COURT OF APPEALS NO. 30809-0-III

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

STATE OF WASHINGTON,

Respondent,

v.

UNTERS L. LOVE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Maryann C. Moreno, Judge,

OPENING BRIEF OF APPELLANT

DANA M. NELSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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RULES, STATUTES AND OTHER AUTHORITIES

A. INTRODUCTION

To obtain a conviction for second degree theft, the state must prove the accused obtained property or services of another in a value exceeding $750.00. For one of the second degree theft charges levied here, the state showed only that the complainant, Jennifer Lail, gave the appellant, Unters Love, a money order for $500.00 and a postdated check for $1,200.00 – which Lail subsequently cancelled. Love will argue a post-dated check that is cancelled before it becomes due has no value, and the state therefore failed to prove the value element for second degree theft of Lail.

Love will also argue that all of his convictions should be reversed, because the process by which "for-cause" and peremptory challenges were exercised during voir dire – at a sidebar – violated his right to a jury trial and to be present at all critical stages of the proceeding.

B. ASSIGNMENTS OF ERROR

1. The trial court violated Love's constitutional right to a public trial by taking for-cause and peremptory challenges during private sidebars, the latter of which was also unreported.

2. The trial court violated Love's constitutional right to be present at all critical stages of trial.

3. The evidence was insufficient to convict Love of second degree theft, allegedly committed against Jennifer Lail.

Issues Pertaining to Assignments of Error

1. During jury selection, the parties made for-cause and peremptory challenges at private sidebars, the latter of which was also unreported. Because the trial court did not analyze the Bone-Club[1] factors before conducting this important portion of jury selection in private, did the court violate Love's constitutional right to a public trial?

2. Did Love's absence from the sidebars violate his constitutional right to be present at all critical stages of trial?

3. Did the state fail to prove the value element of second degree theft where its evidence showed Love obtained currency from Lail in the amount of $500, in addition to a postdated check that was cancelled before it was cashed?

[1] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

C. STATEMENT OF THE CASE[2]

1. Procedural Facts

Unters Love is appealing his convictions for six counts of second degree theft and one count of bail jumping, following a jury trial in Spokane county superior court. CP 60-90, 95-106, 107-108.[3]

Jury selection in this case occurred on April 9, 2012. After general questioning was complete, and at the court's direction, the court addressed "for-cause" challenges at the bench:

> THE COURT: Counsel, why don't you approach.
>
> (The following bench conference was held outside the hearing of the jury.)
>
> THE COURT: This is the mic for her headphones (indicating).
>
> MR. KNOX [defense counsel]: Hello.
>
> THE COURT: Any for-cause challenges?
>
> MR. KNOX: Fifteen.

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[2] The verbatim report of proceedings is referred to as "RP" and consists of three bound volumes, consecutively paginated, of the jury trial and sentencing in April 2012.

[3] Although the convictions stem from charges filed under three separate cause numbers, the trial court ruled the cases could be consolidated for trial. CP 20. Although there was also fourth case, the court dismissed the charges filed under that cause number (two counts of unlawful issuance of a bank check) at the close of the state's case, for insufficient evidence. RP 370.

THE COURT: Fifteen? Any objection?

MR. GAGNON: For cause, 18? Is that what you –

THE COURT: No. Fifteen.

MR. KNOX: One-five.

MR. GAGNON [prosecutor]: I think that's – the state has no objection to No. 15 being struck for cause.

THE COURT: Mm-hm. Any others?

MR. KNOX: Number 30.

THE COURT: Number 30?

MS. ELDER [prosecutor]: Yeah, no objection.

MR. GAGNON: The state has no objection to No. 30 being struck for cause.

THE COURT: Okay. Anyone else?

MR. KNOX: No.

RP 132-33.

Still at the bench, the parties and the court thereafter questioned whether Juror No. 28 was blind, whether Juror No. 32 was paying attention, the question of alternates and whether Juror 11 should be excused for a business trip, which the court decided against. RP 133-34. The record next indicates:

(Bench conference concluded.)

(Peremptory challenge process is being conducted).

THE COURT: This process generally takes a couple minutes, so if you wanted to stand and stretch, talk quietly amongst yourselves, feel free.

