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
Cause No. 13-1-01630-7

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Decisions Of The Court Of Appeals

U.S. Supreme Court Decisions

Federal Court Cases

Other State Court Cases

Statutes and Rules

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether a witness who testified as to the reasons she believed Effinger had violated a no-contact order denied him his right to a fair trial by expressing an opinion that he was guilty.

2. Whether the court violated RCW 10.01.160(3) by imposing certain legal financial obligations without an inquiry into Effinger's current and future ability to pay them.

3. Whether Effinger received ineffective assistance of counsel because his attorney failed to object to the witness testimony and the imposition of legal financial obligations.

4. Whether taking for cause and peremptory challenges to the jury venire at a sidebar violated Effinger's right to a public trial under the United States and Washington Constitutions.

5. Whether taking for cause and peremptory challenges to the jury venire at a sidebar violated Effinger's right to be present at a critical stage of the proceedings.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the substantive and procedural facts of the case.

C. ARGUMENT.

1. There was no improper opinion testimony regarding Effinger's credibility or guilt. Even if the testimony were error, it was harmless because it could have had no effect on the outcome of the trial.

Effinger argues that a State witness improperly testified that he was guilty of violation of a no-contact order, violating his right to a fair trial under Washington Constitution art. I, § 21 and 22.

Appellant's Opening Brief at 12. Lt. Debra Thompson, a supervisor in the Thurston County Sheriff's Department Correctional Facility, testified about the jail telephone system and about her investigation into telephone calls made to a phone number Effinger was prohibited from calling. RP 162-66.[1] Thompson testified that she listened to an unknown number of calls, but only logged two in her incident report. RP 168-69. The prosecutor, seeking to explain why those two calls were significant, first asked if they were concerning to Thompson. Thompson replied that concern wasn't the word she would use. RP 169. The prosecutor then asked if Thompson believed those calls were violations of a no-contact order, and Thompson replied that she did. The testimony then continued as follows:

> Q: What about those calls made you believe that?
>
> A: Well, there were several things. When I looked at the police report, the victim indicated that she was in the process of leaving Mr. Effinger. And in a recorded call—in one of the recorded calls, if not both—I can't remember—he basically begs her not to leave him. He indicates—about a minute into one of the calls, he calls her "Jen." You can barely hear it, but he says "Jen," and that's her first name, Jen or Jennifer. He also refers to her as his wife once during the phone call. And he talks about kissing his ring on his finger.

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1 Unless otherwise identified, all references to the Verbatim Report of Proceedings are to the two-volume trial transcript dated May 19, 20, and 21, 2014.

> And they also discuss something about a psych eval during both phone calls.
>
> Q: Okay. And so is—were there similarities between—because you said the two calls were not made under the same inmate's pin number, is that correct?
>
> A: Correct.
>
> Q: And so were there similarities between the two calls that made you believe that both calls were made by the same two individuals—involving the same two individuals?
>
> A: Yeah. There was an issue with a—with Jennifer, Ms. Giovani, had asked him in one of the calls—well, in both of the calls, to—something about getting a psych eval signed or a copy of the psych eval. And also, he was—in both calls, he was real panicky.
>
> He's got a certain quality to his voice in the calls. It sounds like he may be kind of nasally, might even at times have a lisp.

RP 169-70. Effinger did not object to this testimony.

"The general rule is that no witness, lay or expert, may testify 'testify to his opinion as to the guilt of the defendant, whether by direct statement or inference.'" Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (quoting State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Such testimony invades the province of the fact-finder and is unduly prejudicial. Id.

> However, testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on

> inferences from the evidence is not improper opinion testimony.

Id. at 578. Opinion testimony is defined as "testimony based on one's belief or idea rather than on direct knowledge of the facts at issue." State v. Demery, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001)

When deciding whether particular statements are impermissible opinion evidence, the court considers five factors:

> (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.

Id, at 759. An opinion is not automatically inadmissible just because it addresses an issue that the jury must decide. State v. Kirkman, 159 Wn.2d 918, 929, 155 P.3d 125 (2007). "In some instances, a witness who testifies to his belief that the defendant is guilty is merely stating the obvious, such as when a police officer testifies that he arrested the defendant because he had probable cause to believe he committed the offense." State v. Sutherby, 138 Wn. App. 609, 617, 158 P.3d 91 (2007), *affirmed in part and reversed in part* 165 Wn.2d 870, 204 P.3d 916 (2009). Similarly, an inference resulting from an investigation is not necessarily

impermissible opinion testimony. State v. Stark, 183 Wn. App. 893, 904-05, 334 P.3d 1196 (2014).

