NO. 44279-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

VERNE L. JACKSON,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. THE USE OF A SIDEBAR TO CONDUCT FOR CAUSE CHALLENGES DOES NOT AMOUNT TO A CLOSURE OF THE COURTROOM AND DOES NOT IMPLICATE THE PUBLIC TRIAL RIGHT.

The Court has directed the parties to provide supplemental briefing on the issue of whether "for cause" jury challenges implicate the public trial right based upon the record and in light of the Supreme Court's recent public trial right decisions. The Defendant alleges that conducting for-cause challenges in open court at a sidebar constitutes a closure of the courtroom. However, the practice complained of did not amount to a closure of the courtroom, factually or legally. As such, this Court should reject any claim of error.

i. Standard of Review

"A public trial claim may be raised for the first time on appeal and does not require an objection at trial to preserve the error." State v. Njonge, No. 86072-6, slip op at 7-9 (Wa Sup. Ct September 25, 2014). In evaluating a claim of closure a defendant has the burden to first show a closure occurred. Id. at 9 citing to State v. Jasper, 174 Wn. 2d 96, 121-24, 271 P.3d 876 (2012). If a defendant proves a closure occurred, the court must then determine whether the proceeding implicates the public trial right. State v. Smith, No. 85809-8, slip op at 6 (Wa Sup Ct, September 25, 2014). The recent opinions from the Supreme Court uphold the idea "[n]ot every

interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public." State v. Slert, 334 P.3d 188, 1091 (2014) citing State v. Sublett, 176 Wn. 2d 58, 71, 292 P.3d 715 (2012). Moreover, the court maintains the experience and logic test.

The experience and logic test asks 1) "whether the place and process have historically been open to the press and general public;" and 2) "whether public access plays a significant positive role in the functioning of the particular process in question." State v. Smith, No. 85809-08, slip op at 6 (Wa Sup Ct., September 25, 2014).

ii. The defendant fails to show there was a closure of the courtroom.

The Defendant alleges there was a courtroom closure when the parties conducted for-cause challenges at a sidebar conference. The Defendant fails to prove the courtroom was closed during this process or that anything happened at the sidebar requiring public participation.

In State v. Njonge, Njonge contended the courtroom was closed because not all spectators could watch the proceedings due to a lack of space. The record indicated the court was doing the best it could to accommodate the seating restrictions, it did not exclude anyone from

watching, and there was nothing showing spectators were excluded entirely or there were any objections. Njonge, slip op at 2-3, 10. The Supreme Court held a partial or incomplete record will not sustain or support the finding of a closure. Id. at 9-11. The court requires a better factual record to find a violation of this magnitude. Id. at 12.

In State v. Koss, No. 85306-1, slip op at 9 (Wa. Sup Ct, September 25, 2014), the Court rejected Koss' allegation there was a discussion of a jury question in chambers because Koss had nothing in the record to document this occurred. See also State v. Slert, 334 P.3d 1088, 1093 (2014). The court was very clear the parties could supplement the record to "make a record" if they wished, but Koss did not and it was his burden. Id. at 10, 12.

In the present case, Jackson cannot support a claim of closure and there is nothing in the record supporting this claim. The courtroom was never closed to the public, all the juror's answers were made in open court and there was no record made by the defendant of any discussion by the parties or judge at sidebar implicating anything was said or done. Under the rationale of Koss and Slert, when the defendant does not make a record of "what specifically was discussed" a reviewing court "will not infer that a trial judge violated the constitution." Slert at 1093.

Moreover, a closure only occurs "when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." State v. Smith, 334 P.3d 1049, 1055 (2014) citing State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). Because there is nothing indicating the public could not enter or leave, the defendant fails to prove there was a closure.

iii. Engaging in a Sidebar Conference Does Not Constitute a "Closure" of the Courtroom.

The State disputes the appellant's claim that the courtroom was closed by conducting for-cause challenges at the bench. Instead, this was merely a form of sidebar conference, while the actual courtroom remained open to the public.

