

No. 45663-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID M. HENKLEMAN,

Appellant.

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

The Honorable Christine Schaller, Judge
Cause No. 12-1-01684-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether conducting challenges for cause at sidebar, following voir dire, constitutes a courtroom closure that requires a Bone-Club analysis.

2. Whether the trial court erred in giving the jury a first aggressor instruction.

3. Whether the court erred in imposing consecutive sentences for the two serious violent offenses.

B. STATEMENT OF THE CASE.

The State accepts Henkleman's statement of the substantive and procedural facts of the case. Additional facts will be included in the argument portion of this response brief.

C. ARGUMENT.

1. The trial court did not err by taking challenges for cause at sidebar because (1) that procedure does not implicate the right to a public trial and (2) the courtroom was not closed.

Henkleman argues that his right to a public trial, guaranteed by both the Washington Constitution article 1, § 22, and the Sixth Amendment to the United States Constitution, was violated when the court heard and decided challenges for cause and excused

eight jurors at sidebar. The court made a record of that sidebar, with no objection from either party. RP 85-86.¹

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).

¹ All references to the Verbatim Report of Proceedings, unless otherwise noted, are to the eight volume trial transcript. The transcript of the sentencing hearing will be referred to as Sentencing RP.

In Bone-Club, the court closed the courtroom during a pretrial suppression hearing, on the State's motion, because an undercover police officer was testifying and he feared public exposure would compromise his work. The Supreme Court found that this temporary, full closure of the courtroom had not been justified because the trial court failed to weigh the competing interests using a five-factor test derived from a series of prior cases, including Seattle Times v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982). Those factors are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
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 the closure and the public.
5. The order must be no broader in its application or duration than necessary for the purpose.

Bone-Club, 128 Wn.2d. at 258-59.

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. Storde, 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.

Henkleman's argument presumes that the sidebars constituted 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 formulated 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.

There is no dispute that the sidebars at issue in this trial occurred in the courtroom and the courtroom was open. Henkleman offers no authority, nor can the State find any, to show that sidebars have not historically been conducted out of the hearing of the jurors and spectators. That is the whole purpose of the sidebar—so that the jury does not hear the discussion, and if the jurors cannot hear, neither can the spectators. The alternative would be to excuse the jury each time some issue needed to be addressed outside of its presence.

In the case of sidebar discussions, issues arising with the jury present would always require interrupting trial to send the jury to the jury room, often located some distance from the courtroom, thereby occasioning long delays every time the court wishes to caution counsel or hear more than a simple “objection, Your Honor.” This would do nothing to make the trial more fair, to foster public trust, or to serve as a check on judges by way of public scrutiny.

Ticeson, 159 Wn.2d at 386, n. 38. Sidebars do not violate any of the core values of the public trial right.

In State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), 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 919-20.² 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).

Henkleman argues that this court should reverse its decision in Dunn and decline to follow Love. Appellant’s Opening Brief at 10. He cites to State v. Wilson, 174 Wn. App. 328, 298 P.3d 148 (2013); State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009); and State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012), 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

² In Henkleman’s case, a specific record was made of the content of the sidebar. RP 85-86.

Strode, the court held that it was error to hold a portion of voir dire in the judge's chambers without conducting the Bone-Club analysis. It did not specifically address challenges either for cause or peremptory challenges, although challenges for cause were also made and decided in chambers. Strode, 167 Wn.2d at 224, 231. In Wise, ten potential jurors were questioned in chambers, and six were excused for cause, but the opinion does not specify whether the challenges were also heard and decided in chambers. Id. at 7-8. 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 distinction in these cases, then, is between what happens in chambers and what happens in the courtroom that has not been closed to the public, or between pre-voir dire jury selection and voir dire.

Henkleman does not claim that the courtroom was closed to the public, only that the challenges to the jury venire were made at a sidebar where the public could not hear what was being said. He points to State v. Slert, 169 Wn. App. 766, 774 n. 11, 282 P.3d 101 (2012), where this court remarked in a footnote that “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 outside Slert's and the public's purview." Id. However, in Slert's case the challenged conduct had occurred in chambers, Id. at 775, and the footnote is dicta. Dunn was decided two years later and specifically held that it was not error to conduct challenges to the venire at sidebar.

During the evidentiary portion of Henkleman's trial, there were several sidebars. RP 246, 498, 523, 834, 998, 106, 1112. Henkleman has not assigned error to those or argued that they violated his right to a public trial. There seems to be no reason to conclude that challenges to potential jurors at sidebar constitute a courtroom closure and other sidebars do not.

A sidebar is not a closure of the courtroom. Because it is not a closure, there is no requirement for the court to conduct a Bone-Club analysis. The cases to which Henkleman cites do not support an argument that the court was wrong when it decided either Love or Dunn, and the holding of those cases should be followed in this appeal.

