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SUPREME COURT NO. 89619-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

UNTERS L. LOVE,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Maryann C. Moreno, Judge,

SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUPPLEMENTAL STATEMENT OF FACTS¹

On the afternoon of April 9, 2012, the jury panel entered the courtroom and was sworn in by the clerk, after welcoming remarks by the court:

THE COURT: It's not morning anymore. I was checking to see if you were awake. Good afternoon. An important part of the trial is the selection of a jury, for which the law requires that all prospective jurors be sworn before questions are asked. So if you wouldn't mind standing one more time, raise your right hand; my clerk will swear you in.

(THE JURY PANEL was duly sworn.)

RP 76.

After general questioning, and at the court's direction, the court addressed "for-cause" challenges at the bench:

THE COURT: Counsel, why don't you approach.

(The following bench conference was held outside the hearing of the jury.)

THE COURT: This is the mic for her headphones (indicating).

MR. KNOX [defense counsel]: Hello.

THE COURT: Any for-cause challenges?

MR. KNOX: Fifteen.

THE COURT: Fifteen? Any objection?

¹ The verbatim report of proceedings is referred to as "RP" and contained in three bound volumes, consecutively paginated.

MR. GAGNON [prosecutor]: For cause, 18? Is that what you –

THE COURT: No. Fifteen.

MR. KNOX: One-five.

MR. GAGNON: I think that's – the state has no objection to No. 15 being struck for cause.

THE COURT: Mm-hm. Any others?

MR. KNOX: Number 30.

THE COURT: Number 30?

MS. ELDER [co-prosecutor]: Yeah, no objection.

MR. GAGNON: The state has no objection to No. 30 being struck for cause.

THE COURT: Okay. Anyone else?

MR. KNOX: No.

RP 132-33.

Still at the bench, the parties and the court thereafter discussed whether Juror No. 28 was blind, whether Juror No. 32 was paying attention, the question of alternates and whether Juror 11 should be excused for a business trip, which the court decided against. RP 133-34.

The record next indicates:

(Bench conference concluded.)

(Peremptory challenge process is being conducted).

THE COURT: This process generally takes a couple minutes, so if you wanted to stand and stretch, talk quietly amongst yourselves, feel free.

(Peremptory challenges continuing).

...

THE COURT: Okay. I think we have jury selected, so please be seated.

RP 135.

The clerk then instructed that Juror No. 4 would be coming out of the juror box, while "Ms. Fall" would be going in, in addition to two alternates:

THE CLERK: We only have one juror that we're going to be removing from the jury box back there as far as the 12 jurors that will be selected. And Juror No. 4, Mr. Patterson, if you could step down and come stand by Tracy or have a seat in the front row.

JUROR NO. 4: I can.

THE CLERK: And then also Jurors No. 13 and 14, if you can have a seat in the front row also. Actually, Ms. Fall, if you wouldn't mind taking the seat back there along the back row, that will give us our final jury for trial.

COURT: No, alternates.

THE CLERK: Oh, we do have two alternates. I'm sorry. Mr. Porter, Juror No. 14 – I didn't do that very well, did I?

JUROR NO. 14: Do you want me to go back?

THE CLERK: If you could take the first seat there, you're our first alternate. And then Ms. Bottelli, Juror No. 16, you'll be the next alternate.

Sir, if you could just move one more seat, please.

(The juror complied.)

THE COURT: All right. Everyone else in the courtroom is excused for the day.

RP 135-36.

Several days later, on April 12, 2012, a document entitled "Record of Jurors" was filed in the superior court file. CP 109-111. It has various markings on it by the prosecutor and defense counsel, indicating the parties' juror challenges. CP 111.

B. SUPPLEMENTAL ARGUMENT

1. THE COURT'S TAKING OF FOR-CAUSE CHALLENGES AT A BENCH CONFERENCE AND WRITTEN PEREMPTORY CHALLENGES VIOLATED LOVE'S RIGHT TO A PUBLIC TRIAL.

