NO. 44919-6

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DUSTIN MARKS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 12-1-00967-0

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

1. Has defendant failed to show that there was a closure of the courtroom during jury selection when all jury selection proceedings occurred in an open courtroom? 1

2. Has defendant failed to show that the trial court acted improperly by imposing legal financial obligations upon him or that this issue was preserved for review in the trial court? 1

B. STATEMENT OF THE CASE. 1

1. Procedure 1

2. Facts 2

C. ARGUMENT 7

1. AS JURY SELECTION OCCURRED IN AN OPEN COURTROOM, DEFENDANT FAILS TO SHOW ANY CLOSURE OF THE COURTROOM 7

2. THIS COURT SHOULD NOT CONSIDER DEFENDANT'S CLAIM REGARDING THE IMPOSITION OF DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS UPON THE DEFENDANT AS IT WAS NOT PROPERLY PRESERVED FOR REVIEW 22

D. CONCLUSION. 26

Table of Authorities

State Cases

In re Personal Restraint of Orange, 152 Wn.2d 795, 807-8, 100 P.3d 291 (2004) 13

Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982) 11

State v. Baldwin, 63 Wn. App. 303, 310, 818 P.2d 1116 (1991) 24

State v. Bertrand, 165 Wn. App. 393, 400, 267 P.3d 511 (2011) 23

State v. Beskurt, 176 Wn.2d 441, 449-50, 293 P.3d 1159 (2013) 8

State v. Beskurt, 176 Wn.2d 441, 449-51, 293 P.3d 1159 (2013) 9

State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997) 24

State v. Blazina, 174 Wn. App. 906, 193 P.3d 678, *review granted*, 178 Wn.2d 1010 (2013) 23

State v. Bone-Club, 128 Wn.2d 254, 257, 906 P.2d 325 (1995) 9, 12

State v. Brightman, 155 Wn.2d 506, 514–15, 122 P.3d 150 (2005) 9, 12, 15

State v. Davis, 41 Wn.2d 535, 250 P.2d 548 (1952) 7

State v. Devin, 158 Wn.2d 157, 168, 142 P.3d 599 (2006) 9

State v. Easterling, 157 Wn.2d 167, 172, 137 P.3d 825 (2006) 12

State v. Erickson, 146 Wn. App. 200, 189 P.3d 245 (2008) 13

State v. Holedger, 15 Wash. 443, 448, 46 Pac. 652 (1896) 19, 20

State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) 7

State v. Lormor, 172 Wn.2d 85, 91, 257 P.3d 624 (2011) 11, 12

State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013) 16, 17

State v. Marsh, 126 Wn. 142, 145-46, 217 P.705 (1923) 8, 10

State v. McFarland, 127 Wn.2d 322, 332–33, 899 P.2d 1251 (1995) 7

State v. Momah, 167 Wn.2d 140, 146, 217 P.3d 321 (2009) 12

State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993) 22

State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) 7

State v. Slert, 169 Wn. App. 766, 774 n.11, 282 P.3d (2012), *review granted*, 176 Wn.2d 1031, 299 P.3d 20 (2013) 21, 22

State v. Smits, 152 Wn. App. 514, 523–524, 216 P.3d 1097 (2009) 24

State v. Stockhammer, 34 Wash. 262, 264, 75 P. 810 (1904) 20

State v. Strode, 167 Wn.2d 222, 224, 217 P.3d 310 (2009) 12

State v. Sublett, 176 Wn.2d 58, 72, 292 P.3d 715 (2012) 12, 15, 16

State v. WWJ Corp., 138 Wn.2d 595, 601, 980 P.2d 1257, 1260 (1999) 8

Federal and Other Jurisdiction

Georgia v. McCollum, 505 U.S. 42, 53 n.8, 112 S. Ct. 2348 (1992) 17, 18

People v. Harris, 10 Cal. App. 4th 672, 12 Cal.Rptr.2d 758 (1992) 21

Peterson v. Williams, 85 F.3d 39, 43 (2d Cir. 1996) 15

Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010) 12

Press–Enterprise Co. v. Superior Court, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) 11, 15