> Under these circumstances, nothing in the record suggests that the testimony was unfairly prejudicial, *i.e.*, that it persuaded the jury to abdicate its responsibility and decide the case on a basis other than the evidence and the pertinent law.

Heatley, 70 Wn. App. at 582.

A claim of error may be raised for the first time on appeal only if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). If a reviewing court concludes that had an objection been made it would have been sustained, then the court must decide if the admission of the testimony amounted to a manifest constitutional error. State v. Madison, 53 Wn. App. 754, 762, 770 P.2d 662 (1989). The exception for manifest constitutional errors is intended to be a narrow one. Kirkman, 159 Wn.2d at 934. "Appellate courts are and should be reluctant to conclude that questioning, to which no objection was made at trial, gives rise to a 'manifest constitutional error' reviewable for the first time on appeal." Madison, 53 Wn. App. at 762. Testimony that touches on an ultimate fact, which is not objected to, is not automatically a manifest error and thus not automatically reviewable. State v. King, 167 Wn.2d 324, 332, 219 P.3d 642 (2009). The burden is on the

defendant to show how the error actually affected his rights. "It is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review. Kirkman, 159 Wn.2d at 926-27.

The court in Madison, 53 Wn. App 754, explained the correct analysis. If the reviewing court concludes that there was error, it must decide if it was of constitutional magnitude. If not, the court should deny review. If the court finds that the claim is of constitutional magnitude, then the harmless error analysis applies. Id. at 763. "Strong policy reasons support the use of harmless error analysis. 'A judicial system which treats every error as a basis for reversal simply could not function because, although the courts can assure a fair trial, they cannot guarantee a perfect one.'" State v. White, 72 Wn.2d 524, 531, 433 P.2d 692 (1967). "A reversal should occur only when the reliability of the verdict is called into question." State v. Neidigh, 78 Wn. App. 71, 78-79, 895 P.2d 423 (1995).

Effinger cites to State v. Barr, 123 Wn. App. 373, 98 P.3d 518 (2004), *review denied*, 154 Wn.2d 1009, 114 P.3d 1198 (2005), and State v. Jones, 117 Wn. App. 89, 68 P.3d 1153 (2003), to support his argument that Thompson gave improper opinion testimony. Both cases are distinguishable from Effinger's. In Barr,

a police officer testified that he had training which allowed him to detect when a person was lying and described the responses of the defendant that he interpreted as indicating deception. Barr, 123 Wn. App. at 378-79. The Court of Appeals reversed, finding that this was an impermissible opinion about Barr's guilt, and that it was a manifest error of constitutional magnitude that could be raised for the first time on appeal. Id. at 375-76.

In Jones, a police officer testified extensively about his interview of the defendant and that he did not believe Jones. The Court of Appeals found that to be an opinion of Jones' credibility. Jones, 117 Wn. App. at 92.[2] In Effinger's case, Thompson was not testifying about Effinger's credibility, or even about anything that could be construed as an expert opinion. Her opinion was that the parties in both telephone calls were Effinger and Giovani, and she listed the reasons she believed that. RP 169-70. The jury listened to recordings of both calls. RP 173-195. It could observe those

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2 The court in Demery reached a different result. In that case, the court admitted a recording of Demery's interview by the police during which the officers accused the defendant of lying. 144 Wn.2d at 756-57. In a plurality opinion, the Supreme Court found this not to be "testimony," and thus not "opinion testimony." Id. at 760. "Because the officers' statements were not made under oath at trial, we conclude that they do not fall within the definition of opinion testimony for purposes of the evidentiary prohibition." "[W]e have consistently declined to take an expansive view of claims that testimony constitutes an opinion on guilt." Id. at 760. The court went on to explain that the statements were admitted to provide context to the defendant's answers to questions. Id. at 761.

same characteristics itself. Thompson was clear that she was not qualified in voice recognition, RP 200, but Effinger offered no evidence at trial, nor does he argue on appeal, that only voice recognition experts can determine if the voices on two different recordings belong to the same people. It is common sense that most people, having heard the first recording, could come to a conclusion about whether the same people are speaking in the second recording.

