

NO. 71217-9-I

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

2014 JUL 23 PM 1:37  
COURT OF APPEALS  
STATE OF WASHINGTON  
[Signature]

---

STATE OF WASHINGTON

Respondent

v.

DAIN A. MCGILL,

Appellant

---

BRIEF OF RESPONDENT

---

MARK K. ROE  
Prosecuting Attorney

KATHLEEN WEBBER  
Deputy Prosecuting Attorney  
Attorney for Respondent

Snohomish County Prosecutor's Office  
3000 Rockefeller Avenue, M/S #504  
Everett, Washington 98201  
Telephone: (425) 388-3333

**TABLE OF CONTENTS**

I. ISSUES ..... 1

II. STATEMENT OF THE CASE ..... 1

III. ARGUMENT ..... 4

    A. THE DEFENDANT'S RIGHT TO PUBLIC TRIAL WAS NOT VIOLATED BECAUSE THE COURTROOM WAS NEVER CLOSED..... 4

        1. The Defendant Did Not Object To the Sidebar. Whether The Court Should Consider The Issue Should Be Determined By Applying RAP 2.5(a)(3)..... 6

        2. Under The Experience And Logic Test No Courtroom Closure Occurred When The Court Held A Sidebar Conference To Consider An Objection To An Argument During Defense Counsel's Closing Summation. .... 9

    B. IF A SIDEBAR CONSTITUTES A COURTROOM CLOSURE IT IS A DE MINIMUS VIOLATION THAT DOES NOT WARRANT A NEW TRIAL..... 13

IV. CONCLUSION ..... 16

## **TABLE OF AUTHORITIES**

### **WASHINGTON CASES**

<u>In re Lord</u> , 123 Wn.2d 296, 866 P.2d 835 (1994) .....	10, 13
<u>In re Yates</u> , 177 Wn.2d 1, 296 P.3d 872 (2013) .....	5, 9
<u>Popoff v. Mott</u> , 14 Wn.2d 1, 126 P.2d 597 (1942) .....	10
<u>State v. Bennett</u> , 168 Wn. App. 197, 275 P.3d 1224 (2012).....	13
<u>State v. Bone-Club</u> , 128 Wn.2d 254, 906 P.2d 325 (1995) .....	5, 6, 8
<u>State v. Brightman</u> , 155 Wn.2d 506, 122 P.3d 150 (2005) .....	12, 13
<u>State v. Easterling</u> , 157 Wn.2d 167, 137 P.3d 825 (2006) ....	4, 5, 14
<u>State v. Hairston</u> , 133 Wn.2d 534, 946 P.2d 397 (1997) .....	7
<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007) .....	6
<u>State v. Lormor</u> , 172 Wn.2d 85, 257 P.3d 624 (2011) .....	5, 14
<u>State v. Love</u> , 176 Wn. App. 911, 309 P.3d 1209 (2013) .....	11, 12
<u>State v. Lynn</u> , 67 Wn. App. 339, 835 P.2d 251 (1992) .....	6
<u>State v. Maganano</u> , ___ Wn. App. ___, 326 P.3d 845 (2014) .....	5
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	7, 8
<u>State v. Momah</u> , 167 Wn.2d 140, 217 P.3d 321 (2009), <u>cert denied</u> , 131 S.Ct. 160 (2010) .....	4
<u>State v. Paumier</u> , 176 Wn.2d 29, 288 P.3d 1126 (2012) .....	5
<u>State v. Russell</u> , 125 Wn.2d 24, 88 P.2d 747 (1994), <u>cert denied</u> , 514 U.S. 1129 (1995) .....	11
<u>State v. Strode</u> , 167 Wn.2d 222, 217 P.3d 310 (2009).....	14
<u>State v. Sublett</u> , 176 Wn.2d 58, 292 P.3d 715 (2012) .....	4, 5, 12, 14
<u>State v. Wise</u> , 176 Wn.2d 1, 288 P.3d 113 (2012) .....	5, 7

### **FEDERAL CASES**

<u>Press-Enterprise Co. v. Superior Court</u> , 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986).....	6
<u>Richmond Newspapers, Inc. v. Virginia</u> , 488 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980).....	9
<u>Steiner v. United States</u> , 134 F.2d 931 (5 <sup>th</sup> Cir. 1943), <u>cert denied</u> , 319 U.S. 774 (1943) .....	10
<u>United States v. Nolan</u> , 910 F.2d 1553 (7 <sup>th</sup> Cir. 1990), <u>cert denied</u> , 499 U.S. 942 (1991) .....	9