(Peremptory challenges continuing).

THE DEFENDANT: Your Honor, may I – may I approach the bench?

THE COURT: No.

THE DEFENDANT: Please, may I approach the bench, your Honor?

THE COURT: No.

THE DEFENDANT: Mr. Knox cannot represent this case.

THE COURT: Sir, if you say one more word . . .

(the defendant sat down)

(Juror No. 28 is audibly talking on a cell phone).

THE COURT: Okay. I think we have jury selected, so please be seated.

RP 135.

The clerk then instructed that Juror No. 4 would be coming out of the juror box, while "Ms. Fall" would be going in, in addition to two alternates:

THE CLERK: We only have one juror that we're going to be removing from the jury box back there as

far as the 12 jurors that will be selected. And Juror No. 4, Mr. Patterson, if you could step down and come stand by Tracy or have a seat in the front row.

JUROR NO. 4: I can.

THE CLERK: And then also Jurors No. 13 and 14, if you can have a seat in the front row also. Actually, Ms. Fall, if you wouldn't mind taking the seat back there along the back row, that will give us our final jury for trial.

COURT: No, alternates.

THE CLERK: Oh, we do have two alternates. I'm sorry. Mr. Porter, Juror No. 14 – I didn't do that very well, did I?

JUROR NO. 14: Do you want me to go back?

THE CLERK: If you could take the first seat there, you're our first alternate. And then Ms. Bottelli, Juror No. 16, you'll be the next alternate.

Sir, if you could just move one more seat, please.

(The juror complied.)

THE COURT: All right. Everyone else in the courtroom is excused for the day.

RP 135-36.

2. State's Evidence of Jennifer Lail Count

Regarding count I (No. 10-1-02667-4), the state alleged:

That the defendant, Unters L. Love, in the State of Washington, on or about March 31, 2010, did obtain control over property and services, other than a firearm as defined in RCW 9.41.010 or a motor

> vehicle, to-wit: currency and negotiable instruments valued at $2,000, of a value exceeding seven hundred fifty ($750), belonging to Jennifer Lail by color and aid of deception, by means of selling, renting to own, or leasing with an option to own, real property which he did not own or have rights to convey, by representing himself as the owner or a person entitled to convey possessory or ownership rights to those properties to victims, with intent to deprive Jennifer Lail of such property and services[.]

CP 23.

In March 2010, Jennifer Lail was looking for a place to live, responding to various advertisements in the newspaper and on Craigslist. RP 357. Love returned one of her calls and said he had a Spokane area home for her to lease, with an option to buy, at 306 West 31st. RP 357-58. Love reportedly said he would need an initial down payment for his investors. RP 358.

Lail testified she gave Love $500 and a postdated check for $1,200.00 for the property. She testified she cancelled the check, however, after becoming suspicious about the deal. RP 358-59. Lail testified Love was very upset she cancelled the check. RP 358.

At some point, Lail made numerous unsuccessful attempts to contact Love about the property. RP 359. In her fourth or fifth message, she informed Love she had given notice at her current

residence and needed to move into the house on West 31st. RP 359. When Love returned her call, he reportedly said the investors decided she would not be a "good fit" for the home, based on her income. RP 359-60. Love indicated he had another house that was available, at 610 East 26th. RP 360.

Lail testified she ultimately leased the house at 610 East 26th. She signed the papers at Love's kitchen table, but it was for a lease with the owners, Linda and Roger Carney; Love did the paperwork. RP 360. Lail testified the $500 she previously gave Love did not get applied toward the lease with the Carneys. RP 361. Nor did Lail receive a refund. RP 361. When Lail asked for a refund, Love reportedly told her the $500 was for credit counseling, which Lail testified they had never discussed. RP 361.

Carney testified she was contacted by Love who said he had a woman interested in renting and possibly buying her home. RP 229. Love reportedly asked for Carney's permission to sell the home on her behalf, but Carney declined. RP 229, 232.

Carney testified she rented the home to Jennifer Lail, but Love never gave her any money for Lail to move in. RP 229. Carney testified Lail was under the impression it was Love's home. RP 232.

