NO. 44061-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LEE McCLURE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda Lee

No. 11-1-01384-9

SUPPLEMENTAL BRIEF OF RESPONDENT

MARK LINDQUIPST
Prosecuting Attorney

By
Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

Table of Authorities

State Cases

Federal And Other Jurisdictions

Constitutional

Other

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Where all of jury selection, including peremptory challenges, was conducted in open court, did a sidebar conference violate the open courtroom rule?
2. Whether sidebar conferences, in general, violate the open courtroom rule?
3. Whether sidebar conferences that the court later explains on the record in open court violate the open courtroom rule?
4. If the trial court erred in conducting sidebar conferences, was the error invited where the conference was requested by the defendant?

B. STATEMENT OF THE CASE.

The procedure and facts of the present case have been laid out in the original Response Brief. Additional specific facts will be discussed in the argument section.

C. ARGUMENT.

1. WHERE VOIR DIRE WAS DONE IN OPEN COURT AND DEFENDANT FAILS TO SHOW ANY RULING OF THE COURT CLOSING THE COURTROOM, HE HAS FAILED TO SHOW THAT ANY CLOSURE OF THE COURTROOM OCCURRED.

A criminal defendant's right to a public trial is found in article I, section 22 of the Washington constitution, and the Sixth Amendment to the United States Constitution. Both provide a criminal defendant the right to a "public trial by an impartial jury." The state constitution also provides that "[j]ustice in all cases shall be administered openly," which grants the public an interest in open, accessible proceedings, similar to rights granted

in the First Amendment of the federal constitution. Wash. Const. article I, section 10; ***State v. Lormor***, 172 Wn.2d 85, 91, 257 P.3d 624 (2011); ***Seattle Times Co. v. Ishikawa***, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); ***Press–Enter. Co. v. Superior Court***, 464 U.S. 501, 104 S. Ct. 819, 78 L.Ed.2d 629 (1984). The public trial right "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." ***State v. Sublett***, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). "There is a strong presumption that courts are to be open at all trial stages." ***Lormor***, 172 Wn.2d at 90. The right to a public trial includes voir dire. ***Presley v. Georgia***, 558 U.S. 209, 130 S. Ct. 721, 175 L Ed.2d 675 (2010).

Whether the right to a public trial has been violated is a question of law reviewed de novo. ***State v. Momah***, 167 Wn.2d 140, 147, 217 P.3d 321 (2009). The right to a public trial is violated when: 1) the public is fully excluded from proceedings within a courtroom, ***State v. Bone–Club***, 128 Wn.2d 254, 257, 906 P.2d 325 (1995)(no spectators allowed in courtroom during a suppression hearing), and ***State v. Easterling***, 157 Wn.2d 167, 172, 137 P.3d 825 (2006) (all spectators, including codefendant and his counsel, excluded from the courtroom while codefendant plea-bargained); 2) the entire voir dire is closed to all spectators, ***State v. Brightman***, 155 Wn.2d 506, 511, 122 P.3d 150 (2005); 3) and is implicated when individual jurors are privately questioned in

chambers, *see* ***Momah***, 167 Wn.2d at 146, and ***State v. Strode***, 167 Wn.2d 222, 224, 217 P.3d 310 (2009) (jury selection is conducted in chambers rather than in an open courtroom without consideration of the ***Bone–Club*** factors). In contrast, conducting individual voir dire in an open courtroom without the rest of the venire present does not constitute a closure. ***State v. Erickson***, 146 Wn. App. 200, 189 P.3d 245 (2008).

When faced with a claim that a trial court has improperly closed a courtroom, the Washington Supreme Court has held that the reviewing court determines the nature of the closure by the presumptive effect of the plain language of the court's ruling, not by the ruling's actual effect. ***In re PRP of Orange***, 152 Wn.2d 795, 807-8, 100 P.3d 291 (2004). In the present case, the defendant has failed to identify any ruling of the court that closed the courtroom to any person. Instead, defendant argues that part of the process, at sidebar, used during peremptory challenges constituted a court room closure.

The record indicates the following occurred after the court excused jurors for cause and it was time for the parties to exercise their peremptory challenges:

(A sidebar discussion off the record.)