Constitutional Provisions

Article I, section 10, Washington State Constitition 11

Article I, section 22, Washington State Constitution 11

First Amendment, United States Constitution 11

Sixth Amendment, United States Constitution 11

Rules and Regulations

CrR 3.5 1

RAP 2.5 8

RAP 2.5(a) 8, 9, 22

RAP 2.5(a)(3) 7, 8, 9, 11

Other Authorities

B. Rosenow, *The Journal of the Washington State Constitutional Convention*, at 468 (1889; B. Rosenow ed. 1962) 20

C. Sheldon, *The Washington High Bench: A Biographical History of the State Supreme Court*, 1889-1991, at 134-37 (1992) 20

Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 Colum.L.Rev. 725, 751, n. 117 (1992) 17

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

1. Has defendant failed to show that there was a closure of the courtroom during jury selection when all jury selection proceedings occurred in an open courtroom?

2. Has defendant failed to show that the trial court acted improperly by imposing legal financial obligations upon him or that this issue was preserved for review in the trial court?

B. STATEMENT OF THE CASE.

1. Procedure

On March 19, 2012, the Pierce County Prosecuting Attorney's Office filed an information charging appellant, Dustin W. Marks ("defendant") with assault in the first degree, unlawful possession of a firearm in the first degree, vehicle prowling in the second degree, and reckless endangerment; a firearm enhancement was alleged on the assault. CP 1-2.

The matter came on for trial before the Honorable James Orlando on April 11, 2013. RP 1-3. After a hearing held pursuant to CrR 3.5, the court ruled that the defendant's custodial statements - up until the point

that the defendant cut off further questioning- were admissible in the State's case-in-chief. RP 31-69; CP 5-9.

All voir dire proceedings occurred in open court; the court used a written process for the parties to indicate their peremptory challenges. RP 77-154; CP 80.

After hearing the evidence the jury found defendant guilty as charged, including finding the firearm enhancement. CP 10-16.

At sentencing on May 17, 2013, the court imposed a standard range sentence of 318 months on the assault and 116 months on the unlawful firearm possession convictions based upon an offender score of "9." CP 57-68. The addition of the sixty months for the firearm enhancement brought defendant's total term of confinement to 378 months. CP 57-68. On the two misdemeanors, the court imposed 365 days on each to run concurrent with the felony convictions. CP 69-71.

Defendant filed a timely notice of appeal from entry of this judgment. CP 74.

2. Facts

Although the facts adduced at trial are not relevant to the issues raised in this appeal, what follows is a brief summary of what was adduced at trial.

Early in the morning of March 16, 2012 Michael Brunner was awakened by the barking of his two Chihuahuas- they sounded very agitated to him. RP 209-11. He got out of bed and went to windows that looked into the backyard and side yard, but saw nothing unusual. RP 216-17. When he looked out to the front of the house, he saw a vehicle that he did not recognize as belonging to the neighborhood, which was unusual. RP 223-26. He also saw a man moving around a silver truck that belonged to his neighbor Stu; the man was peering inside Stu's truck. RP 226. The man walked toward the front door of Stu's house, then came back, walked around Stu's truck then walked toward the vehicle that Mr. Brunner did not recognize and put a bag inside that car. RP 227-28.

When the man then went over to another neighbor's truck, peered into that truck and tried the door handle, Mr Brunner believed that the man was engaged in vehicle prowling. RP 228-29. His wife, Lea Brunner also observed the man's actions and thought that he was breaking into vehicles. RP 458-59. Mr. Brunner told his wife to call 911, then he retrieved a handgun, and went outside so he could get the license number on the unfamiliar vehicle. RP 230- 33. Mr. Brunner surreptitiously observed the man continue to act suspiciously and in a manner to avoid detection, until a passing vehicle illuminated the area so as to reveal Mr. Brunner's presence to the man. RP 243-46.