2. The trial court correctly gave the first aggressor instruction.

Henkleman was convicted of first degree assault and second degree assault for his stabbing of Eric Cooper and John Poole. RP 1473. The evidence was undisputed that Cooper approached Henkleman because he was attacking Cooper's friend Casey Heath. RP 436. Cooper testified that Henkelman took a step toward him, and Cooper hit Henkleman twice. Between the two punches he felt something puncture his side. Henkleman had a knife in his hand. RP 436-39. Cooper had a knife wound in his side under his left armpit. RP 439, 443, 445. John Poole also responded to assist Heath. He used his elbow and his knee in an attempt to get Henkleman away from Heath. RP 967, 973, 1055-57. In response, Henkleman struck Poole in the left arm with a knife, RP 974, cutting Poole's arm so that blood spurted from the wound. RP 975.

Henkleman sought and received self-defense instructions. RP 1236; Instructions No. 22, 23, 24, and 25, CP 241-42. Over Henkleman's objection, the court also gave the first aggressor instruction. RP 1262; Instruction No. 26, CP 242. At trial, the defense argued that Henkleman did not make the first move toward

Cooper or Poole, and that the right of self-defense had revived because Henkleman had withdrawn from his aggression. RP 1428-42.

Instruction No. 22 reads as follows:

It is a defense to a charge of Assault in the First Degree or Second Degree charged in counts II and III respectively that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 241.

The first aggressor instruction, Instruction No. 26, reads as follows:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use force upon or toward another person.

Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that the defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense. However, the right of self-defense may be revived if the aggressor in good faith withdrew from the aggression at such a time and in such a manner as to have clearly apprised Mr. Cooper and/or Mr. Poole that he in good faith was desisting, or intended to desist, from further aggressive action.

CP 242.

The State argued that Henkleman was the first aggressor in attacking Heath, causing Cooper and Poole to go to Heath's defense. RP 1390-91. The State does not dispute that Henkleman did not attack Cooper and Poole until after they tried to stop him from stabbing Heath. On appeal, Henkleman argues that his attack on Heath cannot be the act provoking a response, but rather it must be some action he took in relation to Cooper and Poole, the victims of the assaults. Appellant's Opening Brief at 12-13. That interpretation does not follow from the language of the instruction, and it leads to an absurd result.

The plain language of the first aggressor instruction, which was taken from WPIC 16.04, says only that a person may not provoke a belligerent response and then claim self-defense when reacting to that belligerent response. It does not say that the

provocation must be directed at the person who responds belligerently. Henkleman attacked Heath, and it was clear to Cooper and Poole, as well as other witnesses, that Heath was in serious trouble. RP 434-35, 670-72, 965-67. It was lawful for Cooper and Poole to use force to aid another person who was being, or about to be, injured. RCW 9A.16.020(3). There is no dispute that Heath was being injured; he died from the injuries that Henkleman was inflicting.

If Henkleman's reasoning is followed to its logical conclusion, no one could ever come to the aid of another person being injured. The rescuers would always be taking the first aggressive action toward the attacker. It is simply not reasonable that the law would permit an attacker to lawfully injure people who are trying to prevent him from killing a third party. Henkleman argues that this is a "questionable position," Appellant's Opening Brief at 13, but he does not explain why. If the law permits a third person to interfere in an assault to protect the intended victim, then it is perfectly rational that the attacker has no right to assault that third person in an attempt to complete his assault on the original victim. To hold that Henkleman could not be held responsible for injuring the people trying to save Heath's life would, as our

Supreme Court said in a different context, "embarrass justice."
State v. Whitfield, 129 Wash. 134, 139, 224 P. 559 (1924).

It is true that the first aggressor instruction is to be used sparingly, because it essentially nullifies a self-defense argument. State v. Douglas, 128 Wn. App. 555, 563, 116 P.3d 1012 (2005), citing to State v. Riley, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999)). But both parties are entitled to jury instructions that support their theories of the case so long as there is evidence to support those theories. Riley, 137 Wn.2d at 909. The first aggressor instruction is appropriate when there is credible evidence, even if it is conflicting, that the defendant provoked the necessity of defending himself: Id. at 909-910. The act provoking the response must be intentional and one a reasonable person would expect to provoke a belligerent response. State v. Arthur, 42 Wn. App. 120, 124, 708 P.2d 1230 (1985). "Nor can it be an act directed toward one other than the actual victim, *unless the act was likely to provoke a belligerent response from the actual victim.*" State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847 (1990) (emphasis added). For purposes of the assault convictions, Cooper and Poole were the actual victims, and certainly the stabbing of their friend

was an act likely to provoke a belligerent response from the two men.

