

**FILED**

OCT 09, 2013  
Court of Appeals  
Division III  
State of Washington

No. 30764-6-III

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,  
Plaintiff/Respondent,

v.

STEVEN M. SWINFORD,  
Defendant/Appellant.

---

SUPPLEMENTAL BRIEF OF RESPONDENT

---

Douglas J. Shae WSBA #17942  
Chelan County Prosecuting Attorney

Chelan County Prosecuting Attorney's Office  
P.O. Box 2596  
Wenatchee, Washington 98807-2596  
(509) 667-6204

TABLE OF CONTENTS

	<u>Page</u>
I. <u>FACTS</u> -----	1
II. <u>ISSUE AND ARGUMENT</u> -----	3
III. <u>CONCLUSION</u> -----	5

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>State v. Bone-Club</u> , 128 Wn.2d 254, 261, 906 P.2d 325 (1995)-----	1,3,5
<u>State v. Love</u> , No. 30809-0-III (Filed September 24, 2013) -----	4,5
<u>State v. McFarland</u> , 127 Wn1.2d 322, 333, 899 P.2d 1251 (1995)-----	5
<u>State v. Sublett</u> , 176 Wn.2d 58, 292 P.3d 715 (2012)-----	3
<u>State v. Thomas</u> , 16 Wn. App. 1, 553 P.2d 1357 (1976)-----	4
<u>Rules and Statutes</u>	<u>Page</u>
Article 1, § 22 Washington Constitution -----	3

## I. FACTS

Mr. Swinford was tried before a jury in Chelan County Superior Court February 3 through February 10, 2012, on a charge of Murder in the Second Degree. The jury returned a verdict of guilty and sentencing occurred on March 30, 2012. This matter was argued to the Court of Appeals on September 11, 2013. The State was requested by the Court to address a further issue which was argued by appellate counsel in this matter.

Appellate counsel is now arguing that by use of the silent peremptory challenges in the jury selection process, the trial court effectively closed the courtroom without a proper Bone-Club analysis. State v. Bone-Club, 128 Wn.2d 254, 261, 906 P.2d 325 (1995).

There were no challenges or objections to the peremptory challenge process as it proceeded during trial. The first challenge of the process was made at the appellate court level.

Generally speaking, the way the peremptory challenge process during jury selection works is the court has the court bailiff approach the State, the State then writes down the name and number of particular juror they wish to peremptory challenge, the

defense is made aware of the State's request, and then the process reverses itself beginning with the defense counsel with respect to their peremptory challenges. The process in this case is part of the trial transcript starting at page 203, line 10, and going through page 206, line 6. In reviewing the transcript on those pages, it is clearly marked when the defense made a peremptory challenge to a particular juror, as well as when the State made an peremptory challenge to a particular juror. At the end of the challenge process, the jurors who were excused by peremptory challenges are asked to leave the jury box and are replaced by the other jurors. It is very clear in the record who challenged whom.

Again, there was no objection made regarding any of this process by defense or the State; when the court asked the parties if the jury was constituted to conform with the records, both the prosecution and the defense agreed it was and accepted the jury. (RP 205, ln. 23-25; 206, ln. 1-2).

## II. ISSUE AND ARGUMENT

The issue is whether the trial court violated Mr. Swinford's public trial rights by conducting silent strikes through the peremptory challenge process.

In this case there was clearly no improper closure of the courtroom. Article 1, § 22 of the Washington Constitution guarantees a criminal defendant has a right to a "speedy public trial by an impartial jury." There is a five factor test set forth in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). The decision as to whether a particular portion of a proceeding was required to be held in public is determined by use of the "experience and logic" test. State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012). Jury selection is a public part of the process, and in this case the jury selection was open to the public. The courtroom doors had not been closed. There is no indication in the record that any closure of the courtroom had taken place. In this case, there was no closure because the peremptory cause challenges were all conducted in the open courtroom in the presence of any spectators who wanted to be present. Furthermore, there were no objections by the defense to the jury selection process and the defense

accepted the jury as it was presented by the court. It is further the case as indicated by the trial transcript that as the jurors were challenged by respective counsel, it was noted by the court reporter who made the challenge and who was challenged one-by-one.