Mr. Brunner shouted out for the man to stop and informed him that the police had been called. RP 256. The man did not obey the commands to stop, but positioned himself behind a neighbor's truck; he raised a gun and fired a shot at Mr. Brunner. RP 252-53. As Mr. Brunner took cover, the man fired additional shots. RP 254. Mr. Brunner returned fire. RP 257-59. When Mr. Brunner saw that his son had come outside, he continued to yell at the man so as to keep his attention focused in Mr. Brunner's direction. RP 260. The man fired again, and then ran off in the direction of Rhodes Lake Road. RP 260. Mr. Brunner and his son went inside their home and waited for law enforcement to arrive. RP 263-65.

On March 16, 2012, shortly after 4:00 a.m., Pierce County Sheriff's deputies were dispatched to11401 173rd Court East on a call regarding a vehicle prowler at in a housing development off of Rhodes Lake Road near Bonney Lake, Washington; before an officer could arrive, there was an additional dispatch that shots had been fired. RP 174-77, 188. Upon arrival, Deputy Mahlum contacted Mr. Brunner at his residence for a brief statement as to what had occurred, then secured the scene and set up a containment area for a canine officer. RP 179-83.

Deputy Mahlum noted the details of the vehicle that Mr. Brunner had indicated did not belong to the neighborhood; it was a black Ford Ranger pickup truck with a License Number "B41865R." RP 184-85.

This vehicle was registered to Amber Robertson. RP 542-43. She testified that defendant, Dustin Marks, had possession of the truck on March 16, 2012, and that is what she told the dispatcher when she was contacted about her vehicle on that date. RP 544-47. In court, she identified defendant as the person who had her truck on that day. RP 547.

The canine track led to the discovery of a holster for a handgun and some clothing wrapped around a handgun. RP 591, 630-646. The dog tracked to a deep ravine and indicated that he wanted to go into the ravine, but due to safety concerns about a possible drop off, the canine handler stopped the track. RP 647-48. After approaching the ravine from the other side, there was no indication that anyone had come out the other side, leaving the handler to conclude that a person was probably hiding in the underbrush in the ravine. RP 648- 50. Around 6:00 a.m. on the morning of March 16, 2012, Pierce County Deputy Carolus was dispatched to a report of a suspicious person who matched the description of the shooter. RP 499-500. The call came from an area about three-quarters of a mile away from the scene of the shooting. *Id.* When she arrived she found that a Bonney Lake police officer had defendant on his knees in the roadway, his clothes were wet and muddy. RP 501. She transported him back to the district office. RP 502.

Mr. Brunner spoke to deputies at his house and was later asked to participate in a show up procedure on a possible suspect. RP 269-70, 591-94. Mr. Brunner identified the suspect in the show up as being the person who had fired shots at him earlier. RP 271-72. He also identified the defendant at trial as being that same person; he was certain of his identification at both the show up and in court. RP 272.

Deputies contacted Mr. Brunner's neighbor, Stuart Smalik, at his residence and asked him to check his truck. RP 422-43. He found that his glove box was open and his dome light was on, which was not the way he had left his truck when he parked it. RP 426. Mr. Smalik's checkbook was later found inside a backpack inside the Ford Ranger. RP 428, 598-99.

Another neighbor, Derik Rieger, testified that he was awakened in the early morning hours of March 16, 2012, by yelling and loud popping noises. RP 431-32. He and his two step children were sleeping in the house. RP 432-33. He later discovered bullet damage to his living room and kitchen walls. RP 435-36. There was also bullet damage to his truck. RP 267-68, 438.

The jury heard a stipulation that defendant on March 16, 2012, the defendant had previously been convicted of a serious offense and that they were to accept this stipulation as proof beyond a reasonable doubt of that

fact. RP 443. The jury also heard some of defendant calls from the jail wherein he made statements that tied him to the shooting. RP 557-78.

A forensic firearms expert examined casings found at the scene of the shooting and concluded that they had been fired from the gun found on the canine track. RP 367-406, 509-30.

The defendant did not testify or put on other witnesses.

