69449-9

69449-9

NO. 69449-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

COREY ALEXANDER SCHUMACHER,

Appellant.

2013 OCT -2 PM 3:15

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JIM ROGERS, JUDGE

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES

1. Whether Schumacher's right to a public trial was violated, where the court heard jurors' hardship excuses in open court and excused jurors in open court, but a discussion on hardship excusals took place at a side-bar conference that was later placed on the record.

2. Whether Schumacher was denied his right to be present at all critical stages of his trial, where he was present in court for all proceedings and was afforded an opportunity to consult with his attorney on the hardship excuses, but may not have been present at a side-bar discussion of hardship excusals.

B. SUPPLEMENTAL STATEMENT OF THE CASE

After prospective jurors had filled out questionnaires and the trial court had sworn in the jury panel, the judge explained how the court defined "hardship." RP[1] 2, 5, 6-8. The court heard from a number of jurors in open court, and then sent the entire panel back to the juror assembly room. RP 8-16. The court then went through the requests for hardship excusal with the attorneys, excusing a number of the prospective jurors by agreement of the parties. RP 17-25. After determining that the number of remaining jurors

[1] "RP" refers to the verbatim report of proceedings on May 31, 2012.

was insufficient, the court recessed until additional jurors could be made available. RP 25-26.

When court reconvened in mid-afternoon, the judge announced that a new panel of prospective jurors would be brought to the courtroom and screened for hardship. RP 26. Trying to make the best use of the limited time remaining in the court day, the judge formulated a plan:

> I definitely want to get to my general orientation, because that's where I tell them not to discuss the case. So I think after the new panel comes up and we screen them for hardship and we'll have a side-bar, *I will give you a chance to speak to your client so you can discuss any hardships before I make any final decisions*, and then we will – I will excuse some people, and then the rest of the jurors will come up, I will give them a general orientation, and the people that we'll speak to individually we'll send back to the jury room, and everybody else will be gone for the weekend.

RP 26-27 (italics added).

After the new panel was sworn, the judge explained how the court defined "hardship." RP 34, 38-40. While the estimated length of the trial was relevant, none of the possible reasons for hardship excusal recounted by the judge had anything to do with the facts of Schumacher's case. RP 38-40. Nor did the reasons proffered by prospective jurors relate to the facts of the case. RP 40-44.

When the discussion of hardships was completed, the court announced: "I am going to talk to the lawyers over here, and if you want to stand and stretch or talk amongst yourselves, you certainly may." RP 44. A side-bar discussion ensued.[2] RP 44.

Following the side-bar, the court excused several members of this second panel based on hardship. RP 44-45. The court then sent the remainder of the group back to the juror assembly room. RP 45. The judge put the substance of the side-bar discussion on the record:

> We had a side-bar, and there was no disagreement on the people excused. We did agree to let number 70 go, and I did not. And I will tell counsel now that the reason that I didn't is it seemed to me to be unfair to keep 61 and let 70 go. Really the same rationale we are talking about there with people for work, but I may excuse him eventually, number 70.
>
> *I also asked Mr. Wolfe[[3]] if he wanted any additional time to talk to his client, and he did not.*

RP 45 (italics added).

The court then gave the remaining prospective jurors (those remaining after both rounds of hardship excusals) a brief orientation

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[2] Schumacher did not object to the side-bar that he now claims violated his right to a public trial; thus, he has waived this claim. RAP 2.5(a). Whether a criminal defendant waives this claim by failing to object is currently before the Washington Supreme Court in State v. Frawley, No. 80727-2 (oral argument scheduled for October 17, 2013).

[3] Justin Wolfe was Schumacher's trial counsel. RP 1.

to voir dire and some preliminary instructions and cautions. RP 46-57. The time remaining in the court day was occupied with individual questioning of several jurors in open court, followed by challenges for cause.[4] RP 59-77.

C. ARGUMENT

1. SCHUMACHER'S RIGHT TO A PUBLIC TRIAL WAS NOT VIOLATED BY THE SIDE-BAR DISCUSSION OF HARDSHIP EXCUSALS.

Schumacher claims that the side-bar discussion of hardship excusals effectively closed the courtroom, violating his right to a public trial. Neither the facts nor the law support this claim.

