

NO. 45229-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

RENE MELINA REYNOLDS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-01304-7

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

I. THE TRIAL COURT DID NOT CLOSE THE COURTROOM.

II. REYNOLDS WAS NOT DENIED HER CONSTITUTIONAL RIGHT TO BE PRESENT.

B. STATEMENT OF THE CASE

Renee Reynolds was convicted after a jury trial of possession of heroin with the intent to deliver and possession of methamphetamine with the intent to deliver. CP 38-39. During jury selection at her trial, the judge asked the jury some preliminary questions. RP 5. The judge said “Now we anticipate this case to go a day and a half so that more than likely – no promises – but more than likely it will get to you for deliberations by the end of tomorrow. Does that present any undue problems for anybody, with emphasis on ‘undue’?” RP 5. Juror number 21 replied: “I do, Your Honor. I have a rate hearing tomorrow, a multi-party rate hearing. I represent Cowlitz PUD...And it’s been scheduled and there are – the public is invited and I’m supposed to be there.” RP 5. The court replied “You’re supposed to be there, huh?” Juror 21 replied “That’s right.” RP 5. The court said “We’ll make a notation of that and we’ll – we can discuss it.” Juror number 22 responded to the court’s question by saying “I have a

meeting that I can't get out of tomorrow." RP 5. The court asked "For business?" She replied "No, it's personal." RP 6.

Later, after the parties finished questioning the prospective jurors during voir dire, the court said "Okay. Could I have a quick sidebar with counsel?" RP 67. Defense counsel said "Okay." RP 68. The transcript then notes that a sidebar was held off the record. RP 68. Following that the court then asked additional questions of a different juror not at issue in this appeal. No further discussion about jurors 21 and 22 took place on the record. Verbatim Report of Proceedings. For peremptory challenges, the court invited the lawyers to the bar to use a clip board to memorialize their peremptory strike selections. RP 71. The defendant did not object to any procedure used during voir dire.

C. ARGUMENT

I. THE TRIAL COURT DID NOT CLOSE THE COURTROOM.

Reynolds claims that the trial court closed the courtroom during jury selection. Specifically, Reynolds complains that peremptory strikes were conducted by the attorneys passing a clip board, and that a sidebar occurred that wasn't recorded, after which time jurors 21 and 22 were excused without further questioning, and that these actions constituted an improper closure of the courtroom. Reynolds' claim lacks merit.

With regard to jurors 21 and 22, Reynolds has failed to demonstrate on this record that these jurors were dismissed after a challenge for cause. On this record, it is just as likely they were dismissed administratively by the judge based solely on their representations that they had irreconcilable scheduling conflicts the following day. Stated another way, this record shows that the public and the defendant heard everything that the judge based his decision to excuse them on, and Reynolds hasn't shown there was any further discussion by anyone about these two jurors. Reynolds behaves as though she bears no burden to make a record that this Court can actually review. The Court, defendant, and public heard Juror 21 say that he represents the Cowlitz PUD and had a multi-party rate hearing the following day, that the public had been invited to the hearing, and that he needed to be there.¹ RP 5. The court said it would "make a notation" of the issue for later consideration. Id.

Juror 22 indicated that he or she had a personal meeting that the juror could not "get out of." RP 5-6. The clerk's log sheet, which is not direct evidence of anything and is merely a summary of events written by a court employee, states that jurors 21 and 22 were "stricken for cause" at the sidebar conference. Supp. CP 63. But this notation by the clerk isn't

¹ Nothing in the record indicates the name or gender of Juror 21. The undersigned assumes Juror 21 is Paul Brachvogel, general counsel for Cowlitz PUD. If this person was not Mr. Brachvogel and is, in fact, a woman, the State apologizes for the use of "he."

evidence of what occurred at the sidebar. The log sheet is not a verbatim record, and not intended to be evidence. On this record, there is no evidence that one side moved to have these jurors excused or that there was any debate on the matter. The decision could have been made administratively by the judge, utilizing no more information than that which was given during voir dire – information that related solely to the physical availability of the jurors and not to the substance of their answers to the lawyers’ questions during voir dire. What occurred on this record is analogous to what occurred in *State v. Wilson*, 174 Wn.App. 328, 349, 298 P.3d 148 (2013). In that case, this Court held that the courtroom was not closed when the bailiff excused two jurors administratively where the excusals were not “for cause” and were not related to the jurors’ fitness to serve.

Moreover, this case is governed by two recent opinions from the Court of Appeals. In *State v. Dunn*, 321 P.3d 1283, 1285 (2014), this Court held that the trial court did not violate the defendant’s public trial right when the attorneys exercised peremptory challenges during a sidebar. In *State v. Love*, 176 Wn.App. 911, 920, 309 P.3d 1209 (2013), Division III of this Court held that under the experience and logic test, the trial court does not close the courtroom by hearing for cause challenges at

sidebar. This Court should adhere to these two decisions and reject Reynolds' claim that the trial court improperly closed the courtroom.

II. REYNOLDS WAS NOT DENIED HER CONSTITUTIONAL RIGHT TO BE PRESENT.

Reynolds also complains that her right to be present was violated when her attorney passed a clip board to do peremptory strikes and participated in a side bar conference. But Reynolds, contrary to her claim, has not shown that she was excluded from these events. There is nothing in the record to show that she was not with her counsel, or that she was unable to confer with her counsel, when he possessed the clip board. She merely assumes it because she believes the record shows that her counsel was at the bar. But even if her counsel remained at the bar, there is nothing in the record to show that she was prevented from joining counsel, or that counsel never returned to counsel table to confer with her. Because Reynolds cannot show, on this record, that she was denied the right to be present during peremptory challenges, this Court cannot grant her relief on this assignment of error. In order to obtain review of this assignment of error the defendant must "make an adequate record in the trial court about what transpired during any conference" so that the reviewing court can determine whether the content of the conference was purely

administrative, involving a matter which would not implicate the public trial right. *State v. Bennett*, 168 Wn.App. 197, 206, 275 P.3d 1224 (2012).

Moreover, in *Love*, supra, Division III held that the defendant could not complain for the first time on appeal that his public trial right had been violated by the trial court's use of a sidebar procedure to hear his challenges for cause because he did not object to the procedure below.

Love at 921. The Court said:

Mr. Love has not established that the alleged constitutional error was manifest because he has not shown that he was prejudiced by the process. He was present beside his counsel during the information gathering phase of voir dire and apparently had the opportunity to provide any input necessary to whether to pursue any challenges for cause.

Love at 921.

As in *Love*, this Court should decline to review this claimed error for the first time on appeal, particularly where, as noted above, the record does not even establish that jurors 21 and 22 were removed as the result of a for cause challenge by a particular party. Reynolds' convictions should be affirmed.

D. CONCLUSION

Reynolds' convictions should be affirmed.

DATED this 2nd day of June, 201~~5~~⁶

Respectfully submitted:

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