor's response, if any.

As for peremptory challenges, whether members of the public could discern, *after the fact*, which prospective jurors had been removed by whom (generously assuming they knew to look in the court file), the public could not tell at the time the challenges were made which party had removed any particular juror, making it impossible to determine whether a particular side had improperly targeted any protected group based, for example, on gender or race. See State v. Burch, 65 Wn. App. 828, 833-834, 830 P.2d 357 (1992) (identifying both as protected classes); see also State v. Saintcalle, 178 Wn.2d 34, 309 P.3d 326 (2013) (lead opinion, concurrence, and dissent underscore harm resulting from improper race-based exercises of peremptory challenges and difficulty of prevention).

There is no indication the trial court considered the Bone-Club factors before conducting the private hearings that led to denying the defense motion to excuse jurors 5 and 18 (for cause)

and a total of 14 jurors by peremptory challenge. CP 58. By employing its chosen procedures, the court violated Kitchens' right to public trial. Wise, 288 P.3d at 1119 ("The trial court's failure to consider and apply Bone-Club before closing part of a trial to the public is error."). Reversal is the only proper course.

2. THE COURT'S ADMISSION OF NON-TESTIFYING WITNESSES' OUT-OF-COURT STATEMENTS IDENTIFYING KITCHENS AS THE DRIVER VIOLATED KITCHENS' RIGHT TO CONFRONT HIS ACCUSERS.

The state elicited that there were at least 20 witnesses at the scene assisting when police responded. Part of the investigation involved taking statements from the witnesses. The state called only three of these witnesses. Yet, the state was allowed to elicit that in taking the statements of the witnesses, the police determined Kitchens was the driver. If the state had limited the officers' testimony to taking the statements of only the three who testified, there would be no issue. However, the state failed to do so.

As a result, it left the impression that more than the three who testified identified Kitchens as the driver. Indeed, the state in closing argument emphasized this fact, stating trooper Seaburg did not immediately suspect Kitchens until he spoke with someone else

who was there, an “eyewitness, three of them at least” who said Kitchens exited from the driver’s side. RP 371 (emphasis added). This violated Kitchens’ right to confront his accusers.

Because Kitchens’ attorney initially objected to this particular testimony and was overruled, the constitutional violation is properly before this Court. State v. O’Cain, 169 Wn. App. 228, 235-36, 279 P.3d 926 (2012) (“It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must (if the defendant objects) be introduced live”) (quoting Melendez–Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 2532 n.1, 174 L.Ed.2d 314 (2009)).

While defense counsel did not continue to object each time the state asked whether the witness statements helped the troopers determine Kitchens was the driver, doing so would have been a useless endeavor. See, State v. Cantabrana, 83 Wn. App. 204, 208, 921 P.2d 572 (1996) (where overruled objection alerted court to problem, no need to lodge additional objections).

When the prosecutor first broached this line of questioning by asking trooper Seaburg whether the witness statements supported the trooper’s belief the defendant was driving (RP 189), defense counsel immediately objected on hearsay grounds. The

court disagreed, ruling the trooper could answer yes or no. Further objections to similar questions calling for a yes or no response would have been a useless endeavor under the circumstances.

An accused person has both state and federal constitutional rights to confront witnesses. Article I, section 22 guarantees an accused shall have the right . . . to meet the witnesses against him face to face. Wash. Const. art. I, § 22 (Amend. 10); State v. Shafer, 156 Wn.2d 381, 395, 128 P.3d 87, cert. denied, 75 U.S. 3247 (2006). Likewise, the Sixth Amendment protects the right of the accused to confront the witnesses against him, including those whose testimonial statements are offered through other witnesses. Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

The essence of the right to confrontation is the right to meaningfully cross-examination one's accusers. Id. at 50, 59. Consequently, unless the speaker is unavailable and the accused had an earlier opportunity to cross-examine, hearsay evidence of a testimonial statement is inadmissible. Id. at 68. This Court reviews alleged confrontation clause violations de novo. State v. Kronich, 160 Wn.2d 893, 901, 161 P.3d 982 (2007).