Both the state and federal constitutions guarantee the right to a public trial. U.S. Const. amend. VI; Wash. Const. art. I, § 22. The presumption of openness extends to voir dire. State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009); Presley v. Georgia, 558 U.S. 209, 213, 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 that is reviewed *de novo*. State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

[4] There is a separate volume of the report of proceedings (June 4, 2012) that contains voir dire of the panel, ending with peremptory challenges. The issues raised in appellant's supplemental brief can be resolved without resort to this volume.

a. There Was No Courtroom Closure.

Before the appellate court will determine whether there has been a violation of a defendant's right to a public trial, it must first determine whether there was a closure implicating that right. State v. Beskurt, 176 Wn.2d 441, 446, 293 P.3d 1159 (2013). The Washington Supreme Court has found that a courtroom was closed when a defendant's entire family was excluded, when the courtroom doors were closed to all spectators, when the defendant was prohibited from attending a portion of his trial, and where part of the proceeding was conducted in an inaccessible location such as the judge's chambers. State v. Lormor, 172 Wn.2d 85, 92-93, 257 P.3d 624 (2011) (citing cases). Even if the court someday adds sidebar discussions to this list, there was no closure here.

First of all, all of the questioning concerning hardship excuses was done in open court. RP 40-44. Then, following the sidebar discussion, the judge in open court excused a number of jurors for hardship. RP 44-45. Finally, the judge in open court placed on the record that there had been no disagreement at sidebar as to the hardship excusals. RP 45.

Thus, the *only* thing that occurred at sidebar – counsel agreeing as to which prospective jurors could be excused for

hardship -- was explicitly put into the record of the proceedings. Under these circumstances, there was no open court violation.

b. Hardship Excusals Are Not A Part Of Voir Dire, And The Right To A Public Trial Does Not Attach.[5]

In any event, the right to a public trial does not attach to the excusal of jurors for hardship, a purely administrative task. The legislature has empowered "the court" to excuse persons from jury service upon a showing of "undue hardship, inconvenience, public necessity, *or any* reason *deemed sufficient by the court* for a period of time the court deems necessary." RCW 2.36.100(1) (italics added). The judge may delegate the task of excusing persons from jury service for reasons of hardship to the court clerk. State v. Rice, 120 Wn.2d 549, 561, 844 P.2d 416 (1993). The statute grants a court "broad discretion" in excusing jurors. Id. at 562.

While hardship excusals are clearly a part of the general process of jury selection, they are *not* a part of voir dire, which is defined as "the preliminary examination which the court and attorneys make of prospective jurors to determine their *qualification and suitability* to serve as jurors." Black's Law Dictionary (6th ed.

[5] Whether consideration of hardship excuses is subject to the public trial requirement is currently before the Washington Supreme Court in State v. Njonge, No. 86072-6 (scheduled for oral argument on October 17, 2013).

1990) at 1575 (italics added). Notably, "[p]eremptory challenges or challenges for cause" may result from voir dire. Id.

The court rules are in accordance with this definition of voir dire, and illustrate the difference between the preliminary administrative procedure that may result in hardship excusals, and the substantive questioning of voir dire. When a case is called for trial, jurors are to be selected from among those who have appeared "and have not been excused." CrR 6.3. Then, "[a] voir dire examination shall be conducted *for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges.*" CrR 6.4(b) (italics added).

Case law also supports the distinction between the general process of jury selection, which includes hardship excusals, and the specific portion of jury selection that is designated as "voir dire." See State v. Wilson, 174 Wn. App. 328, 340 n.12, 298 P.3d 148 (2013) ("jury selection" begins when the court issues a summons to members of the public, some of whom do not respond and some of whom will be unable to serve due to hardship; "voir dire" is a later-occurring component of the broader process of jury selection that provides the parties with an opportunity to question the remaining

prospective jurors in open court as to their biases, with an eye to obtaining a fair and impartial jury in the specific case being tried).

The Washington Supreme Court has sometimes used the terms "jury selection" and "voir dire" interchangeably. In State v. Wise, 176 Wn.2d 1, 11, 288 P.3d 1113 (2012), the court cited (in addition to its own cases) to Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed.2d 675 (2010) for the proposition that "[t]he public trial right applies to jury selection." The Supreme Court in Presley, however, phrased the question before it as "whether it is . . . well settled that the Sixth Amendment right [to a public trial] extends to jury *voir dire*." Presley, 558 U.S. at 213 (italics in original). Indeed, the Court referred throughout its opinion to the process at issue as "voir dire." The Court mentioned "jury selection" only in a general sense, phrasing the "initial question" as "whether the right to a public trial in criminal cases extends to the jury selection phase of trial, *and in particular the voir dire of prospective jurors*." Id. at 212 (italics added). This Court should not rely on mere labels to ignore the important differences between hardship excusals and voir dire. See Wilson, 174 Wn. App. at 339 n.10 ("Resolution of whether the public trial right attaches to a

particular proceeding cannot be resolved based on the label given to the proceeding.") (quoting Sublett, 176 Wn.2d at 72-73).