As discussed below, for-cause and peremptory challenges have historically been open to the public. Public access plays an important role in ensuring a defendant's right to a public trial. As a result, the private manner in which the court took for-cause and peremptory challenges in Love's case violated his public trial rights.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to a public

trial. Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012). The state constitution also requires that “[j]ustice in all cases shall be administered openly.” CONST. art. I, section 10. Whether a defendant’s public trial right has been violated is a question of law, subject to de novo review on direct appeal. State v. Smith, 181 Wn.2d 508, 334 P.3d 1049 (2014).

The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). This is a core safeguard in our system of justice. Wise, 176 Wn.2d at 5. The open and public judicial process helps assure fair trials, deters perjury and other misconduct by participants, and tempers biases and undue partiality. Wise, 176 Wn.2d at 6. It is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Id. The public trial right is also for the benefit of the accused: “that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.” State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (quoting In re Oliver, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L. Ed. 2d 682 (1948)).

While the courts have not delineated the complete universe of proceedings to which the public trial right attaches, Washington employs the experience and logic test to determine whether a proceeding implicates the public trial right. State v. Sublett, 176 Wn.2d 58, 72-73, 292 P.3d 715 (2012); Id. at 136 (Stephens, J., concurring) (adopting test from Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 7, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press II)). Where experience and logic counsel that a particular proceeding must be open, a trial court's failure to conduct a Bone-Club analysis justifying a closure will result in a new trial. State v. Paumier, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012). A violation of the public trial right is structural, meaning prejudice is per se presumed to inhere in the violation. Wise, 176 Wn.2d at 13-14. A public trial right violation may be raised for the first time on appeal and does not require an objection at trial to preserve the error. State v. Njonge, 181 Wn.2d 546, 334 P.3d 1068 (2014).

In analyzing public trial right cases, this Court examines (1) whether the public trial right is implicated; (2) if so, whether there was a closure; and (3) if there was a closure, whether it was justified. Smith, 181 Wn.2d at 513 (citing State v. Sublett, 176 Wn.2d 58, 92, 292 P.3d 715 (2012) (Madsen, C.J., concurrence)).

(i) For-Cause and Peremptory Challenges Implicate the Public Trial Right.

This Court has held numerous times the public trial right attaches to the voir dire portion of jury selection. See e.g. Wise, 176 Wn. 2d at 12 n.4; In re Pers. Restraint of Morris, 176 Wn.2d 157, 174, 288 P.3d 1140 (2012) (Chambers, J., concurring). Nonetheless, this Court has also explained that application of the experience and logic test is necessary to determine whether the public trial right attaches to other portions of the jury selection process. State v. Slert, 181 Wn.2d 598, 334 P.3d 1088 (2014) (citing with approval State v. Wilson, 174 Wn. App. 328, 338, 298 P.3d 148 (2013)).

Applying the experience prong, the court asks “whether the place and process have historically been open to the press and general public.” Press II, 478 U.S. at 8. The logic prong asks “whether public access plays a significant positive role in the functioning of the particular process in question.” Id. If the answer to both is yes, the public trial right attaches and the Waller or Bone-Club factors must be considered before the proceeding may be closed to the public. Press II, 478 U.S. at 7-8.

Experience shows for-cause and peremptory challenges have historically been open to the press and general public. This is evidenced

by statutes governing the exercise of such challenges, court rule, foreign case law and Washington's own jurisprudence.

Washington statutes governing voir dire indicate challenges were historically made in open court. As the Love court noted in a footnote, "RCW 4.44.240 does provide for testimony if needed to assess a question of jury bias." State v. Love, 176 Wn. App. 911, 919 n.7, 309 P.3d 1209 (2013), review granted in part by, State v. Love, ___ Wn. App. ___, 340 P.3d 228 (2015). RCW 4.44.240 provides:

When facts are determined under RCW 4.44.230,^[2] the rules of evidence applicable to testimony offered upon the trial of an ordinary issue of fact shall govern. The juror challenged, or any other person otherwise competent may be examined as a witness by either party. If the challenge is sustained, the juror shall be dismissed from the case; otherwise, the juror shall be retained.

