NO. 46445-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

RYAN EFFINGER,

Appellant.

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

The Honorable Anne Hirsch, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

JARED B. STEED
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to a public trial.

2. Appellant was denied his constitutional right to be present for all critical stages of trial.

Issues Pertaining to Supplemental Assignments of Error

During jury selection, the parties questioned jurors in open court about potential hardship associated with serving on the jury. The court then conducted "for cause" and peremptory challenges at separate private sidebars. After the sidebar conferences ended, several jurors were excused. Later, the trial court filed a chart showing which party excused which prospective jurors.

1. Where historically, the public trial right has extended to voir dire, which includes "for-cause" and peremptory challenges, and logically, the openness of voir dire is essential to the basic fairness of a criminal trial, did the court's private proceeding for conducting for-cause and peremptory challenges violate appellant's right to a public trial under the experience and logic test of State v. Sublett[1]?

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

2. Did the appellant's absence from the sidebar where the "for cause" and peremptory challenges occurred violate his constitutional right to be present at all critical stages of trial?

B. SUPPLEMENTAL STATEMENT OF THE CASE

After swearing in the venire, the trial court announced the charges against Effinger, and explained the process of jury selection. 1RP[2] 48-59; RPVD[3] 4-5. The trial court asked prospective jurors if personal experiences would cause any of them to doubt whether they could remain fair and impartial. In open court, the judge asked the potential jurors to explain their concerns about remaining fair and impartial in a case of this type and they did so. RPVD 7-37.

After further questioning by both parties, the court explained the for cause challenge process, "so at this time I'm going to invite the attorneys up to sidebar to exercise their challenges." RPVD 73. An unrecorded sidebar discussion between counsel and the court then occurred. RPVD 74. After the sidebar ended, the court excused 9 jurors "for cause and/or hardship." RPVD 75.

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[2] The index to the citations to the record is found in the brief of appellant at 3, n.2.

[3] RPVD refers to the verbatim report of void dire occurring May 19, 2014.

After excusing the jurors for cause and hardship purposes, the trial court explained the peremptory challenge process: "at this point I'm going to ask the attorneys back up to sidebar so they can exercise their peremptory challenges, and that will take a bit of time." RPVD 76. The transcripts then reflect that "peremptory challenges were exercised." RPVD 76. After the sidebar ended, the court called out the jurors who had been selected to serve on the jury. RPVD 77-78

The trial court did not first consider the Bone-Club[4] factors before deciding the for cause and peremptory challenge process should be shielded from public sight and hearing. Neither party objected to this portion of jury selection, nor had anything to add after the jury was selected. Later that same day, the court filed a chart showing which party excused which prospective juror. Supp. CP ___ (Case Information Sheet – Panel Jr. #, dated 5/19/14, at 1-2).

C. SUPPLEMENTAL ARGUMENT

1. THE COURT'S TAKING OF FOR-CAUSE CHALLENGES AT A BENCH CONFERENCE AND WRITTEN PEREMPTORY CHALLENGES VIOLATED EFFINGER'S RIGHT TO A PUBLIC TRIAL.

As discussed below, for-cause and peremptory challenges have historically been open to the public. Public access plays an important role in ensuring a defendant's right to a public trial. As a result, the private

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

manner in which the court took for-cause and peremptory challenges in Effinger's case violated his public trial rights.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to a public trial. Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012). The state constitution also requires that "[j]ustice in all cases shall be administered openly." CONST. art. I, section 10. Whether a defendant's public trial right has been violated is a question of law, subject to de novo review on direct appeal. State v. Smith, 181 Wn.2d 508, 334 P.3d 1049 (2014).

The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). This is a core safeguard in our system of justice. Wise, 176 Wn.2d at 5. The open and public judicial process helps assure fair trials, deters perjury and other misconduct by participants, and tempers biases and undue partiality. Wise, 176 Wn.2d at 6. It is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Id. The public trial right is also for the benefit of the accused: "that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a

sense of their responsibility and to the importance of their functions." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (quoting In re Oliver, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L. Ed. 2d 682 (1948)).