C. ARGUMENT.

1. AS JURY SELECTION OCCURRED IN AN OPEN COURTROOM, DEFENDANT FAILS TO SHOW ANY CLOSURE OF THE COURTROOM.

a. RAP 2.5(a)(3) Should Be Applied to Right to Public Trial Cases, As It Is To Other Constitutional Rights.

Ordinarily an appellate court will consider a constitutional claim for the first time on appeal only if the alleged error is manifest and truly of constitutional dimension. ***State v. McFarland***, 127 Wn.2d 322, 332–33, 899 P.2d 1251 (1995); ***State v. Davis***, 41 Wn.2d 535, 250 P.2d 548 (1952); RAP 2.5(a)(3). Such a restriction is necessary because the failure to raise an objection in the trial court "deprives the trial court of [its] opportunity to prevent or cure the error" thereby undermining the primacy of the trial court. ***State v. Kirkman***, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); ***State v. Scott***, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (the

constitutional error exception in RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below). A defendant attempting to raise a claim for the first time on appeal must show both a constitutional error and prejudice to his rights. *Id.* at 926-27. A defendant can demonstrate actual prejudice on appeal by making a "plausible showing ... that the asserted error had practical and identifiable consequences in the trial of the case." *Id.* at 935.

Prior to the adoption of RAP 2.5 the Washington Supreme Court held that a closed courtroom claim could be raised on appeal even if there was no objection on this ground in the trial court. ***State v. Marsh***, 126 Wn. 142, 145-46, 217 P.705 (1923).

> At common law, constitutional issues not raised in the trial court were not considered on appeal, with just two exceptions. If a defendant's constitutional rights in a criminal trial were violated, such issue could be raised for the first time on appeal. Secondly, where a party raised a constitutional challenge affecting the jurisdiction of the trial court, an appellate court could also reach the issue.

State v. WWJ Corp., 138 Wn.2d 595, 601, 980 P.2d 1257, 1260 (1999) (citations omitted). These common law rules were replaced in 1976 by the adoption of the Rules of Appellate procedure, and specifically RAP 2.5(a). *Id.* at 601. As noted in a recent opinion, *see* ***State v. Beskurt***, 176 Wn.2d 441, 449-50, 293 P.3d 1159 (2013) (Madsen, J., *concurring*), when the

Supreme Court decided ***State v. Bone-Club*** in 1995, it cited to the rule in ***Marsh*** without taking into consideration of the impact of RAP 2.5(a)(3). *See* ***State v. Bone-Club***, 128 Wn.2d 254, 257, 906 P.2d 325 (1995). This failure to consider the impact of RAP 2.5(a)(3) has persisted in other decisions. *See, e.g.,* ***State v. Brightman***, 155 Wn.2d 506, 514–15, 122 P.3d 150 (2005).

As three justices of the Supreme Court recently concluded, the appellate courts should refuse to apply a rule that conflicts with the Rules of Appellate Procedure and subverts the intent of RAP 2.5(a). ***State v. Beskurt***, 176 Wn.2d 441, 449-51, 293 P.3d 1159 (2013) (Madsen, J., *concurring*). The Court in ***Bone-Club*** did not consider the change effected by RAP 2.5(a); its holding that a public trial error need not be raised in the trial court to be considered on appeal should be corrected.

Respect for *stare decisis* requires a clear showing that an established rule is incorrect and harmful before it is abandoned. ***State v. Devin***, 158 Wn.2d 157, 168, 142 P.3d 599 (2006). In this instance, the rule is incorrect because it contradicts the spirit and letter of the Rules of Appellate Procedure adopted by this Court. It is harmful in at least three respects: 1) the trial court is denied the opportunity to correct any error when no objection is required to preserve the issue for review; 2) it allows a defendant to participate in procedures

and practices in the trial court that are to his benefit, yet still claim that these practices are the basis for error in the appellate court; and 3) as the ***Marsh*** rule does not require a defendant to show a manifest error or any actual prejudice before obtaining new trial, public respect for the court is diminished and judicial resources are wasted when retrial is given as a remedy when it is evident from the record that there is no prejudice to the defendant.

