No. 45497-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CALVERT R. ANDERSON,

Appellant.

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

The Honorable Gary R. Tabor, Judge
Cause No. 13-1-00532-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether sidebars during jury selection, held out of the hearing of anyone but the judge and the attorneys, violates a defendant's right to a public trial under the Sixth Amendment or article 1, § 22, of the Washington Constitution.

B. STATEMENT OF THE CASE.

The State accepts Andersons' statement of the substantive and procedural facts of the case.

C. ARGUMENT.

> Anderson's right to a public trial was not violated by conducting for-cause challenges at sidebar. The courtroom was never closed; sidebars are not proceedings historically open to the public and public access wouldn't further the goals of an open courtroom.

Anderson argues that his right to a public trial under both the Washington Constitution article 1, § 22, and the Sixth Amendment to the United States Constitution, was violated when the court held for-cause challenges in sidebars during which only the prosecutor, the defense attorney, and the judge could hear what was said. Anderson did not object to the for-cause challenges, and in fact the defense made four of the five for-cause challenges; the other challenge was made by the court. Trial RP 12-13.

A defendant may raise a public trial claim under article 1, § 22 for the first time on appeal. If the right to a public trial has been violated, prejudice will be presumed. In re Pers. Restraint of Ticeson, 159 Wn. App. 374, 382, 246 P.3d 550 (2011). "Whether the right to a public trial has been violated is a question of law reviewed de novo. State v. Lormor, 172 Wn.2d 85, 90, 257 P.3d 624 (2011). Both the Sixth Amendment to the United States Constitution and article 1, § 22 of the Washington Constitution guarantee a criminal defendant a public trial. Id. at 90-91. The question is whether the challenged proceeding even implicates the public trial right. State v. Sublett, 176 Wn.2d 58, 71, 292 P.3d 715 (2012)

The right to a public trial is not absolute, but the courtroom may be closed only for the most unusual of circumstances. State v. Heath, 150 Wn. App. 121, 715, 206 P.3d 712 (2009). The right to open proceedings extends to jury selection and some pretrial motions, and a trial court must, before closing the courtroom, conduct the analysis required by State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

The Bone-Club analysis is not required unless the public is "fully excluded from the proceedings within a courtroom," Lormor, 172 Wn.2d at 92 (citing to Bone-Club, 128 Wn.2d at 257, or when jurors are questioned in chambers. Id, (citing to State v. Momah, 167 Wn.2d 140, 146, 217 P.3d 321 (2009) and State v. Strode, 167 Wn.2d 222, 224, 217 P.3d 310 (2009)). The court then went on to define a closure:

> [A] "closure" occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.

Lormor, 172 Wn.2d. at 93.

Anderson's argument presumes that the sidebars constituted a closure of the courtroom, but under this definition, the courtroom was never closed and there was no requirement for a Bone-Club analysis; the court did not err.

Not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure, even if the public is excluded. Sublett, 176 Wn.2d at 71. To decide whether a particular process must be open to the general public, the Sublett court adopted 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). The "experience" prong requires the court to determine if "'the place and process have historically been open to the press and public.'" Sublett, 176 Wn.2d at 73 (quoting Press-Enterprise, 478 U.S. at 8). The "logic" prong addresses "'whether public access plays a significant positive role in the functioning of the particular process in question.'" Id. If both questions are answered in the affirmative, the public trial right attaches and the trial court must consider the Bone-Club factors before closing the proceeding to the public. Id.

The experience and logic test was formulated to determine whether the core values of the right to a public trial are implicated. Sublett, 176 Wn.2d at 73. The right to a public trial exists to ensure a fair trial, and to discourage perjury State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (citing to federal cases). The harms associated with a closed trial have been identified as:

> [T]he inability of the public to judge for itself and to reinforce by its presence the fairness of the process, ... the inability of the defendant's family to contribute their knowledge or insight to the jury selection, and the inability of the venirepersons to see the interested individuals.

In re Pers. Restraint of Orange, 152 Wn.2d 795, 812, 100 P.3d 291 (2004).

Applying that test, the Sublett court held that no violation of the right to a public trial occurred when the court considered a jury question in chambers.

In State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), the court used the experience and logic test to decide whether for-cause challenges must be made in public. Id. at 920. In that case, challenges for-cause to the venire had been held at a sidebar. Id. at 915. Applying the Sublett experience and logic test, the court concluded that it was not error to handle challenges at a sidebar. The court held that "[t]he sidebar conference did not close the courtroom." Id. at 920. In regards to the experience prong, the Court noted that neither party had cited any authority to suggest for-cause challenges are normally made in public. Id. at 918. The Court remarked that in 140 years of Washington for-cause challenges, "there is little evidence of public exercise of such challenges, and some evidence they are conducted privately." Id. at 919. The Court then applied the logic prong, noting that nothing indicated for-cause challenges need to be made in public. Id. The purpose of a conducting a public trial are:

> [T]o ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.