Jury selection in a criminal case is subject to the public trial right and is typically open to the public. State v. Strode, 167 Wn.2d 222, 227, 217 P.3d 310 (2009) (lead opinion); Strode, 167 Wn.2d at 236 (concurrence). While the right to a public trial is not absolute, a trial court may restrict the right only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Before a judge can close any part of a trial, he or she must first apply on the record the five factors set forth in Bone-Club. Orange, 152 Wn.2d at 806-07, 809.

A violation of the right to a public trial is presumed prejudicial on a direct appeal and is not subject to harmless error analysis. Wise, 176 Wn.2d at 16-19l; Strode, 167 Wn.2d at 231; State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006). A public trial right violation may be raised for the first time on appeal and does not require an objection at trial to preserve the error. State v. Njonge, 181 Wn.2d 546, 334 P.3d 1068 (2014).

a. For Cause and Peremptory Challenges Implicate the Public Trial Right.

The Supreme Court has held the public trial right attaches to the voir dire portion of jury selection. See e.g. Wise, 176 Wn. 2d at 12 n.4; In re Pers. Restraint of Morris, 176 Wn.2d 157, 174, 288 P.3d 1140 (2012) (Chambers, J., concurring). Nonetheless, the Court has also explained that application of the experience and logic test is necessary to determine whether the public trial right attaches to other portions of the jury selection process. State v. Slert, 181 Wn.2d 598, 334 P.3d 1088 (2014) (citing with approval State v. Wilson, 174 Wn. App. 328, 338, 298 P.3d 148 (2013)).

Recently, this Court, relying in part on its previous opinion in State v. Wilson, 174 Wn. App. 328, 335-37, 298 P.3d 148 (2013), held the exercise of peremptory challenges was not a part of "voir dire." State v. Marks, 184 Wn. App. 782, 787-88, 339 P.3d 196, (2014), petition for review pending (2015). This Court therefore determined that application of the "experience and logic" test was necessary and ruled that the private exercise of peremptory challenges did not implicate the public trial right, relying on its opinion in State v. Dunn, 180 Wn. App. 570, 321 P.3d 1283 (2014). Marks, 339 P.3d at 199-200. That decision, in turn, relied on Division Three's decision in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), review granted in part by, State v. Love, 181 Wn.2d 1029,

340 P.3d 228 (2015) in rejecting a similar argument. Dunn, 180 Wn. App. at 574-75.

Contrary to the Marks opinion, the Wilson decision supports that the public trial right attaches not only to "for-cause," but also to peremptory challenges. There, the Court applied the "experience and logic" test adopted by this Court in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012) to find that the administrative excusal of two jurors for illness did not violate Wilson's public trial rights. Wilson, 174 Wn. App. at 333. This Court noted that, historically, the public trial right has not extended to excusals for hardship before voir dire begins. But in doing so, this Court expressly differentiated between those excusals and "for-cause" and peremptory challenges, which must occur openly. Wilson, 174 Wn. App. at 342 (unlike potential juror excusals governed by CrR 6.3, exercise of peremptory challenges, governed by CrR 6.4, constitutes part of "voir dire," to which the public trial right attaches). Thus, in Wilson, this Court appeared to recognize, correctly, that "for-cause" and peremptory challenges are part of voir dire, which must be conducted openly, to be distinguished from the broader concept of "jury selection," which may encompass proceedings that need not. Wilson, 139 Wn. App. at 339-40.

