

NO. 47947-8-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

KENNETH E. BARRETT,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COURT
The Honorable Erik D. Price, Judge
Cause No. 14-1-00826-4

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in allowing the prosecutor to argue facts not in the record.
02. The trial court erred in allowing Barrett to be represented by counsel who provided ineffective assistance by failing to object or to either move for a mistrial or request a curative instruction in light of the State's improper closing argument that alleged facts not in the record.
03. The trial court erred by taking challenges for cause at sidebar during jury selection.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the prosecutor's flagrant and ill-intentioned closing argument, which alleged facts not in evidence, substantially affected the jury's verdict and eliminated the possibility that even a precise objection or a carefully worded curative instruction would have obviated the resultant prejudice?
[Assignment of Error No. 1].
02. Whether the trial court erred in allowing Barrett to be represented by counsel who provided ineffective assistance by failing to object or to either move for a mistrial or request a curative instruction in light of the State's improper closing argument that alleged facts not in the record?
[Assignment of Error No. 2].
03. Whether the trial court violated Barrett's right to a public trial by taking challenges for cause at sidebar during jury selection?
[Assignment of Error No. 3].

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C. STATEMENT OF THE CASE

01. Procedural Facts

Kenneth E. Barrett was charged by second amended information filed in Thurston County Superior Court January 30, 2015, with malicious mischief in the second degree, count I, and bail jumping, count II, contrary to RCWs 9A.48.080(1)(a) and 9A.76.170(3)(c). [CP 15].

No pretrial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 8, 13]. Trial to a jury commenced February 4, the Honorable Erik D. Price presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 234].

The jury failed to reach a verdict on the malicious mischief charge, but convicted Barrett of bail jumping. [CP 57, 59, 60]. On July 30, following the filing of the third amended information, Barrett entered a plea of guilty to the lesser degree offense of malicious mischief in the third degree, contrary to RCW 9A.48.090(1) [RP 07/30/15 4-7; CP 61-65, 87]. He was later sentenced within his standard range and timely notice of this appeal followed. [CP 68, 74-84].

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02. Trial¹

Through senior deputy prosecuting attorney John M. Jones, the State introduced the following documents relating to the bail jumping charge: certified copy of 06/17/14 Order and Notice Setting Trial Date or Other Hearings [State's Exhibit 35; RP 97-98],² certified copy of 06/17/14 Conditions of Release, requiring Barrett to appear before the court within "three (3) days notice" [State's Exhibit 36; RP 100-01], certified copy of 08/14/14 Agreed Order of Trial Continuance, setting forth, among other dates, a status conference hearing for "11-12, 2014, at 9:00 a.m." and notice that failure to appear for a scheduled hearing "MAY RESULT IN ISSUANCE OF AN ARREST WARRANT, FORFEITURE OF BAIL, AND CRIMINAL PROSECUTION FOR BAIL JUMPING" [State's Exhibit 37; RP 105-08], and a certified copy of 11/12/14 Order for Bench Warrant after Failure to Appear issued for Barrett. [State's Exhibit 38; RP 113-14].

During direct-examination, 53-year-old Barrett had the following exchange with his attorney:

Q. ... On November 12th, 2014, you came to court?

¹ The facts are limited to the offense of bail jumping for which the jury found Barrett guilty.

² Unless otherwise indicated, all references to the Report of Proceedings are to the transcript entitled "Jury Trial" Volumes I-II.

- A. Yes, I was late.
- Q. Approximately what time?
- A. Oh, before noon.
- Q. Okay. And what were you told to do?
- A. Come back the next day.
- Q. Did you come back the next day?
- A. Yes.
- Q. What happened the next day?
- A. They squished the warrant and gave me a paper so I wouldn't be arrested if I got pulled over.
- Q. Did they give you a new court date?
- A. Yes.
- Q. Okay. Now, the notice that told you to come to court on November 12th, did you read that document?
- A. No.
- Q. Okay. How do you get apprised of your court dates?
- A. Brother.
- Q. Okay. What's the process? Walk the jury through that. You get a piece of paper from the Court, what happens?

A. Magnet on the refrigerator, my brother tells me when the dates are, and then I write some dates up on the calendar.

Q. Okay. So what happened on the 12th?

A. I was in town, and then you called my brother, and he called me, and he didn't tell me about the court date.

Q. So what happened next?

A. You called and said I had a warrant so come right up here.

Q. And?

A. And got another court date.

Q. You were told to come back the next day?

A. Yeah. Next day and got another court date.

[RP 166-67].