Although it is not error to reject an instruction if other instructions permit a party to argue its theory of the case, Kidd, 57 Wn. App. at 99, without the first aggressor instruction the State would not have been able to argue that Henkleman did not have the right to claim self-defense against Cooper and Poole. Instruction No. 22, CP 241, which is set forth above, would have permitted the jury to treat them as the first aggressors and not informed it that they could lawfully react to the attack on Heath. The first aggressor instruction was not only proper but necessary to the State's argument. It was not error to give that instruction.

3. The sentencing court correctly acknowledged that an exceptional sentence was possible but declined to consider that option. It was not error to impose consecutive sentences for second degree murder and first degree assault.

Henkleman argues that the sentencing court mistakenly believed it did not have the discretion to impose an exceptional sentence downward, and because of that he is not barred from raising a challenge to his standard range sentence for the first time on appeal. Appellant's Opening Brief at 17. The record does not support his argument.

Generally, sentences for current offenses run concurrently. RCW 9.94A.589(1)(a). Where two or more of the current convictions are for serious violent offenses, those sentences "shall" be served consecutively, but the first does not count against the offender score for the second or subsequent convictions. RCW 9.94A.589(1)(b). A sentencing court has the discretion to run the convictions for two or more serious violent offenses concurrently, but it must do so as an exceptional sentence which either the defendant or the State may appeal. RCW 9.94A.535. Both second degree murder and first degree assault are serious violent offenses. RCW 9.94A.030(44).

Henkleman did not seek an exceptional sentence in the trial court; rather, he asked for the low end of the standard range. Sentencing RP 44. For the first time on appeal, he claims that the sentencing constituted a fundamental defect which resulted in a miscarriage of justice. Appellant's Opening Brief at 17; RAP 2.5(a). He cites to In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 166 P.3d 677 (2007), where the court held that a court does have the discretion to impose an exceptional sentence by running two serious violent offense convictions concurrently. In that case, the sentencing court had indicated a potential willingness to impose

concurrent sentences, but believed it did not have the discretion to do so. *Id.* at 334. The Supreme Court affirmed the Court of Appeals' reversal of his sentence and remanded for the sentencing court to consider an exceptional sentence. *Id.* at 335.

Henkleman argues that at his sentencing the court also misunderstood its authority and mistakenly believed it did not have discretion to impose concurrent sentences for the second degree murder and first degree assault convictions. He points to a statement from the court that it was required to impose consecutive sentences. Appellant's Opening Brief at 17; Sentencing RP 58. That statement is taken out of context.

The court made some preliminary remarks before actually imposing sentence. Among other things, it said:

In Washington state, there are mandatory sentencing guidelines, and I am required to sentence a defendant within that sentencing range. Absent extraordinary circumstances, a sentencing range is based upon the seriousness of the offense and a defendant's offender score. Today, I do not find there is anything extraordinary that would require the Court to go above or below the sentencing guidelines as defined by the law, and a sentence today will be imposed within those guidelines.

Sentencing RP 55, emphasis added.

And in consideration of all of the arguments made to me and the facts and evidence presented at trial, the

only appropriate sentence for this crime is the maximum, and I impose 244 months for the charge of murder in the second degree, and I impose 24 months for the deadly weapon enhancement. The 24 months will run consecutive to all other sentences.

Sentencing RP 57.

In consideration of all the arguments made to me and the facts and evidence presented at trial, the only appropriate sentence for this crime is the maximum sentence, and I will impose 123 months for the assault in the first degree charge. This sentence will run consecutive, *as is required*, to the time that I have imposed on the murder in the second degree charge. I also am imposing the 24-month deadly weapon enhancement sentence, which also will run consecutive to all other sentences.

Sentencing RP 58, emphasis added.

It is apparent from this record that the court was aware it could impose an exceptional sentence but had chosen not to do so. Once that option has been considered and eliminated, the court then did not have the discretion to run the two serious violent sentences concurrently because the only way to do that is as an exceptional sentence. RCW 9.94A.535. The court in Mulholland reversed at least in part because the sentencing court had expressed some willingness to impose an exceptional sentence downward, and therefore the Supreme Court concluded that the petitioner had been prejudiced, in that it could not say that, had the

sentencing court correctly understood its authority, the sentence imposed would likely have been the same. Mulholland, 161 Wn.2d at 334. In Henkleman's case, it is apparent that the court did understand its authority, decided not to impose an exceptional sentence, and from that point was required to impose consecutive sentences. There is nothing to indicate that the court was at all receptive to arguments about an exceptional sentence. There was no error and Henkleman's sentence should stand as imposed.

D. CONCLUSION.

There was no violation of Henkleman's public trial right, the first aggressor instruction was properly given, and the court correctly imposed sentence. The State respectfully asks this court to affirm Henkleman's convictions.

Respectfully submitted this 6th day of August, 2014.



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THURSTON COUNTY PROSECUTOR

August 06, 2014 - 9:41 AM

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