D. ARGUMENT

1. THE TRIAL COURT VIOLATED LOVE'S RIGHT TO A PUBLIC TRIAL BY CONDUCTING FOR-CAUSE AND PEREMPTORY CHALLENGES AT SIDEBAR.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the accused a public trial by an impartial jury.[4] Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 629 (1995). Additionally, article I, section 10 of the Washington Constitution provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." This latter provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). A violation is presumed prejudicial and is not subject to harmless error analysis. State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006); In re Personal Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

[4] The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." Article I, section 22 provides that "[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury . . . ."

The public trial requirement is for the benefit of the accused; it allows the public to ensure the accused is tried fairly and to keep the court and the parties keenly aware of their responsibilities and the importance of their roles. Bone-Club, 128 Wn.2d at 259. As the United States Supreme Court has observed:

> The open trial . . . plays as important a role in the administration of justice today as it did for centuries before our separation from England. . . . Openness . . . enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Press–Enter. Co. v. Superior Court, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).

While the right to a public trial is not absolute, a trial court may restrict the right only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Before a trial judge can close any part of a trial, it must first apply on the record the five factors set forth in Bone-Club. Orange, 152 Wn.2d at 806-07, 809.

The accused's right to a public trial under both the federal and state constitutions applies to voir dire. Presley, 130 S. Ct. at 724; State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009). Washington courts have repeatedly held that jury selection conducted in chambers violates the right to public trial. See, e.g.,

Strode, 167 Wn.2d at 226-29 (Alexander, C.J., lead opinion); 167 Wn.2d at 231-36 (Fairhurst, J., concurring); State v. Paumier, 155 Wn. App. 673, 679, 685, 230 P.3d 212, review granted, 169 Wn.2d 1017 (2010); State v. Heath, 150 Wn. App. 121, 125-29, 206 P.3d 712 (2009); State v. Frawley, 140 Wn. App. 713, 718-21, 167 P.3d 593 (2007). Because the peremptory challenge process is an integral part of voir dire, the constitutional public trial right also extends to that portion of criminal proceedings. People v. Harris, 10 Cal.App.4th 672, 684, 12 Cal.Rptr.2d 758 (1992) (holding peremptory challenges conducted as sidebar violate public trial right, even where such proceedings are reported).

The right to challenge a potential juror for cause is an integral part of a "fair trial." People v. Rhodus, 870 P.2d 470, 474 (Colo. 1994). Thus, the constitutional public trial right must extend to that portion of criminal proceedings as well. See Harris, 10 Cal. App.4th at 684. The trial court violated appellant's constitutional right to a public trial by taking for-cause challenges during a private sidebar.

The court also violated appellant's constitutional right to a public trial by taking peremptory challenges during a private, unreported sidebar. Id. And while there is no Washington case

containing identical facts, the private, unreported sidebar was no less a violation of the right to a public trial than the closed voir dire sessions that Washington courts have repeatedly held to violate the public trial right. Because the error is structural, prejudice is presumed, and thus reversal is required. Strode, 167 Wn.2d at 231.

2. THE TRIAL COURT VIOLATED LOVE'S RIGHT TO BE PRESENT AT ALL CRITICAL STAGES BY CONDUCTING FOR-CAUSE AND PEREMPTORY CHALLENGES AT SIDEBAR.

"A criminal defendant has a fundamental right to be present at all critical stages of a trial." State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). This includes the right to be present during voir dire and empanelling of the jury. Diaz v. United States, 223 U.S. 442, 455, 32 S. Ct. 250, 56 L. Ed. 500 (1912). The right to be present derives from the Confrontation Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. Id.[5]

Jury selection is "'the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic,

[5] In situations in which the accused is not actually confronting witnesses or evidence against him, this right is protected by the Due Process Clause. Irby, 170 Wn.2d at 880-81 (quoting United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)).

racial, or political prejudice, or predisposition about the defendant's culpability.'" Irby, 170 Wn.2d at 884 (quoting Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989)). "[A] defendant's presence at jury selection 'bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend' because 'it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether.'" Irby, 170 Wn.2d at 883 (quoting Snyder v. Massachusetts. 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934), overruled on other grounds by Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964))). This right attaches from the time empanelment of the jury begins. Irby, 170 Wn.2d at 883.