> THE COURT: Ladies and gentlemen of the jury. We are at the point in our process where the attorneys are going to be doing what we call peremptory challenges. What the lawyers are going to be doing at this point is taking that one piece of paper and passing it back and forth between each other. What I need for

> the jurors to do at this point is relax and chat amongst yourselves. If you need to stand, please feel free to stand, but I ask that you stand in the order you're seated so the lawyers can match their notes with your juror numbers and responses to questions so they can make their choices. What they're doing is they have a right -- each side has a right to strike a number of jurors without giving me any reason. This is a right of the parties and that's what they're exercising at this point. And to exercise that right, they're passing that piece of paper back and forth.
>
> (Peremptory challenges exercised)
>
> THE COURT: At this time I'm going to be calling out a list of names, and when I call out a name I'm also going to give that name a new number. So for the moment, please forget your marbled number. If I call your name and give you a new number, please remember the new number I give you.

8/7/ 2012 RP 120-121. The court then read off the names of the jurors who would sit on the case and excused the remainder of the venire. *Id.*

The defendant does not point to any ruling of the court that excluded spectators or any other person from the courtroom during voir dire proceedings. The record indicates that all voir dire was carried on in open court. 8/6-7/2012 RP. Peremptory challenges were made by the attorneys in open court, by a written process. Presumably, the defendant could see the peremptory sheet and discuss the process with his attorney while it was going on. The written record of the process was reviewed by the court and filed, making it available for public inspection. CP 798.

None of the peremptory challenges were contested and there was no need for the court to make any decisions on the peremptory challenges. The record offers no basis to assume that anything occurred during this process other than the written communication, between counsel and to the court, of the names of the prospective jurors each counsel had decided to excuse by the right of peremptory challenge. Anyone, whether the defendant or a member of the public, can look at the peremptory challenge sheet and see exactly which party exercised which peremptory against which prospective juror and in what order. CP 798, 795-797.

As the improper use of peremptory challenges can raise constitutional concerns, *see* ***Batson v. Kentucky***, 476 U.S. 79, 106 S. Ct. 1712, 90 L Ed.2d 69 (1986); ***Georgia v. McCollum***, 505 U.S. 42, 112 S. Ct. 2348, 120 L Ed.2d 33 (1992), it is important to have a record of information as to how the peremptory challenges were exercised. The defendant fails to show how the written process used in open court in the trial below fails to serve such purpose. The parties carefully recorded the names of the prospective jurors who were removed by peremptory challenge, as well as the order in which each challenge was made and the party who made it. CP 798. This document is easily understood, and it was made part of the open court record, available for public scrutiny. It is in the court file, which is available for examination in the Superior Court

Clerk's Office and as a scanned image on the Superior Court's digital database, LINX. This procedure satisfied the court's obligation to ensure the open administration of justice.

The Washington Supreme Court has observed several times recently that 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. *See, e.g.*, ***State v. Brightman***, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (citing ***Peterson v. Williams***, 85 F.3d 39, 43 (2d Cir. 1996)). But not every interaction between the court, counsel, and defendants will implicate the right to a public trial. ***Sublett***, 176 Wn.2d at 71.

To decide whether a particular process must be open to the press and 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). ***Sublett***, 176 Wn.2d at 73.

> The first part of the test, the experience prong, 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 and the Waller or Bone–Club factors must be considered before the proceeding may be closed to the public. We agree with this approach and adopt it in these circumstances.

Sublett, 176 Wn.2d at 73.

Applying that test, the ***Sublett*** Court held that no violation of the right to a public trial occurred when the trial court considered a jury question in chambers. *Id.*, at 74–77. "None of the values served by the public trial right is violated under the facts of this case.... The appearance of fairness is satisfied by having the question, answer, and any objections placed on the record." *Id.*, at 77. The defendant has the burden to satisfy the "experience and logic" test. *See*, ***In re Personal Restraint of Yates***, 177 Wn. 2d 1, 29, 296 P. 3d 872 (2013).

