NO. 44895-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

VANESSA WHITFORD, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn Nelson

No. 12-1-03467-4

BRIEF OF RESPONDENT

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Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdiction

Constitutional Provisions

Other Authorities

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court violated the public trial provisions of the Washington State Constitution where the court conducted jury selection in open court and made no rulings closing the courtroom?

B. STATEMENT OF THE CASE.

1. Procedure

On September 13, 2012, the Pierce County Prosecuting Attorney (State) filed an Information charging Vanessa Whitford, the defendant, with one count of robbery in the first degree, including a deadly weapon sentencing enhancement. CP 1. The State later filed an Amended Information which dropped the weapon enhancement. CP 4.

The case was assigned for trial to Hon. Kathryn Nelson on May 9 2013. 1 RP 3. After hearing all the evidence, the jury found the defendant guilty of robbery in the first degree, as charged. CP 16. The court sentenced the defendant to 129 months in prison. CP 48. The defendant filed a timely notice of appeal on the same day. CP 41.

2. Facts

On August 30, 2012, the defendant and a companion went to the Wal-Mart in Puyallup, Washington. 2 RP 54, 105. They went to the liquor department where they selected two bottles of tequila. 2 RP 52, 105. The defendant put the two bottles in her large purse. 2 RP 52, 106. The defendant and her companion proceeded to the women's socks aisle where they selected socks. They put the socks into the defendant's purse. 2 RP 55. The defendant and her companion left the store with the merchandise, without paying for it. 2 RP 57, 60.

As the defendant and her companion left the store, three Wal-Mart employees contacted them. 2 RP 110, 156. Loss prevention officer Meagan Taylor identified herself and asked them to return inside. 2 RP 110. The defendant reacted belligerently. The defendant told them to get away from her, and reached into her purse. 2 RP 110, 157. The defendant pulled out a knife and brandished it, threatening the Wal-Mart employees. 2 RP 111, 157. The Wal-Mart employees backed away and called the police. 2 RP 113, 160.

The defendant and her companion ran to a pick-up truck in the parking lot. 2 RP 115, 160. The Wal-Mart employees got the license number. *Id.* The defendant drove the truck out of the parking lot. 2 RP 116, 162. She was arrested a month later in the same truck. 2 RP 175.

C. ARGUMENT.

1. WHERE VOIR DIRE WAS DONE IN OPEN COURT AND DEFENDANT FAILS TO SHOW ANY RULING OF THE COURT CLOSING THE COURTROOM, HE HAS FAILED TO SHOW THAT ANY CLOSURE OF THE COURTROOM OCCURRED.

A criminal defendant's right to a public trial is found in article I, section 22 of the Washington constitution, and the Sixth Amendment to the United States Constitution. Both provide a criminal defendant the right to a "public trial by an impartial jury." The state constitution also provides that "[j]ustice in all cases shall be administered openly," which grants the public an interest in open, accessible proceedings, similar to rights granted in the First Amendment of the federal constitution. Wash. Const. article I, section 10; ***State v. Lormor***, 172 Wn.2d 85, 91, 257 P.3d 624 (2011); ***Seattle Times Co. v. Ishikawa***, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); ***Press–Enter. Co. v. Superior Court***, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). The public trial right "serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." ***State v. Sublett***, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). "There is a strong presumption that courts are to be open at all trial stages." ***Lormor***, 172 Wn.2d at 90. The right to a public trial includes

voir dire. ***Presley v. Georgia***, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010).

Whether the right to a public trial has been violated is a question of law reviewed de novo. ***State v. Momah***, 167 Wn.2d 140, 147, 217 P.3d 321 (2009). The right to a public trial is violated when: 1) the public is fully excluded from proceedings within a courtroom, ***State v. Bone–Club***, 128 Wn.2d 254, 257, 906 P.2d 325 (1995) (no spectators allowed in courtroom during a suppression hearing), and ***State v. Easterling***, 157 Wn.2d 167, 172, 137 P.3d 825 (2006) (all spectators, including codefendant and his counsel, excluded from the courtroom while codefendant plea-bargained); 2) the entire voir dire is closed to all spectators, ***State v. Brightman***, 155 Wn.2d 506, 511, 122 P.3d 150 (2005); 3) and is implicated when individual jurors are privately questioned in chambers, *see* ***Momah***, 167 Wn.2d at 146, and ***State v. Strode***, 167 Wn.2d 222, 224, 217 P.3d 310 (2009) (jury selection is conducted in chambers rather than in an open courtroom without consideration of the ***Bone–Club*** factors). In contrast, conducting individual voir dire in an open courtroom without the rest of the venire present does not constitute a closure. ***State v. Erickson***, 146 Wn. App. 200, 189 P.3d 245 (2008).