"Hearsay" is any out-of-court statement offered as "evidence to prove the truth of the matter asserted." ER 801(c); ER 802; State v. Johnson, 61 Wn. App. 539, 545, 811 P.2d 687 (1991). A statement includes nonverbal conduct intended as an assertion. ER 801(a)(2).

The "core class" of testimonial statements includes those "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Crawford, 541 U.S. at 52.

In Davis, the Court elaborated on what did and did not constitute testimonial statements. Non-testimonial statements may occur in the course of police interrogation when, objectively viewed, the primary purpose of the interrogation is to enable police to meet an ongoing emergency. Davis, 547 U.S. at 822. In contrast, statements are testimonial when, objectively viewed, there is no such ongoing emergency and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Id., 547 U.S. at 822; accord, State v. Ohlson, 162 Wn.2d 1, 11-12, 168 P.3d 1273 (2007).

Generally speaking, a police officer's testimony may not incorporate the out-of-court statements of an informant or

dispatcher. Johnson, 61 Wn. App. at 549; State v. Aaron, 57 Wn. App. 277, 280, 787 P.2d 949 (1990). A police officer may describe the context and background of a criminal investigation, but such explanation must not include out-of-court statements. State v. O'Hara, 141 Wn. App. 900, 910, 174 P.3d 114 (2007), reversed on other grounds, 167 Wn.2d 91, 217 P.3d 756 (2009).

The troopers' testimony here included out-of-court statements of unidentified witnesses. Trooper Seaburg's and trooper Burgess' testimony – while couched in the form of yes or no responses to the prosecutor's questions – was the equivalent of saying the witnesses said Kitchens was driving. Otherwise, it would not have helped the troopers to “determine” Kitchens was the driver. The court erred in failing to realize the state's questions and troopers' testimony necessarily conveyed out-of-court statements offered to prove the truth of the matter – i.e. that Kitchens was driving. Moreover, the out-of-court statements were not limited to the witnesses who actually testified.

The next question is whether the hearsay statements were testimonial. To determine whether statements elicited through police questioning trigger the confrontation clause, the question is whether, objectively considered, the interrogation that took place

produced testimonial statements. Davis, 547 U.S. at 826. Under the primary purpose test, courts must objectively appraise the interrogation to determine whether its primary purpose is to enable police to meet an ongoing emergency. Id. at 822.

In applying the test to the cases of two defendants, Davis and Hammon, the Davis Court discussed four pertinent factors to be considered in making such a determination: (1) the timing relative to the events discussed; (2) the threat of harm posed by the situation; (3) the need for information to resolve a present emergency; and (4) the formality of the interrogation. Id. at 827-30; Ohlson, 162 Wn.2d at 12.

In Davis' case, the Court determined a caller's statements to a 911 operator during a domestic disturbance, including the caller's identification of her assailant by name in response to the operator's questions, were not testimonial. First, the caller was speaking about events as they occurred. Second, a reasonable listener would have concluded the caller faced an immediate physical threat. Third, objectively viewed, the elicited statements were necessary to resolve the present emergency, rather than simply to learn (as in Crawford) what happened in the past. Finally, as to the level of formality, unlike the declarant in Crawford, the caller

provided answers in a frantic environment. The Davis Court concluded the circumstances of the interrogation objectively indicated its primary purpose was to enable police to meet an ongoing emergency, rendering the resulting statements non-testimonial. Davis, 547 U.S. at 827-28.

With respect to Hammon's case, however, the Davis court held a woman's statements to a police officer who responded to a domestic disturbance call were testimonial. When the officer questioned the woman, and elicited the challenged statements, he was not seeking to determine what was happening, but rather what happened. Id. at 830. There was no emergency in progress. Id. at 829. Finally, while the Crawford interrogation was more formal, the interrogation at issue was formal enough. Id. at 830. The Davis Court concluded, "It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct, rendering the resulting statements testimonial." Id. at 829.