Significantly, before its amendment in 2003, this statute referred to this process as a "trial of a challenge." RCW 4.44.240 (2002); Code 1881 s 218. As the Love court could not deny: "that aspect of jury selection would appear to need to take place in the public courtroom[.]" Love, 176 Wn. App. at 919 n.7. Yet, the court failed to give this requirement any significance, remarking only "we do not believe that the evidence

² RCW 4.44.230 provides:

The challenge may be excepted to by the adverse party for insufficiency, and if so, the court shall determine the sufficiency thereof, assuming the facts alleged therein to be true. The challenge

gathering function should be confused with the legal question of whether a juror displays disqualifying bias.” Id.

But the Love court does not explain why the challenge or the court’s ruling would be divorced from the “trial” of the challenge or not conducted at the same time. As this Court has stated, the presumption is in favor of openness. Paumier, 176 Wn.2d at 34-35.

Moreover, the next statutory provision provides: “[t]he challenge, the exception, and the denial may be made orally. The judge shall enter the same upon the record, along with the substance of the testimony on either side.” RCW 4.44.250. This provision lends further weight to the conclusion the evidence gathering function and legal question of juror bias are part of the same proceeding, to which the public trial right attaches.

Ignoring these provisions, Division III instead hangs its hat on one case – State v. Thomas, 16 Wn. App. 1, 553 P.2d 1357 (1976) – as “strong evidence that peremptory challenges can be conducted in private.” Love, 176 Wn. App. at 918. Thomas rejected the argument that “Kitsap County’s use of secret – written – peremptory jury challenges” violated the defendant’s right to a fair and public trial where the defendant had failed to cite any supporting authority. Thomas, 16 Wn. App. at 13. Notably, Thomas predates Bone-Club by nearly 20 years. Moreover, the

may be denied by the adverse party, and if so, the court shall determine

fact Thomas challenged the practice suggests it was atypical even at the time.³ This Court should therefore reject Division III's characterization of Thomas as "strong evidence."

Washington court rules governing voir dire likewise indicate challenges were historically made in open court. CrR 6.4(b) provides:

A voir dire examination shall be conducted for the purpose of discovering any basis for a challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges. The judge shall initiate the voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge and counsel may then ask the prospective jurors questions touching on their qualifications to serve as jurors in the case, subject to the supervision of the court as appropriate to the facts of the case.

In Wilson, Division II found this rule supported the conclusion that historically, for-cause and peremptory challenges are made in open court, as opposed to administrative excusals made pursuant to CrR 6.3.⁴ As the court reasoned, CrR 6.3 provided for administrative excusals before voir

the facts and decide the issue.

³ Citing to a Bar Association directory, the Thomas court noted that "several counties" had employed Kitsap County's practice. Thomas, 16 Wn. App. at 13 n.2. Even ignoring the questionable methodology of what appears to be some type of informal poll, that only "several counties" had used the method certainly leaves open the possibility a majority of Washington's 39 counties did not, even before Bone-Club.

⁴ CrR 6.3 provides:

When the action is called for trial, the jurors shall be selected at random from the jurors summoned who have appeared and have not been excused.

dire began, as opposed to for-cause and peremptory challenges, which are explored during voir dire. Wilson, 174 Wn. App. at 342-44.

The Wilson court therefore distinguished between the illness-related excusals in Wilson's case prior to voir dire and the for-cause challenges that were conducted in chambers in State v. Slert, 169 Wn. App. 766, 282 P.3d 101 (2012), reversed by plurality opinion, 181 Wn.2d 598, 334 P.3d 1088 (2014). Only to the latter proceeding, did the public trial right attach. Wilson, 174 Wn. App. at 342-44.

This Court subsequently reversed Division II's decision in Slert. Importantly, however, only four members of this Court disagreed that the public trial right attached to the for-cause challenges in that case. Moreover, it appears these members were swayed by the particular circumstances in which the challenges were made; it was unclear whether jurors had been sworn, formal voir dire had not yet begun, and the record was missing "many other facts that could usefully bear on [the] analysis." Slert, 181 Wn.2d at 608. The four-justice lead opinion characterized the questioned proceeding merely as involving the parties' and court's "examination of jury questionnaires" and found the public trial right did not attach. Id. (analogizing to sealed jury questionnaires, such as those at issue in State v. Beskurt, 176 Wn.2d 441, 293 P.3d 1159 (2013)).