These harms can be seen in the case now before the court. The trial court had the parties indicate their peremptory challenges in writing on a paper that was passed back and forth; neither party voiced an objection to this procedure. RP 148; CP 80. Defendant exercised all of his peremptory challenges thereby eliminating venire persons he did not want on his jury. Had defendant objected to this procedure and argued it constituted a violation of his right to an open courtroom, the trial court might have opted for different procedure just to eliminate a potential claim. Defendant cannot articulate any practical and identifiable negative consequences to his trial or show that he was prejudiced by the use of the written process to indicate peremptory challenges. His failure to object to what he now claims was a courtroom closure and a denial of his right to a public trial coupled with his inability to establish resulting actual prejudice should preclude appellate review. Despite the fact that he cannot show

any actual prejudice from the procedures used, defendant nevertheless, argues that he is entitled to a new trial. This is an abuse of the judicial process that should not be condoned.

This court should find that defendant's failure to object brings this issue under RAP 2.5(a)(3) and that he has failed to show an issue of truly constitutional magnitude that has caused him actual prejudice. As such this court should refuse to review the claim.

b. The Courtroom Was Open Throughout Voir Dire Proceedings.

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–Enterprise 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* ***State v. Momah***, 167 Wn.2d 140, 146, 217 P.3d 321 (2009) 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 case now before the Court, defendant argues that the procedure used by the court for exercising peremptory challenges constituted a courtroom closure. The record shows the following occurred: At the close of questioning, the court called both counsel to a sidebar before the attorneys started the peremptory challenge process. RP 148. The verbatim report of proceeding then reads as follows:

> THE COURT: Members of the Jury, the attorneys are going to be doing their final selection here in writing. It will take a few minutes to accomplish that. You can talk quietly between yourselves over anything other than this case. ...[The court gives additional instructions about what not to do] ... We ask you to stay on the fourth floor, that you not leave the fourth floor. If you need to go to the restroom, go use it, come right back to your same position as quickly as you can. Okay? Thank you. Then if you want to stretch, feel free to do that while they're doing their final selection.

> (Off the record while the attorneys are doing their peremptory challenges.)
>
> (Sidebar held but not reported.)

RP 148. Next, the court read off the names of the venire persons who would sit as jurors on the case and identified two alternates. RP 150-51 One of the alternates immediately expressed concern that he would not be a fair juror; after a hearing outside the presence of the venire, he was excused for cause and replaced by the next remaining venire person. RP 150-55.

After excusing the remainder of the jury venire, seating the jury, swearing it in, defense counsel asked to make a record as to what had occurred at a side bar. RP 155-63, 165. Defense counsel then made a record about his sidebar request to have Juror 2 removed for cause, which the court had denied. Although the record is somewhat ambiguous, it would appear that this objection was made in the side bar that preceded the exercise of peremptory challenges. RP 165-66. The court made a record of its reasoning in denying the challenge for cause. RP 165-66. The written sheet indicating the peremptory challenges used by each side was filed, thereby making it a public document. CP 80. No objections were raised regarding either party's use of peremptory challenges. RP 148-166.

Defendant has failed to identify any ruling of the court that closed the courtroom to any person. All jury selection was conducted in the courtroom as opposed to the judge's chambers or the jury room. Defendant can point to no Washington case that has found a courtroom closure under these circumstances. Rather, defendant argues that conducting the peremptory challenge process in writing effectively "closed" the courtroom.

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. ***Brightman***, 155 Wn.2d at 514 (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 court in ***Sublett*** 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, 141.

> 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 court held that no violation of Sublett's right to a public trial occurred when the court considered a jury question in chambers. ***Sublett***, 176 Wn.2d 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." ***Sublett***, 176 Wn.2d at 77.

Division III of the Court of Appeals recently addressed whether challenges for cause done in a sidebar constituted a courtroom closure under the experience and logic test in ***State v. Love***, 176 Wn. App. 911, 309 P.3d 1209 (2013). As to the experience prong the court concluded:

> 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.