When faced with a claim that a trial court has improperly closed a courtroom, the Washington Supreme Court has held that the reviewing

court determines the nature of the closure by the presumptive effect of the plain language of the court's ruling, not by the ruling's actual effect. ***In re Personal Restraint of Orange***, 152 Wn.2d 795, 807-8, 100 P.3d 291 (2004). In the present case, the defendant has failed to identify any ruling of the court that closed the courtroom to any person. Instead, defendant argues that part of the process, in writing, used during peremptory challenges constituted a court room closure.

The record indicates the following occurred after the court excused jurors for cause and it was time for the parties to exercise their peremptory challenges:

> THE COURT: Ladies and Gentlemen, at this time the two lawyers will be exercising those peremptory challenges I told you about. If you have a piece of reading material or you'd like to speak softly to your neighbor -- of course, not about the case -- you may do so. I do need you to stay seated and let's make sure those yellow tabs are way up high so it will be easier for the lawyers to remember. So you can read whatever you would like and/or pull out your computer, if you've got it in your lap, but you have to stay seated.

(Attorneys picking jury.) 5/9/2013 RP 83-84. The court then read off the names of the jurors who would sit on the case and excused the remainder of the venire. *Id.*

The defendant does not point to any ruling of the court that excluded spectators or any other person from the courtroom during voir

dire proceedings. The record indicates that all voir dire was carried on in open court. 5/9/2013 RP. From the fact that the judge tells the jurors to sit so that the attorneys could see the juror numbers, it is clear from the record that this process was occurring in open court. 5/9/2013 RP 84. The record does not reflect or imply that the judge or the attorneys ever left the courtroom. *Cf.* ***Momah***; ***Strode***.

Peremptory challenges were made by the attorneys in open court, by a written process. Presumably, the defendant could see the peremptory sheet and discuss the process with his attorney while it was going on. The written record of the process was reviewed by the court and filed, making it available for public inspection. CP 59.

None of the peremptory challenges were contested and there was no need for the court to make any decisions on the peremptory challenges. The record offers no basis to assume that anything occurred during this brief process other than the written communication, between counsel and to the court, of the names of the prospective jurors each counsel had decided to excuse by the right of peremptory challenge. Anyone, whether the defendant or a member of the public, can look at the peremptory challenge sheet and see exactly which party exercised which peremptory against which prospective juror and in what order. CP 59.

As the improper use of peremptory challenges can raise constitutional concerns, *see* ***Batson v. Kentucky***, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); ***Georgia v. McCollum***, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992), it is important to have a record of information as to how the peremptory challenges were exercised. The defendant fails to show how the written process used in open court in the trial below fails to serve such purpose. The parties carefully recorded the names of the prospective jurors who were removed by peremptory challenge, as well as the order in which each challenge was made and the party who made it. CP 59. This document is easily understood, and it was made part of the open court record, available for public scrutiny. It is in the court file, which is available for examination in the Superior Court Clerk's Office and as a scanned image on the Superior Court's digital database, LINX. This procedure satisfied the court's obligation to ensure the open administration of justice.

The Washington Supreme Court has observed several times recently that the right to a public trial serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. *See, e.g.*, ***State v. Brightman***, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (citing ***Peterson v. Williams***, 85 F.3d 39, 43 (2d

Cir. 1996)). But not every interaction between the court, counsel, and defendants will implicate the right to a public trial. ***Sublett***, 176 Wn.2d at 71.

