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**FILED**

**Nov 21, 2013**

Court of Appeals

Division III

State of Washington

SUPREME COURT NO. \_\_\_\_\_

NO. 30809-0-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

UNTERS LOVE,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Maryann C. Moreno, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Unters Love asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the published court of appeals decision in State v. Love, \_\_\_ Wn. App. \_\_\_, 309 P.3d 1209 (2013), filed September 24, 2013, and the order denying the motion for reconsideration, filed October 22, 2013, attached as appendices A and B to this petition.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court violated Love's constitutional right to a public trial by taking "for-cause" challenges at a private bench conference?

2. Whether the court violated Love's constitutional right to a public trial where it took peremptory challenges based on a piece of paper passed back and forth between the parties?

3. Whether the trial court violated Love's constitutional right to be present at all critical stages of trial, where the court called the attorneys up to the bench for a private conference at which the court took "for-cause" challenges?

4. Whether the evidence was insufficient to convict Love of second degree theft, allegedly committed against Jennifer Lail?

D. STATEMENT OF THE CASE

1. Jury Selection

Unters Love was convicted of six counts of second degree theft and one count of bail jumping, following a jury trial in Spokane county superior court. CP 60-90, 95-106, 107-108. Jury selection in this case occurred on April 9, 2012.

After the completion of 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?

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 questioned 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 DEFENDANT: Your Honor, may I – may I approach the bench?

THE COURT: No.

THE DEFENDANT: Please, may I approach the bench, your Honor?

THE COURT: No.

THE DEFENDANT: Mr. Knox cannot represent this case.

THE COURT: Sir, if you say one more word . . .

(the defendant sat down)

(Juror No. 28 is audibly talking on a cell phone).

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, a sheet of paper 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, apparently indicating the parties' juror challenges. CP 111.

2. State's Evidence of Jennifer Lail Count

To prove second degree theft, the state must prove the individual stole property or services of another exceeding \$750.00. RCW 9A.56.040. For one of the second degree theft charges levied against Love, the state showed only that the complainant, Jennifer Lail, gave Love a money order for \$500.00 and a postdated check for \$1,200.00 – which Lail subsequently cancelled before it came due. RP 357-59.

3. Court of Appeals Decision

Love made three arguments on appeal. First, Love argued that his right to a public trial was violated because the parties and the court conducted “for-cause” and peremptory challenges at a private bench conference. Brief of Appellant (BOA) at 9-12; Supplemental Brief of Appellant (SBOA), at 3-6. As an initial matter, the court of appeals did not agree the record showed that peremptory challenges were conducted at the sidebar. Appendix A at 4 (“The transcript clearly showed that the sidebar conference ended at the conclusion of the challenges for cause”). Regardless, the court held its analysis would not change had the record shown that peremptories were in fact conducted at sidebar. Appendix A at 4.

Importantly, despite the state's argument to the contrary, the court of appeals assumed the sidebar conference constituted a courtroom closure for purposes of State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). Appendix at 6 (noting other states have concepts of "limited closure" that may be suggestive to Washington courts in this context, citing for example, Commonwealth v. Cohen, 456 Mass. 94, 921 N.E.2d 906 (2010)). Nonetheless, the court held under the "experience and logic" test of State v. Sublett,<sup>1</sup> that neither "for-cause" nor peremptory challenges are required to be conducted in open court. Appendix A at 7-11.

Love filed a motion for reconsideration in which he altered his argument slightly. While he maintained the "for-cause" challenges taken at the private sidebar violated his public trial right, he argued the process by which peremptory challenges were taken – by passing a sheet of paper back and forth – also violated his public trial right. He did not seek reconsideration of the court's reading of the record regarding peremptories. Motion for Reconsideration (MR) at 2, n.1, 3-6.

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<sup>1</sup> State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012).

Substantively, Love argued the courts' decision conflicted with this Court's decision in State v. Strode,<sup>2</sup> State v. Wise<sup>3</sup> and Division II's decision in State v. Wilson.<sup>4</sup> MR at 3-6. Division III denied the motion for reconsideration without further analysis, however. Appendix B.