Existing case law in Washington on the public trial right does not specifically address the process at issue here – the excusal of prospective jurors for hardship reasons. See Wilson, 174 Wn. App. at 338-40. "[T]he vast majority of Washington cases finding a violation of the public trial right have all involved the public's exclusion from voir dire or a similar proceeding amounting to its functional equivalent, where individual jurors are examined for *case-specific reasons* and counsel and the court have the *opportunity to exercise peremptory and/or for-cause challenges.*" Id. at 339 n.11 (citing cases) (italics added).

When addressing a claim of a public trial right violation in a context not clearly covered by existing case law, our supreme court has adopted the so-called "experience and logic" test. Sublett, 176 Wn.2d at 72-73. The first part of this test asks "whether the place and process have historically been open to the press and general public." Id. at 73 (quoting Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed.2d 1 (1986)). The second part asks "whether public access plays a significant positive role in the functioning of the particular process in question." Id.

Hardship excusals fail both parts of this test.[6] First, there appears to be no evidence that hardship excusals have historically been open to the public. Wilson, 174 Wn. App. 342. Thus, they fail the "experience" portion of the test. Second, given that such excusals are purely administrative, and are not based on the facts of any particular case, there is no logical reason to conclude that having them open to the public would "enhance[ ] 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 (quoting Press-Enterprise, 464 U.S. at 508). Because public access would not play a "significant positive role" in the hardship excusal process, this portion of jury selection fails the "logic" portion of the test. Wilson, 174 Wn. App. at 346-47 (concluding that hardship excusals fail the "logic" portion of the test); see also State v. Love, 2013 WL 5406434 (Wash. App. Div. 3) (holding that neither experience nor logic suggests that the exercise of either peremptory or for-cause challenges must take place in public).

[6] Schumacher's reliance on State v. Slert, 169 Wn. App. 766, 282 P.3d 101 (2012), review granted in part, 176 Wn.2d 1031 (2013), and State v. Leyerle, 158 Wn. App. 474, 242 P.3d 921 (2010), is misplaced, as both of those cases involved voir dire, i.e., questioning specifically related to the case at hand. Slert, 169 Wn. App. at 774 (dismissal of four jurors for "case-specific reasons"); Leyerle, 158 Wn. App. at 477 ("During voir dire, the trial court asked if any jurors felt that they could not be impartial if they were to be on Leyerle's jury.").

Schumacher does not really dispute that hardship excusals are an administrative matter. Rather, he focuses on the fact that, in his case, jurors had already "completed their questionnaires, entered the courtroom, and were sworn in." Supplemental Brief of Appellant at 6. But this does not change the fact that, in contrast to challenges made in the course of voir dire, hardship excusals have nothing to do with the facts of the case before the court for trial. Basing the public trial right solely on the *timing* of such excusals would elevate form over substance, an approach that the supreme court has rejected in applying the right to a public trial. See Sublett, 176 Wn.2d at 72-73 (refusing to resolve whether public trial right attaches to a proceeding based on the label given to that proceeding). There was no violation of the public trial right here.

2. SCHUMACHER'S CONSTITUTIONAL RIGHT TO BE PRESENT AT HIS TRIAL WAS NOT VIOLATED.

Schumacher argues that his right to be present at all critical stages of his trial was violated because he was not present at side-bar for the discussion of hardship excusals.[7] This claim fails.

[7] The record does not show whether Schumacher was present at side-bar. For purposes of this argument, the State assumes that he remained at counsel table during the side-bar discussion of hardship excusals.

a. Schumacher Did Not Have A Constitutional Right To Be Present For Hardship Excusals.

"The core of the constitutional right to be present is the right to be present when evidence is being presented." In re Personal Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (citing United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed.2d 486 (1985)). Beyond that, the defendant has a right to be present whenever his presence bears a reasonably substantial relation to his opportunity to defend against the charge. Id. Whether a defendant's constitutional right to be present has been violated is a question of law that is reviewed *de novo*. State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011).