### **OTHER CASES**

<u>People v. Virgil</u> , 51 Cal.4 <sup>th</sup> 1210, 126 Cal Rptr. 3d 465, 253 P.3d 553 (Cal. 2011), <u>cert denied</u> , ___ U.S. ___, 132 S.Ct. 1636, 182 L.Ed.2d 237 (2012).....	14, 15
---	--------

### **WASHINGTON CONSTITUTIONAL PROVISIONS**

Article 1, §22 .....	4, 7
----------------------	------

**U.S. CONSTITUTIONAL PROVISIONS**

Sixth Amendment ..... 4, 7

**COURT RULES**

RAP 2.5(a)(3) ..... 6

## **I. ISSUES**

1. May the defendant raise a challenge to a sidebar conference held during closing argument for the first time on appeal?

2. Under the experience and logic test, was a sidebar conference to resolve an objection during closing argument a violation of the defendant's right to a public trial?

3. If the sidebar did violate the defendant's right to a public trial, was the violation so de minimus that the court should not order a new trial?

## **II. STATEMENT OF THE CASE**

On June 11, 2013 Deanna Stewart and an acquaintance, Stephanie, spent the day together. Eventually they ended up at the home of Stephanie's friend, Chastity Thacker. After spending several hours there Ms. Stewart planned on leaving. She and Stephanie spent a few minutes in Ms. Stewart's car, smoking and talking. Stephanie eventually left, heading back to Ms. Thacker's house. Stephanie left the windows of the car open. 1 RP 23-24, 26-29.

Shortly after Stephanie left, and before Ms. Stewart drove off, the defendant, Dain McGill and Matthew Probst approached

Ms. Stewart's car. The defendant motioned to Ms. Stewart, indicating that he wanted a cigarette. As Ms. Stewart went to get one from her purse Probst went around to the passenger side of the car and got in the front seat. The defendant then went to the passenger side of the car, and got in the back seat. Ms. Stewart was alarmed that the two men got in her car because she did not know them. She attempted to drive off before the defendant got in her car, but was not able to prevent him from doing so. Instead Probst grabbed the steering wheel. They stopped, almost hitting the curb on the opposite side of the street. 1 RP 29-31, 80-83, 162-167.

After the car stopped the defendant grabbed Ms. Stewart around the neck. Probst then started punching her. Eventually the defendant told Probst to stop punching her, but he did not let go of Ms. Stewart. Ms. Stewart had been screaming loudly enough that the neighbors started gathering around the scene. Ms. Stewart was able to get out of the car. Probst ran off with Ms. Stewart's purse. The defendant also walked away from the scene for a few minutes. He returned shortly thereafter. Onlookers noticed that Ms. Stewart reacted violently when he returned to the scene. She

identified the defendant as one of her attackers. 1 RP 33-37, 64-68, 71, 84-85, 104.

Ms. Stewart suffered injuries as a result of the attack. She was bleeding from her nose. She suffered a bruised lip. Her teeth were loosened and one tooth was chipped. 1 RP 39-42.

The defendant was arrested at the scene. Police searched the defendant and found a cell phone which was taken as evidence. A search of the phone found four text messages that indicated that the sender was interested in "hitting a lick." That phrase is a street slang term for committing a crime. 1 RP 106, 108, 138-146.

The defendant was charged with one count of first degree robbery. 1 CP 64-65. Ms. Stewart, some of the neighbors who saw the assault, and several officers testified to the facts outlined above. During defense counsel's closing argument the prosecutor objected on the basis that the defense attorney was making a statement of personal belief. The prosecutor suggested that the court may want to hear argument outside the presence of the jury. Instead the court invited the attorneys to the bench, and instructed people in the courtroom that they "may talk amongst yourselves". The record reflects that a discussion was held off the record at side

bar. When the discussion concluded defense counsel resumed closing, continuing with the same argument he had made before the prosecutor objected. 2 RP 232-235.

### **III. ARGUMENT**

#### **A. THE DEFENDANT'S RIGHT TO PUBLIC TRIAL WAS NOT VIOLATED BECAUSE THE COURTROOM WAS NEVER CLOSED.**

The defendant argues that by holding a sidebar conference the court closed the courtroom, thereby violating his right to a public trial. Because he has failed to show that the courtroom was closed to the public, he has not established a violation of his right to a public trial.

The Sixth Amendment and Washington Constitution Art. 1, §22 guarantee a criminal defendant the right to a public trial. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). Whether a defendant's public trial right was violated is an issue of law reviewed de novo. State v. Momah, 167 Wn.2d 140, 147-48, 217 P.3d 321 (2009), cert denied, 131 S.Ct. 160 (2010).