Second, Love argued on appeal that his right to be present at a critical stage of the proceeding was violated when the parties conducted "for cause" and peremptory challenges outside his presence at the bench conference. BOA at 12-17. As indicated, the court did not agree the record showed peremptory challenges were conducted at sidebar. Appendix at 4-5. Regarding Love's right to be present while "for-cause" challenges were conducted, the court did not decide whether Love established he was not present. Appendix A at 12, n.9 ("If 'present' means standing beside counsel he might be correct, ..."). Instead, the court held Love failed to establish manifest constitutional error allowing him to raise the error for the first time on appeal. Appendix A at 11.

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<sup>2</sup> State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009).

<sup>3</sup> State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012).

<sup>4</sup> State v. Wilson, 174 Wn. App. 328, 298 P.3d 148 (2013).

As indicated, Love did not seek reconsideration of the court's reading of the record regarding peremptory challenges. However, he argued the court's decision in regard to Love's right to be present during "for cause" challenges conflicted with this Court's decision in Irby,<sup>5</sup> in that the appellate court applied the wrong test to show prejudice. MR at 7-8. Again, however, the court denied the motion without analysis. Appendix B.

Third, Love argued on appeal that the state failed to prove the value element of the Jennifer Lail theft count, because the state's evidence consisted of a postdated check that was cancelled before it became due. BOA at 17-20. In rejecting this challenge, the court relied in part on this Court's decision in State v. Easton, 69 Wn.2d 965, 422 P.2d 7 (1966). Appendix A at 12-15. In the motion for reconsideration denied by Division III, Love argued the court's decision conflicted with this Court's decision in State v. State v. Bradley, 190 Wash. 538, 69 P.2d 819 (1937). MR at 8; Appendix B.

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<sup>5</sup> State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011).

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. THIS COURT SHOULD ACCEPT REVIEW BECAUSE DIVISION III'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN STATE v. STRODE AND STATE v. WISE AND DIVISION II'S DECISION IN STATE v. WILSON.

As the appellate court correctly noted jury selection in a criminal case is considered part of the public trial right and is typically open to the public. State v. Strode, 167 Wn.2d 222, 227, 217 P.3d 310 (2009). Moreover, whether or not a particular portion of a proceeding is required to be held in public is determined by use of the "experience and logic" test. State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012). However, contrary to Division III's conclusion, Strode, Wise, the "experience and logic" test and Division II's decision in Wilson actually support the conclusion that "for-cause" and peremptory challenges must be made in open court, not at a private bench conference or by passing a sheet of paper back and forth.

There are no Washington cases directly on point. However, this Court's decision in Strode supports the conclusion that the public trial right attaches to "for-cause" challenges. In that case, jurors were questioned, and "for-cause" challenges were

conducted, in chambers. This Court treated the “for-cause” challenges in the same manner as individual questioning and held their occurrence in chambers violated the public trial right. Strode, 167 Wn.2d at 224, 227, 231.

Division II’s recent decision in Wilson also supports the conclusion that the public trial right attaches to both “for-cause” and peremptory challenges. There, the court applied the experience and logic test to find that the administrative excusal of two jurors for sickness did not violate the defendant’s public trial rights. The court noted that historically, the public trial right has not extended to hardships the court may make administratively *before* voir dire begins. But in doing so, the court expressly differentiated between the administrative excusal at issue and a jury selection proceeding involving the exercise of “for-cause” and peremptory challenges, which the court said historically, occur in open court. Wilson, 174 Wn. App. at 342. Thus, under Wilson’s application of the experience prong of the experience and logic test, “for-cause” and peremptory challenges historically are done in open court.

Also, logically, exercising peremptory and “for-cause” challenges in open court implicates the core concerns of the constitutional right to a public trial – basic fairness to the defendant,

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.

And although peremptory challenges may be made for almost any reason, openness still fosters core values of the public trial right to ensure that there is no inappropriate discrimination occurring. Thus, it is just as important for the public to be able to scrutinize the parties' exercise of peremptory challenges as it is for "for-cause" challenges.