Recently, the Court of Appeals considered and rejected the same argument made by the defendant. In ***State v. Love***, -Wn. App.-, 309 P.3d 1209 (2013), Division III applied the "experience and logic" test of ***Sublett*** in holding that peremptory challenges conducted at sidebar did not "close" the court room. ***Love***, at 1213-1214. The Court found no authority to require peremptory challenges to be conducted in public. To the contrary, the Court cited ***State v. Thomas***, 16 Wn. App. 1, 13, 553 P.2d 1357 (1976), where secret written peremptory challenges did not violate the right to public trial. ***Love***, at 1213. ***Love*** went on to reject the notion that a sidebar violated public policy aspect of an open trial. The Court found that, because all of the jury selection was done in open court, the public's interest in the case had been protected and that all activities were conducted aboveboard, "even if not within public earshot". *Id.*, 309 P. 3d at 1214.

Here, the only thing that did not occur in open court was the vocal announcement of each peremptory challenge as it was made. There is no indication that the State or federal Constitutions require that everything and anything that concerns a public trial be announced in open court.

As the Court in ***Love*** points out, Washington caselaw does not support either the "experience" or "logic" prongs. This history goes back even farther than the ***Thomas*** case cited in ***Love***. For example, seven years after statehood, the Washington Supreme Court issued its opinion in ***State v. Holedger***, 15 Wash. 443, 448, 46 Pac. 652 (1896). Holedger complained that his attorney was asked in open court and in front of the jury panel whether there was any objection to the jury being allowed to separate. The Supreme Court did not find any evidence that Holedger was prejudiced by this action, but did indicate that the better practice would be for the court to ask this question in a sidebar so as to avoid incurring the displeasure of jurors who might be upset if there was an objection. The decision in ***Holedger*** was authored by Justice Dunbar and concurred in by Chief Justice Hoyt. Chief Justice Hoyt was the president of the 1889 constitutional convention, and Justice Dunbar was a delegate to the constitutional convention. *See* B. Rosenow, The Journal of the Washington State Constitutional Convention, at 468 (1889; B. Rosenow ed. 1962); C. Sheldon, The Washington High Bench: A Biographical History of the State Supreme Court, 1889-1991, at 134-37 (1992). Thus,

at least two of the justices signing this opinion had considerable expertise in the protections given under the state constitution, yet neither found certain trial functions being handled in a sidebar to be inconsistent with the public's right to open proceedings. In 1904, the Court upheld the actions of trial court that utilized the "best-practice" recommended in ***Holedger***. *See* ***State v. Stockhammer***, 34 Wash. 262, 264, 75 P. 810 (1904) (noting that consent for the jury to separate was given by defense counsel at the bench out of the hearing of the defendant and the jury).

There is some authority that the public announcement of a peremptory challenge in open court by the party exercising the challenge is not a widespread practice. When the United States Supreme Court decided that it was just as improper for a criminal defendant to excuse a potential juror for an improper reason as it was a prosecutor, the court commented that "it is common practice not to reveal the identity of the challenging party to the jurors and potential jurors[.]" ***Georgia v. McCollum***, 505 U.S. 42, 53 n.8, 112 S. Ct. 2348 (1992), citing Underwood, Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?, 92 Colum.L.Rev. 725, 751, n. 117 (1992).

The defendant has failed to show that any of the values served by the public trial right is violated by using a written peremptory challenge procedure in open court during the jury selection process when the written document created in the process is also made a public record. He relies upon a case from California to support his argument. ***People v. Harris***, 10

Cal. App. 4th 672, 12 Cal.Rptr.2d 758 (1992). App. Sppl. Brf. at 11. In ***Harris***, the peremptory challenges were exercised in chambers then announced in open court. This is distinguishable from what happened here. The retreat of the parties and court into chambers and out of the public view and hearing leaves a public spectator with no assurance that matters which should be on the public record are not being discussed in chambers.

In the defendant's case, however, a spectator could observe how the process was being conducted. The court even explained to all present what was occurring. 8/7/2012 RP 120. Anyone could later ascertain which party was excusing which juror.

It should be noted that under ***McCollum***, 505 U.S. 42, both the prosecution and defense are forbidden from removing a juror for an improper purpose. Thus, if there was a concern that a juror was being removed for an improper reason, it is immaterial which party exercised a peremptory against that juror. Any potential juror who felt that he or she was being improperly removed from the jury could raise his or her concern with the trial court. Under the written process used here, the court would know who had exercised its peremptory against that person and could decide whether it was necessary for that party to explain its reasons for doing so. The procedure used below protects the values of the public trial right.