Thompson's testimony was more like police officers testifying that they developed probable cause to arrest than like police officers testifying they can tell when a person is lying. It is not the sort of testimony that invades the province of the jury, and it is not reasonable to conclude that the jury convicted Effinger for those two counts of violating a no-contact order solely because Thompson was of the opinion that the calls constituted a violation. Even if it were error, it would be harmless. An error is harmless "'unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" State v. Smith, 106 W.2d 772, 780, 725 P.2d 951 (1986) (quoting State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)).

It is true that courts have held that testimony at trial by a police officer may carry an "'aura of special reliability and trustworthiness.'" Demery, 144 Wn.2d at 763, quoting United States v. Espinosa, 827 F.2d 604, 613 (9th Cir. 1987); Kirkman, 159 Wn.2d at 928. However, the testimony of the officer should be considered in context to determine whether it "fundamentally affect[ed] the fairness of the trial." Dubria v. Smith, 224 F.3d 995, 1001 (9th Cir. 2000). The opinions of a police officer are not presumptively prejudicial. Dubria, 224 F.3d at 1001 n. 3.

Effinger concludes that because the jury acquitted him of six charges it must have disbelieved the State's witnesses and thus Thompson's "opinion" packed extra weight. Appellant's Opening Brief at 18. The record does not support that inference. The telephone calls were the basis for Counts 4 and 5, CP 10, and the jury heard the calls. Counts 1, 2, 3, and 11, CP 9-10, 12, were charges that depended on Giovani's credibility, and she did not testify.

The final six charges, 6 through10, all for violation of a no-contact order, were based upon the letters sent to Cheryl Adams' address. CP 11-12; RP 133-34; RP 350. Adams testified she received five or six letters addressed to Liz Adams, opened one or

two, and tore up some of them. RP 134. Envelopes for three of the letters were admitted into evidence as Exhibit 15. RP 249-51. The most likely explanation for the fact that the jury convicted Effinger of three counts of violation of a no-contact order connected with the letters and acquitted him of two counts is that there was documentary evidence of three letters. The jury convicted where there was some physical or audio evidence it could examine, and acquitted where there was not. There is no basis to believe Thompson's "opinion" carried any significant weight.

Finally, defense counsel, rather than objecting to Thompson's testimony, inquired:

> A: A report. Okay. And you think that he's been violating the—this No Contact Order; is that correct?
>
> A: Correct.
>
> Q: But you don't know for certain who he was talking to.
>
> A: No. Not 100 percent, no.
>
> Q: 360-470-8895. Do you know whose number that is?
>
> A: No, I do not.
>
> Q: Do you know—or do you have any sort of paperwork from the cell phone company or other company that shows who this number belongs to?

A: I do not.

RP 213-14. Counsel impeached Thompson's "opinion," making it even less likely that it was prejudicial to Effinger. If there were error, which the State does not concede, it was harmless error. A harmless error would not be a manifest error, and therefore this court should not consider his claim for the first time on appeal.

2. The trial court did not consider Effinger's ability to pay before imposing the domestic violence assessment. This court should decline to consider a claim of statutory violation for the first time on appeal where that violation did not affect the fairness of the trial.

The trial court imposed, without objection, a domestic violence assessment of $100. CP 77. It did not consider Effinger's current or future ability to pay the assessment. Sentencing RP 21. Effinger is correct that this assessment is discretionary. A domestic violence assessment fee is permitted under RCW 10.99.080. "All superior courts...may impose a penalty assessment not to exceed one hundred dollars on any person convicted of a crime involving domestic violence. The assessment shall be in addition to, and shall not supersede, any other penalty, restitution, fines, or costs provided by law." RCW 10.99.080(1). "[J]udges are *encouraged* to solicit input from the victim or representatives for the

victim in assessing the ability of the convicted offender to pay the penalty, including information regarding current financial obligations, family circumstances, and ongoing restitution." RCW 10.99.080(5), emphasis added.

As before, errors not raised in the trial court will not be addressed for the first time on appeal. A narrow exception exists for "manifest error[s] affecting a constitutional right." RAP 2.5(a)(3); Kirkman, 159 Wn.2d at 936. The imposition of legal financial obligations (LFOs) is not of constitutional magnitude. State v. Blazina, 182 Wn.2d 827, 840, 344 P.3d 680 (2015), Fairhurst, J., concurring. In Blazina, the court exercised its own discretion under RAP 2.5, without elaboration, to address the imposition of LFOs for the first time on appeal. Id. at 830. That case did not, however, imply that every such challenge should be considered on appeal if not raised below.