Initially, the court must determine whether the proceeding at issue was a closure implicating a public trial right. State v. Sublett, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). A courtroom closure occurs when "the courtroom is completely and purposefully closed

to spectators so that no one may enter and no one may leave.” State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). Thus a courtroom closure occurred when the court held portions of jury selection in chambers, a room that the public did not ordinarily have access to. State v. Wise, 176 Wn.2d 1, 12, 288 P.3d 113 (2012), State v. Paumier, 176 Wn.2d 29, 288 P.3d 1126 (2012). The courtroom was closed when the court did not allow any spectators in the courtroom during pretrial hearings or trial proceedings. State v. Bone-Club, 128 Wn.2d 254, 258, 906 P.2d 325 (1995), State v. Easterling, 157 Wn.2d 167, 172, 137 P.3d 825 (2006).

The defendant who asserts his right to a public trial was violated bears the burden to show that there was a closure under the experience and logic test. State v. Maganano, \_\_\_ Wn. App. \_\_\_, 326 P.3d 845, 848 (2014). In re Yates, 177 Wn.2d 1, 29, 296 P.3d 872 (2013). “[N]ot every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public.” Sublett, 176 Wn.2d at 71. To determine whether the courtroom was closed the court has adopted the “experience and logic test.” Sublett, 176 Wn.2d at 73. Under the experience prong the court asks “whether the place and process have historically been open to the press and general

public.” Id. quoting, Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986). Under the logic prong the court asks “whether public access plays a significant positive role in the functioning of the particular process in question.” Id. If each question is answered affirmatively then the court is required to conduct a hearing as outlined in Bone-Club before the proceeding may be closed. Id.

**1. The Defendant Did Not Object To the Sidebar. Whether The Court Should Consider The Issue Should Be Determined By Applying RAP 2.5(a)(3).**

The defendant challenges the sidebar conference as a violation of his right to a public trial for the first time on appeal. Under this circumstance a party may raise an issue if it constitutes a manifest error of constitutional magnitude. RAP 2.5(a)(3). An issue meets this criteria if the claimed error raised suggests a constitutional issue and if the appellant has made a plausible showing that that the error had a practical and identifiable consequence in the trial of the case. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). “If the trial record is insufficient to determine the merits of the constitutional claim, the error is not manifest and review is not warranted.” State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).

Here the defendant has raised a constitutional issue; he asserts his right to a public trial has been abridged under the Sixth Amendment and Washington Constitution Article 1, § 22. A majority of the Supreme Court has held that a claim that a defendant's constitutional public trial right may be raised for the first time on appeal. Wise, 176 Wn.2d at 9.<sup>1</sup>

If the facts necessary to determine the alleged public trial violation are not in the record however, the error is not manifest. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). In that case the Court will not review and issue raised for the first time on appeal. Thus, if the contents of the sidebar are immaterial to determine whether a public trial violation occurred under the experience and logic test, then the record is sufficient to determine the matter, and any error would be manifest. Under those circumstances review would be appropriate.

If however, the substance of the discussions is relevant to considering whether there was a "closure" sufficient to implicate the

---

<sup>1</sup> Four members of the Supreme Court disagree that any claim that a defendant's public trial right was violated is necessarily "manifest." Wise, 176 Wn.2d at 21 (Madsen, dissenting), 176 Wn.2d at 25 (Johnson, dissenting). The Court of Appeals is obligated to follow the decisions of the Supreme Court. State v. Hairston, 133 Wn.2d 534, 539, 946 P.2d 397 (1997). Unless a majority of the Supreme Court reverses its decision on this point, any claim of a public trial violation may be raised for the first time on appeal, regardless of any showing that the asserted closure had a "practical and identifiable consequence at trial."

right to a public trial, and there is no other evidence indicating what the substance of that discussion was, then the error is not manifest. Since the substance of the discussion conducted in this case was not put on the record, any error from conducting the sidebar conference would not be manifest. Under those circumstances review would not be appropriate.

Here, even though the substance of the sidebar conference was not made part of the record, there is sufficient information on the record for the court to consider the issue. The prosecutor stated a specific objection to the defense attorney's argument on the record. At the conclusion of the sidebar conference the defense attorney continued making the same arguments the prosecutor had objected to. It is clear therefore that after discussion the prosecutor either withdrew the objection or the court overruled the objection. Thus, if holding the sidebar in the absence of a Bone-Club hearing was error, any prejudice from that act can be ascertained from the record and it is therefore manifest. McFarland, supra.

