No. 91805-8
COA No. 46008-4-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

DANIEL MICHAEL PIERRE.,

Respondent.

PETITION FOR REVIEW

JON TUNHEIM
Prosecuting Attorney

Carol La Verne
Attorney for Petitioner

Thurston County Prosecutor's Office
2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

FILED IN COA ON JUNE 16, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Decisions Of The Court Of Appeals

U.S. Supreme Court Decisions

Statutes and Rules

I. IDENTITY OF THE PETITIONER.

The State of Washington, appellant, petitions the Court for review of a decision of the Court of Appeals in State v. Daniel Michael Pierre, Court of Appeals No. 46008-4-II, filed on June 4, 2015.

II. COURT OF APPEALS OPINION.

The State seeks review of the Court of Appeals opinion filed on June 4, 2015, reversing Pierre's convictions for third degree assault, felony harassment, and bail jumping. The decision was unpublished. State v. Pierre, COA No. 46008-4-II, (June 4, 2015). A copy of the decision is attached to this petition as Appendix A.

III. ISSUES

1. Whether the public trial right applies to challenges for cause to members of the jury venire.
2. If the public trial right applies to challenges for cause to the jury venire, whether a sidebar, at which challenges for cause to the jury venire are taken, is a courtroom closure to which the Bone-Club[1] factors must be applied.

---

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

IV. STATEMENT OF THE CASE.

Pierre was convicted by a jury of third degree assault, felony harassment, and bail jumping. Pierre, COA 46008-4-II, *slip op.* at 1-2. The first two charges resulted from an altercation with police when they responded a report of a disturbance at an apartment. Trial RP 47-50, 71-88. The bail jumping charge followed Pierre's failure to appear at a pretrial hearing. Exhibits 3,4.

Following voir dire, the trial court heard for-cause challenges to the jury venire at sidebar. The court made a record of those challenges and its rulings in open court.

> THE COURT: Please be seated. I want to go ahead and put the sidebars on the record. During jury selection, we had two sidebars. At the first sidebar, we all agreed that Juror No. 25 should be dismissed for cause based upon a health issue that Juror No. 25 described during the course of jury selection briefly.
>
> The defense made a motion to dismiss Number 1 for cause. Mr. Wheeler indicated that he would leave it to the court and the court's recollection of what Juror No. 1 indicated. I dismissed Number 1 for cause based upon her statements of being a victim 20 years ago and that it was still affecting her. And then she talked about that and brought it up more than one time during the course of the jury selection process.
>
> There was a second sidebar after jury selection had started, and that was the defense requesting that Juror No. 10 be dismissed for cause based upon the fact that he had disclosed that he was good friends

> with Officer Winner's brother and that Officer Winner's brother was his supervisor. Mr. Wheeler objected and indicated that he had not made an unequivocal statement that he could not be fair. I ultimately agrees with Mr. Wheeler's argument. I too did not hear a definitive statement, so I denied the request for cause as to Juror No. 10.
>
> Anything to add to those two sidebars, Mr. Wheeler?
>
> MR. WHEELER: No, Your Honor.
>
> THE COURT: Mr. Pilon?
>
> MR. PILON: No.

01/21/14 RP 37-38. The court went on to make a record of a sidebar that occurred during the defense attorney's opening statement. Id. at 38-39.

Division II of the Court of Appeals reversed the convictions on the grounds that the sidebar during jury selection violated Pierre's right to a public trial under the Sixth Amendment to the United States Constitution and Art. I, § 22 of the Washington Constitution. The Court of Appeals relied entirely on its earlier decision in State v. Calvert R. Anderson, COA 45497-1-II (May 19, 2015), without additional discussion or analysis. The opinion in Pierre was not published; the opinion in Anderson was.

The State did not bring a motion for reconsideration in the Court of Appeals. The State does not seek review of the Court of

Appeals' holding that the harassment to-convict instruction omitted an essential element of the offense, Pierre, *slip op.* at 3-7, only the holding that Pierre's public trial right was violated when the court took challenges for cause to the jury venire at sidebar.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

A. The decision of the Court of Appeals conflicts with a decision from another division of the Court of Appeal and to some extent with another of its own decisions. The Division II opinion also presents a significant question of law under both the federal and state constitutions.