> Unpreserved LFO errors do not command review as a matter of right under *Ford*[3] and its progeny. . . . We thought it justifiable to review these challenges [to miscalculated offender scores and vague community custody conditions] raised for the first time on appeal because the error, if permitted to stand, would create inconsistent sentences for the same crime and because some defendants would receive unjust

[3] State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999).

> punishment simply because his or her attorney failed to object.
>
> But allowing challenges to discretionary LFO orders would not promote sentencing uniformity in the same way. . . The legislature did not intend LFO orders to be uniform among cases of similar crimes. . . . The error is unique to these defendants' circumstances and the Court of Appeals properly exercised its discretion to decline review.

Blazina, 182 Wn.2d at 833-34.

Having made the ruling that sentencing courts must make individual inquiries into the defendant's current and future ability to pay before imposing LFOs, the Blazina court did not also require that every challenge made for the first time on appeal be considered. Id. at 835. The Court of Appeals has concluded that since consideration of the ability to pay LFOs is something a defendant is more likely to waive than overlook, this is "the sort of issue we should decline to consider for the first time on appeal." State v. Duncan, 180 Wn. App. 245, 253, 327 P.3d 699 (2014), *review pending decision in* Blazina, 2014 Wash. LEXIS 547 (July 9, 2014).

If this court declines to hear Effinger's challenge, he still has the ability to obtain review of his ability to pay at the time the State attempts to collect the LFOs. If the sentencing court finds at a later

time that the costs will impose a manifest hardship, it has the authority to modify the monetary obligations. State v. Curry, 118 Wn.2d 911, 914, 829 P.2d 166 (1992).

> A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

RCW 10.01.160(4).

This court should decline to consider this claim. But even if it chooses to do so, the remedy is to remand for a new sentencing hearing. Blazina, 182 Wn.2d at 839. His convictions would not be affected.

While the court did not, on the record, consider Effinger's financial status, his counsel informed the court that although he had been in prison four times, "he has a pretty good work ethic. And he would go to work. And—but his problem is the drug relapsing." Sentencing RP 16. Counsel also argued that Effinger was amenable to treatment. Sentencing RP 18. Effinger was born in 1981, CP 74, making him 33 years old at the time of sentencing.

Although he has health issues, Sentencing RP 16, counsel did not indicate that they affected his ability to work. The sentencing court had some reason to think he could pay the $100 in addition to the other legal financial obligations which Effinger has not challenged.

3. Defense counsel was not ineffective for failing to object to Lt. Thompson's testimony or the court's imposition of a domestic violence assessment absent an inquiry into his ability to pay.

Effinger argues that he received ineffective assistance of counsel because his attorney did not object to Lt. Thompson's testimony that she believed his calls from the jail constituted a violation of a no-contact order, Appellant's Opening Brief at 19-21, and because his attorney did not object to the court's imposition of the domestic violence assessment without considering his ability to pay. Appellant's Opening Brief at 26-28.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an

objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70.

A defendant must overcome the presumption of effective representation. Strickland, 466 U.S. at 687; Hendrickson, 129 Wn.2d at 77-78; McFarland, 127 Wn.2d at 334-35. "The reasonableness of counsel's performance is to be evaluated from

counsel's perspective at the time of the alleged error and in light of all the circumstances." Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984).

As argued above, it is not reasonable to believe that Lt. Thompson's testimony prejudiced Effinger in any way. Further, as also described in section one, above, defense counsel used Thompson's testimony to establish her lack of expertise in voice recognition and lack of knowledge about the calls generally. Even had there been any prejudice, counsel effectively neutralized it, demonstrating a tactical decision.

Regarding counsel's failure to object to the domestic violence assessment, it can hardly be said that this failure resulted in an unfair trial. Thomas, 71 Wn.2d at 471. The outcome of the trial was not impacted, which is the standard for finding prejudice. If failing to object to $100 of legal financial obligations constitutes

ineffective assistance of counsel, virtually any mistake by counsel would get the defendant a new trial or sentencing hearing. There is no authority for that proposition.