A defendant does not generally have a right to be present during bench conferences, at least where the matter does not require resolution of disputed facts. Lord, at 306. The discussion of hardship excusals that took place at side-bar had nothing to do with the presentation of evidence. Nor did it have anything to do with Schumacher's opportunity to defend against the charges – the reasons for hardship were wholly unrelated to the facts of his case. See RP 41-44. And it is clear that discussion of the proffered

reasons for hardship excusal did not involve resolution of disputed facts. See RP 45 (no disagreement on the hardship excusals).

Even if Schumacher had a constitutional right to be present at the sidebar where the hardship excusals were discussed, any error was harmless. A violation of the right to be present is subject to constitutional harmless error analysis. In re Personal Restraint of Benn, 134 Wn.2d 868, 921, 952 P.2d 116 (1998); Irby, 170 Wn.2d at 885-86. Given the administrative nature of the hardship excusal process, its lack of any connection with the facts of the case, and the court's broad discretion in making a decision on a hardship excuse, any error was harmless beyond a reasonable doubt – the same decisions would have resulted had Schumacher been present. As in Benn, the same factors that support a conclusion that Schumacher had no right to be present also compel the conclusion that, if such a right existed, his absence was harmless. 134 Wn.2d at 921.

And even if there was a *de minimis* violation here of Schumacher's right to be present, the error was harmless beyond a reasonable doubt for another reason. The trial court gave defense counsel an opportunity to consult with his client before any final decisions were made. Thus, to the extent that Schumacher's

"presence" was required at the sidebar discussion, the goals served by such presence were fulfilled.

Schumacher relies primarily on Irby to argue that his right to be present was violated here. But Irby was a very different case. Not only was Irby not present for the e-mail discussion concerning juror dismissals, there was no indication in the record that he had been consulted on the matter.[8] Irby, 170 Wn.2d at 878. More importantly, the court found that decisions were made, at least in part, on the basis of jurors' answers to questions about the specifics of Irby's case. Id. at 882.

And while hardship excusals were a part of the decisions made in Irby's absence, the finding that his right to be present was violated appears to have been based on the decisions that were made on "for cause" challenges: "The fact that jurors were being evaluated individually and dismissed *for cause distinguishes* this proceeding from other, ostensibly similar proceedings that courts have held a defendant does not have the right to attend." Id. (italics added). The court followed with citations to two cases that illustrate this distinction: Wright v. State, 688 So.2d 298, 300 (Fla. 1996) (distinguishing general qualification of jury from qualification to try a

[8] The supreme court found it "unlikely" that Irby was consulted before decisions were made on juror dismissals. Irby, 170 Wn.2d at 884.

specific case, and holding that general qualification is not a critical stage that requires defendant's presence); Commonwealth v. Barnoski, 418 Mass. 523, 530, 531, 638 N.E.2d 9 (1994) (distinguishing preliminary hardship colloquy from individual, substantive voir dire). Irby does not control the outcome here.

b. Schumacher Was Present For The Discussion Of Hardship Excusals.

Finally, it is not clear that Schumacher was not "present" at the side-bar discussion. He was certainly present in court, no more than a few feet from the discussion. RP 34. The court in Love addressed this situation in a footnote, albeit inconclusively:

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

Love, 2013 WL 5406434, at *5 n.9.

Like Love, Schumacher was present in an open courtroom. Moreover, Schumacher was offered the opportunity, after hearing the hardship excuses, to contribute to any decision. Under these

circumstances, Schumacher was for all practical purposes "present" for the sidebar discussion of hardship excusals.

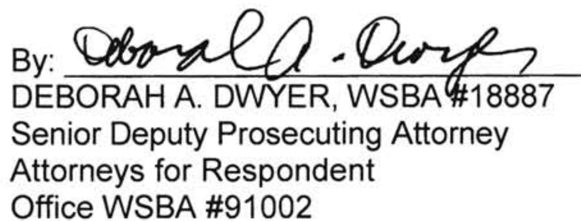
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to reject Schumacher's supplemental assignment of error, and affirm his convictions.

DATED this 2nd day of October, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



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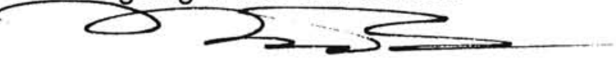
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Jared B. Steed**, the attorney for the appellant, at **Nielsen, Broman & Koch, PLLC**, 1908 East Madison, Seattle, WA 98122, containing a copy of the **Supplemental Brief of Respondent** in **STATE v. COREY A. SCHUMACHER**, Cause No. **69449-9-I,** in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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