NO. 43987-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

JASON FITZGERALD,

Appellant.

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

The Honorable Gary R. Tabor, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE PROSECUTOR'S REPEATED IMPROPER ARGUMENTS CAUSED PREJUDICE THAT COULD NOT BE CURED BY INSTRUCTION.

By arguing that "birds of a feather flock together," the prosecutor conveyed the idea that Fitzgerald must have been guilty because he hung out with criminals. The prosecutor might validly have argued that, because Fitzgerald was in the truck with the two burglars so soon after the burglary, it is likely he was also with them earlier during the burglary. But that sort of empirical logic is not what the aphorism "birds of a feather flock together" suggests. The phrase suggests, instead, that when people are found together, it is because they are the same sort of person. It is shorthand for guilt by association and bad character.

This association was made more clear by the prosecutor's reference to his mother's advice to "choose your friends wisely, because the people you hang out with usually have common interests, and if those interests aren't good, you're going to be involved with those." 2RP 304. Fitzgerald was not guilty because of the people he chose to hang out with. Hanging out with someone who is involved in criminal activity does not mean, "[Y]ou're going to be involved," or are criminally liable. Using the "birds of a feather" argument to indicate criminal liability based solely on presence at the scene of a crime is precisely what the court disapproved of in People v. Ong, 94 Ill.

App. 3d 780, 790, 419 N.E.2d 97, 105 (1981) (condemning "birds of a feather flock together" arguments because they, "combined with the prosecutor's attempt to define accountability as presence at the scene of a criminal act, worked to further confuse the jury to the prejudice of the defendant.") Id. at 790. There is a legal standard for accomplice liability. It requires more than mere presence or "hanging out." State v. Jackson, 137 Wn.2d 712, 726-27, 976 P.2d 1229 (1999). The prosecutor's argument diminished that standard by suggesting Fitzgerald was an accomplice merely because he hung out with the people known to have committed the crime.

Defense counsel in no way invited this argument. On the contrary, the argument cited by the State at 2RP 338-39 was an attempt to defuse the prosecutor's guilt-by-association argument by recognizing the jury's natural inclination to be swayed by it. And contrary to the State's argument, it was not "undisputed" whether the three men were together when the crime was committed. See Brief of Respondent (BoR) at 16. The only evidence was that Fitzgerald was present in the truck afterward. Defense counsel specifically argued in closing that there was no evidence Fitzgerald was present at the burglary. 2RP 332-33.

In addition to arguing Fitzgerald's presence in the truck made him guilty of burglary by association, the prosecutor also improperly played to the jury's sympathy by eliciting and then relying on irrelevant evidence that

the burglary traumatized a child. 2RP 317. The State does not even try to argue this fact was relevant to the charges. Yet even after that was made clear to the prosecutor, it was brought up again in closing argument. 1RP 169; 2RP 226, 317.

The prosecutor is correct that there is nothing unconstitutional about common sense. BoR at 21. But the level of certainty required to convict in a criminal trial is not the level of certainty used in making common, every day decisions. To suggest that the two are the same is prosecutorial misconduct that diminishes the State's burden of proof beyond a reasonable doubt. State v. Lindsay, 171 Wn. App. 808, ____, 288 P.3d 641, 652 (2012). The State here went far beyond arguing the jury should use common sense. The prosecutor compared the jury's decision to decisions made in their every day lives, such as choosing to believe a person telling a story in a coffee shop. 2RP 322, 347. This was improper. Lindsay, 171 Wn. App. at ____, 288 P.3d at 652.

The prosecutor also argued defense counsel was putting up roadblocks to reality. 2RP 341-42. This was no different than the argument held to be improper in State v. Warren that counsel was "taking these facts and completely twisting them to their own benefit." State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008). This was not an "innocuous remark." BoR at 24. It was a suggestion to jurors that defense counsel was trying to

deceive them, rather than engaging in the important and constitutionally mandated role of putting the State's evidence to the test.