During cross-examination, Barrett explained that he is legally blind [RP 161], that he has "23/100 vision [RP 201]," and that he "will be blind by the time I'm 60, totally blind. It's a hereditary disease on my mom's side of the family." [RP 203]. He is unable to read documents. [RP 161]. When handed State's Exhibits 35-37, he said that "he signed things without reading them because I can't see." [RP 202]. He said the paper with the dates on it—presumably State's Exhibit 37, which lists the missed

hearing date of “11-12, 2014 at 9:00 a.m.”— “was unlegible.” [RP 202].

“I couldn’t read the dates on it.” [RP 202].

During redirect, Barrett was again questioned by his attorney:

Q. Let’s turn to those court documents that the prosecutor showed you. Isn’t it true that you can’t read those documents?

A. No, I can’t.

Q. So when you come into court and I’m your attorney, I tell you to sign something, you just do it; is that correct?

A. Yes.

Q. Okay. So you don’t recall whether those documents were ones that you went before the judge or whether I just signed - - told you to sign them.

A. Yes.

[RP 211].

....

Q. (By Defense Counsel) Okay. Now, do you always come to court at the same time?

A. No.

Q. Okay. Sometimes it’s - - what time are you instructed to come to court?

A. First time was ten o’clock, 10:30, something like that.

Q. And what were the other times?

A. I don't know.

[RP 212].

D. ARGUMENT

01. THE PROSECUTOR'S FLAGRANT AND ILL-INTENTIONED CLOSING ARGUMENT, WHICH ALLEGED FACTS NOT IN EVIDENCE, SUBSTANTIALLY AFFECTED THE JURY'S VERDICT AND ELIMINATED THE POSSIBILITY THAT EVEN A PRECISE OBJECTION OR A CAREFULLY WORDED CURATIVE INSTRUCTION WOULD HAVE OBLVIATED THE RESULTANT PREJUDICE.

The law in Washington is clear, prosecutors are held to the highest professional standards, for he or she is a quasi-judicial officer who has a duty to ensure defendants receive a fair trial. See State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). Violation of this duty can constitute reversible error. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

A criminal defendant's right to a fair trial is denied when the prosecutor makes improper comments and there is a substantial likelihood that the comments affected the jury's verdict. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Where, as here, a defendant fails to object to improper comments at trial, or fails to request a curative instruction, or to move for a mistrial, reversal is not always required unless

the prosecutorial misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). The defense bears the burden of establishing both the impropriety and the prejudicial effect. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). “The State’s burden to prove harmless error is heavier the more egregious the conduct is.” State v. Rivers, 96 Wn. App. 672, 676, 981 P.2d 16 (1999).

A prosecutor’s obligation is to see that a defendant receives a fair trial and, in the interest of justice, must act impartially, seeking a verdict free of prejudice and based on reason. State v. Belgarde, 110 Wn.2d 504, 516, 755 P.2d 174 (1988). The hallmark of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury and thus deny the defendant a fair trial guaranteed by the due process clause? Smith v. Phillips, 455 U.S. 209, 210, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982). In this context, the definitive inquiry is not whether the error was harmless or not harmless but rather did the irregularity violate the defendant’s due process rights to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

During closing, in addressing State’s Exhibit 37, the order setting forth the subsequently missed status conference hearing for November 12, 2014, at 9:00 a.m., the prosecutor, without objection, argued:

These are his court dates. They're not his brother's court dates. And more importantly, he's already had notice of those court dates. He signed for them. He's talked to the judge about them

[RP 272].

He signed those documents, and he had conversations with the Court and his attorney DPA Jones talked to you about. That happens every time.

[RP 290].

While a prosecutor has latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury, State v. Warren, 165 Wn.2d 17, 44, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009), a prosecutor may not offer facts not in the record or call the jury's attention to matters that the jury has no right to consider. State v. Hoffman, 116 Wn.2d at 94-95.

To prove Barrett guilty of bail jumping, the State, in part, was required to establish that he missed the November 12, 2014 hearing with knowledge of the requirement of his appearance at the hearing. [CP 51; Court's Instruction 14]. In short, Barrett testified that he was unable to read State's Exhibit 37, the order setting the status conference hearing for November 12, 2014, and was unaware of his required appearance until he spoke with his attorney by telephone and was informed of the outstanding warrant. [166-67].

To prove that Barrett had knowledge of the hearing, the prosecutor, as set forth above, argued that Barrett had “talked to the judge about them” and had “conversations with the Court,” which “happens every time(,)” even though no direct evidence was presented that Barrett had any colloquy with the court regarding his required appearance at the status conference hearing November 12, 2014. The prosecutor’s argument relied upon facts not in evidence. See State v. Belgarde, 110 Wn.2d at 507 (“prejudicial allusions to matters outside the evidence, are inappropriate”) (quoting State v. Belgarde, 46 Wn. App. 441, 448, 730 P.2d 746 (1986), review granted, 108 Wn.2d 1002 (1987)).

To offset Barrett’s defense that the notice of the required hearing was “unlegible” because he was unable to read documents (“I can’t see.”), the prosecutor called the jury’s attention to matters it had no right to consider, and in the process made “prejudicial allusions” to matters outside the record.

The case against Barrett relied upon sufficient proof of his awareness of his required attendance at the status conference hearing November 12, 2014, and the prosecutor’s impermissible comments undermined his claim that he was unaware. In this context, where Barrett’s conviction was far from a certainty, the prejudicial impact of the misconduct is magnified. State v. Perez-Mejia, 134 Wn. App. 907, 919,

143 P.3d 838 (2006). The prosecutor's comments not only substantially affected the jury's verdict but also eliminated the possibility that even a precise objection or a carefully worded curative instruction would have cured the prejudicial effect of the prosecutor's argument, with the result that Barrett was denied a fair trial.

02. BARRETT WAS PREJUDICED BY HIS
COUNSEL'S FAILURE TO OBJECT OR TO
MOVE FOR A MISTRIAL OR REQUEST
A CURATIVE INSTRUCTION IN LIGHT
OF THE STATE'S IMPROPER CLOSING
ARGUMENT.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70

Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995).

Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)); RAP 2.5(a)(3).

Assuming, arguendo, this court finds that counsel waived the error claimed and argued in the preceding section of this brief by failing to object or to move for a mistrial or request a curative instruction in light of the prosecutor's improper closing argument, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to do so. For the reasons and under

the law set forth in the preceding section of this brief, had counsel done so, the trial court would have granted the objection, motion or request for a curative instruction. Trial counsel's failure to exercise due diligence in this context cannot be deemed a tactical decision and falls below an objective standard of reasonableness.

Second, the prejudice here is self evident. Again, as set forth in the preceding section of this brief, the prosecutor's argument called the jury's attentions to facts not in evidence and in the process precluded the jury from making a fair determination of Barrett's guilt or innocence. Counsel's performance was deficient and Barrett was prejudiced, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his conviction for bail jumping.

03. THE TRIAL COURT VIOLATED
BARRETT'S RIGHT TO A PUBLIC
TRIAL BY TAKING CHALLENGES FOR
CAUSE AT SIDEBAR DURING JURY
SELECTION.

Both the Sixth Amendment to the United States Constitution and art. I, §§ 10 and 22 of the Washington Constitution guarantee criminal defendants the right to a public trial. State v. Russell, 141 Wn. App. 733, 737-38, 172 P.3d 361 (2007), reviewed denied, 164 Wn.2d 1020 (2008); Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721,

723, 175 L. Ed. 2d 675 (2010). This right is not, however, unconditional, and a trial court may close the courtroom in certain situations. State v. Easterling, 157 Wn.2d 167, 174-75, 137 P.3d 825 (2006). Such a closure may occur only after (1) properly conducting a balancing process of five factors and (2) entering specific findings on the record to justify so ruling. State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). A trial court's failure to conduct the required Bone-Club inquiry "results in a violation of the defendant's public trial rights." State v. Brightman, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005). In such a case, the defendant need show no prejudice; it is presumed. Bone-Club, 128 Wn.2d at 261-62. Additionally, a defendant's failure to "lodge a contemporaneous objection" at the time of the exclusion does not amount to a waiver of his or her right to a public trial. Brightman, 155 Wn.2d at 514-15, 517. The remedy for such a violation is to reverse and remand for a new trial. In re Pers. Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). This court reviews de novo the question of law of whether a defendant's right to a public trial has been violated. Brightman, 155 Wn.2d at 514; State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

In State v. Wilson, 174 Wn. App. 328, 298 P.3d 148 (2013), this court, discussing State v. Paumier, 176 Wn.2d 29, 288 P.3d 1126 (2012), State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012), and Sublett,

recognized that our Supreme Court has developed a two-step process for determining whether a particular proceeding implicates a defendant's public trial right:

First, does the proceeding fall within a specific category of trial proceedings that our Supreme Court has already established implicates the public trial right? Second, if the proceeding does not fall within such a specific category, does the proceeding satisfy Sublett's "experience and logic" test? (footnote omitted).

State v. Wilson, 174 Wn. App. at 335.

Given this court's acknowledgement in Wilson, 174 Wn. App. at 335-40, that the Washington Supreme Court has established that the public trial right applies to jury selection, Barrett addresses only whether the trial court violated his right to a public trial by taking challenges for cause at sidebar during jury selection. See State v. Wise, 176 Wn.2d at 11-12.

The record demonstrates that during the jury selection process several prospective jurors were excused for cause at sidebar.

THE COURT: All right. Please be seated.

We did have a sidebar at approximately 10:58 for - - by my count about two minutes to discuss the challenges. The Court first suggested that there were no appropriated hardship challenges, and the Court then sought either objection or agreement from counsel, and to the Court's recollection (the prosecutor) agreed and (defense counsel) agreed.

Anything to add with respect to that part of the sidebar, (defense counsel)?

[DEFENSE COUNSEL]: No, Your Honor.

THE COURT: (Prosecutor).

[PROSECUTOR]: Not from the State, Your Honor. Thank you.

THE COURT: The next issue that the Court discussed at the sidebar was the cause challenges. And the Court offered that juror 11 be excused for cause. Juror 11 had stated during voir dire that he had a couple of children, kids I guess come through the neighborhood, create a lot of damage and vandalism including blowing up his mailbox. To the Court's follow-up question of whether that affected his ability to be fair and impartial he said that it did. When the Court pressed on whether he could set aside those experiences and decide the case, juror eleven said he could not. And therefore the Court felt that he could not be - - he could not be an appropriate juror.

The Court then offered number 32. Juror 32 testified - - or rather stated during voir dire that she had her car and perhaps home broken into by homeless individuals that were never caught, and created some damages apparently, and she could not be fair as a result. The Court pressed again on whether she could set those aside, and she declared that she could not.

The Court then suggested juror 33. Juror 33 stated that her son was accused some years ago of malicious mischief and she had relatively strong feelings. I say relatively. That was not her words. She had strong feelings about whether the charges should have been brought. She did not want to discuss what happened to the charges. The Court

permitted her not to answer that. But in any event, she stated very clearly that she could not be fair based on that experience.

And finally juror 34 stated that he had been a teacher of the defendant Mr. Barrett and was familiar with him and as a result of his experienced with Mr. Barrett he could not be fair and impartial to both sides.

So the Court suggested those four jurors for cause excusals and sought the opinions of the parties. Neither party objected and both parties to the Court's recollection agreed with those four as for-cause challenges and they were then excused.

[RP 02/04/15 7-9].

In State of Washington v. Unters Lewis Love, 183 Wn.2d 598, 354 P.3d 841 (2015), our Supreme Court, while recognizing that a defendant's public trial rights attach to "jury selection, including for cause and preemptory challenges[.]" 183 Wn.2d at 598, the nevertheless affirmed Love's conviction, holding he was not denied his right to a public trial because there was no closure during the challenges for cause at sidebar.

As here, in Love, counsel exercised for cause challenges to potential jurors during a sidebar conversation. Love, 183 Wn.2d at 601. Though the jury could not hear the conversation, it "was on the record and visible to observers in the courtroom." Love, 183 Wn.2d at 602. In finding there was no closure, the court observed that the public was able to "watch the trial judge and counsel ask questions of potential jurors, listen to the

answers to those questions, see counsel exercise challenges at the bench and on paper, and ultimately evaluate the empaneled jury.” Love, 183 Wn.2d at 607. In determining there was no closure and thus no violation of Love’s public trial right, the court noted “[t]he public was present for and could scrutinize the selection of Love’s jury from start to finish, affording the safeguards of the public trial right[.] Id.

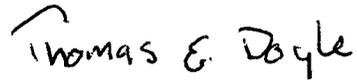
In contrast, here no transcript was made of the sidebar discussion about the for cause challenges, hence the trial court later offering a recollection of the discussion in order to make a record, as previously set forth. As noted above, the court in Love, in finding no closure, relied on the fact that the sidebar discussion “was on the record,” presumably because the discussion about the for cause challenges would be publically available for review and scrutiny, a situation absent from this record. Under these facts and a strict reading of Love, it cannot be said there was no closure in Barrett’s case, with the result that the Love case is not controlling in this regard.

The trial court erred in taking challenges for cause at sidebar during jury selection, outside the public’s purview and in violation of Barrett’s right to a public trial. The error was structural, prejudice is presumed, and reversal is required.

E. CONCLUSION

Based on the above, Barrett respectfully requests this court to reverse his conviction consistent with the arguments presented herein.

DATED this 18th day of February 2016.

Handwritten signature of Thomas E. Doyle in black ink.

THOMAS E. DOYLE
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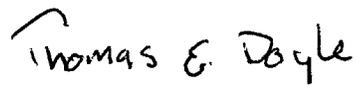
CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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DATED this 18th day of February 2016.

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