Love, 176 Wn. App. at 919. Under the logic prong, the court found that none of the purposes of the public trial right were furthered by a party's actions is making a challenge for cause or a peremptory challenge as a

challenge for cause creates an issue of law for the judge to decide and a peremptory challenge "presents no questions of public oversight." *Id.* The court concluded that use of a side bar to conduct challenges for cause did not constitute a courtroom closure. *Id.* at 920.

In addition to the historical review conducted in ***Love***, there is some additional authority that the public announcement of a peremptory challenge in open court by the party exercising the challenge is not a 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).

In the case now before the court, defendant does not point to any ruling of the court that excluded spectators or any other person from the courtroom during the voir dire process. The record indicates that all of voir dire and the exercise of peremptory challenges were carried out in an open courtroom. Challenges for cause were initially made by the prosecutor on the record and then, following the court's instructions,

defense counsel made one in a sidebar; the court later made a public record as to what had occurred in the sidebar. RP 129-130, 148, 165. Peremptory challenges were made by the attorneys in open court, albeit by a written process. RP 148, CP 80. Presumably, 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 80. None of the peremptory challenges were contested and there was no need for the court to make any decisions on the peremptory challenges. RP 148-165. The record offers no basis to assume that anything occurred during this process other than the written communication, among counsel and the court, of the names of the prospective jurors each counsel had decided to excuse by the right of peremptory challenge. Anyone can look at the peremptory challenge sheet and see exactly which party exercised which peremptory against which prospective juror and in what order. CP 80.

It should be noted that under ***McCollum***, both the prosecution and defense are forbidden from removing a juror with a peremptory challenge 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. Any 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.

Defendant has failed to identify any closure of the courtroom during voir dire and fails to show how the procedures used in an open court undermined the purposes of the public trial right. Anyone sitting in the court room would know which jurors were excused for cause and why. RP 129-130. 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 80. This document is easily understood, and it was made part of the open court record, available for public scrutiny. These procedures satisfied the court's obligation to ensure the open administration of justice.

The only thing that did not occur was the vocal announcement of each peremptory challenge as it was made. There is no indication that our constitution requires that everything and anything that is done in the course of a public trial be announced in open court. 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 he was prejudiced when the court asked his attorney 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 juror 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 manner that precluded the entire courtroom from hearing what was being said 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).

Defendant has failed to show that any of the values served by the public trial right was violated by use of the written peremptory challenge procedure during the voir dire process when the written document created in the peremptory process is later filed, making it a public record. He relies upon a case from California to support his argument, ***People v. Harris***, 10 Cal. App. 4th 672, 12 Cal.Rptr.2d 758 (1992), but that was a case where the peremptory challenges were exercised in chambers then announced in open court; it is distinguishable from what happened here. The retreat of the parties and court into chambers and out of the open courtroom raises a closure issue. A public spectator at the ***Harris*** case could not see or hear what was happening in chambers. In defendant's case, a public spectator could watch the attorneys writing down their peremptory challenge on a piece of paper and later see which venire persons had been subjected to a peremptory challenge by the fact that they were not called to sit in the jury box. If that spectator were curious as to which attorney had removed a particular venire person, he could ascertain that by examining the written public record. He also relies upon dicta in a footnote in ***State v. Slert***, 169 Wn. App. 766, 774 n.11, 282 P.3d (2012), *review granted*, 176 Wn.2d 1031, 299 P.3d 20 (2013), about whether

excusing a juror in a side bar conference is proper. In ***Slert***, a divided panel of Division II of the Court of Appeals reversed for the trial court's pre-voir dire, in-chambers discussion with the attorneys, but not Slert, that led to the excusal of four potential jurors. The majority found that this violated Slert's public trial right and his right to be present. The facts in ***Slert*** are inapposite to those presented in this case.

As defendant has failed to show that any improper closure of the courtroom occurred this issue is without merit.