**2. Under The Experience And Logic Test No Courtroom Closure Occurred When The Court Held A Sidebar Conference To Consider An Objection To An Argument During Defense Counsel's Closing Summation.**

A defendant bears the burden to show that under the experience and logic test a courtroom closure implicating his right to a public trial has occurred. Yates, 177 Wn.2d at 29. He has failed to do so.

Historically it has been an accepted practice for courts to use sidebar conferences to momentarily discuss a variety of issues. One court noted "It is common for trial judges to hold discussions about evidentiary objections (and other matters) at sidebar." United States v. Nolan, 910 F.2d 1553, 1559 (7<sup>th</sup> Cir. 1990), cert denied, 499 U.S. 942 (1991). Although the United States Supreme Court held that the press and public had a right to be present at criminal trials, one justice remarked that the presumption of public trial is not at all incompatible with reasonable restrictions on courtroom behavior. "Thus, when engaging in interchanges at the bench, the trial judge is not required to allow public or press intrusion upon the huddle." Richmond Newspapers, Inc. v. Virginia, 488 U.S. 555, 598, n. 23, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). (Brennen, concurring). Where neither a defendant nor his attorney objected to

argument on legal matters “in sotto voce at the bench in full view of the jury but out of the hearing of the defendant and the public” the defendant’s challenge to that procedure on appeal was rejected as an “afterthought” and dismissed “wholly without merit.” Steiner v. United States, 134 F.2d 931, 935 (5<sup>th</sup> Cir. 1943), cert denied, 319 U.S. 774 (1943).

Washington courts have also historically relied on the availability of sidebar conferences to conduct discussions on variety of administrative and legal issues. In Lord the court used sidebar conferences to make arrangements for the defendant’s haircut and clothing for trial and to discuss legal issues such as the wording of jury instructions. In re Lord, 123 Wn.2d 296, 306, 866 P.2d 835 (1994). Id. The Court found the defendant’s right to be present at trial was not violated because he did not participate personally in those discussions. Id.

Sidebar conferences have also been used to exercise preemptory challenges. Popoff v. Mott, 14 Wn.2d 1, 9, 126 P.2d 597 (1942). The Court of Appeals concluded the use of sidebar conferences for that purpose does not violate the defendant’s right

to a public trial using the experience and logic test. State v. Love, 176 Wn. App. 911, 918-919, 309 P.3d 1209 (2013).

Thus experience shows that courts have routinely employed a sidebar conference to consider purely legal or administrative issues. An allegedly improper argument is considered in light of the total argument, the issues in the case, and the evidence presented, and the instructions given. State v. Russell, 125 Wn.2d 24, 85, 88 P.2d 747 (1994), cert denied, 514 U.S. 1129 (1995). A court who decides whether to sustain or overrule an objection to an allegedly improper remark makes a legal determination. It is the kind of determination that has been historically considered appropriate for a sidebar discussion. Because sidebar conferences have not historically been open to the press and public, the experience prong does not support the conclusion that the sidebar conference here implicated the defendant's public trial right.

The logic prong does not support that conclusion either. In Love the Court considered whether the public had any meaningful role to play in excusing jurors during jury selection. It observed that the "purpose of the public trial right are 'to ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage

perjury.” Love, 176 Wn. App. at 919 quoting State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). The court concluded these purposes are not furthered by the exercise of preemptory challenge because it presented no question of public oversight. Id. Nor were they furthered by challenges for cause because those presented the purely legal issue of whether the juror met the statutory qualification for jury service. Id.

Similarly the Court concluded that the logic prong did not support finding a public trial violation where the court considered the answer to a jury question in chambers with counsel. Sublett, 176 Wn.2d at 77. The Court found that none of the values served by the public trial right were violated, where the process in question did not involve taking testimony and there was a record of what had been asked and answered. Id.

Here the logic prong also supports the conclusion that the sidebar conference in this case did not violate the defendant’s right to a public trial. The issue was a purely legal one. The resolution of that issue was solely within the trial court’s province. Although in this case the specific discussion conducted during that conference was not made part of the record that fact does not mean that the public’s role in that process would ensure a fair trial. The contents

of sidebar conferences are often made part of the record as they were in Lord.

Even where the parties do not specifically state on the record what was discussed at those conferences, there may still be a sufficient record to ensure the fairness of the trial. Although the court characterized the record as sparse, there was a sufficient record of what happened in an in chambers conference regarding jury instructions for the court to conclude no public trial right was violated in State v. Bennett, 168 Wn. App. 197, 206-207, 275 P.3d 1224 (2012). Here the prosecutor placed a specific objection to the defense attorney's argument on the record. After the sidebar discussion was concluded defense counsel continued his argument in the same vein without further objection. From this record any member of the public in attendance would understand that the prosecutor's objection was overruled. There was sufficient information in the open that the purpose to ensure a fair trial by the right to public trial was satisfied.