State v. Brightman, 155 Wn.2d at 514. The court in Love found that these purposes are not furthered by conducting for-cause challenges of a potential juror in public, because for-cause challenges typically present questions of law for the judge. Love, 176 Wn. App. at 919. The court further explained that the written record of the challenges to potential jurors satisfied the public interest in monitoring the integrity of trials. Id. at 919-20.

Washington courts have twice held that peremptory challenges held during sidebar do not violate one's right to a public trial. Love, 176 Wn. App 911, and State v. Dunn, __Wn. App.__, 321 P.3d 1283 (2014). Using the experience and logic test for peremptory challenges, the courts have held that experience and logic do not suggest exercising peremptory challenges in sidebar implicates a public trial right. Id. at 1286.

Applying the experience and logic test to Anderson, there is no dispute that the sidebars at issue in this trial occurred in the courtroom and the courtroom was open. Anderson offers no authority, nor can the State find any, to show that sidebars have not

historically been conducted out of the hearing of the jurors and spectators. That is the whole purpose of the sidebar—so that the jury does not hear the discussion. The alternative would be to excuse the jury each time some issue needed to be addressed outside of its presence.

> In the case of sidebar discussions, issues arising with the jury present would always require interrupting trial to send the jury to the jury room, often located some distance from the courtroom, thereby occasioning long delays every time the court wishes to caution counsel or hear more than a simple "objection, Your Honor." This would do nothing to make the trial more fair, to foster public trust, or to serve as a check on judges by way of public scrutiny.

Ticeson, 159 Wn.2d at 386, n. 38. Further, the logic prong does not suggest that public oversight is necessary; for-cause challenges present questions of law for the judge. For Anderson's trial there is a written record of the challenges to potential jurors, sufficient for the public to monitor the integrity of trial, as will be discussed below.

The appellant argues that for-cause challenges made during a sidebar diminish the fairness of trial. The fairness is in fact not diminished when for-cause challenges are made during sidebar. Love, 176 Wn. App. at 919. The jury questioning and answers are fully recorded so that one could tell from the context the reasoning

behind Anderson's own for-cause challenges. From the record the public can conclude that Juror 5 was excused because he worked for the Department of Corrections and knew a lot of police officers, as well as having an admitted mindset of guilty until proven innocent, and a bias against tattoos. Jury Selection RP 30, 52-53. Juror 15 knew many of the witnesses well. Jury Selection RP 18, 26. Juror 18 also had a bias against tattoos due to time spent working at a correction facility. Jury Selection RP 53-54. Juror 34 had been married to a chief of police who allegedly constantly beat and cheated on her, leading her to have a bias against police officers. Jury Selection RP 30-31. With regard to the one juror dismissed by the judge, Juror 27, his father was killed by a drunk driver and thus had an extreme bias against those who couldn't control their use of alcohol. Jury Selection RP 41.

Further, while the role of the appellant's counsel in dismissing four of the five jurors does not constitute a waiver, the fact that it was the appellant's counsel who dismissed the jurors can speak to the fairness and integrity of the trial. State v. Strode, 167 Wn.2d at 228.

The appellant notes that a defendant has a right to a public trial, and that right extends to voir dire. Sublett, 176 Wn.2d at 71.

There was a sidebar held during the evidentiary portion of Anderson's trial, and he has not challenged that as a courtroom closure. Trial RP 155-56. The appellant has not distinguished as to why sidebars held during voir dire constitute closure of the court, while a sidebar during the presentation of evidence do not. Anderson notes the historic importance of open voir dire. Historically trial has been open; historically trial has also included sidebars. The right to an open voir dire is an extension of the right to a public trial, there is no logical reason sidebars would constitute a closure during voir dire but not in other phases of the trial.

The appellant argues that Division Three, as well as Division Two, within the past two years has used flawed reasoning to conclude that for-cause challenges can be made during sidebar. Neither the Washington Constitution, nor the United States Constitution has been amended with regard to public trial rights, statutes have not addressed opening for-cause challenges to the public, and practice has been consistent since for-cause challenges have occurred in the state of Washington. Nothing has altered the law to affect for-cause challenges or sidebar procedure. Love, 176 Wn. App. at 919. Anderson has not asserted a reason to abandon this historic practice.

D. CONCLUSION.

There was no violation of Anderson's rights to a public trial. The State respectfully asks this court to affirm his convictions.

Respectfully submitted this 9th day of June, 2014.

Carol La Verne, WSBA# 19229
Attorney for Respondent

THURSTON COUNTY PROSECUTOR

June 09, 2014 - 9:09 AM

Transmittal Letter

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