To decide whether a particular process must be open to the press and the general public, the ***Sublett*** court adopted the "experience and logic" test formulated by the United States Supreme Court in ***Press–Enterprise Co. v. Superior Court***, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986). ***Sublett***, 176 Wn.2d at 73.

> The first part of the test, the experience prong, asks "whether the place and process have historically been open to the press and general public." The logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." 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. We agree with this approach and adopt it in these circumstances.

Sublett, 176 Wn.2d at 73.

Applying that test, the ***Sublett*** Court held that no violation of the right to a public trial occurred when the trial court considered a jury question in chambers. *Id.*, at 74–77. "None of the values served by the public trial right is violated under the facts of this case.... The appearance of fairness is satisfied by having the question, answer, and any objections placed on the record." *Id.*, at 77. The defendant has the burden to satisfy the "experience and logic" test. *See* ***In re Personal Restraint of Yates***, 177

Wn. 2d 1, 29, 296 P.3d 872 (2013); ***State v. Halverson***, 176 Wn. App. 972, 309 P.3d 795 (2013).

Recently, the Court of Appeals considered and rejected the same argument currently made by the defendant. In ***State v. Love***, 176 Wn. App. 911, 309 P.3d 1209 (2013), Division III applied the "experience and logic" test of ***Sublett*** in holding that peremptory challenges conducted at sidebar did not "close" the court room. ***Love***, at 1213-1214. The Court found no authority to require peremptory challenges to be conducted in public. To the contrary, the Court cited ***State v. Thomas***, 16 Wn. App. 1, 13, 553 P.2d 1357 (1976), where secret written peremptory challenges did not violate the right to public trial. ***Love***, at 1213. ***Love*** went on to reject the notion that a sidebar violated public policy aspects of an open trial. The Court found that, because all of the jury selection was done in open court, the public's interest in the case had been protected and that all activities were conducted aboveboard, "even if not within public earshot". *Id.*, 309 P.3d at 1214.

Here, as in ***Love***, the only thing that did not occur in open court was the vocal announcement of each peremptory challenge as it was made. There is no indication that the State or federal Constitutions require that everything and anything that concerns a public trial be announced in open court.

As the Court in ***Love*** points out, Washington caselaw does not support either the "experience" or "logic" prongs, as applied to this procedure of peremptory challenges. The history of trial courts consulting with counsel out of the earshot of those present in court goes back even farther than the ***Thomas*** case cited in ***Love***. For example, seven years after statehood, the Washington Supreme Court issued its opinion in ***State v. Holedger***, 15 Wash. 443, 448, 46 Pac. 652 (1896). Holedger complained that his attorney was asked in open court and in front of the jury panel whether there was any objection to the jury being allowed to separate. The Supreme Court did not find any evidence that Holedger was prejudiced by this action, but did indicate that the better practice would be for the court to ask this question in a sidebar so as to avoid incurring the displeasure of jurors who might be upset if there was an objection. The decision in ***Holedger*** was authored by Justice Dunbar and concurred in by Chief Justice Hoyt. Chief Justice Hoyt was the president of the 1889 constitutional convention, and Justice Dunbar was a delegate to the constitutional convention. *See* B. Rosenow, *The Journal of the Washington State Constitutional Convention*, at 468 (1889; B. Rosenow ed. 1962); C. Sheldon, *The Washington High Bench: A Biographical History of the State Supreme Court*, 1889-1991, at 134-37 (1992). Thus, at least two of the justices signing this opinion had considerable expertise in

the protections given under the state constitution, yet neither found certain trial functions being handled in a sidebar to be inconsistent with the public's right to open proceedings. In 1904, the Court upheld the actions of trial court that utilized the "best-practice" recommended in ***Holedger***. *See* ***State v. Stockhammer***, 34 Wash. 262, 264, 75 P. 810 (1904) (noting that consent for the jury to separate was given by defense counsel at the bench out of the hearing of the defendant and the jury).

There is some authority that the public announcement of a peremptory challenge in open court by the party exercising the challenge is not a universal, or even widespread, practice. When the United States Supreme Court decided that it was just as improper for a criminal defendant to excuse a potential juror for an improper reason as it was a prosecutor, the court commented that "it is common practice not to reveal the identity of the challenging party to the jurors and potential jurors[.]" ***Georgia v. McCollum***, 505 U.S. 42, 53 n.8, 112 S. Ct. 2348 (1992), citing Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 Colum.L.Rev. 725, 751, n. 117 (1992).