Moreover, contrary to the court of appeals, the fact the jury information sheet was made part of the record here does not remedy the public trial right violation with regard to the parties' exercise of peremptories. See Appendix A at 9-10. At the outset, it would be difficult for a layperson to understand the document. Written notations are made in various places on the document, some of which are difficult to discern. CP 109-111. Specifically, it might be difficult for members of the public to understand what is meant by "D1" or "P1." CP 109-111.

More importantly, however, this Court in Wise found the defendant's public trial right was violated by individual questioning of jurors in chambers, even though the questioning was recorded



and transcribed. State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012). Accordingly, applying this Court's reasoning in Wise, the filing of the juror information sheet here was not sufficient to protect the core values of the public trial right. And whether, "[m]ost parties, in fact, would probably rather not have a challenge for cause made in the presence of the juror in case the challenge failed,"<sup>6</sup> a less restrictive alternative would be to excuse the jurors, rather than the public.

Finally, in rejecting Love's public trial right challenge, the appellate court placed undue emphasis on State v. Thomas, 16 Wn. App. 1, 13, 553 P.2d 1357 (1976), which found no merit to the defendant's challenge to secret, written peremptory challenges. Importantly, Thomas predates State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995), by nearly twenty years and fails to apply the experience and logic test now required by this Court under Sublett.

Because Division III's decision conflicts with several of this Court's decisions, as well as Division II's decision in Wilson, this Court should accept review. RAP 13.4(b)(1), (2). Whether the public trial right extends to the "for-cause" and peremptory challenge portion of voir dire is also an issue of substantial public

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<sup>6</sup> Appendix A at 8.

interest as it is a vital part of voir dire that occurs in every case in which a jury is selected. RAP 13.4(b)(4).

2. THIS COURT SHOULD ACCEPT REVIEW BECAUSE DIVISION III'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN STATE v. IRBY.

Before "for-cause" challenges, the court expressly directed counsel to approach the bench: "*Counsel*, why don't you approach." RP 132 (emphasis added). The parties and the court then conducted "for-cause" challenges at a private bench conference. RP 132-33. The record indicates the parties could scarcely hear each other and that the conference was held outside the hearing of the jury. RP 132-33. This process violated Love's right to be present at a critical stage of the proceeding as much as the email exchange in Irby. BOA, at 12-17; see also 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 violates right to be present; court refused to speculate that defendant could overhear conversations).

In rejecting Love's challenge, Division III found he had not shown prejudice because his counsel successfully challenged two jurors for cause. Appendix, at 12. Under Irby, however, this is not the test for prejudice.

The state bears the burden of proving beyond a reasonable doubt that the error is harmless. Irby, 170 Wn.2d at 885. In finding Irby's absence from jury selection prejudiced him, this Court considered whether the same jurors would have inevitably sat on the jury regardless of Irby's participation and concluded the answer was no. Irby, at 886-87. Accordingly, the state could not show the error was harmless. Id.

The same is true here, as there is a possibility juror 15 could have served on the jury. Although defense counsel successfully challenged this juror for cause, he did so in Love's absence. It is possible that Love's participation would have made a difference regarding defense counsel's decision to challenge this juror. This juror 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.

Because Division III did not apply the same test as used by this Court in Irby, this Court should accept review. RAP 13.4(b)(1). This Court should also accept review as the issue involves a significant question of law under the state and federal constitutions.

RAP 13.4(b)(3).

3. THIS COURT SHOULD ACCEPT REVIEW BECAUSE DIVISION III'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN STATE v. BRADLEY.

Love argued the state failed to prove the value element of the theft count involving Jennifer Lail, because the state's evidence involved a postdated check that was cancelled before it came due. In rejecting this argument, Division III relied on State v. Easton, 69 Wn.2d 965, 422 P.2d 7 (1966). There, a stolen check with a face value of \$95.00 was cancelled before the defendant had the opportunity to cash it. However, the lower court's reliance on Easton was misplaced, as it did not involve a *postdated* check that was cancelled before its due date. In Bradley, this Court described a postdated check as "worthless." Bradley, 190 Wash. at 546-47. This Court should therefore accept review, as the court of appeals decision conflicts with this Court's decision in Bradley regarding the worthlessness of postdated checks. RAP 13.4(b)(1).

