NO. 32466-4-III

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

FILED

OCT 20, 2015

Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Respondent,

v.

MARGARITO GORDIAN CRUZ

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KLICKITAT COUNTY
Superior Court No. 00-1-00023-7

SUPPLEMENTAL BRIEF OF RESPONDENT

DAVID R. QUESNEL
PROSECUTING ATTORNEY

ERIKA GEORGE
DEPUTY PROSECUTING ATTORNEY

Klickitat County Prosecuting Attorney
205 S. Columbus Avenue, MS-CH-18
Goldendale, Washington 98620
(509) 773 – 5838

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

A. ISSUES PRESENTED 1

At trial, the parties exercised silent, written peremptory challenges during jury selection. Was Mr. Cruz's constitutional right to a public trial violated by this procedure when the public record included a list of the jurors challenged, in what order, and by whom?

B. STATEMENT OF THE CASE 1

C. ARGUMENT 2

Mr. Cruz's constitutional right to a public trial was not violated when the parties exercised silent, written peremptory challenges because the public record included a list of the jurors challenged, in what order, and by whom.

D. CONCLUSION 3

TABLE OF AUTHORITIES

Cases

Washington State Supreme Court

State v. Unters Lewis Love, No. 89619-4 (July 16, 2015).....2,3

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

At trial, the parties exercised silent, written peremptory challenges during jury selection. Was Mr. Cruz's constitutional right to a public trial violated by this procedure when the public record included a list of the jurors challenged, in what order, and by whom?

B. STATEMENT OF THE CASE

The Klickitat County Prosecutor's Office charged Margarito Cruz with Rape of a Child in the Second Degree and Child Molestation in the Second Degree. (CP 46-48). A jury found Cruz guilty; however the convictions were reversed on appeal. (CP 19-21). Following remand, Cruz was convicted again. (CP 49).

During the second trial, peremptory challenges were executed in a manner in which the prosecutor and defense counsel passed a sheet of paper back and forth, taking turns writing down peremptory challenges. The court announced when each side used a peremptory challenge. (VRP 81-82). Once the challenges were completed, the court announced the jury. (VRP 82). The peremptory challenge list was filed. (CP 62).

At no time during the process was the courtroom locked, and people were not prohibited from entering. At no time was the jury panel asked to leave the courtroom. The procedure was not conducted outside the courtroom, such as in chambers, but in open view of the public.

Following conviction, Cruz timely filed his Notice of Appeal. (CP 60-61).

C. ARGUMENT

Mr. Cruz's constitutional right to a public trial was not violated when the parties exercised silent, written peremptory challenges because the public record included a list of the jurors challenged, in what order, and by whom.

Mr. Cruz argues that his convictions should be reversed and his case remanded for trial because his right to a public trial was violated when the peremptory challenges were excercised in a method in which a piece of paper was silently passed back and forth, with counsel writing down their peremptory challenges.

The Washington State Supreme Court has recently decided *State v. Unters Lewis Love*, No. 89619-4, a case with an identical fact pattern in which peremptory challenges were excercised silently when counsel exchanged a written list of jurors between them, alternating in striking a name from the list on a struck juror sheet. The struck juror sheet was filed in the court record and available to the public, as it was in Mr. Cruz's case. There was no indication that the spectators or prospective jurors were forced to leave the courtroom, that the courtroom was locked, or that any person was prohibited from entering the courtroom..

State v. Unters Lewis Love holds that "the juror challenges in this case were excercised in a manner consistent with the minimum safeguards of the public trial right and affirm." The Court further explains that

> [W]ritten peremptory challenges are consistent with the public trial right so long as they are filed in the public record. Spoken peremptory challenges certainly increase the transparency of

> jury selection, but there are still legitimate methods of challenging jurors in writing, like the practice here, that do not amount to a courtroom closure because they are made in open court, on the record, and subject to public scrutiny."

State v. Unters Lewis Love also specifically states that there was no courtroom closure because 1) the courtroom was not closed "completely and purposefully closed to spectators so that no one may enter and no one may leave." (*internal citations omitted);* and 2) no portion of the trial was held "someplace 'inaccesssble' to spectators" (*internal citations omitted).*

There are no facts indicated on the record that show the courtroom was closed in any matter. There are no facts to indicate that the process did not take place in front of the jury panel.

With the facts of Mr. Cruz's case being identical to the facts in *State v. Unters Lewis Love*, and the Supreme Court holding that this procedure does not violate the right to a public trial, Mr. Cruz cannot show closure occurred and therefore his public trial claim fails.

D. CONCLUSION

Mr. Cruz's guilty verdict should be affirmed.

Respectfully submitted this 20th day of October, 2015.

KLICKITAT COUNTY
PROSECUTING ATTORNEY

ERIKA GEORGE, WSBA No. 43871
Deputy Prosecuting Attorney

COURT OF APPEALS OF WASHINGTON
DIVISION III

STATE OF WASHINGTON **Respondent,** **vs.** **MARGARITO GORDIAN CRUZ,** **Appellant**	**NO. 32466-4-III** **Superior Court No. 00-1-00023-7** **CERTIFICATE OF SERVICE**

I, Erika George, declare that on October 16, 2015, I emailed per agreement, a copy of the Supplemental Brief of the Respondent to:

ATTORNEY FOR APPELLANT:
DAVID B. KOCH, WSBA NO. 23789
1908 E. MADISON ST.
SEATTLE, WA 98122
KOCHD@NWATTORNEY.NET

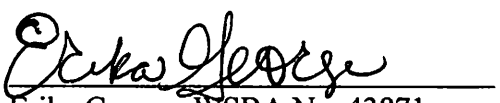
I, Erika George, declare that on October 16, 2015, I deposited in the United States mail by first class mail, proper postage affixed, a copy of the Supplemental Brief of the Respondent to:

APPELLANT:
MARGARITO CRUZ, DOC NO. 896459
AIRWAY HEIGHTS CORRECTIONS CENTER
PO BOX 2049
AIRWAY HEIGHTS, WA 99001

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 20th day of October, 2015.

KLICKITAT COUNTY
PROSECUTING ATTORNEY



Erika George, WSBA No. 43871
Deputy Prosecuting Attorney