The Court's attempt in Marks to reframe its prior consideration of the matter makes little sense. The Court observes that CrR 6.4(b) refers to "voir dire examination." Marks, 339 P.3d at 199. But, contrary to the Court's reasoning, the court rule's inclusion of the term "examination" instead indicates that the "examination" portion should be differentiated from "voir dire" as a whole. Court rules are interpreted in the same manner as statutes, Jafar v. Webb, 177 Wn. 2d 520, 526, 303 P.3d 1042 (2013), and this Court presumes statutes do not include superfluous language. State v. Roggenkamp, 153 Wn.2d 614, 624-25, 106 P. 106 P.3d 196 (2005). The Court's reframing of its discussion of the matter in Wilson violates this principle. Moreover, if "voir dire examination" enables the intelligent exercise of peremptory challenges, then it follows that peremptory challenges themselves are an integral part of "voir dire." Contrary to the Marks opinion, and consistent with the earlier decision in Wilson, such challenges are part of that portion of jury selection that must be conducted openly, and are subject to existing law clearly establishing that the public trial right applies.

Assuming for the sake of argument that the exercise of challenges is *not* an integral part of jury selection, it would be necessary to apply the "experience and logic" test to determine whether the public trial right applies to a portion of the trial process. This Court examines (1) whether

the place and process have historically been open and (2) whether public access plays a significant positive role in the functioning of the process. Sublett, 176 Wn.2d at 73 (citing Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)).

But the result of analysis under the experience and logic test is no different than the result dictated by Strode and Wilson. First, Effinger can satisfy the "logic" prong because meaningful public scrutiny plays a significant positive role in the exercise of for cause and peremptory challenges. The right of an accused to a public trial "keep[s] his triers keenly alive to a sense of their responsibility" and "encourages witnesses to come forward and discourages perjury." Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). "[J]udges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." Estes v. Texas, 381 U.S. 532, 588, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965) (Harlan, J., concurring). The openness of jury selection (including which side exercises which challenge) enhances core values of the public trial right, "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Sublett, 176 Wn.2d at 75; see Orange, 152 Wn.2d at 804 (process of jury selection "is

itself a matter of importance, not simply to the adversaries but to the criminal justice system").

While peremptory challenges may be made for almost any reason, openness still fosters core values of the public trial right to ensure that there is no inappropriate discrimination. This protection can only be accomplished if peremptory challenges are made in open court in a manner allowing the public to determine whether a party is targeting and eliminating jurors for impermissible reasons. See State v. Sadler, 147 Wn. App. 97, 107, 109-118, 193 P.3d 1108 (2008) (private Batson[5] hearing following State's use of peremptory challenges to remove only African-American jurors from panel denied defendant his right to public trial), review denied, 176 Wn.2d 1032, 299 P.3d 19 (2013), overruled on other grounds, Sublett, 176 Wn.2d at 71-73; see also State v. Saintcalle, 178 Wn.2d 34, 46, 88-95, 118-19, 309 P.3d 326 (2013) (opinions highlighting difficulty of obtaining appellate relief for discriminatory acts even where discriminatory exercise may have occurred).

Regarding the historic practice, Love, the Division Three case relied on in Dunn, appears to have reached an incorrect conclusion based on the available evidence. Love cites to one case, State v. Thomas, 16

[5] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

Wn. App. 1, 553 P.2d 1357 (1976), as "strong evidence that peremptory challenges can be conducted in private." Love, 176 Wn. App. at 918. Thomas rejected the argument that "Kitsap County's use of secret — written — peremptory jury challenges" violated the defendant's right to a fair and public trial where the defendant had failed to cite to any supporting authority. Thomas, 16 Wn. App. at 13. Notably, Thomas predates Bone-Club by nearly 20 years. But most significantly, the fact that Thomas challenged the practice suggests it was atypical even at the time.

Other Washington cases similarly suggest for-cause and peremptory challenges were historically made in open court. See State v. Njonge, 181 Wn.2d 546 (2014); State v. Jones, 175 Wn. App. 87, 303 P.3d 1084 (2013). Moreover, Washington statutes governing voir dire indicate challenges were historically made in open court. As the Love court noted in a footnote, "RCW 4.44.240 does provide for testimony if needed to assess a question of jury bias." Love, 176 Wn. App. at 919 n.7. RCW 4.44.240 provides:

> When facts are determined under RCW 4.44.230,[6] the rules of evidence applicable to testimony offered upon the trial of an ordinary issue of fact shall govern. The juror challenged, or any other person otherwise competent may be examined as a witness by either party. If the challenge is sustained, the juror shall be dismissed from the case; otherwise, the juror shall be retained.