F. CONCLUSION

This Court should accept review of the public trial right issues because Division III's decision conflicts with decisions of this

Court, namely Strode and Wise, as well as Division II's decision in Wilson. RAP 13.4(b)(1), (2).

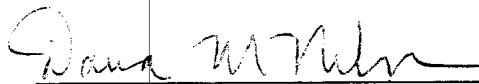
This issue is also one of substantial public interest as this Court's recent acceptance of other cases with similar issues indicates. See e.g. State v. Slert, 169 Wn. App. 766, 282 P.3d 101 (2012), review granted, 176 Wn.2d 1031 (2013) (S. Ct. No. 87844-7) (Whether the trial court in this criminal prosecution violated the defendant's constitutional right to a public trial by conferring with counsel (but not the defendant) in chambers about whether some prospective jurors should be dismissed); State v. Njonge, 161 Wn. App. 568, 255 P.3d 753 (2011), review granted, 176 Wn.2d 1031 (2013) (S. Ct. No. 86072-6) (Whether in this criminal prosecution the trial court violated the defendant's constitutional right to a public trial when it closed the courtroom to spectators while considering and ruling on the dismissal of some prospective jurors for hardship).

This Court should also accept review of the right to be present issue and sufficiency of the evidence claim, as Division III's decision on both conflicts with this Court's decisions in Irby and Bradley, respectively, and involves a significant question of law under the state and federal constitutions. RAP 13.4(b)(1), (3).

Dated this 21<sup>st</sup> day of November, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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# APPENDIX A

No. 30809-0-III

**FILED**  
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In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 30809-0-III
	)	consolidated with 30810-3-III;
Respondent,	)	30811-1-III
	)	
v.	)	
	)	
UNTERS L. LOVE,	)	PUBLISHED OPINION
	)	
Appellant.	)	

KORSMO, C.J. — Mr. Unters Love challenges his conviction for six counts of second degree theft and one count of bail jumping on the basis that the court erred in considering his challenges for cause at sidebar during jury selection. He also argues that he should have been present at the sidebar conference and that a postdated check that was cancelled before it came due had no value under our theft statute. We conclude that the court did not close the courtroom, Mr. Love has not shown that his due process claim was manifest, and that the check did have value at the time it was acquired. Accordingly, we affirm the convictions.



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30811-1-III  
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## FACTS

The noted charges were filed in three different cause numbers, but all of the matters proceeded to a single jury trial. Mr. Love was represented by counsel, although their relationship appeared on the record to be strained on occasion.

At the conclusion of voir dire, the trial judge called the attorneys forward for a bench conference to discuss challenges for cause; the record does not reflect whether Mr. Love joined the conference. Defense counsel challenged jurors 15 and 30 for cause; the prosecutor had no objection and the court struck the two jurors for cause. Counsel also discussed three other jurors, but no challenges were raised to those jurors after it appeared they were too far down the list to end up serving on the panel. Counsel also both assented to the trial judge's suggestion that two alternates be used. The court reporter then noted that the bench conference concluded.

At that point, the transcript reads: "(Peremptory challenge process is being conducted.)" The judge explained to the jurors that this process "generally takes a couple minutes, so if you want to stand and stretch, talk quietly amongst yourselves, feel free." Report of Proceedings (RP) at 134. The record of jurors shows that the prosecutor exercised one peremptory challenge. Defense counsel waived his peremptory challenges and the prosecutor waived further challenges. Both declined to strike any alternate

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jurors.<sup>1</sup>

After the judge's remarks inviting the jurors to relax, the transcript reports:  
“(Peremptory challenges continuing.)” RP at 134. The next line of the report of proceedings contains the beginning of the following exchange:

THE DEFENDANT: Your Honor, may I—may I approach the bench?

THE COURT: No.

THE DEFENDANT: Please, may I approach the bench, your Honor?

THE COURT: No.

THE DEFENDANT: Mr. Knox cannot represent this case.

THE COURT: Sir, if you say one more word. . . .

(The defendant sat down.)

RP at 135.