4. Taking challenges to the jury venire at sidebar did not violate Effinger's right to a public trial.

Effinger argues that when the court took both for cause and peremptory challenges to the jury venire at a sidebar, Voir Dire RP 74, 76, it violated his right to a public trial under the Sixth Amendment to the United States Constitution and art. I, § 22 of the Washington Constitution. He asks this court to overrule or disregard recent cases which hold that the public trial right does not attach to the exercise of challenges to the jury venire and that a sidebar does not constitute a courtroom closure.

A defendant may raise a public trial claim under article 1, § 22 for the first time on appeal. If the right to a public trial has been violated, prejudice will be presumed. In re Pers. Restraint of Ticeson, 159 Wn. App. 374, 382, 246 P.3d 550 (2011). "Whether the right to a public trial has been violated is a question of law reviewed de novo. State v. Lormor, 172 Wn.2d 85, 90, 257 P.3d 624 (2011). The initial question is whether the challenged

proceeding even implicates the public trial right. State v. Sublett, 176 Wn.2d 58, 71, 292 P.3d 715 (2012)

The right to a public trial is not absolute, but the courtroom may be closed only for the most unusual of circumstances. State v. Heath, 150 Wn. App. 121, 715, 206 P.3d 712 (2009). The right to open proceedings extends to jury selection and some pretrial motions, and a trial court must, before closing the courtroom, conduct the analysis required by State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). That analysis is not required unless the public is "fully excluded from the proceedings within a courtroom," Lormor, 172 Wn.2d at 92 (citing to Bone-Club), 128 Wn.2d at 257, or when jurors are questioned in chambers. Id. (citing to State v. Momah, 167 Wn.2d 140, 146, 217 P.3d 321 (2009) and State v. Strode, 167 Wn.2d 222, 224, 217 P.3d 310 (2009)). The court then went on to define a closure:

> [A] "closure" occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.

Lormor, 172 Wn.2d. at 93. Effinger asserts that sidebars constitute a closure of the courtroom, but under this definition, the courtroom

was never closed and there was no requirement for a Bone-Club analysis.

Not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure, even if the public is excluded. Sublett, 176 Wn.2d at 71. To decide whether a particular process must be open to 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). The "experience" prong requires the court to determine if "'the place and process have historically been open to the press and public.'" Sublett, 176 Wn.2d at 73 (quoting Press-Enterprise, 478 U.S. at 8). The "logic" prong addresses "'whether public access plays a significant positive role in the functioning of the particular process in question.'" Id. If both questions are answered in the affirmative, the public trial right attaches and the trial court must consider the Bone-Club factors before closing the proceeding to the public. Id.

The experience and logic test was created to determine whether the core values of the right to a public trial are implicated. Sublett, 176 Wn.2d at 73. The right to a public trial exists to

"ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (citing to federal cases). The harms associated with a closed trial have been identified as:

> [T]he inability of the public to judge for itself and to reinforce by its presence the fairness of the process, ... the inability of the defendant's family to contribute their knowledge or insight to the jury selection, and the inability of the venirepersons to see the interested individuals.

In re Pers. Restraint of Orange, 152 Wn.2d 795, 812, 100 P.3d 291 (2004). Applying that test, the Sublett court held that no violation of the right to a public trial occurred when the court considered a jury question in chambers.

In State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), *review granted in* part, 181 Wn.2d 1029, 340 P.3d 228 (2015), the Court of Appeals assumed, without deciding, that a sidebar conference constituted a closure. Id. at 917. In that case, challenges for cause to the jury venire had been held at a sidebar. Id. at 915. Applying the Sublett experience and logic test, the court concluded that it was not error to handle challenges at a sidebar.

Despite its earlier assumption, the court held that "[t]he sidebar conference did not close the courtroom." Id. at 920.

The court in Love further explained that the written record of the challenges to potential jurors satisfied the public interest in monitoring the integrity of trials. Love, 176 Wn. App. at 919-20. This court adopted the reasoning of the Love court and held that the public trial right does not attach to challenges during jury selection. State v. Dunn, 180 Wn. App. 570, 575, 321 P.3d 1283 (2014), *review denied*, 181 Wn.2d 1030, 340 P.3d 228 (2015). That reasoning was followed in State v. Webb, 183 Wn. App. 242, 247, 333 P.3d 470 (2014), *review denied*, 182 Wn.2d 1005, 342 P.3d 327 (2015), holding that conducting peremptory challenges at sidebar by passing a sheet of paper back and forth did not constitute a public trial violation. Id. at 247.