The four dissenters, however, characterized the questioned proceeding as involving for-cause challenges to which the public trial right attaches:

No matter what form it takes, the dismissal of jurors by a judge for case-specific reasons is not merely 'a prelude to a formal process,' as the lead opinion believes. Lead opinion at 1093. What occurred in chambers here was voir dire. Under well-settled precedent, voir dire must be conducted in open court unless the trial court justifies a closure under the Bone-Club factors.

Slert, 181 Wn.2d at 618 (Stephens, J., dissenting).

The concurring opinion agreed that under the court's prior cases, the for-cause challenges were part of voir dire and should have been made in open court:

It appears that this is a voir dire case that easily could have been decided under Paumier and Wise, but the majority creates a new distinction and thereby avoids sending back this murder case for a fourth trial.

Slert, 181 Wn.2d at 610-11 (Wiggins, J., concurring). Thus, five members of this Court agreed the taking of jury challenges is a proceeding to which the public trial right attaches. The concurrence nonetheless would have held that Slert's failure to object or show manifest constitutional error precluded his challenge. Slert, 181 Wn.2d at 612 (Wiggins, J., concurring).

Other Washington cases similarly suggest for-cause and peremptory challenges were historically made in open court. See State v. Njonge, 181 Wn.2d 546 (2014); State v. Jones, 175 Wn. App. 87, 303 P.3d 1084 (2013). In Njonge, this Court considered whether observers were excluded from the courtroom during hardship excusals of prospective jurors, in violation of Njonge's public trial rights. Njonge, 181 Wn.2d at 548-49. In finding no public trial right violation, this Court found the record did not establish that observers were excluded during hardship excusals. Njonge, 181 Wn.2d at 557-559. In light of this Court's three-step process for addressing public trial right cases, as set forth in Smith,⁵ the Njonge opinion appears to have implicitly recognized the public trial right attaches to hardship excusals.

In Jones, Division II held the public trial right attaches to the selection of alternate jurors. Jones, 175 Wn. App. at 101-103. In finding the experience prong supporting openness, the court relied primarily on the fact that historically, alternates were subject to the same challenges as regular jurors, which generally occurs as part of voir dire in open court. Jones, at 101.

⁵ Under Smith, this Court considers (1) whether the public trial right is implicated, (2) if so, whether there was a closure, and (3) if there was a closure, whether it was justified. Smith, 181 Wn.2d at 513.

Finally, foreign case law also indicates that historically, for-cause and peremptory challenges were conducted in open court. See People v. Harris, 10 Cal. App.4th 672, 12 Cal. Rptr. 2d 758 (1992). There, the court held that conducting all peremptory challenges in chambers violated Harris' right to a public trial. Harris, 10 Cal. App. 4th at 689.⁶

The aforementioned authorities demonstrate for-cause and peremptory challenges are intimately tied to, and part of, voir dire, which is presumptively open to the public.

The next question is whether public access plays a significant role in the functioning of for-cause and peremptory challenges. Contrary to Division III's decision in Love's case, the answer is a resounding yes.

Logically, exercising challenges in open court implicates the core concerns of the constitutional right to a public trial – basic fairness to the accused, in that it helps to ensure a fair jury is selected, and to remind the trial court of the importance of its functions. See Sublett, 176 Wn.2d at 72. As this Court recently explained with regard to the importance of peremptory challenges in particular:

⁶ In a subsequent case, the California court approved of a potential procedure during which the attorneys would make preliminary peremptory challenges at sidebar, and if no "Wheeler" objection was made, would then be put on the record. People v. Willis, 27 Cal Cal 4th 811, 822, 118 Cal. Rptr. 2d 301, 43 P.3d 130 (2002); People v. Wheeler, 22 Cal. 3d 258, 282, 148 Cal. Rptr. 890, 583 P.2d 748 (1978) (requiring court to dismiss all the jurors thus far selected where either party in a criminal case succeeds in showing the opposing party has improperly exercised peremptory challenges to exclude members of a

The peremptory challenge is an important “state-created means to the constitutional end of an impartial jury and a fair trial.” [Georgia v. McCollum, 505 U.S. 42, 58, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992)]; accord State v. Latham, 100 Wn.2d 59, 70, 667 P.2d 56 (1983) (the peremptory challenge “is an important and substantial right which protects a party’s constitutional right to trial by jury”) (citing Smith v. Kent, 11 Wn. App. 439, 523 P.2d 446 (1974).