Significantly, before its amendment in 2003, this statute referred to this process as a "trial of a challenge." RCW 4.44.240 (2002); Code 1881 s 218. As the Love court could not deny: "that aspect of jury selection would appear to need to take place in the public courtroom[.]" Love, 176 Wn. App. at 919 n.7. Yet, the court failed to give this requirement any significance, remarking only "we do not believe that the evidence gathering function should be confused with the legal question of whether a juror displays disqualifying bias." Id.

But the Love court does not explain why the challenge or the court's ruling would be divorced from the "trial" of the challenge or not conducted at the same time. As the Supreme Court has recognized, the presumption is in favor of openness. Paumier, 176 Wn.2d at 34-35.

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[6] RCW 4.44.230 provides:

> The challenge may be excepted to by the adverse party for insufficiency, and if so, the court shall determine the sufficiency thereof, assuming the facts alleged therein to be true. The challenge may be denied by the adverse party, and if so, the court shall determine the facts and decide the issue.

Moreover, the next statutory provision provides: "[t]he challenge, the exception, and the denial may be made orally. The judge shall enter the same upon the record, along with the substance of the testimony on either side." RCW 4.44.250. This provision lends further weight to the conclusion the evidence gathering function and legal question of juror bias are part of the same proceeding, to which the public trial right attaches. In summary, both prongs of the experience and logic test support that the public trial right was implicated in this case.

The state may argue the subsequent filing of the Record of Jurors sufficiently protects the core concerns of the public trial right. See e.g. State v. Filitaula, 184 Wn. App. 819, 823-24, 339 P.3d 221 (2014). In Filitaula, Division One noted "a record of information about how peremptory challenges were exercised could be important, for example, in assessing whether there was a pattern of race-based peremptory challenges." Filitaula, 339 P.3d at 224. Thus, Division One implicitly recognized that peremptory challenges implicate public trial rights. However, the court found no public trial right violation, because a member of the public could later access a form the parties filled out to exercise their peremptory challenges. Filitaula, 339 P.3d at 224.

Regardless of when the form was filed, Division One's rationale should be rejected outright, because a piece of paper fails to adequately

insure the right to a public trial. For example, members of the public would have to know the sheet documenting peremptory challenges had been filed and that it was subject to public viewing. Moreover, even if members of the public could recall which juror name or number was associated with which individual, they also would have to recall the identity, gender, and race of those individuals to determine whether protected group members had been improperly targeted. Furthermore, in Effinger's case, the juror case information sheet does not indicate which party successfully challenged which jurors for cause. It is simply unrealistic to assume, as did Division One, that members of the public would be able to recall the specific features of so many individuals. As a result, public access to a sheet of paper after the fact is simply inadequate to protect the right to a public trial.

In addition, Wise holds individual questioning of jurors in chambers, even when questioning was recorded and transcribed, violates the public trial right. 176 Wn.2d 1. By analogy, filing a juror information sheet or similar document is also insufficient to protect the public trial right.

b. The For-Cause and Peremptory Challenge Portion of Jury Selection Was Closed.

As indicated above, the court called the parties up to the bench to exercise for-cause challenges. The record reflects that this portion of voir dire occurred outside the hearing of the jurors. The record also reflects that peremptory challenges were exercised at the bench outside the hearing of the jurors. The court did not announce on the record which party challenged which juror. The end result is that the public was excluded to the same extent as if the courtroom doors had been locked.

Physical closure of the courtroom is not the only situation that violates the public trial right. For example, a closure occurs when a juror is privately questioned in an inaccessible location. State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011) (citing State v. Momah, 167 Wn.2d 140, 146, 217 P.3d 321 (2009); Strode, 167 Wn.2d at 224); see also State v. Leyerle, 158 Wn. App. 474, 483, 242 P.3d 921 (2010) (moving questioning of juror to public hallway outside courtroom a closure despite the fact courtroom remained open to public).

