NO. 47602-9-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOSEPH M. DONNETTE-SHERMAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COURT
The Honorable Erik D. Price, Judge
Cause No. 13-1-01173-9

BRIEF OF APPELLANT

THOMAS E. DOYLE, WSBA NO. 10634
Attorney for Appellant

P.O. Box 510
Hansville, WA 98340
(360) 626-0148

TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT 3

01. DONNETTE-SHERMAN WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S MISCONDUCT DURING CLOSING ARGUMENT THAT IMPROPERLY UNDERMINED THE PRESUMPTION OF INNOCENCE AND SOUGHT TO SHIFT THE BURDEN OF PROOF TO DEFENSE 3

02. THE TRIAL COURT VIOLATED DONNETTE-SHERMAN'S RIGHT TO A PUBLIC TRIAL BY TAKING CHALLENGES FOR CAUSE AT SIDEBAR DURING JURY SELECTION 11

E. CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

State of Washington

In re Glasman, 175 Wn.2d 696, 286 P.3d 673 (2012) 6, 9

In re Pers. Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004) 12

State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988) 6

State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005) 5

State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995) 12

State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005) 12

State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984) 6

State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) 4

State v. Early, 70 Wn. App. 452, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994) 4

State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996) 5

State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006) 12

State v. Emery, 174 Wn.2d 741, 7761, 278 P.3d 653 (2012) 5, 10

State v. Fleming, 83 Wn. App. 209, 921 P.2d 1996) 9

State v. Gentry, 125 Wn.2d 570, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995) 4

State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969) 4

State v. Graham, 78 Wn. App. 44, 896 P.2d 704 (1995) 4

State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985) 6

State v. Henderson, 114 Wn.2d 867, 792 P.2d 514 (1990) 4

State v. Huson, 73 Wn.2d 660, 440 P.2d 192 (1968) 4

State v. Leavitt, 49 Wn. App. 348, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988) 10

State of Washington v. Love, 183 Wn.2d 598, 354 P.3d 841 (2015) 16, 17

State v. McCreven, 170 Wn. App. 444, 284 P.3d 793 (2012), review denied, 176 Wn.2d 1015 (2013) 8, 10

State v. Paumier, 176 Wn.2d 29, 288 P.3d 1126 (2012) 12

State v. Rivers, 96 Wn. App. 672, 981 P.2d 16 (1999) 5

State v. Russell, 141 Wn. App. 733, 172 P.3d 361 (2007), reviewed denied, 164 Wn.2d 1020 (2008) 11

State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012) 12

State v. Tarica, 59 Wn. App. 368, 798 P.2d 296 (1990) 4

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987) 3

State v. Thorgerson, 172 Wn.2d 438, 258 P.3d 43 (2011) 3

State v. Walden, 131 Wn.2d 469, 932 P.2d 1237 (1997) 9

State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008) 10

State v. White, 81 Wn.2d 223, 500 P.2d 1242 (1972) 4

State v. Wilson, 174 Wn. App. 328, 298 P.3d 148 (2013) 12, 13

State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012) 14, 15, 17

State v. Ziegler, 114 Wn.2d 533, 789 P.2d 79 (1990) 5

Federal Cases

Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010) 11

Smith v. Phillips, 455 U.S. 209, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982) 26

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 3

Constitutional

Sixth Amendment 3, 11

Art. I, sec. 10 of the Washington Constitution 11

Art. I, sec. 22 of the Washington Constitution 3, 11

Statutes

RCW 9.94A.533.. 1

RCW 9.94A.825.. 1

RCW 9A.36.021.. 1

Rules

RAP 2.5(a)(3).. 4

A. ASSIGNMENTS OF ERROR

01. The trial court erred in permitting Donnette-Sherman to be represented by counsel who provided ineffective assistance by failing to object to the prosecutor's improper closing argument.

02. The trial court erred in taking challenges for cause t sidebar during jury selection.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether Donnette-Sherman was prejudiced as a result of his counsel's failure to object to the prosecutor's misconduct during closing argument that improperly undermined the presumption of innocence and sought to shift the burden of proof to defense?
[Assignment of Error No. 1].

02. Whether the trial court violated Donnette-Sherman's right to a public trial in taking challenges for cause at sidebar during jury selection?
[Assignment of Error No. 2].

C. STATEMENT OF THE CASE

01. Procedural Facts

Joseph Michael Donnette-Sherman was charged by information filed in Thurston County Superior Court August 7, 2013, with assault in the second degree while armed with a deadly weapon, contrary to RCWs 9A.36.021(1)(c), 9.94A.533(4), and 9.94A.825. [CP 2].