State v. Saintcalle, 178 Wn.2d 34, 309 P.3d 326 (2013) (Madsen, C.J., concurring).

Public oversight furthers the goals of an impartial jury and fair trial. Saintcalle, 178 Wn.2d at 41-42 (lead opinion) (noting the importance of effective procedures for identifying racially motivated challenges, as racial discrimination “undermines public confidence in the fairness of our system of justice.”)⁷

In its supplemental brief, the state may argue the subsequent filing of the Record of Jurors sufficiently protects the core concerns of the public trial right. See e.g. State v. Filitaula, ___ Wn. App. ___, 339 P.3d 221 (2014). In Filitaula, Division I noted “a record of information about how peremptory challenges were exercised could be important, for example, in assessing whether there was a pattern of race-based peremptory challenges.” Filitaula, 339 P.3d at 224. Thus, Division I implicitly

cognizable group). The procedure was proposed as one way to alleviate prejudice to a party making an unsuccessful challenge. Id.

⁷ Love is African American.

recognized that peremptory challenges implicate public trial rights. However, the court found no public trial right violation, because a member of the public could later access a form the parties filled out to exercise their peremptory challenges. Filitaula, at 224.

As an initial matter, the Record of Jurors form here was not filed contemporaneously with the selection of the jury. Accordingly, a member of the public would not have been able to find out which party exercised a challenge to which juror for several days. Concerns related to secrecy therefore remain. See Smith, 181 Wn.2d at 515 (lead opinion) (noting the sidebars at issue were contemporaneously memorialized and recorded, thus negating concerns about secrecy).

But regardless of when the form was filed, Division I's rationale should be rejected outright, because a piece of paper fails to adequately insure the right to a public trial. For example, members of the public would have to know the sheet documenting peremptory challenges had been filed and that it was subject to public viewing. Moreover, even if members of the public could recall which juror name or number was associated with which individual, they also would have to recall the identity, gender, and race of those individuals to determine whether protected group members had been improperly targeted. While there were only three challenges in Love's case, it is frequently the case when the

crime charged is more serious or sensitive, that both sides will use all of their peremptory challenges, in addition to for-cause challenges. It is simply unrealistic to assume, as did Division I, that members of the public would be able to recall the specific features of so many individuals. As a result, public access to a sheet of paper after the fact is simply inadequate to protect the right to a public trial.

In addition, Wise holds individual questioning of jurors in chambers, even when questioning was recorded and transcribed, violates the public trial right. 176 Wn.2d 1. By analogy, filing a juror information sheet or similar document is also insufficient to protect the public trial right.

In short, this Court should hold the proceeding at issue here – the exercise of for-cause and peremptory challenges – implicates the public trial right.

(ii) The For-Cause and Peremptory Challenge Portion of Jury Selection Was Closed.

As indicated above, the court called the parties up to the bench to exercise for-cause challenges. The record reflects that this portion of voir dire occurred outside the hearing of the jurors and privacy was obtained through the use of a special microphone that allowed only the court reporter to hear. The record also reflects that peremptory challenges were

exercised through the use of a piece of paper passed back and forth between the parties. The court did not announce on the record which party challenged which juror. The end result is that the public was excluded to the same extent as if the courtroom doors had been locked.

Physical closure of the courtroom is not the only situation that violates the public trial right. For example, a closure occurs when a juror is privately questioned in an inaccessible location. State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011) (citing State v. Momah, 167 Wn.2d 140, 146, 217 P.3d 321 (2009); State v. Strode, 167 Wn.2d 222, 224, 217 P.3d 310 (2009)); see also State v. Leyerle, 158 Wn. App. 474, 483, 242 P.3d 921 (2010) (moving questioning of juror to public hallway outside courtroom a closure despite the fact courtroom remained open to public).

