Consol. No. 30809-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

UNTERS L. LOVE, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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INDEX

APPELLANT'S ASSIGNMENTS OF ERROR....1

ISSUES PRESENTED....1

STATEMENT OF THE CASE....2

ARGUMENT....2

A. THE DEFENDANT'S RIGHT TO PUBLIC TRIAL WAS NOT VIOLATED....2

B. THE DEFENDANT'S RELIANCE ON *STATE V. IRBY* IS FACTUALLY INCORRECT....3

C. THERE WAS AMPLE EVIDENCE TO CONVICT THE DEFENDANT ON SECOND DEGREE THEFT....5

CONCLUSION....7

TABLE OF AUTHORITIES

WASHINGTON CASES

IN RE PERS. RESTRAINT OF ORANGE, 152 Wn.2d 795,
100 P.3d 291 (2004) 2

SEATTLE TIMES CO. V. ISHIKAWA, 97 Wn.2d 30,
640 P.2d 716 (1982) 2

STATE V. EASTERLING, 157 Wn.2d 167,
137 P.3d 825 (2006) 2

STATE V. EASTON, 69 Wn.2d 965,
422 P.2d 7 (1966) 6

STATE V. IRBY, 170 Wn.2d 874,
246 P.3d 796 (2011) 4

STATE V. STRODE, 167 Wn.2d 222,
217 P.3d 310 (2009) 2

STATE V. WILSON, 141 Wn.App. 597,
171 P.3d 501 (2007) 4

SUPREME COURT CASES

UNITED STATES V. GAGNON, 470 U.S. 522,
105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985) 4

CONSTITUTIONAL PROVISIONS

ARTICLE I, § 22 4

FOURTH AMENDMENT 4

SIXTH AMENDMENT 4

I.

APPELLANT'S 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 against Jennifer Lail.

II.

ISSUES PRESENTED

A. HAS THE DEFENDANT SHOWN THAT THE PUBLIC WAS EXCLUDED FROM THE *VOIR DIRE* PROCEDURES?

B. CAN THE TRIAL COURT VIOLATE A DEFENDANT'S RIGHT TO BE PRESENT WHEN THE RECORD SHOWS THAT THE DEFENDANT WAS PRESENT IN THE COURTROOM?

C. HAS THE DEFENDANT SHOWN THAT HE DID NOT COMMIT THEFT OF $1,200 FROM JENNIFER LAIL BECAUSE MS. LAIL DISCOVERED THE TRUE SITUATION

AND STOPPED PAYMENT ON A PERSONAL CHECK SHE HAD GIVEN TO THE DEFENDANT?

III.

STATEMENT OF THE CASE

For the purposes of this appeal only, the State accepts the defendant's version of the statement of the case.

IV.

ARGUMENT

A. THE DEFENDANT'S RIGHT TO PUBLIC TRIAL WAS NOT VIOLATED.

The defendant has outlined a series of cases that support his claim that the right to a public trial was violated. Beginning with *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); and extending into more current times with *State v. Strode*, 167 Wn.2d 222, 226, 217 P.3d 310 (2009); *State v. Easterling,* 157 Wn.2d 167, 137 P.3d 825 (2006), there is a long list of rulings on the public trial issue. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004) is one of the more pertinent cases as the court in *Orange* held that *voir dire* was included in the "public trial" right. *In re Pers. Restraint of Orange, supra.*

While the defendant argues from a massive legal base, he fails to note an obvious *factual* distinction in this case. The public was *not* excluded from the *voir dire* process. The record shows that the trial court called several sidebar conferences to discuss juror challenges.

Certainly, since the purpose of a sidebar is to prevent the jury from hearing what is being discussed, the jury did not hear the sidebar discussions. However, the defendant has shown nothing in the record that indicates the trial court closed the courtroom, excluded the public or that any members of the public could not hear the sidebars.

This is a direct appeal and the burden is on the defendant to show that the trial court closed the courtroom to the public without first conducting an analysis of the need to close the courtroom. The defendant has not argued on appeal that any members of the public (who might have been present), could not hear the sidebar discussions.