The circumstances of the unidentified witnesses' statements here are like those in Hammon's case. The police questioning was somewhat formal, at least later, when the troopers passed out clipboards and statement forms for the witnesses to fill out.

Whether that qualifies as “formal” under Crawford, it was, in the words of the Davis Court, formal enough. Id. at 830.

More significant to this Court’s analysis, however, is the fact that the accident already occurred and the police were trying to determine what happened and whether a crime had been committed, as trooper Seaburg smelled an overwhelming odor of alcohol emanating from the occupants of the wrecked Cherokee. While police had yet to deal with clearing the scene, the identity of the driver was not required to meet that task. The witnesses’ statements were made in the midst of a crime scene investigation, not while reacting to meet an ongoing emergency. The witnesses’ statements therefore are within that core class of statements a reasonable person would expect to be used prosecutorially.

Based on the pertinent Davis factors, the witnesses’ out-of-court statements were testimonial and prohibited by the confrontation clause. The court therefore erred in overruling defense counsel’s timely objection and allowing such testimony, which the state thereafter elaborated on several times more.

Confrontation clause errors are subject to harmless error analysis. Shafer, 156 Wn.2d at 395. A constitutional error is harmless only if the appellate court is convinced beyond a

reasonable doubt that a reasonable jury would have reached the same result absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Constitutional error is presumed prejudicial and the state bears the burden of proving the error was harmless. State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980).

The State cannot meet its burden to demonstrate beyond a reasonable doubt the jury would have reached the same result absent the erroneously admitted evidence. None of the three witnesses who testified actually saw Kitchens driving the Cherokee. RP 289. Moreover, trooper Burgess acknowledged seat positioning is not necessarily determinative of who was driving, as individual preferences come into play, as well as body types. For instance, an individual may be either short-wasted or leggy. RP 289, 292. Moreover, Howard maintained at the scene and at trial, she had been driving the morning of the accident. In light of all this evidence, the testimonial hearsay of out-of-court witnesses identifying Kitchens as the driver was not only error, it was particularly prejudicial, especially since the witnesses who were called to testify made inconsistent statements and/or had memory gaps. This Court should reverse Kitchens' conviction.

3. KITCHENS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

To the extent defense counsel contributed to the confrontation clause violation by failing to continually object to the prosecutor's questions and troopers responses conveying that witnesses said Kitchens was the driver, Kitchens received ineffective assistance of counsel.

Kitchens had the right to effective assistance of counsel at trial. U. S. Const. amend. 6; Const. art. 1, § 22. To prevail on an ineffective assistance claim, trial counsel's conduct must have been deficient in some respect, and that deficiency must have prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

As set forth above, the testimony violated Kitchens' right to confront. In recognition of this, defense counsel initially objected to the prosecutor's line of questioning. There was therefore no legitimate tactical reason for defense counsel not to object to similar questions calling for similar responses. And for the reasons stated above, Kitchens was prejudiced by the introduction of these out-of-court accusations. Reversal is required.

D. CONCLUSION

Because the court's jury selection process violated Kitchens' right to a public trial, this Court should reverse his conviction. This Court should reverse because the court admitted testimonial hearsay in violation of Kitchens' right to confront his accusers.

Dated this 30<sup>th</sup> day of May, 2014

Respectfully submitted

NIELSEN, BROMAN & KOCH



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Attorneys for Appellant

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 45541-2-II
	)	
RICKEY KITCHENS,	)	
	)	
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 30<sup>TH</sup> DAY OF MAY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RICKEY KITCHENS  
NO. 370166  
REYNOLDS WORK RELEASE  
410 4<sup>TH</sup> AVENUE  
SEATTLE, WA 98104

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF MAY, 2014.

X *Patrick Mayovsky*

**NIELSEN, BROMAN & KOCH, PLLC**

**May 30, 2014 - 1:49 PM**

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