No pretrial motions were heard regarding either a CrR 3.5 or CrR 3.6 hearing. Trial to a jury commenced April 21, 2015, the Honorable Erik

D. Price presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 134-35]. Donnette-Sherman was found guilty, including weapon enhancement, sentenced within his standard range, and timely notice of this appeal followed. [CP 4, 43-45, 65, 77-86].

02. Substantive Facts

On August 4, 2013, sometime around six or seven in the evening, Bruce Boyles went outside to quiet his barking dog who was chained with a 20-foot cable in the front yard. [RP 80-81]. He saw Donnette-Sherman, his neighbor, "come up my driveway and up my stairs towards my dog with a machete." [RP 80]. "He grabbed the dog's cable and was reeling back with this machete." [RP 82]. When Boyles indicated he was going to take pictures with his cell phone, Donnette-Sherman approached him and knocked the phone from his hand with the machete, thereby damaging both the phone and injuring Boyles's left thumb. [RP 67, 83-85]. Boyles was able to take pictures of Donnette-Sherman with the machete during the incident, after which he called 911. [RP 87-89; State's Exhibits 8, 9, 10].

When questioned at the scene, Donnette-Sherman, who had also called 911 to report the incident, was very cooperative and explained he had gone over to Boyles's house to free the dog, who was chained and constantly barking. He wanted to cut his leash, believing the dog was

abused. [RP 52, 54-56, 71]. He thought what Boyles had in his hand was a weapon, saying he approached Boyles and "swung at it and struck at that time with his machete to disarm this person from it." [RP 58]. Donnette-Sherman voluntarily provided the 22-inch-blade machete to Deputy Brooks. [RP 58-59, 64].

Donnette-Sherman rested without presenting evidence. [RP 140].

D. ARGUMENT

01. DONNETTE-SHERMAN WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S MISCONDUCT DURING CLOSING ARGUMENT THAT IMPROPERLY UNDERMINED THE PRESUMPTION OF INNOCENCE AND SOUGHT TO SHIFT THE BURDEN OF PROOF TO DEFENSE.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that

prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)); RAP 2.5(a)(3).

The law in Washington is clear, prosecutors are held to the highest professional standards, for he or she is a quasi-judicial officer whose duty is not merely to zealously advocate for the State, but also to ensure the accused receives a fair trial. State v. Huson, 73 Wn.2d 660, 663, 440 P.2d

192 (1968). Violation of this duty can constitute reversible error. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

Where it is established that the prosecutor made improper comments, this court reviews whether those improper statements prejudiced the defendant under one of two different standards of review. State v. Emery, 174 Wn.2d 741, 7761, 278 P.3d 653 (2012).

If a defendant, as here, fails to object to improper comments at trial, or fails to request a curative instruction, or to move for a mistrial, reversal is not always required unless the prosecutorial misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). "The State's burden to prove harmless error is heavier the more egregious the conduct is." State v. Rivers, 96 Wn. App. 672, 676, 981 P.2d 16 (1999).

However, where the State's misconduct violates a defendant's constitutional rights, this court analyzes the prejudice under a different standard: the stringent constitutional harmless error standard. State v. Easter, 130 Wn.2d 228, 236-37, 242, 922 P.2d 1285 (1996). Under this standard, this court presumes constitutional errors are harmful and must reverse unless the State meets the heavy burden of overcoming the presumption that the error is prejudicial, Id. at 242, which requires proof

that the untainted evidence overwhelmingly supports a finding of guilt beyond a reasonable doubt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

In the interests of justice, a prosecutor must act impartially, seeking a verdict free of prejudice and based on reason. State v. Belgarde, 110 Wn.2d 504, 516, 755 P.2d 174 (1988). The hallmark of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury and thus deny the defendant a fair trial guaranteed by the due process clause? Smith v. Phillips, 455 U.S. 209, 210, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982). In this context, the definitive inquiry is not whether the error was harmless or not harmless but rather did the irregularity violate the defendant's due process rights to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

> Thus, deciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict. Dhaliwal, 150 Wn.2d at 578. We do not decide whether reversal is required by deciding whether, in our view, the evidence is sufficient….

In re Glasman, 175 Wn.2d 696, 711, 286 P.3d 673 (2012).