In State v. Thomas, 16 Wn. App. 1, 553 P.2d 1357 (1976), this very same issue was presented to that court. Addressing this issue, the Thomas court held the following:

We are cited to no authority for this proposition and we fail to see how this practice, which is utilized in several counties in this state, could in any way prejudice the defendant. There are no state or federal constitutional guarantees of a right to peremptory challenges, the number and manner of exercise of which exclusively with the legislature and the courts, subject only to the requirement of a fair and impartial jury. State v. Persinger, 62 Wn.2d 362, 382 P.2d 497 (1963).

State v. Thomas, at 13. Furthermore, the issue was addressed recently in the Court of Appeals, Division Three, in the matter of State v. Love, No. 30809-0-III (Filed September 24, 2013). In the Love case, which was similar in nature to the case at bar, the court found that Mr. Love did not contest the use of a sidebar procedure to hear his challenges for cause. The general rule is that appellate courts will not hear challenges that were not presented to the trial

court. RAP 2.5(a). Love, at p. 11. Further, that since this was not a manifest error, Mr. Love should not be able to pursue the claim for the first time in the appellate court. See, also, State v. McFarland, 127 Wnl.2d 322, 333, 899 P.2d 1251 (1995).

The court found in the Love case that the “experience and logic” test confirms the trial court did not erroneously close the courtroom by hearing the defendant’s cause for challenges at sidebar. Nor would it have been error to consider the peremptory challenges in that manner if the court had done so. The sidebar did not close the courtroom. The peremptory challenges for cause also did not close the courtroom.

### III. CONCLUSION

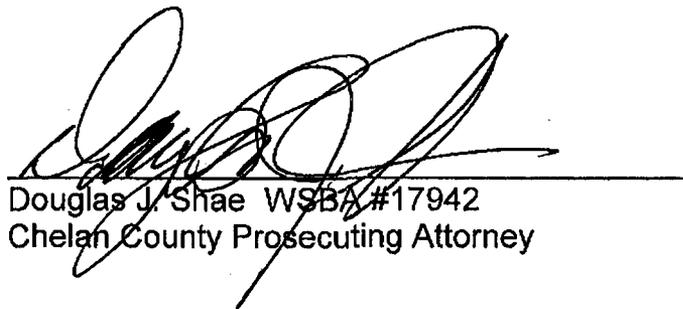
There was no error in this case in using a silent peremptory challenge process during jury selection. Clearly, the record establishes who made what challenges, at what time, in what order, that the process was open to the public, and the public was aware of who was being excused from the jury due to a peremptory challenge because those people left the jury box. This process was completely public and did not violate the Bone-Club rules. The

"experience and logic" test confirms that the courtroom was not closed. In addition, there was no challenge to this process by the defense at any point during the trial as to how the process moved forward.

Based on the foregoing, Mr. Swinford's public trial rights were not violated by use of the silent peremptory challenge process during jury selection.

DATED this 9th day of October, 2013.

Respectfully submitted,

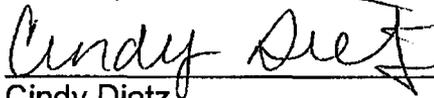


Douglas J. Shae WSBA #17942  
Chelan County Prosecuting Attorney



1 said electronic transmission and envelopes containing true and correct copies of  
2 Supplemental Brief of Respondent.

3 Signed at Wenatchee, Washington, this 9th day of October, 2012.

4 

5 \_\_\_\_\_  
6 Cindy Dietz  
7 Legal Administrative Supervisor  
8 Chelan County Prosecuting Attorney's Office  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

# CHELAN COUNTY PROSECUTOR

**October 09, 2013 - 2:23 PM**

## Transmittal Letter

Document Uploaded: 307646-Swinford 30764-6 Supplemental Brief of Respondent.pdf

Case Name: Steven M. Swinford

Court of Appeals Case Number: 30764-6

Party Represented: Respondent

Is This a Personal Restraint Petition?  Yes  No

Trial Court County: Chelan - Superior Court # 11-1-00039-8

### Type of Document being Filed:

- Designation of Clerk's Papers
- Statement of Arrangements
- Motion: \_\_\_\_\_
- Response/Reply to Motion: \_\_\_\_\_
- Brief
- Statement of Additional Authorities
- Affidavit of Attorney Fees
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_  
Hearing Date(s): \_\_\_\_\_
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: \_\_\_\_\_

### Comments:

Supplemental Brief of Respondent

Proof of service is attached

Sender Name: Cindy Dietz - Email: [cindy.dietz@co.chelan.wa.us](mailto:cindy.dietz@co.chelan.wa.us)