NO. 44487-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

LARDELL COURTNEY,

Appellant.

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

The Honorable James Orlando, Judge

REPLY BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT VIOLATED COURTNEY'S RIGHT TO A PUBLIC TRIAL.

Citing a three-judge concurrence in State v. Beskurt, 176 Wn.2d 441, 449-456, 293 P.3d 1159 (2013), and largely repeating the arguments contained therein, the State argues violations of the public trial right should be ignored on appeal absent an objection below. See Brief of Respondent, at 4-8. Currently, however, a majority of the Supreme Court holds these violations can be raised for the first time on appeal. See, e.g., State v. Wise, 176 Wn.2d 1, 13 n.6, 288 P.3d 1113 (2012); State v. Strode, 167 Wn.2d 222, 229, 217 P.3d 310 (2009). Any change in this approach must come from the Supreme Court. Unless that happens, Courtney's public trial claim is properly before this Court.

Next, the State argues there was no public trial violation because the courtroom remained open at all times to members of the public. Brief of Respondent, at 8-13. As discussed in Courtney's opening brief, however, it was the trial judge's method of jury selection ("for cause" challenges at sidebar and written peremptory challenges) that effectively closed the proceedings to the public. An otherwise open courtroom does not guarantee a

public trial. Constitutional rights are violated when the methods employed deny the public an opportunity to scrutinize events. See SBOR, at 6-7 (citing State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011); State v. Leyerle, 158 Wn. App. 474, 483, 242 P.3d 921 (2010)).

As State v. Wilson, 174 Wn. App. 328, 342, 298 P.3d 148 (2013), indicates, the public trial right attaches to a jury selection proceeding involving "the exercise of 'peremptory' challenges and 'for cause' juror excusals." Moreover, under State v. Slert, 169 Wn. App. 766, 744 n.11, 282 P.3d 101 (2012), review granted in part, 176 Wn.2d 1031, 299 P.3d 20 (2013), dismissing jurors at side bar violates the public trial guarantee.

Although Courtney cited Wilson and Slert in his supplemental brief, the State does not acknowledge these decisions. Instead, the State suggests Courtney must establish the public's right to see and hear the exercise of "for cause" and peremptory challenges with the "experience and logic" test discussed in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012). Brief of Respondent, at 13-14. The experience and logic test only applies, however, when it has not already been established the

proceeding falls within the public trial right. Wilson, 174 Wn. App. at 335.

Even if it had not already been established that the process of exercising challenges falls within the public trial right, both experience and logic support this conclusion. Under the "experience" prong of the test, the court asks "whether the place and process have historically been open to the press and general public." Sublett, 176 Wn.2d at 73. The "logic" prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." Id. If the answer to both is "yes," the public trial right attaches. Id.

Historically, it is well established that the right to a public trial extends to jury selection. See, e.g., Sublett, 176 Wn.2d at 71; State v. Strode, 167 Wn.2d 222, 226-227, 217 P.3d 310 (2009). This includes "'the process of juror selection.'" In re Orange, 152 Wn.2d 795, 804, 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)). "For-cause" and peremptory challenges are an integral part of this process. Strode, 167 Wn.2d at 230 (for-cause challenges of six jurors in chambers not de minimus violation of public trial right); Wilson, 174 Wn. App. at 342 (unlike potential juror

excusals governed by CrR 6.3, exercise of peremptory challenges, governed by CrR 6.4, constitutes part of "voir dire," to which the public trial right attaches).

Moreover, logically, openness in the process of excluding jurors clearly enhances core values of the public trial right – "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Sublett, 176 Wn.2d at 75; see also In re Personal Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (the process of jury selection "is itself a matter of importance, not simply to the adversaries but to the criminal justice system").

Without the ability to hear the arguments and discussions of counsel and the court as they occur, the public has no ability to assess whether "for cause" challenges are being handled fairly and within the confines of the law or, for example, in a manner that discriminates against a protected class. See Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989) (jury selection primary means to "enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice.").

Similarly, open peremptory challenges are critical to guard against inappropriate discrimination. This can only be

accomplished if they are made in open court in a manner allowing the public to determine whether one side or the other is targeting and eliminating jurors for impermissible reasons. See Supplemental Brief, at 8; see also State v. Sadler, 147 Wn. App. 97, 107, 109-118, 193 P.3d 1108 (2008) (private Batson[1] hearing following State's use of peremptory challenges to remove only African-American jurors from panel denied defendant his right to public trial), review denied, 176 Wn.2d 1032, 299 P.3d 19 (2013), overruled on other grounds Sublett, 176 Wn.2d at 71-73.

In response, the State notes that – after jurors 11 and 16 had been removed for cause at sidebar – Judge Orlando summarized what happened at the private conference. Brief of Respondent, at 16-17. But this summary did not take place until *after* the jury had been seated and jurors 11 and 16 dismissed from the courtroom. RP 10-11; SRP 47-48. By that time, it was too late to rectify any error. This is not an adequate substitute for real time public scrutiny.