Effinger argues that Dunn and Love were wrongly decided. Appellant's Supplemental Brief at 10. He cites to State v. Wilson, 174 Wn. App. 328, 298 P.3d 148 (2013) to support his argument that challenges to potential jurors in the venire must be made in such a manner that the spectators may hear them. In Wilson, two jurors were excused by the bailiff, before voir dire began, because they were ill. Wilson, 174 Wn. App. at 332. The court distinguished

between this situation and "for-cause excusals or peremptory challenges traditionally exercised during voir dire in the courtroom." Id. at 344. The court went on to say that jury selection and voir dire are not necessarily coextensive. Id. at 340.

CrR 6.4 establishes the rules for challenges to the jury panel. CrR 6.4(b) discusses voir dire, which is the questioning of the prospective jurors by the court and counsel. Challenges for cause are covered in a separate subsection, CrR 6.4(c), and peremptory challenges in yet another subsection, CrR 6.4(e). In State v. Slert, 181 Wn.2d 598, 334 P.3d 1088 (2014), the defendant challenged the dismissal of four prospective jurors in chambers, based upon answers to a jury questionnaire, before the actual questioning of the jury panel began. Id. at 600. Slert argued that that the public trial right applied to jury selection, but the court said that "the mere label of a proceeding is not determinative." Id. at 604. The Slert opinion quoted with approval language from Wilson:

> Existing case law does not hold that a defendant's public trial right applies to every component of the broad "jury selection" process (which process includes the initial summons and administrative culling of prospective jurors from the general adult public and other preliminary administrative processes). Rather, existing case law addresses application of the public right related *only* to a specific component of jury selection—i.e., the "voir dire" of

> prospective jurors who form the venire (comprising those who respond to the court's initial jury summons and who are *not* subsequently excused administratively).

Slert, 181 Wn.2d at 605, quoting Wilson, 174 Wn. App. 338 (emphasis in original).

The Slert opinion was filed on September 25, 2014. Love was decided in 2013, and Dunn in April of 2014, but the court in Slert, while admittedly not addressing voir dire, did not imply any reservations with the holdings of those two cases. Effinger cites to Wilson as authority for his argument that challenges following voir dire are part of voir dire. Appellant's Supplemental Brief at 7. The Wilson court compared CrR 6.3 and CrR 6.4, 174 Wn. App. at 342-43, but it was addressing a different situation, one where the bailiff excused two potential jurors because they were ill before voir dire began. Id. at 333. As described above, CrR 6.4 separates voir dire from challenges for cause, as well as peremptory challenges, into separate subsections. The court in State v. Marks, 184 Wn. App. 782, 339 P.3d 196 (2014), was correct when it said that "CrR 6.4 distinguishes between voir dire and the exercise of peremptory challenges." Id. at 787. The court then went on to hold that peremptory challenges were not part of voir dire and exercising

those challenges in writing did not violate the defendant's public trial right under either the experience or logic prong of the Sublett test. Id. at 788-89.

Effinger argues at length that public scrutiny of the challenges to the jury panel is as crucial as it is to the questioning of jurors and historically have been open to the public. Appellant's Supplemental Brief at 9-14. The court in Love found little evidence of public exercise of challenges to the jury in the last 140 years. Love, 176 App. at 919.

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 for a prosecutor to do so, 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 practice of silent exercise of peremptory challenges was identified as a "best practice" by the Washington State Jury Commission. *See* Washington State Jury Commission, *Report to the Board for Judicial Administration*, at 41 (July 2000)[4] ("BEST PRACTICES SHOULD INCLUDE . . .TAKING PEREMPTORY CHALLENGES OUT OF THE HEARING OF JURORS, WITH THE COURT ANNOUNCING THE FINAL SELECTIONS TO THE PANEL") (upper case in original).

