

70639-0

70639-0

NO. 70639-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

BAHADAR SINGH,

Appellant.

2018 DEC 26 4:14 PM
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON

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

The Honorable Barbara Linde, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court violated Bahadar Singh's constitutional right to a public trial.

Issue Pertaining to Assignment of Error

The trial court took peremptory challenges at sidebar by having the parties note on a chart which prospective juror they wanted to excuse. The court announced the names of the excused prospective jurors, but did not state which party excused them. The court filed the chart. Did the trial court violate Dunn's right to a public trial?

B. STATEMENT OF THE CASE

Bahadar Singh's wife, Gurbux Kaur, opened a business account for a business called "Raj & Sons" at a Wells Fargo Bank branch in October 2011. 2RP 15, 18-21, 30-31, 77-78. Kaur was listed as the owner of the business and the account. 2RP 43-47, 113. According to records, the bank employee who opened the account verified the business license for Raj & Sons. 2RP 31-33. The account remained in good standing until March 2012 with regular deposits and withdrawals taking place. 2RP 49-55, 110-12. Kaur made all the withdrawals. 2RP 48.

Kaur opened a Banner Bank account on February 8, 2012. 2RP 87-89, 105-06, 113, 3RP 13-17, 20-25. Also present were Singh and his boss,

Gurmail Singh Gill, who owned a restaurant called Taj Palace. 2RP 87-88, 92, 3RP 29-33, 37-38. Singh Gill knew Kaur only as "Raj." 3RP 33, 51. Singh asked his boss to help with the bank paperwork. Kaur did all the talking at the Banner Bank account opening. 3RP 39-40, 50-51. Singh Gill also accompanied Kaur and Singh to the Wells Fargo bank when they opened the business account. 3RP 35-40. Singh Gill did not know Kaur used the address of his restaurant as the address for Raj & Sons. 2RP 123-24, 3RP 41. There was no evidence the business ever existed except on paper. 2RP 144.

During the life of the business account, the banking address changed from the Kaur-Singh residence to that of a postal box located near Taj Palace. 2RP 91-92, 126-28. In a short time period in March, the number of account transactions increased "exponentially." 2RP 145. Fourteen checks totaling \$79,050 were deposited into the business account. 2RP 39-40. Singh was captured by surveillance cameras as depositing several of the checks in different Wells Fargo bank branches. 2RP 21, 43-45, 78, 83-86, Exhibits 1-23. A Bellevue police officer explained making deposits into several different bank branches was a common feature of a "check kiting" scheme. 2RP 67-71. All of the checks were drawn on the same Banner Bank account. 2RP 73-74.

Kaur exclusively made withdrawals and purchases of jewelry for \$33,738.25. None of the transactions were covered by any real funds. 2RP 40, 113-14, 133-36. None of the checks were made payable to Singh. 2RP 134. Singh had a personal account at Wells Fargo that was separate from Kaur's account. That account showed no unusual activity. 2RP 134.

After investigation, a Bellevue police officer arrested Singh. He wanted to arrest Kaur as well, but was unable to find her. 2RP 100-01. The officer seized Singh's cell phone and learned the phone's number was the same one used as the Raj & Sons business number. 2RP 103-04. He also took Singh's credit cards, none of which were connected with the Wells Fargo business account or associated with any fraudulent activity. 2RP 101, 137. Sing also had a check for \$3,000 he said was from his employer. 2RP 137.

The State charged Singh with six counts of unlawful issuance of checks or drafts and one count of conspiracy to commit first degree theft. Supp. CP __ (sub. no. 44, Second Amended Information, filed June 3, 2013). Singh's theory at trial was that Kaur used him and that he did not understand what was going on. 3RP 114-20. The jury disagreed and found Singh guilty as charged. CP 52-57. The trial court, using the first

time offender waiver, sentenced Singh to 90 days, 45 on work release followed by 45 on electronic home detention. CP 66-72.