The essence of the charges against Mr. Love was that he would advertise and sign leases with people for residences that he did not own and collect their down payments for himself. One of the counts at trial involved a victim, Ms. L. who gave him a postdated check along with a \$500 money order. She had second thoughts about the transaction and cancelled the check before the date on the check; Mr. Love never presented the check to the bank. Ms. L. never saw the money order again.

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<sup>1</sup> Although not explained in the record, the handwriting on the record of jurors suggests that the prosecutor exercised the first peremptory strike by drawing a line through the name of the juror and putting a “P1” next to it. After that, the parties waived further challenges by so noting in writing on the form and then signing the document. They appear to have acted off of the written form, which likely was passed back and forth.

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The jury convicted Mr. Love as charged. The court imposed a standard range sentence term. Mr. Love then timely appealed to this court. After the decision in *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (2012), the parties provided supplemental briefing concerning that case at our direction.

#### ANALYSIS

This appeal presents a public trial claim concerning challenges for cause occurring at a sidebar conference and a due process claim arising from Mr. Love's absence from the sidebar conference. Mr. Love also challenges the sufficiency of the evidence to support the conviction for theft involving Ms. L. We will address the three challenges in the noted order.<sup>2</sup>

##### *Public Trial*

Mr. Love contends that the court violated his Washington Constitution article I, section 22 public trial rights by hearing his challenges for cause at sidebar. He also contends that the court erroneously conducted the peremptory challenges at sidebar as well. As to the latter claim, we do not believe the record factually supports the argument. The transcript clearly showed that the sidebar conference ended at the conclusion of the challenges for cause. The peremptory challenge process then began. The record simply

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<sup>2</sup> Mr. Love also filed a pro se statement of additional grounds raising several claims. All are without merit and most have no basis in the record of this case. We will not further address them.

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*State v. Love*

does not suggest that the peremptory challenge process continued at sidebar after the reporter stopped reporting it.<sup>3</sup> However, our analysis would not change even if the peremptory challenges had also been taken at sidebar. There was no improper closure of the courtroom.

Art. I, § 22 guarantees a criminal defendant many trial rights, including the right to “a speedy public trial by an impartial jury.” The meaning of the “public trial” right has been heavily litigated the past several years. In an overly simplified form, it is error under § 22 to “close” the courtroom to any aspect of a criminal trial that is required to be “open.” Whether or not a courtroom was properly closed is adjudged by application of the five factor test set forth in *State v. Bone-Club*, 128 Wn.2d 254, 261, 906 P.2d 325 (1995). Whether or not a particular portion of a proceeding was required to be held in public is determined by use of the “experience and logic” test. *Sublett*, 176 Wn.2d at 141.<sup>4</sup> Jury selection in a criminal case is considered part of the public trial right and is typically open to the public. *State v. Strode*, 167 Wn.2d 222, 227, 217 P.3d 310 (2009).

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<sup>3</sup> Mr. Love’s outburst and attempt to obtain permission to approach the bench during the peremptory process clearly demonstrates Mr. Love was not at the sidebar conference. Although speculative, it is likely that this incident occurred because defense counsel declined to strike any jurors while the two men were together at counsel table making decisions on exercising peremptory challenges.

<sup>4</sup> Although no opinion gathered more than four votes, eight of the nine justices sitting in *Sublett* approved the “experience and logic” test.

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As explained in the lead *Sublett* opinion, the “experience and logic” test requires courts to assess the necessity for closure by consideration of both history (experience) and the purposes of the open trial provision (logic). *Sublett*, 176 Wn.2d at 73. The experience prong asks whether the practice in question historically has been open to the public, while the logic prong asks whether public access is significant to the functioning of the right. *Id.* If both prongs are answered affirmatively, then the *Bone-Club* test must be applied before the court can close the courtroom. *Id.*

The prosecutor argues that there was no closure at all because the peremptory and cause challenges were all conducted in the open courtroom in the presence of the venire and any other spectators who may have been present. While the clarity and simplicity of such a bright line rule is appealing, we will leave that issue to another day when it has been thoroughly briefed from a wider perspective. We note that other states have concepts of “limited closure” that may be suggestive to Washington courts in this context. *See, e.g., Commonwealth v. Cohen*, 456 Mass. 94, 921 N.E.2d 906 (2010) (citing cases). As the prosecutor duly noted, at least one state has expressly addressed sidebar conferences in the open courtroom context. *E.g., People v. Virgil*, 51 Cal. 4th 1210, 253 P.3d 553 (2011). Since we reach the same result by use of the experience and logic test in this case, we will not address further whether a sidebar conference constitutes a closure, but will assume that is in fact the case here.