Thus, as the court in Love concluded, "our experience does not require that the exercise of these challenges be conducted in public." Love, 176 Wn.App. at 919. Effinger points out that the case referred to in Love, State v. Thomas, 16 Wn. App. 1, 553 P.2d 1357 (1976), predated Bone-Club by several years. Appellant's Supplemental Brief at 11. But the issue is the historical practice, and history goes back well beyond Bone-Club. Effinger cites to two cases which he claims suggest that challenges have historically been made in open court: State v. Njonge, 181 Wn.2d 546, 334 P.3d 1068 (2014), and State v. Jones, 175 Wn. App. 87, 303 P.3d 1084 (2013). For neither case does he provide a specific cite, and

4 This report is available at http://www.courts.wa.gov/committee/pdf/Jury_Commission_Report.pdf. (Last visited May 8, 2015.)

any support for his argument in those cases is not readily apparent. Jones concerned the selection of an alternate juror, which was done off the record during a recess. The court found that to be a violation of the public trial right. Jones, 175 Wn. App. at 96. Njonge concerned whether excusing potential jurors for hardship is a proceeding to which the right to a public trial attaches, and whether the right to a public trial was violated when a witness and a television camera were excluded from the courtroom during voir dire. Njonge, 181 Wn.2d at 555-56. The court essentially assumed without actually deciding that a public trial right attached to the hardship excusals, but decided the case on the basis that no closure of the courtroom had occurred. Id. at 558. These cases do not support Effinger's argument.

Effinger argues that the logic prong of the Sublett test is satisfied by challenges to the jury pool. He claims the public can monitor whether challenges are made for improper reasons and guard against discrimination. Appellant's Supplemental Brief at 9-10. He further argues that documenting the challenges on paper does not protect the values underlying the public trial right. Appellant's Supplemental Brief at 13. He maintains that the court in State v. Filitaula, 184 Wn. App. 819, 339 P.3d 221 (2014),

"implicitly recognized that peremptory challenges implicate public trial rights," which may be true, but he asks this court to reject the holding that a written record of those challenges protects the public interest. Filituala, 184 Wn. App. at 823; Appellant's Supplemental Brief at 13. Effinger argues that it would be difficult for a member of the public to recall the characteristics of the individual members of the jury venire, know that the written record was available, etc. Appellant's Supplemental Brief at 14.

A member of the public could presumably understand that a written record exists by asking the clerk's office. The court in Sublett found that the written record of a question from a deliberating jury, and the answer to it, pursuant to CrR 6.15(f)(1), sufficiently protected the values of a public trial. Sublett, 176 Wn.2d at 77. In the case of juror challenges, record must be kept when there is an exception to the challenge. RCW 4.44.250. There is no logical reason that juror challenges recorded on a piece of paper, which is filed with the court,[5] is any less protective of the values of a public trial than a written record of the question from a deliberating jury and the answer to it. As with the jury question in Sublett, none of the values inherent in a public trial were violated.

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5 In Effinger's case, that document was filed on the first day of trial. CP 90-91.

"No witnesses are involved at this stage, no testimony is involved, and no risk of perjury exists." Sublett, 176 Wn.2d at 77.

Contrary to Effinger's argument, the courtroom was not closed. No member of the public was excluded, and the fact that the for cause and peremptory challenges were conducted at a sidebar did not transform the courtroom into a closed one. However, the authorities cited above all held that the public trial right is not implicated by a sidebar exercise of juror challenges, and whether or not the courtroom was closed is not dispositive. Sublett, 176 Wn.2d at 71 ("Before determining whether there was a violation, we first consider whether the proceeding at issue implicates the public trial right, thereby constituting a closure at all.")

There was no violation of Effinger's right to a public trial.

5. Effinger was present in the courtroom, and his absence from the sidebar where juror challenges were made did not make him "not present" for a critical stage of his trial.

A defendant has a constitutional right to be present at all critical stages of the proceedings. A critical stage occurs when evidence is being presented or whenever the defendant's presence has "a relation, reasonably substantial," to the opportunity to defend

against the charge. In re Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (quoting United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 I. Ed. 2d 486(1985)). "The defendant does not have the right to be present during in-chambers or bench conferences between the court and counsel on legal matters, at least when those matters do not require the resolution of disputed facts." Id. Critical stages include voir dire and the empanelling of a jury. State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). The right to be present exists when a defendant's "'presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" Id. at 881 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934, *overruled on other grounds sub nom.* Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

But "because the relationship between the defendant's presence and his 'opportunity to defend' must be 'reasonably substantial,' a defendant does not have a right to be present when his or her 'presence would be useless, or the benefit but a shadow.'" Irby, 170 Wn.2d at 881 (quoting Snyder, 291 U.S. at 106-07). In other words, to obtain relief due to an absence, the defendant must demonstrate that his presence could have been

beneficial. *See* Pirtle, 136 Wn.2d at 484; Lord, 123 Wn.2d at 306. In this case, Effinger was "absent" from a sidebar where he could have contributed nothing. He had the opportunity to discuss the challenges with his attorney before counsel went to the sidebar, and had counsel done something against Effinger's wishes he could have said so when the jurors were selected. The record contains no indication he was dissatisfied with the outcome of the jury selection.