C. ARGUMENT

1 THE TRIAL COURT VIOLATED SINGH'S RIGHT TO A PUBLIC TRIAL BY TAKING PEREMPTORY CHALLENGES IN PRIVATE.

The trial court took peremptory challenges of prospective jurors at sidebar. Because exercising peremptory challenges is part of voir dire, and because the trial court failed to apply the Bone-Club¹ factors, the court violated Singh's constitutional right to a public trial.

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, 213, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); Bone-Club, 128 Wn.2d at 261-62. There is a strong presumption courts must be open at all stages of the trial. State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

Whether a trial court has violated the defendant's public trial right violation is a question of law this Court reviews de novo. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). A trial court may restrict the right only "under the most unusual circumstances." Bone-Club,

¹ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

128 Wn.2d at 259. Before a court can close any part of a trial, it must first apply 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). Violation of this right is presumed prejudicial even when not preserved by objection. State v. Wise, 176 Wn.2d 1, 16, 288 P.3d 1113 (2012).

"The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (Press-Enterprise I). Washington courts have repeatedly held that jury voir dire conducted in private violates the right to public trial. See, e.g., Wise, 176 Wn.2d at 15; State v. Paumier, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012); State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009) (Alexander, C.J., lead opinion); 167 Wn.2d at 231-36 (Fairhurst, J., concurring); State v. Erickson, 146 Wn. App. 200, 211, 189 P.3d 245 (2008), review denied, 176 Wn.2d 1031 (2013).

In Singh's case, the parties exercised peremptory challenges "at counsel table by passing back and forth a clipboard with a form on it" to note which party challenged whom. 1RP 13. The process, which was not transcribed, occurred in open court with prospective jurors present. 1RP 101-02. Once finished, the trial court announced those jurors who had

been excused, but not by whom. RP 102. The form was signed by the parties and filed at an unknown time the same day. Supp. CP __ (sub. no. 41, Peremptory Challenges, filed 6/3/2013). The trial court did not first consider the Bone-Club factors before deciding the live peremptory challenge process should be shielded from public sight and hearing.

This Court must first determine whether a criminal defendant's public trial right applies to the exercise of peremptory challenges. To decide whether a particular process must be open, this Court uses the "experience and logic" test formulated by the United States Supreme Court in Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press-Enterprise II). Sublett, 176 Wn.2d at 73.

State v. Jones² is illuminating in this regard. In that case, during a trial recess, the court clerk randomly pulled names of four sitting jurors from a rotating cylinder to determine which would be alternates. The court announced the names of the four alternate jurors following closing arguments and excused these jurors. Jones, 175 Wn. App. at 95. The alternate juror drawing happened off the record and outside of the trial proceedings. Jones, 175 Wn. App. at 96.

² State v. Jones 175 Wn. App. 87, 303 P.3d 1084, petition for review pending, No. 89321-7 (2013).

Jones challenged this process on appeal. Following Sublett, the court concluded that the Washington experience of alternate juror selection is connected to voir dire. Alternate juror selection, the court held, must be open to the public. Jones, 175 Wn. App. at 101.

As for the logic prong, the court wrote, "The issue is not that the drawing in this case was a result of manipulation or chicanery on the part of the court staff member who performed the task, but that the drawing could have been." Jones, 175 Wn. App. at 102. The court found that two of the purposes for the public trial right -- basic fairness to the defendant and reminding the trial court of the importance of its functions -- were implicated. Id. The court held the secret random drawing raised important questions about "the overall fairness of the trial, and indicates that court personnel should be reminded of the importance of their duties." Id. The court therefore concluded that under the experience and logic test, a closure occurred. Id.