Irby requires reversal in this case. In Irby, the State and Irby agreed to the trial court's suggestion that neither party attend the first day of jury selection and that they appear and begin questioning jurors on the following day. Id. at 877.

As agreed, on the first day of jury selection, the judge swore in the venire members and gave them a jury questionnaire. After the potential jurors completed questionnaires, the judge sent an email to the prosecutor and defense counsel suggesting that 10 venire members be removed from the panel for various reasons.

The judge asked for input, indicating that if any jurors were going to be released, he would like to do it that day. Id.

Irby's counsel agreed to release all ten potential jurors. The prosecutor objected to the release of three. The court then released the remaining seven. Irby, however, was in custody at the time of the exchange and there was no indication that he was consulted about the dismissal of any potential jurors. Id. at 878-79.

Jury selection continued on the following day in Irby's presence. Id. at 878. At the conclusion of trial, the jury convicted Irby as charged. Id. at 879. Irby appealed to Division One of this Court, arguing that the trial court's dismissal of the seven potential jurors via email exchange violated his right to be present at all critical stages. The court agreed, and was affirmed by the Supreme Court. Id. at 887.

This case is like Irby in all important respects. The court took for-cause and peremptory challenges at sidebar and there is no indication that Love was present or permitted to participate. See Lewis v. United States, 146 U.S. 370, 372, 13 S. Ct. 136, 36 L. Ed. 1011 (1892) ("[W]here the [defendant's] personal presence is necessary in point of law, the record must show the fact."); see also People v. Williams, 858 N.Y.S.2d 147, 52 A.D.3d 94, 96-97

(2008) (exclusion of defendant from sidebar conference where jurors excused by agreement violates right to be present; court refuses to speculate that defendant could overhear conversations). In fact, the record shows he was not present and sought to approach the bench at the time peremptory challenges were being exercised.

The fundamental purpose of a defendant's right to be present during jury selection, including the exercise of peremptory challenges, is to allow him to give advice or suggestions to counsel or even to supersede counsel's decisions. Here, as in Irby, because Love was not present for this portion of jury selection, he was unable to exercise that right. See Commonwealth v. Owens, 414 Mass. 595, 602, 609 N.E.2d 1208 (1993) (defendant "has a right to be present when jurors are being examined in order to aid his counsel in the selection of jurors and in the exercise of his peremptory challenges") (citing Lewis, 146 U.S. at 372).

Nonetheless, violation of the right to be present is subject to harmless error analysis. Irby, 170 Wn.2d at 885. The State bears the burden of proving beyond a reasonable doubt that the error is harmless. Id. at 886.

The Irby Court found Irby's absence from the portion of jury selection at issue was not harmless:

> [T]he State has not and cannot show that three of the jurors who were excused in Irby's absence ... had no chance to sit on Irby's jury. Those jurors fell within the range of jurors who ultimately comprised the jury, and their alleged inability to serve was never tested by questioning in Irby's presence . . . . Had [those jurors] been subjected to questioning in Irby's presence . . . the questioning might have revealed that one or more of these potential jurors were not prevented by reasons of hardship from participating on Irby's jury . . . . Therefore, the State cannot show beyond a reasonable doubt that the removal of several potential jurors in Irby's absence [was harmless].

Id. at 886-87.

Thus, the Irby Court considered whether the same jurors would have inevitably sat on the jury regardless of Irby's participation and concluded the answer was no. Accordingly, the State could not show the error was harmless. Id. As in Irby, the State cannot show that the venire members excused during the discussion at sidebar had no chance to sit on this jury; indeed, juror No. 4 would have sat on the jury, had he not been excused via a peremptory challenge. Peremptory challenges are largely based on subjective decision-making, albeit with some limitations.[6] The

[6] Batson v. Kentucky, 476 U.S. 79, 85-86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

State cannot show that Love's absence during this critical stage was harmless beyond a reasonable doubt.

3. THE EVIDENCE WAS INSUFFICIENT TO CONVICT LOVE OF SECOND DEGREE THEFT OF PROPERTY BELONGING TO JENNIFER LAIL.

Due process requires the state to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. To prove second degree theft, the state must prove the individual stole property or services of another exceeding $750.00. RCW 9A.56.040.