It is misconduct for a prosecutor to make improper statements that prejudice the defendant. In re Glasman, 175 Wn.2d at 704. The prosecutor

undermined the presumption of innocence and improperly sought to shift the burden of proof to defense when he misstated the law by implying during argument that the jury need not consider the issue of self-defense if it excludes Donnette-Sherman's statements to Deputy Brooks, which happened here when the prosecutor argued:

> …I submit to you that there is no, none whatsoever, evidence that the force that Mr. Donnette used on this date was justified or lawful.

[RP 167-68].

….

> The only evidence you have is what he (Donnette-Sherman) told the officer when the officer went to talk to him about this incident, and he said he thought Mr. Boyles was holding a weapon, and he demonstrated how Mr. Boyles was holding the weapon, and he held his hands out like this, like somebody holding a camera, not like somebody holding a weapon.

[RP 168].

The implication that without this evidence there can be no claim of self-defense, bears directly on whether the court properly gave a self-defense instruction, which is not at issue. This court, in holding that an argument in another case amounted to prosecutorial misconduct, explained that

> the prosecutor's misleading comments suggested that the codefendants must first prove self-defense to the jury, and that the State could not disprove the

> affirmative defense. This is not the law in Washington.
>
> Whether the defense has presented evidence of self-defense is a question for the trial court to address when deciding whether to instruct the jury on the law of self-defense. (citation omitted) Once the trial court has found evidence sufficient to require a self-defense instruction, that inquiry, even if erroneous, has ended. Thus, the prosecutor's argument improperly sought to shift the burden of proof to the defense.

State v. McCreven, 170 Wn. App. 444, 471, 284 P.3d 793 (2012), review denied, 176 Wn.2d 1015 (2013).

"[A] prosecutor generally cannot comment on the lack of defense evidence because the defense has no duty to present evidence." State v. Thorgerson, 172 Wn.2d 438, 467, 258 P.3d 43 (2011). Consistent with McCreven, the prosecutor's above argument, which communicates that the jury need not consider Donnette-Sherman's claim of self-defense because the only evidence is what he told the arresting officer, misstated the law and improperly undermined the presumption of innocence. McCreven, 170 Wn. App. at 471. As our Supreme Court stated in 1997, "[t]o be entitled to a jury instruction on self-defense, the defendant must produce some evidence demonstrating self-defense," and "once the defendant produces some evidence, the burden shifts to the prosecution to prove the absence

of self-defense beyond a reasonable doubt." State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

As recently as 2012, our Supreme Court held that "it was clearly misconduct for the prosecutor to inform the jury that acquittal was appropriate only if the jury believed Glassman, and [this] shows the prosecutor's failure to prosecute this case as an impartial officer of the court." In re Glasman, 175 Wn.2d at 714. There is no telling distinction between the argument held improper in Glasman and the prosecutor's argument in this case.

> Shifting the burden of proof to the defendant is improper, and ignoring this prohibition amounts to flagrant and ill-intentioned misconduct. Due process requires the prosecution to prove beyond a reasonable doubt, every element necessary to constitute the crime with which the defendant is charged. Misstating the basis on which a jury can acquit insidiously shifts the requirement that the State prove the defendant's guilt beyond a reasonable doubt.

In re Glasman, 175 Wn.2d at 713 (internal citations omitted).

The prosecutor's argument in this case misinformed the jury about the burden of proof. In State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1996), Division I of this court held, in part, that a prosecutor's arguments constituted flagrant and ill-intentioned misconduct where binding precedent recognized the impropriety of the arguments. Donnette-

Sherman's trial commenced April 21, 2015, nearly two-and-a-half years from the September 5, 2012 publication of this court's decision in McCreven, supra, which found similar arguments inappropriate. 170 Wn. App. at 470.

While under State v. Warren, 165 Wn.2d 17, 27-28, 195 P.3d 940 (2008) and State v. Emery, 174 Wn.2d at 759, our Supreme Court has held that a prosecutor's misstatement of the law could be cured by a proper instruction, the lack thereof does not serve as a bar to review a claim of ineffective assistance of counsel. Both elements of ineffective assistance of counsel have been established in this case.

First, the record does not and could not reveal any tactical or strategic reason why trial counsel failed to object to the prosecutor's closing argument for the reasons previously argued. There is no reasonable explanation for why counsel failed to timely object or move for a mistrial or request a curative instruction.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359.