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

Applying the Jones reasoning to Singh's case dictates the same result. Under the "experience" prong, the court asks whether the process

has historically been open to the press and general public. Sublett, 176 Wn.2d at 73. Washington's experience of providing for and exercising peremptory challenges is one "connected to the voir dire process for jury selection." See White v. Territory, 3 Wash. Terr. 397, 406, 19 P. 37 (1888) ("Our system provides for examination of persons called into the jury-box as to their qualifications to serve as such. The evidence is heard by the court, and the question of fact is decided by the court."); State v. Rutten, 13 Wash. 203, 204, 43 P. 30 (1895) (discussing remedy if trial court wrongfully compelled accused to exhaust peremptory challenges on prospective jurors who should have been dismissed for cause); State v. Rivera, 108 Wn. App. 645, 649-50, 32 P.3d 292 (2001) ("[P]eremptory challenge is a part of our common law heritage, and one that was already venerable in Blackstone's time."), review denied, 146 Wn.2d 1006 (2002), overruled on other grounds, Sublett, 176 Wn.2d at 71-72.

The exercise of peremptory challenges, like "for cause" challenges, is a traditional component of voir dire to which public trial rights attach. Wise, 176 Wn.2d at 11; State v. Wilson, 174 Wn. App. 328, 342-343, 298 P.3d 148 (2013).

Under the logic prong, courts consider the values served by open court proceedings, and ask "whether public access plays a significant

positive role in the functioning of the particular process in question." Sublett, 176 Wn.2d at 73 (quoting Press-Enterprise, 478 U.S. at 8). Open proceedings serve to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the defendant and the importance of their duties, to encourage witnesses to come forward, and to discourage perjury. Brightman, 155 Wn.2d at 514.

Just as did the secret random alternate juror selection in Jones, the secret peremptory challenge process used at Singh's trial involved the first two purposes. The public lacked the assurance that Singh and the excused prospective jurors were treated fairly. As well, requiring the parties to voice their peremptory challenges in public at the time they are made reminds them of the importance of the process and its effect on the panel chosen to sit in judgment.

Peremptory challenges permit the parties to strike prospective jurors "who are not challengeable for cause but in whom the parties may perceive bias or hostility-thereby eliminating extremes of partiality on both sides-and to assure the parties that the jury will decide on the basis of the evidence at trial and not otherwise." Rivera, 108 Wn. App. at 649-50 (citing United States v. Annigoni, 96 F.3d 1132, 1137 (9th Cir. 1996), overruled on other grounds, Rivera v. Illinois, 556 U.S. 148, 161-62, 129

S. Ct. 1446, 173 L. Ed. 2d 320 (2009)). Regardless whether there are objections that require making a record, a transparent peremptory challenge process guards against arbitrary use of challenges for nefarious reasons that are not necessarily race- or gender-based, such as age or educational level.

The public nature of trials is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Wise, 176 Wn.2d at 6. "Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges [and] lawyers . . . will perform their respective functions more responsibly in an open court than in secret proceedings." Id. at 17 (quoting Waller v. Georgia, 467 U.S. 39, 46 n.4, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). The peremptory challenge process squarely implicates those values.

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

Singh anticipates the State may assert the proceeding was not closed because it occurred in the open courtroom. This reasoning ignores the purposes of the public trial right.

Though the courtroom itself remained open, the proceedings were not. Jurors were allowed to remain in the courtroom while the peremptory challenges were exercised, which demonstrates they were done in a way that those present would not be able to overhear. A proceeding the public can see but not hear adds nothing to its fairness. If the participants can communicate in code, by whispering, or under the cone of silence, the "public" nature of the proceeding is rendered a farce.

Furthermore, a closure occurs even when the courtroom is not physically closed if the proceeding at issue takes place in a manner that renders it inaccessible to public scrutiny. See State v. Slert, 169 Wn. App. 766, 774 n.11, 282 P.3d 101 (2012) ("if a side-bar conference was used to dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reasons and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview."), review granted, 176 Wn.2d 1031 (2013); State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011) (closure occurs when a juror is privately questioned in an inaccessible location); State v. Leyerle, 158 Wn. App. 474, 483, 242 P.3d 921 (2010) (moving questioning of juror to public hallway outside courtroom a closure even though courtroom remained open to public). Members of the public are no more able to approach the bench and listen

to an intentionally private jury selection process than they are able to enter a locked courtroom, access the judge's chambers, or participate in a private hearing in a hallway. The practical effect is the same — the public is denied the opportunity to scrutinize events.