The sidebars concerned legal issues, not factual determinations.

> We now hold that meetings between counsel and the court at which the participants discuss whether jurors should be excused for cause, exercise peremptory challenges, or decide whether to proceed in the absence of prospective jurors are all examples of "a conference or hearing on a question of law" from which the defendant may be excluded at the district court's discretion.

United States v. Reyes, 764 F.3d 1184, 1190-91 (9th Cir. 2014).

Effinger argues that Irby stands for the proposition that he had a constitutional right to be present at the sidebar where challenges were taken. That case is easily distinguishable.

In Irby, the defendant was on trial for murder. Prospective jurors filled out a questionnaire the day before voir dire was to

begin. Several members of the venire indicated on their questionnaires that the predicted length of the trial would constitute a hardship for them, or that a member of their families had been murdered. That same day, the judge exchanged e-mails with counsel about agreeing to excuse those jurors so they would not have to appear for voir dire. The defendant had no opportunity to participate in that exchange of messages. Counsel stipulated to the dismissal of seven of the venire for cause without Irby every having seen them. The Supreme Court found this a constitutional violation because the jurors were being individually evaluated without any input from Irby. Irby, 170 Wn.2d at 882-83. Effinger, on the other hand, was present in the courtroom during voir dire and had the chance to discuss with his attorney any challenges he wished to make.

Effinger cites to State v. Miller, 184 Wn. App. 637, 338 P.3d 873 (2014), claiming it held that it was error, though harmless, for a juror to be excused in the defendant's absence. Appellant's Supplemental Brief at 20. In fact, the Miller court never addressed whether it was error or not. "We hold that *even if* Miller's right to be present was violated, this violation was harmless error." Id. at 646, emphasis added. He also cites to a New York case, People v.

Williams, 858 N.Y.S.2d 147, 52 A.D.3d 94 (2008), for the holding that it was a violation to exclude the defendant from a sidebar conference where jurors were excused by agreement. Appellant's Supplemental Brief at 20. In that case, however, three potential jurors were questioned at sidebars. It was that fact, not the excusals themselves, that resulted in the violation of the defendant's right to be present. Id. at

Effinger was, in fact, present. The record does not show that he was absent from the courtroom during any portion of jury selection. He was present during all of the questioning. No jurors were privately questioned, even in open court. Unlike Irby, he had full access to his attorney at all times, and had the opportunity to consult with counsel and give his input into the selection of the jury. The fact that he sat at counsel table while his attorney made the actual challenges does not deny him his right to be present. His attorney represented him and was acting on his behalf. It strains the notion of "presence" to conclude that he was not present.

Even if there had been a violation of Effinger's right to be present, which there was not, it is subject to harmless error analysis. *See* United States v. Marks, 530 F.3d 799 (9th Cir. 2008); Rice v. Wood, 77 F.3d 1138 (9th Cir. 1996). An error will be deemed

harmless unless it has a "substantial and injurious effect or influence in determining the jury's verdict." Rice, 77 F.3d at 1144 (internal quotation marks omitted). Effinger argues that had he been present at the sidebar one or more of the excused jurors might have been seated on the jury. That is not the test for prejudice. He must demonstrate a prejudicial impact on jury deliberations. United States v. Thomas, 724 F.3d 632, 646 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1040 (2014).

The sidebar where jury challenges were made simply is not the sort of critical stage of the proceedings at which a defendant has a right to be present. Effinger had the opportunity to consult with his attorney throughout the voir dire and before and after the sidebar conference. He was present in the courtroom when the sidebar occurred. There appears to have been no dispute over the challenges for cause, and thus no disputed facts or contested issues. The fact that he was not standing at the front of the courtroom where the sidebar took place did not make him "not present."

D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm Effinger's convictions and his sentence.

Respectfully submitted this 13th day of May, 2015.

Carol La Verne, WSBA# 19229
Attorney for Respondent

THURSTON COUNTY PROSECUTOR

May 13, 2015 - 11:56 AM

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