The defendant has failed to show that any closure, improper or otherwise, of the courtroom occurred. This issue is without merit.

2. SIDEBAR CONFERENCES, IN GENERAL, DO NOT VIOLATE THE OPEN COURTROOM RULE.

As the defendant points out (App. Suppl. Brf. at 3), the court held a number of sidebar conferences during the course of the trial. Some were on questions of law regarding to the admissibility of, the relevancy of, or the general propriety of evidence. *E.g.*, 4 RP 329. Some pertained to general ministerial matters, like when to take a recess. 4 RP 441. They were traditional lawyer-to-judge and judge-to-lawyer discussions about how the case should proceed when in front of the jury and why.

There is a strong presumption that the courts are to be open at all stages of a trial. ***Sublett***, 176 Wn. 2d at 70. But, as the Court determined in ***Sublett***, not every matter decided by the trial court or discussed by the court and the attorneys is required to be seen or heard by the public. In ***Sublett***, the discussion and answer to a jury question occurred in chambers. The Court held that this did not violate the open courtroom requirement. *Id.*, at 78.

As pointed out above, the trial judge's decision here to conduct sidebar conferences has a long tradition, recognized by members of the State Constitutional Convention. The defendant does not meet the "experience and logic" test for such conferences in general. Nor does he

demonstrate how these conferences violated the open trial rule in his specific case. After one of the sidebar conferences requested by the defense (at 4 RP 441), the court had the parties make a record of what happened during the sidebar. 4 RP 442-444. After the last sidebar conference, although initiated by the court, the defense counsel made a record regarding the sidebar conference. 9 RP 955-956. The sidebar conferences did not implicate or violate the defendant's right to a public trial.

3. IF SIDEBAR CONFERENCES WERE ERROR, THREE WERE INVITED BY THE DEFENDANT.

Under the invited error doctrine, a party who sets up an error at trial cannot claim it as error on appeal. ***State v. Henderson***, 114 Wn.2d 867, 868, 792 P.2d 514 (1990). The invited error doctrine applies even when the alleged error is of constitutional magnitude. ***City of Seattle v. Patu***, 147 Wn.2d 717, 720, 58 P.3d 273 (2002).

An error in closing the courtroom typically is considered structural in nature and the defendant need not show prejudice. ***State v. Wise***, 176 Wn.2d 1, 13–14, 288 P.3d 1113 (2012). However, there is no structural error when defendant joins in closing courtroom during jury selection. *See*, ***State v. Momah***, 167 Wn.2d 140, 156, 217 P.3d 321 (2009).

Here, the defendant points out five instances where the trial court conducted sidebar conferences, apart from the peremptory challenges

discussed above. App. Suppl. Brf. at 3. The defense requested three of the five sidebar conferences. 4 RP 329, 441; 8 RP 905.

In requesting three of the five sidebars, the defendant is barred by the invited error doctrine from now complaining about them. As the proponent[1] of the "closure", the defendant certainly cannot complain that his request was granted. After the last of the sidebars, which was requested by the court, the court and counsel, including the defense, explained, on the record, what the sidebar was about; thereby alleviating any concerns or possible sidebar "violation" of the open court requirement.

D. CONCLUSION.

The courtroom and proceedings were not closed in this case. The defendant does not show, through the "experience and logic" test that sidebar conferences, whether in jury selection or in the trial in general, violate the open courtroom rule. The State respectfully requests that the conviction be affirmed.

DATED: November 20, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

[1] *See*, ***Bone-Club***, 128 Wn. 2d at 258.

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S.~~ e mail or ABC-LMI delivery to the attorney of record for the ~~appellant and~~ appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11.20.13 Theresa Kahn

Date Signature

PIERCE COUNTY PROSECUTOR

November 20, 2013 - 1:50 PM

Transmittal Letter

Document Uploaded: 440610-Respondent's Brief~2.pdf

Case Name: St. v. McClure

Court of Appeals Case Number: 44061-0

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: __Respondent'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: Therese M Kahn - Email: **tnichol@co.pierce.wa.us**

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

elaine@washapp.org