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The experience prong requires that we look at historic practices. Mr. Love argues that because cause and peremptory challenges are part of jury selection, a process that is normally open, the exercise of those challenges must be done openly rather than at sidebar. We believe this focus is too narrow. The argument here is that the sidebar conference violated our open courtroom norms because of what occurred at that conference. The focus thus has to be on whether the activities occurring at that conference were those normally required to be conducted in public. If Mr. Love had argued more generally that having *any* sidebar conference during jury selection violated § 22, then his broader focus would be a bit closer to the mark and we would look to historic practices in the use of sidebar conferences. However, his specific argument is that cause and peremptory challenges were erroneously conducted at sidebar. We therefore have to apply the experience and logic test to those practices.<sup>5</sup>

Neither party cites any authority suggesting that challenges for cause are normally made in public. Challenges for cause, which have existed from our early territorial

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<sup>5</sup> We take guidance for this approach from *State v. Wilson*, 174 Wn. App. 328, 298 P.3d 148 (2013). There the court clerk excused two jurors who were too ill to report for jury selection. The *Wilson* court expressly distinguished the voir dire component of jury selection from the entire process of jury selection and noted that most cases had done the same. *Id.* at 338-40 (discussing cases). Similarly, another panel applying the experience and logic test to the selection of alternate jurors focused on the clerk's actions in selecting the names rather than the general portion of the trial where the activity occurred. *State v. Jones*, 175 Wn. App. 87, 303 P.3d 1084 (2013).

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statutes, typically present solely a legal issue, *i.e.*, has the statutory standard been satisfied?<sup>6</sup> A peremptory challenge is one for which no reason need exist and rests in the discretion of the parties. Again, there is no evidence suggesting that historical practices required these challenges to be made in public. Most parties, in fact, would probably rather not have a challenge for cause made in the presence of the juror in case the challenge failed and the juror might serve knowing the identity of a party that had not wanted him or her to serve.

Our research discloses one case in which the defense challenged the “use of secret—written—peremptory jury challenges.” *State v. Thomas*, 16 Wn. App. 1, 13, 553 P.2d 1357 (1976). Discerning no prejudice to the defendant from the process, and noting that the process was used in several counties, the court rejected the argument for having “no merit.” *Id.* Although suggestive that there may have been an “open” peremptory challenge process in use in other places, *Thomas* is strong evidence that peremptory challenges can be conducted in private.

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<sup>6</sup> The current statutes governing cause challenges and peremptory challenges in civil cases are found in RCW 4.44.130-.250. All of these statutes trace back to at least 1869; some are earlier. *See* Laws of 1869 §§ 212-223. CrR 6.4(e) supersedes the former statutes that provided for peremptory challenges in criminal cases. Those statutes, former RCW 10.49.030-.060, were repealed by Laws of 1984, ch. 76, § 30, and had their genesis in the Laws of 1854 §§ 102-106.

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Also somewhat suggestive is *Sublett* itself. There the court faced a public trial challenge to the trial court's having answered a written jury question in chambers. Applying the experience and logic test, the court determined that jury questions had historically not been answered in open court and that logically there was no need to do so since answering the question in public did not further the purposes of the public trial guarantee. *Sublett*, 176 Wn.2d at 75-77. The use of a written question and answer created a public record that furthered the public trial right. *Id.* at 77.

The history review confirms that in over 140 years of cause and peremptory challenges in this state, there is little evidence of the public exercise of such challenges, and some evidence that they are conducted privately. Our experience does not require that the exercise of these challenges be conducted in public.

Similarly, the logic prong does not indicate that the challenges need to be conducted in public. The purposes 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.