Members of the public here were no more able to approach the bench and/or attorneys and listen to an intentionally private voir dire process than they are able to enter a locked courtroom, access the judge's chamber's or participate in a private hearing in a hallway. The practical impact is the same; the public is denied the opportunity to scrutinize events.

(iii) The Closure Was Not Justified.

Under Bone-Club, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other

than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (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 closure and the public; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-260.

In Love's case, there is nothing on the record to indicate the court considered any of the Bone-Club factors before closing the proceeding. The closure therefore was not justified and reversal is required. State v. Paumier, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012).

2. LOVE WAS DENIED HIS CONSTITUTIONAL RIGHT TO BE PRESENT FOR ALL CRITICAL STAGES OF TRIAL.

A criminal defendant has a fundamental right to be present at all critical stages of a trial. Rushen v. Spain, 464 U.S. 114, 117, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983); State v. Irby, 170 Wn.2d 874, 880-881, 246 P.3d 796 (2011).

The federal constitution does not explicitly guarantee the right to be present, but the right is rooted in the Sixth Amendment's confrontation clause and the Fourteenth Amendment's due process guarantee. United

States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985). Under the federal constitution, a defendant has the right to be present “whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.” Snyder v. Massachusetts, 291 U.S. 97, 105-106, 54 S. Ct. 330, 78 L. Ed. 2d 674 (1934). Stated another way, “the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence.” Snyder, 291 U.S. at 107-108.

The federal constitutional right to be present for jury selection is well recognized.⁸ See Lewis v. United States, 146 U.S. 370, 373-74, 13 S. Ct. 136, 36 L. Ed. 1011 (1892); Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989); State v. Wilson, 141 Wn. App. 597, 604, 171 P.3d 501 (2007).

“Jury selection is the primary means by which [to] enforce a defendant’s right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant’s culpability[.]” Gomez, 490 U.S. at 873 (citation omitted). The defendant’s presence “is substantially related to the defense and allows the defendant ‘to give advice or suggestion or even to supersede his lawyers.’” Wilson, 141 Wn.

⁸ Consistent with this constitutional guarantee, CrR 3.4(a) explicitly requires the defendant’s presence “at every stage of the trial including the empanelling of the jury”

App. at 604 (quoting Snyder, 291 U.S. at 106); see also United States v. Gordon, 829 F.2d 119, 124 (D.C. Cir. 1987) (Fifth Amendment requires opportunity to give advice or suggestions to lawyer when assessing potential jurors).

In contrast to the United States Constitution, article 1, section 22 of the Washington Constitution explicitly guarantees the right to be present,⁹ and provides even greater rights. Irby, 170 Wn.2d at 885 n.6. Under our state provision, the defendant must be present to participate “at every stage of the trial when his substantial rights may be affected.” Id. at 885 (quoting State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914)). This right does not turn “on what the defendant might do or gain by attending. . . or the extent to which the defendant’s presence may have aided his defense[.]” Id. at 885 n.6.

Whether there has been a violation of the constitutional right to be present at trial is a question of law this Court reviews de novo. Irby, 170 Wn.2d at 880. There was a violation in Love’s case when he was excluded from the sidebar conference during which jurors 15 and 30 were discussed and struck for cause. Only counsel was called up to the bench. RP 132.

⁹ Article 1, section 22 provides: “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel.”

This Court has recognized that jury selection is a “critical” stage of trial to which the right to be present attaches. Irby, 170 Wn.2d at 883-84. In Irby’s case, the trial court required prospective jurors to complete a questionnaire seeking information about their familiarity with the substantive issues in Irby’s case, including whether any of the jurors’ family members had been murdered. Irby, 170 Wn.2d at 877-78. Based on the jurors’ questionnaire responses, the trial court and counsel used e-mail to excuse seven members of the jury pool “for cause,” specifically related to issues involved in Irby’s case. See Irby, 170 Wn.2d at 877-78. This Court held that (1) the email exchange between the trial court and counsel was a portion of the jury selection process that Irby had a constitutional right to attend, and (2) the trial court violated his right to be present by excusing jurors for cause in his absence. Irby, 170 Wn.2d at 882.

Under this Court’s decision in Irby, the bench conference between the trial court and counsel was likewise a portion of the jury selection process that Love had a constitutional right to attend, and the trial court violated his right to be present by excusing jurors for cause in his absence.