The procedure used in the defendant's trial was more open and public than that in ***McCullum***, ***Holdeger***, or ***Stockhammer***. The defendant has failed to show that any of the values served by the public trial right is violated by using a written peremptory challenge procedure in open court

during the jury selection process when the written document created in the process is also made a public record. He relies in part upon a case from California to support his argument. ***People v. Harris***, 10 Cal. App. 4th 672, 12 Cal.Rptr.2d 758 (1992). App. Brf. at 10. In ***Harris***, the peremptory challenges were exercised in chambers then announced in open court. This is distinguishable from what happened here. The retreat of the parties and court into chambers and out of the public view and hearing leaves a public spectator with no assurance that matters which should be on the public record are not being discussed in chambers.

In the defendant's case, however, a spectator could observe how the process was being conducted. The court even explained to all present what was occurring. 5/9/2013 RP 83-84. A spectator could see if there were objections or argument by counsel, and rulings by the court. Anyone could later ascertain which party was excusing which juror.

It should be noted that under ***McCollum***, 505 U.S. 42, both the prosecution and defense are forbidden from removing a juror for an improper purpose. Thus, if there was a concern that a juror was being removed for an improper reason, it is immaterial which party exercised a peremptory against that juror. A party or potential juror who felt that he or she was being improperly removed from the jury could raise his or her concern with the trial court. Under the written process used here, the court

would know who had exercised its peremptory against that person and could decide whether it was necessary for that party to explain its reasons for doing so. The procedure used below protects the values of the public trial right.

The process used here compares favorably with several recent cases in the Court of Appeals. In addition to ***Love***, 176 Wn. App. 911, the Court of Appeals has recently applied the ***Sublett*** "experience and logic" test where various important decisions were made out of public view. In ***State v. Miller***, -Wn. App., -P.3d-(2014)(2014 WL 237030), the Court found no violation of public trial right in a pretrial in-chambers discussion of an applicable statute, nor in-chambers discussion of proposed jury instructions. In ***State v. Burdette***, -Wn. App.-, 313 P.3d 1235 (2013), there was no violation of public trial right regarding discussion about responses to jury's question about an instruction, and, later, being deadlocked.

Unlike ***State v. Jones***, 175 Wn. App. 87, 303 P.3d 1084 (2013) (clerk chose alternate jurors off the record) and ***State v. Wilson***, 174 Wn. App. 328, 298 P.3d 148 (2013) (clerk dismissed prospective jurors for illness), here the choice or dismissal of prospective jurors was conducted in open court, while the court was in session.

This case is also distinguishable from a pre-***Sublett*** case, ***State v. Slert***, 169 Wn. App. 766, 282 P.3d 101 (2012). In ***Slert***, the parties used

questionnaires to assist with jury selection. The court conducted an in-chambers conference with counsel to jurors dismiss jurors for cause. 169 Wn. App. at 769, 774. Not only did the process fail to be in open court, it also excluded the defendant. The Court held that the public trial right and the defendant's right to be present were violated. *Id.*, at 774-775.

Here, the challenges were conducted in open court, in writing. Unlike ***Slert***, because the juror challenges here were peremptory, the parties did not have to give reasons for the challenges. And the defendant and public was present for the entire process. Because ***Slert*** was decided before ***Sublett***, there was no "experience and logic" analysis.

The defendant has failed to show that any closure, improper or otherwise, of the courtroom occurred. The defendant likewise fails to demonstrate that the procedure used by the trial court violates the "experience and logic" test of ***Sublett***. This issue is without merit.

D. CONCLUSION.

The courtroom and proceedings were not closed in this case. The defendant does not show, through the "experience and logic" test that jury

selection violated the open courtroom rule. The State respectfully requests that the conviction be affirmed.

DATED: January 28, 2014.

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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1/28/14 Johnson
Date Signature

PIERCE COUNTY PROSECUTOR

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