The Supreme Court recently determined under the experience and logic test that sidebar conferences do not implicate the public trial right. State v. Smith, 334 P.3d 1049 (2014). In the Smith case, sidebar conferences took place in a hallway outside of the courtroom, but were recorded and part of the record available to the public. Id. at 1051-1052. The court held under the experience test sidebar conferences have historically occurred outside the view of the public. Id. at 1054-1055. Moreover, it quoted the 5th Circuit's opinion of Rovinsky v. McKaskle, 722 F.2d 197, 198 (5th Cir 1894), that "[s]idebar conferences in which the

defendant's counsel participates without objection do not violate the right to public trial." Id. The Supreme court then stated since the "public trial right is among other things, a prophylactic measure allowing the public to observe the process and weigh the defendant's guilt or innocence," the public access to sidebars would not aid the public in assessing a defendant's guilt. Id. at 1054. While the State recognizes the for-cause challenge discussion (if any) was not recorded at the bench, the public would be able to go back and review the written struck juror list to determine which jurors were struck and reflect on the juror's answers for the basis.

The Smith Court also examined sidebars under the logic prong. The Court found it difficult to conceive any public interest served by ensuring that the public is privy to a sidebar. Id. at 1055. Additionally that nothing positive was served "by allowing the public to intrude on the huddle at the bench in real time." Id.

The Supreme Court has also held that the pre-voir-dire in-chambers discussion of jurors' answers and dismissal of prospective jurors did not violate the public trial right. State v. Slert, 334 P.3d 1088 (2014). The court pointed out that the mere label of proceedings as voir dire is not determinative of a public trial right. Id. at 1091-92. The court could not find any examples to suggest examination of jury questionnaires is

traditionally performed before the public. Id. at 1092. Moreover, held that public access would have little role, either positive or negative, on review of questionnaires. Id. at 1092-1093. The court discussed that open public review could have a devastating effect to a right to a fair trial. Id. at 1092.

The present case is analogous to both Smith and Slert. Under the experience and logic test there is no reason to believe the for-cause challenge stage of voir dire is historically open to the public, especially when they can hear the answers given by the jurors, nor how it is necessary to not only allow the public access, but to put written information in oral form at the time of occurrence. Under the rational of Slert, this could actually have a negative effect on the trial, as typically parties fear jurors finding out they were requested to be struck by a particular party as it could affect how the seated jurors view the parties. Moreover, there is no reason to believe the public hearing who moved to strike jurors would have an effect on the public's decision as to guilt or innocence and allowing them into the huddle at the bench is not reasonable.

The Supreme Court also decided State v. Frawley, 334 P.3d 1022 (2014) and State v. Shearer, 334 P.3d 1078 (2014) at the same time as Slert, Smith, and Nonje. In Frawley and Shearer, both trial courts questioned a juror about their inability to serve in a chambers and not in the open

courtroom. The Supreme Court in two rather fractured opinions found the individual questioning of a juror in chambers amounted to a closure of the courtroom and a public trial violation. It appears in both instances it is the removal of the juror from the courtroom plus the public's hearing questions and answers of the juror that remain an important part of the public's right rather not any legal discussion or challenge. As such both Frawley and Shearer are distinguishable from the present case. When looking at the decisions of Frawley, Shearer, Slert, Smith, and Nonje the Supreme Court's decision as to public right appears distinguishable between a court's ruling on legal decisions involving voir dire and the method of obtaining the facts for the court to make its ruling. It appears, so long as the public can review the statements elicited by the juror, a judge's decision process or objections done in a sidebar do not violate the public trial right.

II. CONCLUSION

Because sidebar conferences and for-cause challenges are not a public trial right, there was no violation of the public trial right.

Respectfully submitted this 6 day of November, 2014.

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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on November 6th, 2014.

Michelle Sasser

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

November 06, 2014 - 2:57 PM

Transmittal Letter

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