**B. IF A SIDEBAR CONSTITUTES A COURTROOM CLOSURE IT IS A DE MINIMUS VIOLATION THAT DOES NOT WARRANT A NEW TRIAL.**

A trivial closure does not necessarily violate a defendant's right to a public trial. Brightman, 155 Wn.2d at 517. To date the

Supreme Court has not found any case warranted finding a closure so trivial that it did not violate the right to a public trial. State v. Strode, 167 Wn.2d 222, 230, 217 P.3d 310 (2009). However, the Court has left open the possibility that a given closure would meet that standard and warrant adoption of a de minimus rule. Easterling, 157 Wn.2d at 182-183 (Madsen concurring), Lormor, 172 Wn.2d at 96.

These cases were decided before the Court adopted the experience and logic test in Sublett. In each of those cases the court considered a complete courtroom closure or no courtroom closure. The court did not consider whether a sidebar conference, where the public was permitted to observe but not hear the discussion between the court and counsel, was a closure. If it was a closure then under the experience and logic test it was a de minimus closure that would not constitute a public trial violation.

As argued, historically the public has been excluded from sidebar conferences. The purposes behind the right to a public trial are not furthered by public access to those conferences.

One court has specifically considered whether a proceeding at sidebar was a de minimus violation so that no public trial violation occurred. People v. Virgil, 51 Cal.4<sup>th</sup> 1210, 126 Cal Rptr.

3d 465, 253 P.3d 553 (Cal. 2011), cert denied, \_\_\_ U.S. \_\_\_, 132 S.Ct. 1636, 182 L.Ed.2d 237 (2012). There the defendant claimed that his right to a public trial was violated when the 12 prospective jurors were questioned at sidebar. Id. at 1234-1235, 1237. The courtroom was not closed. The court recognized that as a general rule juror should be questioned in open court, with sidebar conferences reserved for particularly sensitive or prejudicial topics. However any violation of the right to public trial resulting from the brief sidebar questioning of jurors was de minimus, and did not deprive the defendant of his right to a public trial. Id. at 1238.

Here the sidebar conference was so brief it was not noted by the clerk in the trial minutes. 2 CP \_\_\_ (sub 34). What had been discussed in that conference was obvious to anyone sitting in the courtroom. Under those circumstances the court should conclude that if a closure occurred, it was so trivial that the defendant's public trial rights were not violated.

#### **IV. CONCLUSION**

For the foregoing reasons the State asks the Court to affirm the defendant's conviction.

Respectfully submitted on July 22, 2014.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By: *Kathleen Webber*  
KATHLEEN WEBBER WSBA #16040  
Deputy Prosecuting Attorney  
Attorney for Respondent



**Snohomish County  
Prosecuting Attorney  
Mark K. Roe**

Criminal Division  
Joan T. Cavagnaro, Chief Deputy  
Mission Building, MS 504  
3000 Rockefeller Ave.  
Everett, WA 98201-4060  
(425) 388-3333  
Fax (425) 388-3572

July 22, 2014

Richard D. Johnson, Court Administrator/Clerk  
The Court of Appeals - Division I  
One Union Square  
600 University Street  
Seattle, WA 98101-4170

2014 JUL 23 PM 1:37  
COURT OF APPEALS  
DIVISION I  
SEATTLE, WA  
*[Handwritten signature]*

**Re: STATE v. DAIN A. MCGILL  
COURT OF APPEALS NO. 71217-9-1**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

*Kathleen Webber*

KATHLEEN WEBBER, #16040  
Deputy Prosecuting Attorney

cc: Nielsen, Broman & Koch  
Appellant's attorney(s)

*[Faint, mostly illegible text from a stamp or document, possibly containing the words "under the laws of the"]*

*2nd* July 20 14  
*[Handwritten signature]*

COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
2014 JUL 23 PM 1:37

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

THE STATE OF WASHINGTON,  Respondent,  v.  DAIN A. MCGILL,  Appellant.
--

No. 71217-9-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 22<sup>nd</sup> day of July, 2014, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I  
ONE UNION SQUARE BUILDING  
600 UNIVERSITY STREET  
SEATTLE, WA 98101-4170

NIELSEN, BROMAN & KOCH  
1908 EAST MADISON STREET  
SEATTLE, WA 98122

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 2<sup>nd</sup> day of July, 2014.

  
\_\_\_\_\_  
DIANE K. KREMENICH  
Legal Assistant/Appeals Unit