The State will also likely argue this Court should follow State v. Love,³ which held exercising peremptory challenges outside the public view does not violate the right to public trial. This decision is poorly reasoned.

With respect to the experience prong, the Love court noted the absence of evidence that peremptory challenges were historically made in open court. Love, 309 P.3d at 1213. 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, before Bone-Club, there were likely many common, but unconstitutional, practices that ended with issuance of that decision.

The Love court cites to one case, State v. Thomas,⁴ as "strong evidence that peremptory challenges can be conducted in private." Love,

³ __ Wn. App. __, 309 P.3d 1209, 1214, petition for review pending, No. 89619-4 (2013).

309 P.3d at 1213. Thomas rejected the argument that Kitsap County's use of secret peremptory challenges violated the defendant's right to a 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. Until Love, Thomas had never been cited in a published Washington opinion for its holding regarding the secret exercise of peremptory challenges. Calling Thomas "strong evidence" is a misleading overstatement.

Regarding logic, the Love court could think of no way in which exercising peremptory challenges in public furthered the right to fair trial, concluding instead a written record of the challenges sufficed. Love, 309 P.3d at 1214. The court failed, however, to mention or consider the increased risk of discrimination against protected classes of jurors resulting from non-disclosure.

The court also held the written record protected the public's interest in peremptory challenges. Love, 309 Wn. App. at 1214. It appears from the court's description the parties used a chart similar to the one filed in Singh's trial. Love, 309 Wn. App. at 1211 n.1.

⁴ State v. Thomas 16 Wn. App. 1, 553 P.2d 1357 (1976).

But the later 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 State v. Sadler, 147 Wn. App. 97, 116, 193 P.3d 1108 (2008) (“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.”), review denied, 176 Wn.2d 1032 (2013), overruled on other grounds, Sublett, 176 Wn.2d at 71-73.

While members of the public could discern after the fact which prospective jurors had been removed and by whom (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. See State v. Burch, 65 Wn. App. 828, 833-834, 830 P.2d 357 (1992) (identifying race and gender as protected classes); see also State v. Saintcalle, 178 Wn.2d 34, 41-42, 69, 85-88, 118-19, 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).

The mere opportunity to find out, sometime after the process, which side eliminated which jurors cannot satisfy the right to a public trial. Members of the public would have to know the chart 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 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. This is not realistic.

The trial court did not consider the Bone-Club factors before conducting the private jury selection process at issue here. A trial court errs when it fails to conduct the Bone-Club test before closing a court proceeding to the public. Wise, 176 Wn.2d at 5, 12. The error violated Singh's public trial right, which requires automatic reversal because it affects the framework within which the trial proceeds. Id. at 6, 13-14.

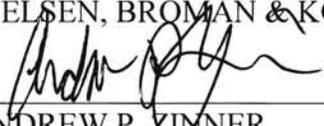
D. CONCLUSION

For the aforesaid reasons, this Court should reverse Singh's convictions and remand for a new trial.

DATED this 26 day of December, 2013.

Respectfully submitted,

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I have deposited in the mails of the United States of America a copy of this declaration, addressed and directed as hereinafter provided, to the Clerk of the Court, King County, Washington, containing a copy of the declaration to which this declaration is attached.

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

John Stone 12-26-13
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State v. Bahadar Singh

No. 70639-0-I

Certificate of Service of brief of appellant by Mail

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to:

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Containing a copy of the brief of appellant, in State v. Bahadar Singh,
Cause No. 70639-0-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
Done in Seattle, Washington

12-26-13
Date