

NO. 67357-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

RAMOS ORTIZ-LOPEZ,

Appellant.

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

The Honorable John M. Meyer, Judge

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

JENNIFER M. WINKLER
Attorney for Appellant

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

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A. SUPPLEMENTAL ISSUES IN REPLY¹

1. Did the exercise of peremptory challenges at a sidebar violate the appellant's right to a public trial?

2. Did the exercise of peremptory challenges at a sidebar likewise violate the appellant's right to be present at all critical stages of a trial?

B. SUPPLEMENTAL ARGUMENT IN REPLY

1. THE TRIAL COURT VIOLATED THE APPELLANT'S RIGHT TO A PUBLIC TRIAL BY CONDUCTING PEREMPTORY CHALLENGES AT SIDEBAR.

The State suggests that the exercise of peremptory challenges is not a "substantive" proceeding for purposes of the right to a public trial and, in any event, the exercise was public because it occurred at a sidebar that occurred in a public court room. Supp. Brief of Respondent (Supp. BOR) at 5. This Court should reject both arguments.

First, the public trial right applies to "the process of juror selection,' which 'is itself a matter of importance, not simply to the adversaries but to the criminal justice system.'" In re Pers. Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629

¹ By August 2, 2012 order, this Court ordered a supplemental reply brief to be filed.

(1984)). The right to a public trial includes ““circumstances in which the public's mere presence passively contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny.” State v. Slert, ___ Wn. App. ___, ___ P.3d ___, 2012 WL 3205356 at *3 (Aug. 8, 2012)² (quoting State v. Bennett, 168 Wn. App. 197, 204, 275 P.3d 1224 (2012)). The peremptory challenge process, an integral part of voir dire,³ is one such proceeding: While peremptory challenges may be exercised based on subjective feelings and opinions, there are important limits on both parties’ exercise of such challenges. Georgia v. McCollum, 505 U.S. 42, 49, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992). Public scrutiny of such proceedings is more than a procedural nicety; it is required by the constitution.

Second, the sidebar procedure itself in this case violated the right to a public trial to the same extent as any in-chambers conference or other

² In Slert, Division Two of this Court reversed Slert’s conviction, holding that an in-chambers conference at which various jurors were dismissed based on their answers to a questionnaire violated his right to a public trial. 2012 WL 3205356 at *1-6. The Court relied on State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011), a right-to-be-present case, for its analysis on the parameters of voir dire. Slert, 2012 WL 3205356 at *3-4

³ People v. Harris, 10 Cal.App.4th 672, 684, 12 Cal.Rptr.2d 758 (1992).

courtroom closure would have. Even though the sidebar occurred in an otherwise open courtroom, the assertion that the sidebar was “public” is a specious one. By its nature, the sidebar occurred privately, outside of the public's scrutiny, and thus violated the appellant’s right to a fair and public trial. Slert, 2012 WL 3205356 at n. 11 (rejecting argument that no violation occurred if jurors were actually dismissed not in chambers but at a sidebar and stating “if a side-bar conference was used to dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reasons and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview”).

As an aside, the State argues that there was an important reason to exclude the public from the exercise of peremptory challenges. The State claims that “[h]aving the *public* and jury available to see which party exercises the peremptory challenge against each juror defeats the purpose of the peremptory challenge which is to keep the jurors from drawing inferences from the exercises of such challenges.” Supp. BOR at 7 (emphasis added) (citing, *inter alia*, McCollum, 505 U.S. at 53 n. 8). The authority cited by the State does not support its assertion. The sole

concern identified in such cases cited by the State has to do with that of the other jurors, not the public.⁴

And assuming *arguendo* that this consideration were somehow relevant to this Court's analysis, no advantage accrues to the public by holding the exercise of peremptory challenges in a private proceeding outside the public eye. There is, moreover, no evidence that the trial court considered the public trial right in holding such a sidebar conference. See Slert, 2012 WL 3205356 at *6 ("The record contains no indication that circumstances required that this conference occur in chambers or that the trial court considered reasonable, public alternatives.").

The trial court violated appellant's constitutional right to a public trial by taking peremptory challenges at the private, unreported sidebar. This was no less a violation of the right to a public trial than the closed voir dire sessions that Washington courts have repeatedly held to violate the public trial right. Supp. Brief of Appellant (Supp. BOA) at 4-5 (citing, *inter alia*, State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009)).