Members of the public here were no more able to approach the bench and/or parties and listen to an intentionally private voir dire process then they are able to enter a locked courtroom, access the judge's chamber's or participate in a private hearing in a hallway. The practical

impact is the same; the public is denied the opportunity to scrutinize events.

c. The Closure Was Not Justified.

Under Bone-Club, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-260.

Here, there is nothing on the record to indicate the court considered any of the Bone-Club factors before closing the proceeding. The closure therefore was not justified and reversal is required. State v. Paumier, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012).

2. EFFINGER WAS DENIED HIS CONSTITUTIONAL RIGHT TO BE PRESENT FOR ALL CRITICAL STAGES OF TRIAL.

A criminal defendant has a fundamental right to be present at all critical stages of a trial. Rushen v. Spain, 464 U.S. 114, 117, 104 S. Ct.

453, 78 L. Ed. 2d 267 (1983); State v. Irby, 170 Wn.2d 874, 880-881, 246 P.3d 796 (2011).

The federal constitution does not explicitly guarantee the right to be present, but the right is rooted in the Sixth Amendment's confrontation clause and the Fourteenth Amendment's due process guarantee. United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985). Under the federal constitution, a defendant has the right to be present "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Snyder v. Massachusetts, 291 U.S. 97, 105-106, 54 S. Ct. 330, 78 L. Ed. 2d 674 (1934). Stated another way, "the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence." Snyder, 291 U.S. at 107-108.

The federal constitutional right to be present for jury selection is well recognized.[7] See Lewis v. United States, 146 U.S. 370, 373-74, 13 S. Ct. 136, 36 L. Ed. 1011 (1892); Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989); State v. Wilson, 141 Wn. App. 597, 604, 171 P.3d 501 (2007).

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[7] Consistent with this constitutional guarantee, CrR 3.4(a) explicitly requires the defendant's presence "at every stage of the trial including the empanelling of the jury . . . ."

"Jury selection is the primary means by which [to] enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability[.]" Gomez, 490 U.S. at 873 (citation omitted). The defendant's presence "is substantially related to the defense and allows the defendant 'to give advice or suggestion or even to supersede his lawyers.'" Wilson, 141 Wn. App. at 604 (quoting Snyder, 291 U.S. at 106); see also United States v. Gordon, 829 F.2d 119, 124 (D.C. Cir. 1987) (Fifth Amendment requires opportunity to give advice or suggestions to lawyer when assessing potential jurors).

In contrast to the United States Constitution, article 1, section 22 of the Washington Constitution explicitly guarantees the right to be present,[8] and provides even greater rights. Irby, 170 Wn.2d at 885 n.6. Under our state provision, the defendant must be present to participate "at every stage of the trial when his substantial rights may be affected.'" Id. at 885 (quoting State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914)). This right does not turn "on what the defendant might do or gain by attending. . . or the extent to which the defendant's presence may have aided his defense[.]" Id. at 885 n.6.

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[8] Article 1, section 22 provides: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel."

Whether there has been a violation of the constitutional right to be present at trial is a question of law this Court reviews de novo. Irby, 170 Wn.2d at 880. There was a violation in Effinger's case when he was excluded from the sidebar conference during which jurors 6, 9, 12, 13, 18, 22, 26 and 35 were discussed and struck for cause. RPVD 73, 76. Only the attorneys were called up to the bench. RPVD 73.