Other cases are in accord. State v. Miller, ___ Wn. App. ___, 338 P.3d 873, 878-79 (2014) (right to be present violated by court’s excusal of juror 28 in Miller’s absence, but error harmless where juror had no chance

to sit on Miller's jury); People v. Williams, 858 N.Y.S.2d 147, 52 A.D.3d 94, 96-97 (2008) (exclusion of defendant from sidebar conference where jurors excused by agreement violated right to be present; court refused to speculate that defendant could overhear conversations).

Division III in Love's case assumed, but did not decide, that Love had the right to be present when his jury was selected, which included the exercise of for-cause challenges. Love, 176 Wn. App. at 920-921. As demonstrated by the cases above, this was a correct assumption. However, the court denied Love relief on grounds he had not established manifest constitutional error under RAP 2.5(a).¹⁰ Id. According to the appellate court:

Mr. Love has not established that the alleged constitutional error was manifest because he has not shown that he was prejudiced by the process. He was present beside his counsel during the information gathering phase of voir dire and apparently had the opportunity to provide any input necessary to whether to pursue and challenges for cause. His counsel then successfully challenged two jurors for cause, and the parties discussed but did not need to reach the qualifications of three other jurors who would not make it on to the panel. Having succeeded in his cause challenges at the sidebar conference, he simply cannot show how he was prejudiced.

Love, 176 Wn.2d at 921 (emphasis added).

¹⁰ To meet RAP 2.5(a) and raise an error for the first time on appeal, an appellant must identify a constitutional error and show how the alleged error actually affected the appellant's rights at trial. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2010).

Division III is incorrect. First, the *apparent* opportunity for input is not sufficient to satisfy the right to be present, where the record shows the defendant's absence at a critical stage. Lewis, 146 U.S. at 372 (“where the [defendant's] personal presence is necessary in point of law, the record must show the fact.”); Irby, 170 Wn.2d at 884 (same).

Second, the required opportunity to provide input includes the possibility the defendant may not only give advice, but “supersede his lawyers.” Wilson, 141 Wn. App. at 604 (quoting Snyder, 291 U.S. at 106). Accordingly, that Love counsel's successfully challenged two jurors for cause is irrelevant, where the record fails to show that Love himself was present during the challenges.

Perhaps for this very reason, the test for prejudice is not whether counsel was successful in removing jurors for cause in the defendant's absence, but whether any of those jurors had the chance to sit on the jury. Irby, 170 Wn.2d at 886.

Contrary to Division III's decision in this case, the constitutional error in excluding Love from the exercise of for-cause challenges was manifest, as there was a possibility juror 15 could have served on the jury. Had Love been allowed to participate, he could have superseded his attorney's decision to challenge this juror. Juror 15 fell within the range of jurors who ultimately comprised the jury, as the two alternates were

numbers 14 and 16. Had Love been able to participate in selecting his own jury, he could have later exercised peremptory challenges that were not utilized to have juror 15 sit on the jury. The denial of Love's presence at this critical stage of jury selection therefore had practical and identifiable consequences.

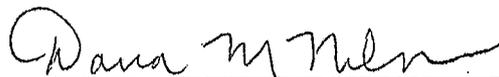
C. CONCLUSION

The procedures used to select Love's jury violated his right to a public trial and to be present for all critical stages of trial. His convictions must be reversed and the case remanded for a new trial.

Dated this 10th day of February, 2015

Respectfully submitted

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State v. Unters Love

No. 89619-4

Certificate 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 10th day of February, 2015, I caused a true and correct copy of the **Supplemental Brief of Petitioner** to be served on the party / parties designated below by email per agreement of the parties and/or by depositing said document in the United States mail.

Unters Love
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Signed in Seattle, Washington this 10th day of February, 2015.

x Patrick Mayovsky

OFFICE RECEPTIONIST, CLERK

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Attached for filing today is a motion for leave to file overlength brief and the supplemental brief of petitioner for the case referenced below.

State v. Unters Love

No. 89619-4

- Motion for Leave to File Overlength Brief
- Supplemental Brief of Petitioner

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