Similarly, the State relies on the fact Judge Orlando filed a written sheet documenting peremptory challenges *after they had*

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[1] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

already been made. Brief of Respondent, at 16-18. The mere opportunity to find out, sometime after the process, which side eliminated which jurors is not sufficient. Members of the public would have to know the sheet documenting peremptory challenges had been filed and that it was subject to public viewing. Moreover, even if members of the public could even vaguely recall which juror number was associated with which individual, they also would have to remember the identity, gender, and race of those individuals to determine whether protected group members had been improperly targeted. This is not realistic.

The State also relies on State v Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), where a panel of Division Three judges recently held, under the experience and logic test, that exercising "for cause" and peremptory challenges outside the public view does not violate the right to public trial. This decision is poorly reasoned.[2]

Regarding experience, the Love court noted the absence of evidence that, historically, these challenges were made in open court. Love, 176 Wn. App. at 918-919. But history would not

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[2] A petition for review is pending in Love and set to be considered in March 2014. See State v. Unters Love, Case No. 89619-4.

necessarily reveal common practice unless the parties made an issue of the employed practice. History does not tell us these challenges were commonly done in private, either. Moreover, prior to State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995), there were likely many common, but unconstitutional, practices that ceased with issuance of that decision.

The Love court cites to one case – State v. Thomas, 16 Wn. App. 1, 553 P.2d 1357 (1976) – as "strong evidence that peremptory challenges can be conducted in private." Love, 176 Wn. App. at 918. Thomas rejected the argument that "Kitsap County's use of secret – written – peremptory jury challenges" violated the defendant's right to a fair and public trial where the defendant had failed to cite to any supporting authority. Thomas, 16 Wn. App. at 13. Notably, Thomas predates Bone-Club by nearly 20 years. Moreover, the fact Thomas challenged the practice suggests it was atypical even at the time.[3] Labeling Thomas "strong evidence" is a vast overstatement.[4]

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[3] Citing to a Bar Association directory, the Thomas court noted that "several counties" had employed Kitsap County's practice. Thomas, 16 Wn. App. at 13 n.2. Even ignoring the questionable methodology of what appears to be some type of informal poll, that only "several counties" had used the method certainly leaves open the possibility a majority of Washington's 39 counties did not even

Regarding logic, the Love court could think of no manner in which exercising "for cause" and peremptory challenges in public furthered the right to fair trial, concluding instead that a written record of the challenges sufficed. Love, 176 Wn. App. at 919-920. The court failed, however, to consider that an after-the-fact record removes the public's ability to scrutinize what is occurring at a time when error can still be avoided. The court also failed to mention or consider the increased risk of discrimination against protected classes of jurors resulting from late disclosure. As discussed above, the subsequent filing of documents from which the source of a challenge might be deciphered is not an adequate substitute for simultaneous public oversight. See also Sadler, 147 Wn. App. at 116 ("Few aspects of a trial can be more important . . . than whether the prosecutor has excused jurors because of their race, an issue in which the public has a vital interest.").

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before Bone-Club and subsequent cases requiring an open process.

[4] The State also cites Georgia v. McCollum, 505 U.S. 42, 53 n.8, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992), for the proposition that the challenging party often is not revealed to prospective jurors. Brief of Respondent, at 15-16. There is much that is not revealed to prospective jurors at trial. This is irrelevant, however, to whether the public must see and hear what is happening.

The trial court's methods for handling juror challenges violated Courtney's right to public trial.

2. COURTNEY WAS DENIED HIS RIGHT TO BE PRESENT FOR ALL CRITICAL STAGES OF TRIAL.

Dismissing jurors at a side bar conference, for case-specific reasons, in the defendant's absence, is a violation of the right to be present. Slert, 169 Wn. App. at 774 n.11 – 775. Nonetheless, the State argues Courtney cannot challenge his exclusion from the sidebar conference at which jurors 11 and 16 were dismissed because the issue is not one of manifest constitutional error under RAP 2.5(a). Brief of Respondent, at 21.

Recognizing that Mr. Irby raised his challenge for the first time on appeal, the State seeks to distinguish Courtney's case by arguing that (1) Courtney had an opportunity to object and (2) "ample opportunity to consult with his attorney." Brief of Respondent, at 21. But whether there was an opportunity to object is irrelevant under RAP 2.5(a). That opportunity is generally presumed. The question is always, in light of the failure to exercise that opportunity, can the issue still be raised? And, regarding Courtney's opportunity to consult, he clearly had no opportunity during the critical discussions at the bench, when the

court was hearing the arguments of the attorneys and making a decision. Where the State seeks to excuse a violation by arguing there was an opportunity to consult, the record must show, in fact, consultation took place. Irby, 170 Wn.2d at 884; Slert, 169 Wn. App. at 775. The State cannot make that showing here.