All of the above mentioned arguments have been disapproved of in the past. Warren, 165 Wn.2d at 17; State v. Belgarde, 110 Wn.2d 504, 507-508, 755 P.2d 174 (1988); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). That is sufficient to show that they are flagrant and ill-intentioned. See State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996) (finding flagrant misconduct because improper argument made over two years after Court of Appeals holding that it was improper). But the touchstone of the analysis is the fairness of the trial and whether instructing the jury could have cured the impact of the argument. State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). It could not.

The prosecutor's argument must be viewed as a whole in the context of the other arguments and the evidence presented. See, e.g., In re Detention of Glasmann, 175 Wn.2d 696, 714, 286 P.3d 673 (2012) ("Considering the entire record and circumstances of this case, there is a substantial likelihood that this misconduct affected the jury verdict."). The misconduct in this case pervaded the closing argument. Counsel would have to have objected repeatedly, interrupting the flow of the argument and adding fuel to the fire of the State's argument that defense counsel was putting up roadblocks. Particularly when viewed cumulatively, and in light of the far from

overwhelming evidence, the prejudice of the repeated misconduct could not have been cured. If this argument is not preserved for review, the failure to do so deprived Fitzgerald of effective assistance of counsel.

2. REMOVING A PORTION OF JURY SELECTION TO A PRIVATE SIDEBAR VIOLATED FITZGERALD'S RIGHT TO BE PRESENT AND HIS RIGHT TO A PUBLIC TRIAL.

The State argues that a sidebar, to which neither Fitzgerald nor the public was privy, was not a closure of the courtroom and did not violate the right to a public trial or the right to be present at all critical stages of the proceedings. BoR at 34-36. This argument should be rejected because the public trial right and right to be present apply to jury selection and because neither Fitzgerald nor the public was meaningfully present for the crucial portion of jury selection that involved exercising the peremptory challenges.

In analyzing a public trial issue, the first question is whether the public trial right applies to the portion of the trial at issue. State v. Sublett, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). Here, that portion is the exercise of peremptory challenges during jury selection. The State argues that, under the experience and logic test from Sublett, there was no closure. BoR at 33-34. Courts use the experience and logic test to determine what portions of the trial process the public trial right applies to: "Under the facts of this case,

then, we find no closure occurred because this proceeding did not implicate the public trial right." Sublett, 176 Wn.2d at 77 (emphasis added).

But it is well established the public trial right applies to jury selection: The public trial right applies to "'the process of juror selection,' which 'is itself a matter of importance, not simply to the adversaries but to the criminal justice system.'" In re Pers. Restraint of Orange, 152 Wn.2d 795, 804, 809, 100 P.3d 291 (2004). (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). The exercise of peremptory challenges is an essential part of selecting the jury. Therefore, it is unnecessary to resort to the experience and logic test to determine whether the public trial right is implicated here. It is. Orange, 152 Wn.2d at 804.

The State also argues that because this was a sidebar, like any other sidebar, it should not be considered a closure of the courtroom. But Sublett rebuts this argument. The court in Sublett made clear that the label attached to a proceeding does not determine whether it must be open to the public. 176 Wn.2d at 72-73. It does not matter that the proceeding was called a side-bar or a bench conference. What matters is the substance of what happened there. Removing jury selection from open court to a sidebar that cannot be observed or heard by the public, the court reporter,

or the defendant does not alter the nature of jury selection or change it into some other sort of proceeding not subject to the public trial right.

Once it is established that the public trial right applies, that right is violated when the proceedings are closed, i.e. not open to the public. Sublett, 176 Wn.2d at 71. The question is not a technological question such as whether a door is closed or open. The question is whether the public was excluded. State v. Lormor, 172 Wn.2d 85, 92, 257 P.3d 624 (2011). The public is certainly excluded from a sidebar. State v. Slert, 169 Wn. App. 766, 774, n. 11, 282 P.3d 101 (2012). That is, in fact, the very purpose of holding a sidebar, so that no one else in the courtroom, particularly the jury, is privy to the discussion.