As charged in this case,

> 1) A person is guilty of theft in the second degree if he or she commits theft of:
>
> (a) Property or services which exceed(s) seven hundred fifty dollars in value but does not exceed five thousand dollars in value, other than a firearm as defined in RCW 9.41.010 or a motor vehicle[.]

For purposes of this case, theft means: "By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services[.]" RCW 9A.56.020(1)(b).

The plain language of the statutes require the individual "to obtain control over the property or services of another" exceeding

$750.00 in value. Here, Love "obtained control" over $500 in cash, and a postdated, ultimately cancelled check with a face value of $1,200.00. The question here is whether "face value" constitutes value for purposes of theft. By statute:

> "Value" means the market value of the property or services at the time and in the approximate area of the criminal act.
>
> (b) Whether or not they have been issued or delivered, written instruments, except those having a readily ascertained market value, shall be evaluated as follows:
>
> (i) The value of an instrument constituting an evidence of debt, such as a check, draft, or promissory note, shall be deemed the amount due or collectible thereon or thereby, that figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied[.]

RCW 9A.56.010(21) (emphasis added).

The problem with the state's evidence here is that the check Lail wrote was postdated. Accordingly, the "face amount" was not actually "due" or "collectible thereon or thereby." See State v. Bradley, 190 Wash. 538, 546-47, 69 P.2d 819 (1937) (delay procured by writing *worthless postdated check* supports intent to defraud). And the amount never became "due," as it was cancelled before that postdate.

Moreover, the fact the statute indicates that the "amount due" *ordinarily* will be deemed the "face amount" of the check, indicates the Legislature necessarily envisioned circumstances where the "face amount" would not in fact constitute the value of the check. See e.g. http://www.merriam-webster.com/thesaurus/ordinarily ("ordinarily" means "normally"). "Ordinarily" does not mean "always." Not only was the check postdated, but it was cancelled before any attempted negotiation.

Once this exception in the *ordinary* definition of value for checks is construed in concert with the definition of theft itself – which requires the individual to actually "obtain control over the property" – it appears Love's conduct is more in the nature of an *attempted* second degree theft. See e.g. People v. Traster, 111 Cal. App.4th 1377, 4 Cal. Rptr.3d 680 (2003) (defendant's wrongful acquisition of employer's credit card constituted attempted larceny by trick, rather than completed offense, where the defendant intended to transfer funds obtained from the credit card to himself, but transaction was blocked by intermediary vendor and then cancelled by employer). Indeed, under similar circumstances, the

state has charged an attempt, rather than a completed crime. See e.g. State v. White, 2006 WL 281065 (Wash. App. Div. 2).[7]

Because Love never obtained control over Lail's property in a value exceeding $500, the state failed to prove the value element required for second degree theft. Love's conviction for this count and the concomitant restitution order (CP 102) should be reversed and dismissed. This Court should also remand for resentencing on the other counts, as the offender score calculation for the other counts included this offense. CP 98; see e.g. State v. Rowland, 97 Wn. App. 301, 306, 983 P.2d 696 (1999).

[7] In keeping with GR 14.1(a), Love does not cite to this case as authority but merely to show the state charged an attempt under similar circumstances.

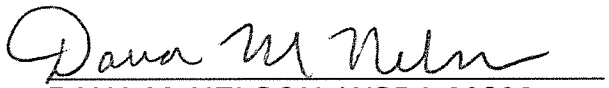
E. CONCLUSION

Because the state failed to prove the value element for second degree theft, the conviction concerning Jennifer Lail should be reversed and dismissed. The remaining convictions should also be reversed, because the voir dire process violated Love's right to a public trial and right to be present during all critical stages of the proceedings.

Dated this 31st day of October, 2012

Respectfully submitted

NIELSEN, BROMAN & KOCH



DANA M. NELSON, WSBA 28239
Office ID No. 91051
Attorneys for Appellant

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.
1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. LIND
JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT

OF COUNSEL
K. CAROLYN RAMAMURTI
JARED B. STEED

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Certificate of Service by email

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 31st day of October, 2012, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Spokane County Prosecuting Attorney
kowens@spokanecounty.org

Unters Love
Doc No. 987298
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001

Signed in Seattle, Washington this 31st day of October, 2012.

X