The State's final argument concerning RAP 2.5(a) is that Courtney cannot demonstrate any prejudice. Brief of Respondent, at 4-5, 22. As Irby makes clear, however, prejudice is established whenever a dismissed prospective juror fell within the range of jurors who ultimately comprised the jury. Irby, 170 Wn.2d at 886. Jurors 11 and 16 fell within the relevant range. Prejudice has been established. See SBOA, at 12.

Alternatively, the State argues the violation of Courtney's right to be present was invited and therefore waived. Brief of Respondent, at 22-23. Since it was at the *court's* request, not defense counsel's, that "for cause" dismissals be handled at a sidebar without Courtney, the State's argument has no merit. See SRP 47. But even if the idea had originated with defense counsel, counsel could not waive the issue for Courtney.

It is the *court's* role to ensure a knowing, voluntary, and intelligent waiver of constitutional rights. The duty to protect

fundamental constitutional rights "imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." Johnson v. Zerbst, 304 U.S. 458, 465, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). Consistent with this duty, CrR 3.4(a) requires the defendant's presence at every stage of trial unless "excused or excluded *by the court* for good cause shown." (emphasis added); see also State v. Thomson, 123 Wn.2d 877, 880-884, 872 P.2d 1097 (1994) (when a defendant initially appears for trial but thereafter fails to attend, it is *the trial court* that must assess several factors to determine whether there has been a knowing and voluntary waiver).

Thus, the critical mistake was Judge Orlando's. While defense counsel also should have recognized Courtney's constitutional right to see, hear, and participate in what was happening, this did not waive Courtney's ability to assert the violation of his rights on appeal. Indeed, violations of the right to be present will often involve a failure, on counsels' part, to adequately protect client rights.

In State v. Rice, 110 Wn.2d 577, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910, 109 S. Ct. 3200, 105 L. Ed. 2d 707 (1989), for example, defense counsel mistakenly believed their client did

not have a right to be present for the replay, in the jury's presence, of a taped confession and affirmatively indicated they could proceed in his absence. The Supreme Court found a violation of Rice's constitutional rights without regard to whether counsel had invited the error. Id. at 613-614.

State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011), provides another example. Defense counsel erroneously believed his client had no right to be present for the release of jurors from the panel and proceeded without him. See id. at 878. Yet, the fact defense counsel arguably contributed to the error did not preclude review of the issue on appeal.

United States v. Gordon, 829 F.2d 119 (D.C. Cir. 1987), provides yet another example. Defense counsel successfully moved the court to conduct jury selection in Gordon's absence. Gordon, 829 F.2d at 121. Although counsel claimed he informed Gordon he could attend, counsel also provided misinformation that may have impacted whether Gordon exercised that right. Id. at 126. The Court of Appeals reversed, holding that Gordon could not knowingly, intelligently, and voluntarily waive his right to participate without an on-the-record colloquy conducted by the trial court. Id.

at 124-126. That defense counsel had invited the error made no difference.

The critical point is this: the defendant, and only the defendant, has the ability to waive his right to be present at a critical stage of trial. Neither defense counsel nor the court can waive this right for him. There was no invited error in Courtney's case. But even if there had been, it would not waive the issue.

Ultimately, the only pertinent question is whether Courtney waived his presence. Courts "must indulge every reasonable presumption against the loss of the constitutional right to be present at a critical stage of the trial." Campbell v. Wood, 18 F.3d 662, 672 (9th Cir. 1994). There can be no knowing and intelligent waiver unless the defendant is aware of the right at issue. See State v. Sargent, 111 Wn.2d 641, 655, 762 P.2d 1127 (1988) ("Unless the defendant is informed of his right, he cannot be presumed to know it."); State v. Duckett, 141 Wn. App. 797, 806-807, 173 P.3d 948 (2007) (without advisement of right and requested waiver, there is not a knowing, intelligent and voluntary waiver of a constitutional right), review denied, 176 Wn.2d 1031, 299 P.3d 19 (2013); see also Gordon, 829 F.2d at 125-126 (on-the-record waiver only sufficient means to determine valid waiver of right to attend); State

v. Eden, 163 W.Va. 370, 256 S.E.2d 868, 873 (1979) (valid waiver of right to be present requires "that the accused has not only a full knowledge of all facts and of his rights, but a full appreciation of the effects of his voluntary relinquishment.").

Cases in which there has been a valid waiver of the right to attend trial proceedings involve a clear and unequivocal waiver, on the record, with full knowledge of the defendant's rights. See, e.g., Amaya-Ruiz v. Stewart, 121 F.3d 486, 495-496 (9th Cir. 1997) (trial judge informs defendant of right and potential adverse consequences of waiver; defense counsel also stressed consequences of waiver), cert. denied, 522 U.S. 1130, 118 S. Ct. 1083, 140 L. Ed. 2d 140 (1998); Campbell v. Wood, 18 F.3d at 670-673 (discussions between defendant and judge in open court regarding consequences of waiving presence followed by signed written waiver).