Without a factual showing that the public was excluded from the *voir dire* process, the defendant's "public trial" arguments fail.

It might be noted that if the defendant prevails in this matter, all potential jurors will hear everything said about them and other jurors. This situation might not be conducive to conducting a fair trial.

B. THE DEFENDANT'S RELIANCE ON *STATE V. IRBY* IS FACTUALLY INCORRECT.

The defendant does not argue that he was absent during the jury selection process. Rather, the defendant argues that he was not part of the sidebars in which the jury was selected.

Clearly, the defendant has a right to be present at all "critical stages" of a trial. Sixth Amendment; Due Process Clause of the Fourth Amendment to the U.S. Constitution; Art. I, § 22 of the Washington State Constitution. *See State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011); *see also United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985).

According to *Irby, supra,* the due process rights available to a defendant extend to the *voir dire* process. *Irby*, 170 Wn.2d at 883 (*quoting State v. Wilson*, 141 Wn. App. 597, 604, 171 P.3d 501 (2007)).

The reason *Irby* does not apply in this case, and the reason the defendant's arguments fail on this issue, is the fact that the defendant has not shown, nor can he show, that he was absent from the trial during jury selection. Nothing in the record before us suggests that the defendant was prevented from involving himself in his counsel's use of peremptory challenges, either by conferring with counsel before the sidebar or after the sidebar when counsel actually exercised peremptory challenges in the presence of the defendant. The selection of jurors

during sidebars did not deprive the defendant of the ability to give advice, suggest alternatives or even to override his defense counsel.

The defendant cannot claim to have been a potted plant during the jury selection process and now claim an error.

As in the previous argument, the State notes that having all manner of comments regarding certain jurors made audible to the jury, would not be conducive to a fair trial.

C. THERE WAS AMPLE EVIDENCE TO CONVICT THE DEFENDANT ON SECOND DEGREE THEFT.

The defendant argues that there was insufficient evidence of value presented for conviction on Count I. The rationale behind defendant's arguments is that the victim for Count I stopped payment on the post-dated $1,200 personal check.

The jury instruction for the count under discussion is as follows:

To convict the defendant of the crime of theft in the second degree as charged in Count I, each of the following four elements of the crime must be proved beyond a reasonable doubt:

> (1) that on or about March 31st, 2010, the defendant, by color or aid of deception, obtained control over property or services of Jennifer Lail or the value thereof;
>
> (2) that the property or services exceeded $750 in value but did not exceed $5,000 in value;

(3) that the defendant intended to deprive the other person of the property or services; and

(4) that this act occurred in the State of Washington.

RP 384-85.

The defendant has not questioned any of the elements except the issue of "value."

The Washington State Supreme Court in *Easton,* held that even though a check had been "stopped," it was not rendered valueless. *State v. Easton*, 69 Wn.2d 965, 970, 422 P.2d 7 (1966). While the *Easton* court was dealing with a stolen government check rather than a personal check as in this case, the logic applied by the Court applies here as well. The personal check by Ms. Lail was a negotiable instrument and the stopping of payment on the check did not change its negotiability. A holder in due course could enforce payment for the full amount thereof. No holder in due course issues arose here, but the idea that the check was not rendered worthless by the stopping of payment has merit.

The defendant also points out that the check was post-dated. The State is not clear on what that fact has to do with the crime of theft. The check could not be cashed prior to the date on the check, but the check held value at the time of the crime. The defendant would have had to wait to get his expected cash from the check, but on the date of the crime the defendant held a check that was worth

$1,200 and he would have been able to obtain the promised amount at some point in the future, had the victim not discovered the true situation.

Essentially, the defendant is arguing that he did not get a chance to complete his theft of funds from Ms. Lail before she got wise to the arrangements and stopped payment on the personal check.

V.

CONCLUSION

For the reasons stated, the convictions of the defendant should be affirmed.

Dated this 14th day of December, 2012.

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent