

NO. 47957-5-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BRIAN L. STREATER,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COURT
The Honorable Gary R. Tabor, Judge
Cause No. 15-1-00135-7

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in failing to give Streater's proposed instructions on the lesser included offense of unlawful display of a weapon.
02. The trial court erred in permitting Streater to be represented by counsel who provided ineffective assistance by failing to properly preserve his exception to the court's failure to give his proposed instructions on the lesser included offense of unlawful display of a weapon.
03. The trial court erred in imposing a firearm enhancement
04. The trial court erred in taking challenges for cause at sidebar during jury selection.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether Streater was entitled to instructions on the lesser included offense of unlawful display of a weapon?
[Assignment of Error No. 9].
02. Whether Streater was prejudiced as a result of his counsel's failure to properly preserve his exception to the court's failure to give his proposed instructions on the lesser included offense of unlawful display of a weapon?
[Assignment of Error No. 2].
03. Whether the trial court erred in imposing a firearm enhancement where the jury returned a special verdict for deadly deadly weapon?
[Assignment of Error No. 3].

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04. Whether the trial court violated Streater's right to a public trial in taking challenges for cause at sidebar during jury selection? [Assignment of Error No. 4].

C. STATEMENT OF THE CASE

01. Procedural Facts

Brian L. Streater was charged by information filed in Thurston County Superior Court January 28, 2015, with assault in the second degree while armed with a firearm, count I, assault in the fourth degree, count II, malicious mischief in the third degree, count III, and assault in the fourth degree, count IV, with each count further alleging domestic violence, contrary to RCWs 9A.36.021(1)(c), 9.94A.825, 9.94A.533(3), 9A.36.041, 9A.48.090(1)(a), and 10.99.020. [CP 6-7].

Streater's pretrial statements were ruled admissible following a CrR 3.5 hearing [RP 04/27/15 46-49; CP 19-21], and trial to a jury commenced May 5, the Honorable Gary R. Tabor presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 313].¹ The jury hung on the assault second charge but convicted on the remaining counts, further finding the State had failed to prove domestic violence for any of the counts. [CP 54-62].

¹ Unless otherwise indicated, all references to the report of proceedings are to those entitled Volumes I-IV

Retrial of the assault in the second degree while armed with a firearm charge concluded with a guilty verdict, including enhancement and finding of domestic violence. [CP 82-84].

Streater was sentenced within his standard range and timely notice of this appeal followed. [CP 89-100].

02. Substantive Facts: First Trial²

On January 24, 2015, near 4:00 a.m., Kali Cababat was visiting Kristy Boatner at her apartment in Thurston County. [RP 36, 39, 105]. While they were talking in the kitchen/living room area, Streater, showed up at the back sliding door. [RP 38, 40, 44-45]. Boatner appeared surprised to see him. [RP 45-46]. When he entered the apartment, he walked up to Boatner and pushed her to the ground with both hands before walking outside with Cababat to calm down. [RP 46-48]. When he went back into the apartment to get some of his personal belongings, he broke open the bedroom door upstairs while yelling at Boatner before bashing in the window in the living room as he left the apartment. [RP 47-52]. Cababat went outside and saw Streater walking down the street. [RP 53].

A short while later a car pulled up to the apartment. [RP 59]. It was a Dodge Charger driven by Thavaro Som and occupied by Streater, who

² Where possible, the facts are limited to the two counts of assault in the fourth degree and the count of malicious mischief in the third degree for which the jury found Streater guilty.

had called Som for a ride back to the apartment so he could get his belongings, telling him “he was there earlier and he caught them together.” [RP 126]. According to Som, Streater got out of his car and then “reached in my glove box and grabbed my gun and he went inside.” [RP 127]. Walking into the apartment, Streater pointed the handgun directly at Boatner and started yelling at her. [RP 59, 68]. Cababat called 911 to report the incident, describing Streater and saying he was leaving the scene with a handgun as a passenger in a light gray Dodge Charger driven by a person wearing a baseball hat. [RP 61-62].

Police were dispatched at 4:14 a.m. [RP 105]. Deputy Cam Clark stopped the vehicle driven by Som and occupied by Streater. [RP 107, 111]. An operational handgun with a round in the chamber was seized from within the car. [RP 114-15, 223-25]. While being handcuffed, Streater spontaneously told Clark that “he took all responsibility for this. He caught his girlfriend with another man and got upset.” [RP 112]. Following advisement and waiver of rights, Streater further explained that he “was full of emotion and hurt from the situation.” [RP 204]. He admitted to throwing a glass fixture at Boatner but said it didn’t hit her. [RP 209]. He also admitted pushing Boatner but denied that he ever punched or kicked her or pointed a gun at her. [RP 05/06/15 209].

Boatner, who had broken off her dating relationship with Streater earlier that January [RP 148], testified that Streater was very upset when he showed up at her apartment and saw her with Cababat, explaining that when she let him in through the sliding back door he threw his keys at her and called her a bitch before using two hands to push her to the floor. [RP 159-160, 163]. When she went upstairs and locked herself in a bedroom, Streater followed and kicked the bedroom door open before going downstairs and breaking the window in the living room as he left the apartment. [RP 161-63]. Boatner was later billed “900 and some dollars for everything.” [RP 164].

When Streater returned about 45 minutes later, he pointed a gun at her. [RP 166-67]. “He just picked it up and pointed it straight at me with a straight arm.” [RP 05/06/15 167]. “[M]aybe 45 seconds to a minute.” [RP 169]. It ended when Som came into the apartment and took the gun from Streater [RP 170]. As he was leaving, Streater threw a glass fixture that hit Boatner’s arm before punching her in the face, arms and ribs and kicking her while she was on the floor. [RP 171-72, 190].

At trial, Streater claimed that about two or three days before the alleged incident he and Boatner rented the apartment together, and that he paid \$400 of the deposit after making an agreement with the landlord that his name would be added to the lease if they stayed current on the rent for

six months. [RP 246]. He denied that his relationship with Boatner had terminated. [RP 247]. When he went to the apartment the morning of the alleged incident, he was surprised to find Boatner and Cababat. [RP 250]. After Boatner let him into the apartment and he saw that she and Cababat were half-dressed, he became upset and threw his keys at Boatner before pushing her. When he went upstairs to get his belongings, he punched in the bedroom door when he heard Boatner's voice inside the room. [RP 254]. Leaving his belongings upstairs, he went back downstairs, broke the window in the living room, and then left and called his friend Som to come help him go back to get his personal belongings. [RP 255-56]. "I felt like that place was mine[.] I felt like, you know, they can't do that, you know. I worked hard for that place, I paid my money, and - -" [RP 256-57].

Som drove him back to the apartment about 30 minutes later. [RP 257-58]. Once they got there, Streater "reach[ed] in the glove compartment and grabbed the gun." [RP 258]. He went back into the apartment, told Cababat to leave, and went upstairs to get bags before returning downstairs and leaving. [RP 259-263]. On the way out of the apartment, he admitted to throwing a light fixture at Boatner. [RP 263]. He denied ever pointing or threatening anybody with the gun. [RP 263].

Streater admitted telling the police that he would take responsibility. “I realized that I broke things in the house and I did push Kristy ... and I shouldn’t have took it that far.” [RP 266]. He admitted it was his fault for “pushing her and breaking things in the house.” [RP 267]. He denied ever pointing a gun at Boatner or punching or kicking her. [RP 268].

The apartment manager testified that Streater paid for the hold on the apartment that was rented to Boatner, but that there was no discussion regarding his name later appearing on the lease. [RP 295].

03. Substantive Facts: Second Trial³

Boatner again testified that after Streater, with whom she had recently ended a dating relationship, had left and then returned to the apartment, he was carrying a handgun that he pointed at her. [RP 441-42, 468]. “I thought he was going to shoot me.” [RP 470]. “He just raised it up and pointed it straight at me.” [RP 470]. “I thought I was going to die.” [RP 471]. From outside the apartment, Cababat saw Streater “pointing the weapon at” Boatner. [RP 554]. It ended when Som came into the apartment and took the operable gun from Streater. [RP 472, 506, 634].

³ The facts are limited to the assault in the second degree while armed with a firearm for which the jury found Streater guilty.

While being arrested, Streater told the police that he was taking all responsibility “for this” and that he had caught his girlfriend with another man. [RP 521]. He said it was all his fault. [RP 621]. “He stated that he had the gun at his side. He claims he didn’t point it at anybody” [RP 607].

Streater once again testified that after Som had driven him back to the apartment, he grabbed Som’s gun from the glove compartment before returning to the apartment. [RP 657]. He saw Cababat before reentering the apartment and chambered a round because he was afraid of him. [RP 657-58, 674]. Within seconds of entering the apartment, Som took the gun from him. [RP 658]. He admitted calling Boatner the “B” word, but denied pointing the gun at anybody or threatening anybody with it. [RP 658, 661].

D. ARGUMENT

01. STREATER WAS ENTITLED TO HIS PROPOSED INSTRUCTIONS ON THE LESSER INCLUDED OFFENSE OF UNLAWFUL DISPLAY OF A WEAPON.

The trial court declined to give Streater’s proposed instructions on the lesser included offense of unlawful display of a weapon. [RP 700-03]. Although the court acknowledged it had “receive[d] proposed instructions from the defense [RP 684],” a search of the record has failed to uncover these instructions. Given that defense

counsel represented during argument on the instructions that he “did put forth Washington Pattern Instruction 133.41 as well as 133.40 [RP 685],” it is a fair inference these are the instructions the court refused to give to the jury.

WPIC 133.40 reads, in pertinent part:

A person commits the crime of unlawfully displaying a weapon when he or she carries, exhibits, displays or draws a [firearm] ...in a manner, under circumstances, and at a time and place [that manifests an intent to intimidate another] [or] [that warrants alarm for the safety of other persons].

11 Washington Practice: Washington Pattern Jury Instructions: Criminal

133.40, at 611 (3d ed., 2008).

WPIC 133.41 reads, in pertinent part:

To convict the defendant of the crime of unlawfully displaying a weapon, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about (date), the defendant [carried] [exhibited] [displayed] [or] [drew] a [firearm]

(2) That the defendant [carried] [exhibited] [displayed] [or] [drew] the weapon in a manner, under circumstances, and at a time and place that [manifested an intent to intimidate another] [or] [warranted alarm for the safety of other persons]....

11 Washington Practice: Washington Pattern Jury Instructions: Criminal
133.41, at 612 (3d ed., 2008).

A defendant is entitled to an instruction on the elements of a lesser included offense when (1) each of the elements of the lesser offense is a necessary element of the offense charged (legal test); and (2) the evidence supports an inference that only the lesser crime was committed (factual test). State v. Berlin, 133 Wn.2d 541, 545-46, 548, 947 P.2d 700 (1997) (citing State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)).

The first or legal test of Workman is satisfied here. See State v. Baggett, 103 Wn. App. 564, 569, 13 P.3d 659 (2000) (all of the elements of the unlawful display statute are elements of second degree assault with a deadly weapon); State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), overruled on other grounds, State v. Blair, 117 Wn.2d 479, 486-87, 816 P.2d 718 (1991). RCW 9A.12.020(1) provides:

(i)t shall be unlawful for any person to carry, exhibit, display, or draw any firearm ... in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons

Streater was charged under RCW 9A.36.021(c), wherein a person is guilty of second degree assault if he or she “(a)ssaults another with a deadly weapon.” Jury Instruction 7 defined assault “as an act done with

intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.” [CP 77]. Given each element of unlawful display of a weapon is a necessary element of second degree assault with a deadly weapon, the former is a lesser included offense of the latter.

In evaluating the adequacy of the evidence to support a proposed instruction, the court must interpret it most strongly in favor of the party requesting the instruction and must not weigh the proof or judge the witnesses’ credibility, which are exclusive functions of the jury. State v. Williams, 93 Wn. App. 340, 348, 968 P.2d 26 (1998), review denied, 138 Wn.2d 1002, 984 P.2d 1034 (1999), abrogated on other grounds, State v. Kurtz, 178 Wn.2d 466, 309 P.3d 472 (2013); State v. Fernandez-Medina, 141 Wn. 2d 448, 455-56, 6 P.3d 1150 (2000) (citing State v. Cole, 74 Wn. App. 571, 579, 874 P.2d 878, review denied, 125 Wn.2d 1012 (1994), overruled on other grounds, Seeley v. State, 132 Wn.2d 776, 940 P.2d 604 (1997)).

In State v. Fernandez-Medina, 94 Wn. App. 263, 971 P.2d 521 (1999), this court affirmed the defendant’s conviction, holding that the denial of his request for a lesser included or inferior degree offense was proper. Our Supreme Court reversed, citing this court’s failure to give the

appropriate “deference” to the fact that it is for the jury to decide what degree of crime a defendant is guilty once evidence supports the giving of lesser included or inferior degree instructions.

[T]he jury’s ability to “separate the wheat from the chaff” deserves more deference than was afforded by the court below, and we are loathe to allow expansion of the trial judge’s authority into the fact-finding province of the jury....

State v. Fernandez-Medina, 141 Wn.2d at 461.

Evidence in this case also satisfies the Workman factual test.

Under this prong, “(t)he test is whether there is evidence supporting an inference that the defendant is guilty of the lesser included offense instead of the greater one.” State v. Bergeson, 64 Wn. App. 366, 369, 824 P.2d 515 (1992). And this evidence need not come from the defendant; it may also come from the State’s evidence. State v. Fernandez-Medina, 141 Wn. 2d at 456. As instructed in this case, to convict Streater of second degree assault with a deadly weapon, the jury had to find specific intent to create in another reasonable fear and apprehension of bodily injury. See State v. Byrd, 125 Wn. 707, 713, 887 P.2d 396 (1995). Such intent may be inferred from pointing a gun, but not from mere display of a gun. State v. Eastmond, 129 Wn.2d 497, 500, 919 P.2d 577 (1996). And to convict a defendant of unlawful display of a weapon, the jury must determine that the defendant displayed a weapon in a manner manifesting an intent to

intimidate another person or warranting alarm for another's safety. RCW 9.41.270(1).

Streater admitted that he was in possession of Som's handgun when he reentered the apartment, but consistently—both to the police and to the jury—asserted that he never pointed it at Boatner. [RP 607, 658, 661]. It was his testimony that Som had followed him into the apartment and took the gun from him within seconds, which is corroborated by Som's testimony that he was behind Streater by about “ten, fifteen seconds.” [RP 635]. Upon entering the apartment, Som saw the handgun “down by (Streater's) side.” [RP 635]. The jury could have found that Streater displayed the handgun in a manner that manifested an intent to intimidate or that warranted alarm for Boatner's safety. And even if Boatner was frightened does not mean that Streater necessarily committed assault. Unlawful display of a deadly weapon is defined by the way Streater used the handgun and not by Boatner's response. If he displayed the handgun only in a manner to intimidate, he committed only the offense of unlawful display of a deadly weapon. Streater was entitled to an instruction on unlawful display of a weapon because both the legal and factual prongs of the Workman test were satisfied. The trial court erred in refusing to give the proposed instructions.

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02. STREATER WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO PROPERLY TAKE EXCEPTION TO THE COURT'S FAILURE TO GIVE HIS PROPOSED INSTRUCTIONS ON THE LESSER INCLUDED OFFENSE OF UNLAWFUL DISPLAY OF A WEAPON.⁴

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).

⁴ While it has been argued in the preceding section that Streater properly preserved the issue of the court's failure to give his proposed instructions, this portion of the brief is presented should this court disagree with this assessment.

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).

Following the court's failure to give Streater's proposed instructions as set forth above, the court took a recess before returning to the bench and asking the prosecutor if she had any objections to the giving or not giving of any of the instructions. [RP 708-09]. The prosecutor indicated she did not and then entered into a colloquy with the court about the definition of assault in the second degree with a deadly weapon, concluding that she agreed with the court that there doesn't need "to be a definition of knowingly because the mens rea is intentionally." [RP 710].

The following then occurred:

THE COURT: Okay. Thank you. Mr. (Defense Counsel)?

(DEFENSE COUNSEL): They look acceptable, Your Honor. Thank you.

[RP 710].

In this context, it does not appear that defense counsel was abandoning his argument that the court should have given his proposed

instructions on the lesser included offense of unlawful display of a weapon, especially since he had just argued the point before the recess. However, should this court find that trial counsel waived the error claimed and argued in the preceding section by failing to further except to the court's failure to give his proposed instructions, then both elements of ineffective assistance of counsel have been established.

The record does not, and could not, reveal any tactical or strategic reason why trial counsel failed in this regard for the reasons argued in the preceding section. And the prejudice is self evident. Streater consistently stated that he had not pointed the handgun at Boatner, with the result that without the lesser included instructions the jury was precluded from considering the lesser included offense of unlawful display of a weapon.

Counsel's performance was deficient, which was highly prejudicial to Streater, 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 assault in the second degree with a deadly weapon.

03. THE TRIAL COURT ERRED IN IMPOSING
A FIREARM ENHANCEMENT WHERE
THE JURY RETURNED A SPECIAL
VERDICT FOR DEADLY WEAPON.

Streater was charged with second degree assault

while armed with a firearm. [CP 6]. Finding him guilty [CP 83], the jury returned the following special verdict:

We the jury, answer the question submitted as follows:

QUESTION: Was the defendant, BRIAN L. STREATER armed with a deadly weapon at the time of the commission of the crime of assault in the second degree?

ANSWER: Yes

[CP 83].

In State v. Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010), our Supreme Court ruled that the imposition of a firearm enhancement where the jury returns a special verdict for deadly weapon violates the defendant's right to a jury trial, even where the State charged the defendant with a firearm enhancement and proved the defendant committed the offense with a firearm, but was only asked to find a deadly weapon in the special verdict. Id. at 898-99. In addition, the court ruled that a harmless error analysis did not apply in this scenario. Id. at 900-01.

This holding is directly on point. Imposing a firearm enhancement of 36 months [CP 93] when the jury returned a deadly weapon enhancement is error, with the result that the matter must be remanded for resentencing with a deadly weapon enhancement rather than a firearm enhancement.

04. THE TRIAL COURT VIOLATED
STREATER'S RIGHT TO A PUBLIC
TRIAL BY TAKING CHALLENGES FOR
CAUSE AT SIDEBAR DURING JURY
SELECTION IN THE FIRST TRIAL.

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, Streater 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: Counsel, you may be seated. All right. Counsel, I want to just make a record of the sidebar that we had. It was actually after the first questioning period and four jurors were excused at that time. Jurors 5 and 10 were excused for hardship, and Jurors 9 and 39 were excused for cause based on answers they had given. There were no challenges for cause or hardship after the second questioning period when we had another sidebar before we began jury selection.

[RP 21].

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.

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 Streater's case, with the result that the Love case is not controlling in this regard.

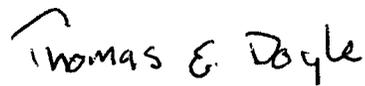
The trial court erred in taking challenges for cause at sidebar during jury selection, outside the public’s purview and in violation of

Streater's right to a public trial. The error was structural, prejudice is presumed, and reversal is required.

E. CONCLUSION

Based on the above, Streater respectfully requests this court to reverse his convictions and/or remand for resentencing.

DATED this 16th day of February 2016.

Handwritten signature of Thomas E. Doyle in black ink.

THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

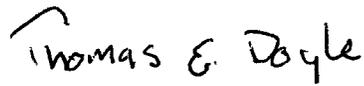
CERTIFICATE

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

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Brian L. Streater #384411
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Connell, WA 99326

DATED this 16th day of February 2016.

Handwritten signature of Thomas E. Doyle in black ink.

THOMAS E. DOYLE
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DOYLE LAW OFFICE

February 16, 2016 - 4:12 PM

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