No one informed Courtney he had the right to see and hear the private proceedings at side bar and no one asked him if he wished to waive that right. Because there was no valid waiver, he can raise this violation of his rights.

Finally, in another argument aimed at prejudice, the State argues defense counsel was going to seek, and the court was

going to order, dismissal of jurors 11 and 16 regardless of Courtney's presence and participation. Brief of Respondent, at 23-24. Of course, had Courtney been present, he could have objected to dismissal of one or both of these individuals based on attributes he deemed favorable. Juror 11, in particular, had served before, was eager to serve again, was confident in the ability to be fair, and was openly concerned about the fairness of the system to criminal defendants. SRP 7, 39-42, 44-46.

The State cannot demonstrate, beyond a reasonable doubt, that at least one of these jurors could not have served. Nor can it show that defense counsel would not have deferred to Courtney in this regard:

> [A] defendant's presence at jury selection "bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend" because "it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether."

Irby, 170 Wn.2d at 883 (quoting Snyder v. Massachusetts, 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934)) (emphasis added).

Courtney has demonstrated a violation of his state and federal constitutional right to be present at a critical stage of trial.

3. COURTNEY'S CONVICTIONS FOR ROBBERY AND ASSAULT VIOLATE DOUBLE JEOPARDY.

As Courtney argued in his opening brief, the robbery was not yet complete when, during his continuing struggle with undercover security officers, Courtney struck Duval. The conduct charged as assault in the third degree (assault with the intent to prevent his apprehension) was part of the force elevating a theft of property to robbery in the second degree (theft by force used to overcome resistance to the taking). Therefore, the two crimes merge. See Brief of Appellant, at 4-8.

Attempting to avoid merger, the State cites State v. Johnson, 155 Wn.2d 609, 121 P.3d 91 (2005), and argues the robbery was complete and entirely over when the two liquor bottles fell from Courtney's pants. Therefore, any assaultive conduct thereafter was necessarily done solely to escape (assault 3) rather than escape with the bottles (robbery 2).[5] Brief of Respondent, at 30-32.

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[5] The State also focuses on whether the two crimes are the same under Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932), and Washington's similar "same evidence" test. Brief of Respondent, at 25-29. That analysis, however, is irrelevant to whether the crimes are considered one under merger analysis. See State v. Freeman, 153 Wn.2d 765, 777-778, 108 P.3d 753 (2005) (assuming assault 2 and robbery 1 are not "the same at law" under Blockburger, but concluding they are a single crime under merger analysis).

Johnson is easily distinguished. The issue in Johnson was whether the force used after a defendant peaceably takes property and then *abandons it* turns a theft into a robbery. Johnson, 155 Wn.2d at 609-610. It was undisputed that Johnson had chosen to discard the property and only used force to escape capture for the theft. Because the force was not used to escape with property, there was no robbery. Id. at 611.

In contrast, Courtney did not abandon the liquor bottles. Rather, they slipped from his pants during his ongoing attempt to escape apprehension with them. Both bottles were still intact (and therefore still capable of being taken) as Courtney resisted the security officers' efforts to gain control of him. RP 67-68, 70. This Court should reject the State's attempt to artificially divide a single extremely short and continuous physical encounter for the purpose of obtaining an additional assault conviction.

The State's argument against a "same criminal conduct" finding fails for the same reason. It turns on acceptance of the notion that Courtney intended to escape with the liquor until the moment it accidently slipped from his pants and, thereafter, Courtney's new and only intent was to escape without the liquor.

See Brief of Respondent, at 41-42. The record does not bear this out.

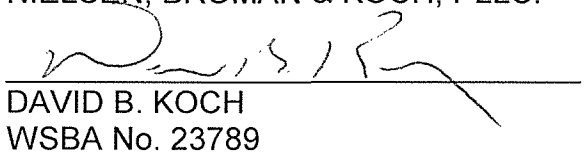
B. CONCLUSION

The trial court's procedures for selecting Courtney's jury violated his right to public trial and right to be present for all critical stages of trial. His convictions should be reversed and the case remanded for a new trial. Courtney's convictions for robbery and assault merge. Therefore the assault conviction should be vacated. Those convictions also involve the "same criminal conduct" for sentencing purposes.

DATED this 10th day of February, 2014.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

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DIVISION TWO

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	)	
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	)	
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	)	
LARDELL COURTNEY,	)	
	)	
	)	
Appellant.	)	

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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 10TH DAY OF FEBRUARY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LARDELL COURTNEY
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AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF FEBRUARY, 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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