⁴ Compare Harris, 10 Cal.App.4th at 684 (exercise of peremptory challenges in chambers violates defendant's right to a public trial) with People v. Williams, 26 Cal.App.4th Supp. 1, 7-8, 31 Cal.Rptr.2d 769 (1994) (peremptory challenges could be held at sidebar to permit party opponent to make motion based on state version of Batson v. Kentucky 476 U.S. 79, 106 S.Ct. 1712, 90 L. Ed. 2d 69 (1986), if challenges and party making them were then announced in open court).

2. THE TRIAL COURT VIOLATED THE APPELLANT'S RIGHT TO BE PRESENT AT ALL CRITICAL STAGES BY CONDUCTING PEREMPTORY CHALLENGES AT SIDEBAR.

Next, the State appears to argue that the appellant's right to be present for all critical stages was not violated and even if it was, he was not prejudiced because his attorney was present. Supp. BOR at 7-10. This Court should reject these arguments.

The presence of an accused at voir dire is necessary because it is "substantially related to the defense and allows the defendant 'to give advice or suggestion or even to supersede his lawyers.'" State v. Wilson, 141 Wn. App. 597, 604, 171 P.3d 501 (2007) (quoting Snyder v. Massachusetts, 291 U.S. 97, 106, 54 S. Ct. 330, 78 L. Ed. 674 (1934), overruled on other grounds by Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)).

In arguing that the appellant's claim should be rejected, the State extensively cites to Wilson, an appellate case analyzing whether an accused had right to be present at an in-chambers conference regarding a seated juror. Supp. BOR at 9. But the State curiously fails to cite a more recent, and controlling, Supreme Court case, State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011). Irby clearly holds that the right to present extends to

voir dire and, moreover, that the presence of defense counsel does not remedy the defendant's absence. 170 Wn.2d at 885-86.

The situation here varies little from the factual scenario present in Irby. Supp. BOA at 8. Indeed, it is difficult to imagine a portion of jury selection more appropriate for the input of an accused than during the exercise of peremptory challenges. Such challenges are "a tool that may be wielded in a highly subjective and seemingly arbitrary fashion, based upon mere impressions and hunches." State v. Evans, 100 Wn. App. 757, 774, 998 P.2d 373 (2000) (quoting United States v. Annigoni, 96 F.3d 1132, 1144-45 (9th Cir. 1996)).

The trial court violated Mr. Ortiz's right to be present at all critical stages and, again, the State cannot show the error was harmless. Supp. BOA at 9-10. Reversal is, therefore, required.

C. CONCLUSION

For the reasons set forth above and in the appellant's opening, reply, and supplemental briefs, Mr. Ortiz's convictions should be reversed or other appropriate relief granted.

DATED this 5TH day of August, 2012.

Respectfully submitted,

NIELSEN, BROMAN, & KOCH, PLLC



JENNIFER M. WINKLER
WSBA No. 35220
Office ID No. 91051

Attorneys for Appellant

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v.)	COA NO. 67357-2-1
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)	
Appellant.)	

DECLARATION OF SERVICE

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 15TH DAY OF AUGUST 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] ERIK PEDERSEN
SKAGIT COUNTY PROSECUTOR'S OFFICE
COURTHOUSE ANNEX
605 S. THIRD
MOUNT VERNON, WA 98273

- [X] RAMOS ORTIZ-LOPEZ
DOC NO. 349223
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

2012 AUG 15 PM 4:41
COURT OF APPEALS
STATE OF WASHINGTON

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF AUGUST 2012.

x *Patrick Mayovsky*

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

STATE OF WASHINGTON
JUL 14 2011
14:11

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C. CONCLUSION

For the reasons set forth above and in the appellant's opening, reply, and supplemental briefs, Mr. Ortiz's convictions should be reversed or other appropriate relief granted.

DATED this 5TH day of August, 2012.

Respectfully submitted,

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JENNIFER M. WINKLER
WSBA No. 35220
Office ID No. 91051

Attorneys for Appellant

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DOC NO. 349223
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

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SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF AUGUST 2012.

x *Patrick Mayovsky*