The prejudice here is self-evident and not harmless. Donnette-Sherman's entire case turned on whether the jury found that he acted in self-defense. Absent that, he was left defenseless. The jury could have inferred that he believed that Boyles had a weapon in his hand and that in response he was acting in self-defense. His attorney could have at least obtained a curative instruction, which would have prevented the prosecutor from undermining the presumption of innocence and its burden of proof relating to Donnette-Sherman's claim of self-defense. Counsel's performance was deficient, which was highly prejudicial to Donnette-Sherman, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his conviction and remand for retrial.

02. THE TRIAL COURT VIOLATED DONNETTE-SHERMAN'S RIGHT TO A PUBLIC TRIAL BY TAKING CHALLENGES FOR CAUSE AT SIDEBAR DURING JURY SELECTION.

Both the Sixth Amendment to the United States Constitution and art. I, §§ 10 and 22 of the Washington Constitution guarantee criminal defendants the right to a public trial. State v. Russell, 141 Wn. App. 733, 737-38, 172 P.3d 361 (2007), reviewed denied, 164 Wn.2d 1020 (2008); Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 723, 175 L. Ed. 2d 675 (2010). This right is not, however, unconditional,

and a trial court may close the courtroom in certain situations. State v. Easterling, 157 Wn.2d 167, 174-75, 137 P.3d 825 (2006). Such a closure may occur only after (1) properly conducting a balancing process of five factors and (2) entering specific findings on the record to justify so ruling. State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). A trial court's failure to conduct the required Bone-Club inquiry "results in a violation of the defendant's public trial rights." State v. Brightman, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005). In such a case, the defendant need show no prejudice; it is presumed. Bone-Club, 128 Wn.2d at 261-62. Additionally, a defendant's failure to "lodge a contemporaneous objection" at the time of the exclusion does not amount to a waiver of his or her right to a public trial. Brightman, 155 Wn.2d at 514-15, 517. The remedy for such a violation is to reverse and remand for a new trial. In re Pers. Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). This court reviews de novo the question of law of whether a defendant's right to a public trial has been violated. Brightman, 155 Wn.2d at 514; State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

In State v. Wilson, 174 Wn. App. 328, 298 P.3d 148 (2013), this court, discussing State v. Paumier, 176 Wn.2d 29, 288 P.3d 1126 (2012), State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012), and Sublett, recognized that our Supreme Court has developed a two-step process for

determining whether a particular proceeding implicates a defendant's public trial right:

> First, does the proceeding fall within a specific category of trial proceedings that our Supreme Court has already established implicates the public trial right? Second, if the proceeding does not fall within such a specific category, does the proceeding satisfy Sublett's "experience and logic" test? (footnote omitted).

State v. Wilson, 174 Wn. App. at 335.

Given this court's acknowledgement in Wilson, 174 Wn. App. at 335-40, that the Washington Supreme Court has established that the public trial right applies to jury selection, Donnette-Sherman addresses only whether the trial court violated his right to a public trial by taking challenges for cause at sidebar during jury selection. See State v. Wise, 176 Wn.2d at 11-12.

The record demonstrates that during the jury selection process several prospective jurors were excused for cause at sidebar. "[T]he sidebar related to the challenges. The court asked for motions for cause and asked first from the State." [RP 30].

> THE COURT: The State made the following motions, and I will take each one individually. The State moved for 10 to be excused for cause. Juror 10 had stated that she had difficulty judging other people, was uncomfortable with the process of judging other people, wasn't sure that she could do

> it. Mr. Jefferson (defense counsel) had no objection to the motion, and the Court granted the motion to excuse 10 cause....

[RP 30].

> THE COURT: The next one was 12. The State moved to have 12 removed for cause. 12 is a juror who stated that he had many distractions outside of this court, was concerned about his ability to concentrate because of distractions, and I believe Juror No. 12 even stated that he had difficulty concentrating in any event.
>
> The Court observed as part of, and stated this at sidebar, in response to even a question from Mr. Jefferson that he wasn't paying attention and needed the question repeated. The defense had no objection to 12 being removed for cause, and the Court granted the motion.

[RP 30-31].

> THE COURT:
>
> ....
>
> The State next moved for 19 to be excused for cause. 19 stated during voir dire that she was uncomfortable with, quote, unquote, "The whole thing." She was anxious. She didn't like the idea of judging people, didn't like the idea of courts and I believe also stated that she was distracted with things outside court.
>
> To the State's motion, Mr. Jefferson stated that he had no objection, although he wasn't sure that he agreed that it rose to the level of cause. The Court concurred with Mr. Jefferson that it, too, felt that 19 was somewhat - - her answers fell short of a clear cause for excusal. But in absence of the objection, the Court granted the motion.