*State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

Those purposes simply are not furthered by a party's actions in exercising a peremptory challenge or in seeking a cause challenge of a potential juror. The first action presents no questions of public oversight, and the second typically presents issues of law



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for the judge to decide.<sup>7</sup> The written record of these actions—the clerk’s written juror record and the court reporter’s transcription of the cause challenges at sidebar—satisfies the public’s interest in the case and assures that all activities were conducted aboveboard, even if not within public earshot. The alternative is to excuse all jurors from the courtroom while legal arguments take place in public concerning a juror’s perceived bias. We do not believe the public trial right requires the use of two rooms in order to facilitate the defendant’s challenge to some jurors for cause.

Neither prong of the experience and logic test suggests that the exercise of cause or peremptory challenges must take place in public. Mr. Love needed to establish that both aspects of that test required that the courtroom be open. The written record protected the public’s interest in Mr. Love’s cause challenges<sup>8</sup> and the prosecutor’s peremptory challenge. *Sublett*, 176 Wn.2d at 77.

The experience and logic test confirms that the trial court did not erroneously close the courtroom by hearing the defendant’s for cause challenges at sidebar, nor would

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<sup>7</sup> RCW 4.44.240 does provide for testimony if needed to assess a question of juror bias. While that aspect of jury selection would appear to need to take place in the public courtroom, we do not believe that the evidence gathering function should be confused with the legal question of whether a juror displays disqualifying bias.

<sup>8</sup> We need not decide whether Mr. Love’s use of the sidebar to make his challenges rather than request a public argument waived his ability to raise the issue without showing how the practice prejudiced him. *Cf. State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009).

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it have been error to consider the peremptory challenge in that manner if the court had done so. The sidebar conference did not close the courtroom.

*Defendant's Presence at Sidebar*

Mr. Love also contends that his due process rights were violated by hearing his for cause challenges at sidebar without his personal presence. He has not established that there was manifest constitutional error allowing him to raise this claim for the first time on appeal.

A criminal defendant has a due process right to be present at all critical stages of his criminal trial. *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011). This includes the voir dire and empanelling stages of the trial. *Id.* at 883-84.

However, Mr. Love did not contest the use of the sidebar procedure to hear his challenges for cause. The general rule in Washington is that appellate courts will not hear challenges that were not presented to the trial court. RAP 2.5(a). An exception is made for issues of "manifest error affecting a constitutional right." RAP 2.5(a)(3). Such issues may be raised if the record is sufficient to adjudicate them. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The alleged error must both be of constitutional nature and be "manifest" in the sense that it actually prejudiced the defendant. *Id.*

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Mr. Love has not established that the alleged constitutional error was manifest because he has not shown that he was prejudiced by the process.<sup>9</sup> 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 any 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 by the procedure.

His due process claim therefore is not manifest error. Accordingly, Mr. Love cannot pursue that claim for the first time in this court. RAP 2.5(a)(3); *McFarland*, 127 Wn.2d at 333.

*Value of a Cancelled, Postdated Check*

Lastly, Mr. Love argues that there is insufficient evidence of his second degree theft conviction involving Ms. L. because the postdated check had no value and the money order that he took was valued below the second degree theft limit. The

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<sup>9</sup> We question, although do not decide, whether Mr. Love has established he was not present. As we have just determined, the courtroom was not closed by the sidebar conference and Mr. Love was admittedly in the courtroom during jury selection. If “present” means standing beside counsel he might be correct, but there has been no authority presented suggesting that presence has such a meaning. He was in the courtroom, which was “open” to him.

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Washington Supreme Court has already decided this issue in an older case that is still applicable to the modern statute.

Second degree theft is committed (as charged in this case) when a defendant takes property or services having a value in excess of \$750 belonging to another. RCW 9A.56.020(1)(b); RCW 9A.56.040. The word “value” typically means the market value of the property in the area at the time of the crime, and with respect to checks, the value “shall be deemed the amount due or collectible thereon or thereby, that figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied.” RCW 9A.56.010(21).

Seizing upon the “ordinarily” clause of the quoted material, Mr. Love argues that the postdated nature of the check in question, which was then cancelled before the date on the instrument, meant that the face value of the check was no longer sufficient to support the valuation. His arguments require us to decide if either cancellation or postdating effects the face value of an instrument. We conclude that the answer is “no” in both cases.

