COURT OF APPEALS NO. 30809-0-III

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

STATE OF WASHINGTON

V.

UNTERS L. LOVE,

Appellant.

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

The Honorable Maryann C. Moreno, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ISSUE

Where historically, the public trial right has extended to voir dire, which includes "for-cause" and peremptory challenges, and logically, the openness of voir dire is essential to the basic fairness of a criminal trial, did the court's private proceeding for conducting for-cause and peremptory challenges violate appellant's right to a public trial under the experience and logic test of State v. Sublett[1]?

B. FACTS RELEVANT TO SUPPLEMENTAL ISSUE

After general questioning of the jury was complete, and at the court's direction, the court addressed "for-cause" challenges at the bench in the defendant's absence. RP 132-135. Three jurors were struck during this private conference. 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 that peremptory challenges were also conducted at the bench:

(Bench conference concluded.)

[1] State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012).

(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).

RP 135.

At this point in the proceedings, the defendant asked if he could join the bench conference but was told to sit back down:

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. RP 135-36.

C. SUPPLEMENTAL ARGUMENT

THE EXPERIENCE AND LOGIC TEST OF STATE V. SUBLETT REQUIRES AN OPEN PROCEEDING FOR VOIR DIRE, INCLUDING FOR-CAUSE AND PEREMPTORY CHALLENGES.

At issue in Sublett was whether the public trial rights of petitioners Sublett and Olsen were violated when the trial judge considered, in chambers and with counsel present, a question from the jury during its deliberations. Sublett, 176 Wn.2d at 65. During its deliberations, the jury submitted a question regarding the accomplice liability instruction. Counsel met in chambers to consider the question and agreed to the court's answer telling the jury to reread the instructions. Sublett, 176 Wn.2d at 67.

The Court of Appeals held the right to a public trial does not extend to hearings on purely ministerial or legal issues that do not require the resolution of disputed facts. Because the jury's question involved a purely legal issue, consideration of the inquiry was not subject to the right for a public trial, so the defendants' rights were not violated. Sublett, 176 Wn.2d at 67-68.

In a plurality opinion, the Supreme Court affirmed – but for a different reason. Sublett, 176 Wn.2d at 72. Instead, applying the "experience and logic" test,[2] the majority opinion held that resolution of the jury's question did not implicate the core values the public trial right serves. Sublett, 176 Wn.2d at 72 (lead opinion); Sublett, 176 Wn.2d at 99-100 (Madsen, J., concurring); Sublett, 176 Wn.2d at 141-42 (Stephens, J., concurring). The right to a public trial serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. Sublett, 176 Wn.2d at 72 (citing State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005)).

Under the "experience" prong of the test, the court asks whether the place and process have historically been open to the press and general public. The "logic" prong asks whether public access plays a significant positive role in the functioning of the particular process in question. If the answer to both is yes, the public trial right attaches. Sublett, 176 Wn.2d at 73.

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[2] The court adopted this test from Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8-10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (applying "experience and logic" test to find public trial right attached to preliminary hearings in California to determine whether probable cause exists to try the defendant).

Applying the experience and logic test to the jury inquiry addressed in chambers in Sublett and Olsen's case, the court noted that historically, proceedings involving jury instructions have not been conducted in an open courtroom. Sublett, 176 Wn.2d at 75. Moreover, by court rule, jury inquiries are to be submitted in writing. Id. at 76. Accordingly, the court found the proceeding did not satisfy the first part of the test and concluded petitioners' public trial rights were not implicated. Sublett, 176 Wn.2d at 77.

In contrast, what is at issue here is voir dire. It is well established that the right to a public trial extends to voir dire. Sublett, 176 Wn.2d at 71; State v. Strode, 167 Wn.2d 222, 226, 217 P.3d 310 (2009). The process of jury selection "is itself a matter of importance, not simply to the adversaries but to the criminal justice system." In re Personal Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004).

Openness of jury selection clearly enhances core values of the public trial right, i.e. "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. "For-cause" and peremptory challenges are an integral part of voir dire. Strode, 167 Wn.2d at 230 (for-cause challenges of six jurors in chambers not de

minimus violation of public trial right); State v. Wilson, __ Wn. App. __, 298 P.3d 148, 155-56 (2013) (unlike potential juror excusals governed by CrR 6.3, exercise of peremptory challenges, governed by CrR 6.4, constitutes part of "voir dire," to which the public trial right attaches).

Accordingly, the experience and logic test is clearly met in the case of voir dire: historically, voir dire has been conducted in open court; and logically, openness clearly enhances the basic fairness of the proceeding. The openness of peremptory challenges is particularly integral to the fairness of the proceeding to protect against inappropriate discrimination. See e.g Batson v. Kentucky, 476 U.S. 79, 85–86, 106 S.Ct. 1712, 90 L Ed.2d 69 (1986).

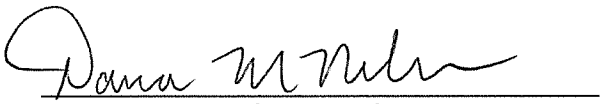
D. CONCLUSION

Love's right to a public trial was violated when the court conducted an important part of jury selection at a private bench conference. This Court should therefore reverse his conviction.

Dated this 6th day of June, 2013

Respectfully submitted

NIELSEN, BROMAN & KOCH



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State v. Unters Love

No. 30809-0-III

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 6th day of June, 2013, I caused a true and correct copy of the **Supplemental 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.

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Signed in Seattle, Washington this 6th day of June, 2013.

x Patrick Mayovsky