[RP 31-32].

> THE COURT: ... The next was the State moved 23 to be excused for cause. Juror No. 23 had, even previous to the voir dire process, had stated to the bailiff that he was uncomfortable, anxious, believed that, because he was anxious, he could not concentrate, would likely just go with what anybody else wanted to do, and could not think independently during the process.
>
> To the Court's questioning during voir dire, he stated he had not been on a jury before but that was his observation of his own belief of himself. The State moved to remove for cause. Mr. Jefferson had no objection. The Court granted the motion.

[RP 32-33].

> THE COURT: The next was No. 39. The State moved to remove 39 for cause. 39 stated during voir dire that she was not sure she could make a decision. She had previously said that she had an experience with jury duty in which she had remorse that held on until today, notwithstanding the fact that she believed the person was guilty in that case. She still felt badly about it and continued to feel badly about it and wasn't sure that she could participate in this trial without feelings of doubt as to her ability to do it.
>
> The State moved to excuse for cause. Mr. Jefferson had no objection. The Court granted the motion.

[RP 33-34].

The court also noted,

> at the sidebar, the Court asked Mr. Jefferson to consult freely with his client during the process of the challenges that, although Mr. Donnette would

> not be at clerk's table, that the Court wanted Mr. Jefferson to have free access as much as he wanted with his client during the challenge process. Mr. Jefferson stated he understood, and the Court's observation is that is what occurred during the challenge process.

[RP 34].

In State of Washington v. Unters Lewis Love, 183 Wn.2d 598, 354 P.3d 841 (2015), our Supreme Court, while recognizing that a defendant's public trial rights attach to "jury selection, including for cause and preemptory challenges[,]" 183 Wn.2d at 598, the nevertheless affirmed Love's conviction, holding he was not denied his right to a public trial because there was no closure during the challenges for cause at sidebar.

As here, in Love, counsel exercised for cause challenges to potential jurors during a sidebar conversation. Love, 183 Wn.2d at 601. Though the jury could not hear the conversation, it "was on the record and visible to observers in the courtroom." Love, 183 Wn.2d at 602. In finding there was no closure, the court observed that the public was able to "watch the trial judge and counsel ask questions of potential jurors, listen to the answers to those questions, see counsel exercise challenges at the bench and on paper, and ultimately evaluate the empaneled jury." Love, 183 Wn.2d at 607. In determining there was no closure and thus no violation of Love's public trial right, the court noted "[t]he public was present for

and could scrutinize the selection of Love's jury from start to finish, affording the safeguards of the public trial right[.] Id.

In contrast, here no transcript was made of the sidebar discussion about the for cause challenges, hence the trial court later offering a recollection of the discussion in order to make a record, as previously set forth. As noted above, the court in Love, in finding no closure, relied on the fact that the sidebar discussion "was on the record," presumably because the discussion about the for cause challenges would be publically available for review and scrutiny, a situation absent from this record. Under these facts and a strict reading of Love, it cannot be said there was no closure in Donnette-Sherman's case, with the result that the Love case is not controlling in this regard.

The trial court erred in taking challenges for cause at sidebar during jury selection, outside the public's purview and in violation of Donnette-Sherman's right to a public trial. The error was structural, prejudice is presumed, and reversal is required.

E. CONCLUSION

Based on the above, Donnette-Sherman respectfully requests this court to reverse his conviction and remand for retrial.

//

//

DATED this 15th day of January 2016.

THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

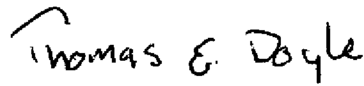
CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

Carol La Verne
paoappeals@co.thurston.wa.us

Joseph M. Donnette-Sherman #383022
WSP
1313 North 13th Avenue
Walla Walla, WA 99362-8817

DATED this 15th day of January 2016.



THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

DOYLE LAW OFFICE

January 15, 2016 - 3:39 PM

Transmittal Letter

Document Uploaded: 5-476029-Appellant's Brief.pdf

Case Name: State v. Donnette-Sherman
Court of Appeals Case Number: 47602-9

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

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

Petition for Review (PRV)

Other: ________

Comments:

No Comments were entered.

Sender Name: Thomas E Doyle - Email: ted9@me.com

A copy of this document has been emailed to the following addresses:

paoappeals@co.thurston.wa.us