2. THIS COURT SHOULD NOT CONSIDER DEFENDANT'S CLAIM REGARDING THE IMPOSITION OF DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS UPON THE DEFENDANT AS IT WAS NOT PROPERLY PRESERVED FOR REVIEW.

a. <u>The Matter Is Not Properly Before This Court.</u>

As noted earlier, arguments not raised in the trial court are generally not considered on appeal. ***State v. Riley***, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993); RAP 2.5(a). There are only three circumstances in which the appellate court must review an issue raised for the first time on appeal: (1) lack of trial court jurisdiction; (2) failure to establish facts upon which relief can be granted; or (3) manifest error affecting a constitutional right. RAP 2.5(a).

For the first time on appeal, defendant raises the issue of his ability to pay his LFOs. The defendant did not object to the imposition of LFOs at his sentencing hearing. RP 753-58.

Defendant correctly notes the applicability of ***State v. Blazina***, 174 Wn. App. 906, 193 P.3d 678, *review granted*, 178 Wn.2d 1010 (2013), where this court held the decision to review an issue raised for the first time on appeal is discretionary and not applicable in every case. In ***Blazina***, Division II of the Court of Appeals addressed that its decision in ***State v. Bertrand***, 165 Wn. App. 393, 400, 267 P.3d 511 (2011), where it allowed a challenge to the imposition of LFOs for the first time on appeal did not establish a controlling precedent:

> While we addressed the finding of current or future ability to pay in ***Bertrand*** for the first time on appeal under RAP 2.5(a), that rule does not compel us to do so in every case. We noted that Bertrand had disabilities that might reduce her likely future ability to pay and that she was required to begin paying her financial obligations within 60 days of sentencing. ***Bertrand***, 165 Wn. App. at 404, 267 P.3d 511. Nothing suggests that Blazina's case is similar.

Blazina, 174 Wn. App. at 911. As the Supreme Court has granted review on ***Blazina***, it will soon speak on this issue.

Similarly, there is no evidence in this case to suggest the defendant's situation is analogous to Bertrand's. Because the defendant failed to raise his inability to pay fees at the trial court level, the issue is not properly before this Court. As will be discussed below, the court's

refusal to review this issue for the first time on appeal will not leave the defendant without a remedy.

b. The Issue Is Not Ripe For Review.

The time to challenge the imposition of LFOs is when the State seeks to collect the costs. ***State v. Baldwin***, 63 Wn. App. 303, 310, 818 P.2d 1116 (1991). Because the time to determine a defendant's ability to pay is when the government seeks collection, the trial court could not have erred in failing to consider defendant's ability to pay at sentencing. ***State v. Smits***, 152 Wn. App. 514, 523–524, 216 P.3d 1097 (2009). *See also* ***State v. Blank***, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997) ("[C]ommon sense dictates that a determination of ability to pay and an inquiry into defendant's finances is not required before a recoupment order may be entered against an indigent defendant as it is nearly impossible to predict ability to pay over a period of 10 years or longer.")

Here, there is no evidence that the State has sought collection of the defendant's LFOs. Thus, the issue is not ripe for review. Defendant still has many due process protections before there is forced collection of his legal financial obligations. The court's refusal to review this claim for failure to properly preserve it below will not deprive defendant of his only chance to challenge collection of legal financial obligations.

In this case, the trial court found that the defendant has the likely future ability to pay his LFOs. Finding 2.5 of the defendant's judgment and sentence states that:

> This court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

CP 57-68. Defendant was born in 1978 and the record reveals no disabilities that would preclude him from working. Unlike the defendant in Bertrand, the defendant here has not presented any evidence of a physical disability that might limit his present or future ability to earn income or pay LFOs.

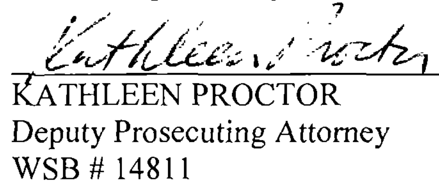
The trial court did not err in imposing discretionary LFOs upon the defendant.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the judgment and sentence below.

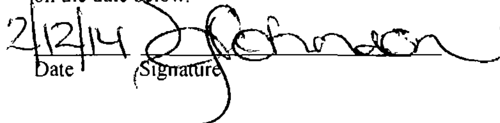
DATED: February 11, 2014.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:
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.



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