The cancellation issue was previously decided in *State v. Easton*, 69 Wn.2d 965, 422 P.2d 7 (1966). There a stolen check with a face value of \$95 was cancelled before the defendant had the opportunity to attempt to cash it. *Id.* at 967. Former RCW 9.54.100 (1965) provided (in part) that the value of an instrument “shall be deemed the

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amount due thereon or secured thereby.” *Easton*, 69 Wn.2d at 970 (quoting statute). The court noted both that the statutory definition of value was not affected by the cancellation and that the cancellation did not affect the negotiability of the check. *Id.* at 970-71.

The quoted language of former RCW 9.54.100 is similar to the modern definition of RCW 9A.56.010(21)(b). *State v. Lampley*, 136 Wn. App. 836, 841, 151 P.3d 1001 (2006). Both statutes describe value in terms of what the instrument states on its face. Neither definition mentions cancellation as an exception to the face value rule. As did the *Easton* court under the former statute, we conclude that the cancellation of a stolen check does not alter its face value under RCW 9A.56.010(21)(b). The value of the check given to Mr. Love was established when it was created and was not affected by the subsequent cancellation.

Mr. Love also argues that because the check was postdated, it had a value of zero when he acquired it. For several reasons, we again disagree. First, nothing in the definition of “value” under the statute speaks to the date the obligation comes due. Rather, it is strictly defined in terms of the face value of the obligation less any payments made. Second, even an instrument with a future maturity date has current value, although perhaps at a discounted rate. Our bond markets operate on that principle.

Third, the Uniform Commercial Code (UCC) recognizes that postdated checks do create liability and are negotiable. Even though an instrument is not payable on demand

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until the stated date,<sup>10</sup> the modern practice is to pay a check when it is presented unless the drawer has expressly advised the bank not to pay until the date of the check. RCW 62A.4-401(c). This is to accommodate automated check cashing systems. See RCWA 62A.4-401 U.C.C. cmt. 3, at 331.

On the basis of these UCC provisions, Division One of this court upheld a forgery conviction involving a postdated check in *State v. Young*, 97 Wn. App. 235, 984 P.2d 1050 (1999). There the defendant had photocopied several checks made out to him and presented the photocopies, at different times, to a check cashing store. One of the checks was presented two days before the date of the check. *Id.* at 237-38. Considering the noted UCC provisions, particularly RCW 62A.4-401(c), the court concluded that the postdated check did create a legal liability and upheld the forgery conviction. *Id.* at 239-40.

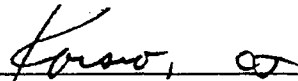
Accordingly, we conclude that neither the postdating of the check by Ms. L. nor its subsequent cancellation invalidated the check. Mr. Love received an instrument of value when he deceived Ms. L. into giving it to him. Accordingly, the evidence was sufficient to support that count.

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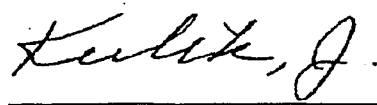
<sup>10</sup> RCW 62A.3-113(a).

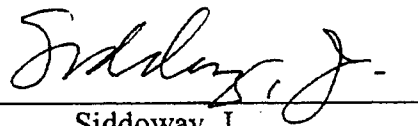
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The convictions are affirmed.

  
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Korsmo, C.J.

WE CONCUR:

  
\_\_\_\_\_  
Kulik, J.

  
\_\_\_\_\_  
Siddoway, J.

## **APPENDIX B**

No. 30809-0-III



**FILED**  
**OCT. 22, 2013**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**  
**DIVISION THREE**

STATE OF WASHINGTON,

Respondent,

v.

UNTERS L. LOVE,

Appellant.

)  
) No. 30809-0-III  
) Consolidated with 30810-3-III;  
) 30811-1-III  
)  
)  
) ORDER DENYING  
) MOTION FOR  
) RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's opinion of September 24, 2013, is denied.

DATED: October 22, 2013

PANEL: Judges Korsmo, Kulik, Siddoway

FOR THE COURT:

  
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KEVIN M. KORSMO  
Chief Judge