The Supreme Court has recognized that jury selection is a "critical" stage of trial to which the right to be present attaches. Irby, 170 Wn.2d at 883-84. In Irby's case, the trial court required prospective jurors to complete a questionnaire seeking information about their familiarity with the substantive issues in Irby's case, including whether any of the jurors' family members had been murdered. Irby, 170 Wn.2d at 877-78. Based on the jurors' questionnaire responses, the trial court and counsel used e-mail to excuse seven members of the jury pool "for cause," specifically related to issues involved in Irby's case. See Irby, 170 Wn.2d at 877-78. This Court held that (1) the email exchange between the trial court and counsel was a portion of the jury selection process that Irby had a constitutional right to attend, and (2) the trial court violated his right to be present by excusing jurors for cause in his absence. Irby, 170 Wn.2d at 882.

Under this Court's decision in Irby, the bench conference between the trial court and counsel was likewise a portion of the jury selection process that Effinger had a constitutional right to attend, and the trial court violated his right to be present by excusing jurors for cause in his absence.

Other cases are in accord. State v. Miller, 184 Wn. App. 637, 338 P.3d 873, 878-79 (2014) (right to be present violated by court's excusal of juror 28 in Miller's absence, but error harmless where juror had no chance to sit on Miller's jury); People v. Williams, 858 N.Y.S.2d 147, 52 A.D.3d 94, 96-97 (2008) (exclusion of defendant from sidebar conference where jurors excused by agreement violated right to be present; court refused to speculate that defendant could overhear conversations).

Division III in Love assumed, but did not decide, that Love had the right to be present when his jury was selected, which included the exercise of for-cause challenges. Love, 176 Wn. App. at 920-921. As demonstrated by the cases above, this was a correct assumption. However, the court denied Love relief on grounds he had not established manifest constitutional error under RAP 2.5(a).[9] Id. According to the appellate court:

[9] To meet RAP 2.5(a) and raise an error for the first time on appeal, an appellant must identify a constitutional error and show how the alleged error actually affected the appellant's rights at trial. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2010).

> 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 and challenges for cause. His counsel then successfully challenged two jurors for cause, and the parties discussed but did not need to reach the qualifications of three other jurors who would not make it on to the panel. Having succeeded in his cause challenges at the sidebar conference, he simply cannot show how he was prejudiced.

Love, 176 Wn.2d at 921 (emphasis added).

Division III is incorrect. First, the *apparent* opportunity for input is not sufficient to satisfy the right to be present, where the record shows the defendant's absence at a critical stage. Lewis, 146 U.S. at 372 ("where the [defendant's] personal presence is necessary in point of law, the record must show the fact."); Irby, 170 Wn.2d at 884 (same).

Second, the required opportunity to provide input includes the possibility the defendant may not only give advice, but "supersede his lawyers." Wilson, 141 Wn. App. at 604 (quoting Snyder, 291 U.S. at 106). Accordingly, that Effinger's counsel may have successfully challenged jurors for cause is irrelevant, where the record fails to show that Effinger himself was present during the challenges.

Perhaps for this very reason, the test for prejudice is not whether counsel was successful in removing jurors for cause in the defendant's

absence, but whether any of those jurors had the chance to sit on the jury. Irby, 170 Wn.2d at 886.

The constitutional error in excluding Effinger from the exercise of for-cause challenges was manifest, as there was a possibility jurors 6, 9, 12, 13, 18, 22, and 26 could have served on the jury. Had Effinger been allowed to participate, he could have superseded his attorney's decision to challenge some, or all, of these jurors. All of these jurors fell within the range of jurors who ultimately comprised the jury, as the twelfth juror was number 27, and the alternate juror was number 29. The denial of Effinger's presence at this critical stage of jury selection therefore had practical and identifiable consequences.

D. CONCLUSION

The procedures used to select Effinger's jury violated his right to a public trial and to be present for all critical stages of trial. His convictions must be reversed and the case remanded for a new trial.

DATED this 16th day of April, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

JARED B. STEED
WSBA No. 40635
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON	)	
Respondent,	)	
v.	)	COA NO. 46445-4-II
RYAN EFFINGER,	)	
Appellant.	)	

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I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 10TH DAY OF APRIL 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RYAN EFFINGER
DOC NO. 829370
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF APRIL 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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