The State suggests that the language in Slert regarding the closed nature of a sidebar proceeding is mere dicta. BoR at 34. Dicta or not, the court in Slert recognized (1) that a sidebar is not open to the public and (2) that jury selection must be subject to public scrutiny. Slert, 169 Wn. App. at 774 n. 11. The first of these assertions is a matter of common sense, and the second is a re-affirmation of what has been the law since Orange: that jury selection is a part of the trial process to which the public trial right applies and from which the public may not be excluded. 152 Wn.2d at 804. By exercising peremptory challenges at a sidebar, the court sidestepped the goal of the public trial right and the right to be present,

namely, scrutiny of the proceeding by both Fitzgerald and the public. State v. Irby, 170 Wn.2d 874, 883, 246 P.3d 796 (2011); Slert, 169 Wn. App. at 772.

The State also cites Lormor for its argument that the sidebar was not a closure. BoR at 32 (citing 172 Wn.2d 85). But Lormor is not on point. In that case, only one person was removed from the trial. Lormor, 172 Wn.2d at 87. That person was a four-year old child who was terminally ill and required a noisy ventilator to breathe. Id. Lormor stands for the proposition excluding one distracting person from the proceedings is not a closure implicating the public trial right. Id. at 92.

The analysis in Lormor actually supports Fitzgerald's position. The court explained that the rules governing courtroom closures "come into play when the public is fully excluded from proceedings." Id. at 92. The court expressly distinguished cases where the proceedings were held "in an inaccessible location such as a judge's chambers." Id. at 93. The public was fully excluded from the sidebar at which the peremptory challenges were exercised in this case. The sidebar was no more open to the public than a judge's chambers. The closure violated Fitzgerald's right to a public trial. Id. at 92-93.

The State does not attempt to argue that the right to be present at critical stages of the proceedings somehow does not apply to jury

selection. BoR at 35. Instead it argues Fitzgerald was "present." Id. This is curious, since the State also acknowledges that "typically defendants do not accompany their attorneys to bench conferences and the State assumes that he remained at counsel table." BoR at 35 n. 6. As the State acknowledges, a sidebar is not a proceeding which a defendant can hear or participate in. While the attorney has approached the bench, the defendant remains behind at counsel table with no chance to exercise any scrutiny or voice any concerns. That is not meaningful presence.

State next suggests that the right to be present at the proceedings against the accused is somehow satisfied when the accused's attorney is present. BoR at 36. But Irby holds that the right to be present extends to jury selection and, moreover, that the presence of defense counsel does not remedy the defendant's absence. 170 Wn.2d at 885-86. The State attempts to distinguish Irby by arguing that counsel in Irby was unable to consult with the defendant, whereas in this case, that consultation may have occurred. BoR at 36. But Irby expressly rejects this argument, holding that the mere possibility of consultation is insufficient:

> Even if "[d]efense counsel had time to ... consult him regarding excusing some of the jurors if they chose to do so," as the State suggests, Suppl. Br. of Pet'r at 16, "where ... personal presence is necessary in point of law, the record must show the fact." *Lewis,* 146 U.S. at 372, 13 S.Ct. 136. Significantly, the record here does not evidence the fact that defense counsel spoke to Irby before responding to the

> trial judge's e-mail. In sum, conducting jury selection in Irby's absence was a violation of his right under the due process clause of the Fourteenth Amendment to the United States Constitution to be present at this critical stage of trial.

Irby, 170 Wn.2d at 884.

It matters little whether jurors are excused at sidebar as in this case, or in an email exchange as in Irby. What matters is that neither Fitzgerald nor the public was present in any meaningful sense of the word. Irby, 170 Wn.2d at 884; Orange, 152 Wn.2d at 804. This process violated Fitzgerald's right to a public trial and his right to be present.

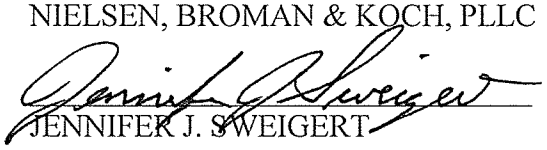
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Fitzgerald requests this Court reverse his convictions.

DATED this 26th day of July, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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	)	
Appellant.	)	

DECLARATION 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 26TH DAY OF JULY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JASON FITZGERALD
DOC NO. 721703
STAFFORD CREEK CORRECTIONS CENTER
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ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF JULY 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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