Because the court in Pierre relied entirely on its decision in Anderson to reverse the convictions in this case, this argument addresses the Anderson decision. A copy of that opinion is attached to this petition as Appendix B.

This Court will accept review when the decision of the Court of Appeals conflicts with a decision of the Supreme Court, RAP 13.4(b)(1), conflicts with another decision of the Court of Appeals, RAP 13.4(b)(2), or raises a significant question of law under the Washington or the United States Constitutions. RAP 13.4(b)(3). The decision at issue does conflict with the decision of the Court of Appeals, Division III, in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), *review granted in part*, 181 Wn.2d 1029, 340 P.3d 228

(2015).[2] It also conflicts to some degree with another decision of Division II. In State v. Dunn, the court held that "the public trial right does not attach to the exercise of challenges during jury selection." 180 Wn. App. 570, 575 321 P.3d 1283 (2014), *review denied*, 181 Wn.2d 1030, 340 P.3d 228 (2015) (citing to Love, 176 Wn. App. at 920).

In addition, this case presents a significant question of constitutional law. Conducting trials in a manner that preserves the right of both the defendant and the public to an open administration of justice, while making wise use of judicial resources and respecting the privacy of jurors, is of the utmost importance to the citizens of the State of Washington.

1. Challenges for cause at sidebar do not implicate the public trial right.

Whether a defendant's constitutional right to a public trial has been violated is a question of law that is subject to de novo review on direct appeal. State v. Easterling, 157 Wn.2d 167,173-74, 137 P.3d 825 (2006) The right to a public trial is guaranteed by both the Sixth Amendment to the United States Constitution and

2 The Supreme Court heard oral argument in State v. Love on March 10, 2015. S. Ct. No. 89619-4. Because the issue there is identical to the issue in this case, the State suggests that a ruling regarding review of this case be stayed pending the decision in Love.

article 1, section 10 of the Washington Constitution. Id., at 174. The remedy for a violation of the right to a public trial is reversal and remand for a new trial. State v. Wise, 148 Wn. App. 425, 433, 200 P.3d 266 (2009), *affirmed,* 176 Wn.2d 1, 288 P.3d 1113 (2012).

The right to a public trial is not absolute, but the courtroom may be closed only for the most unusual of circumstances. State v. Heath, 150 Wn. App. 121, 715, 206 P.3d 712 (2009). The right to open proceedings extends to jury selection and some pretrial motions, and a trial court must, before closing the courtroom, conduct the analysis required by State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). That analysis is not required unless the public is "fully excluded from the proceedings within a courtroom," State v. Lormor, 172 Wn.2d 85, 92, 257 P.3d 624 (2011) (citing to Bone-Club, 128 Wn.2d at 257), or when jurors are questioned in chambers. Lormor, 172 Wn.2d at 92, citing to 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).

The initial question is whether the challenged proceeding even implicates the public trial right. State v. Sublett, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). As noted above, both Divisions II and III of the Court of Appeals have held that the public trial right does

not attach to challenges during jury selection. Love, 176 Wn. App. at 920; Dunn, 180 Wn. App. at 575. Anderson holds otherwise.

The challenges for cause at issue in Anderson were conducted at a sidebar in the courtroom. In State v. Smith, 181 Wn.2d 508, 334 P.3d 1049 (2014), the Supreme Court said:

> Sidebars have traditionally been held outside the hearing of both the jury and the public. Because allowing the public to "intrude upon the huddle" would add nothing positive to sidebars in our courts, we hold that a sidebar conference, even if it is held outside the courtroom, does not implicate Washington's public trial right.

Id. at 519. The Anderson court distinguishes this case, *slip op.* at 8, because the sidebar at issue in Smith dealt with evidentiary rulings, but the holding quoted above is not limited to any particular subject matter. No other case holds that a closure occurs where the proceeding takes place in the courtroom and the public is present in that courtroom, regardless of whether members of the public can hear what is being said or not.

While the public trial right applies to the questioning of potential jurors, it has not been applied to the process of challenging individual members of the venire. In State v. Slert, 181 Wn.2d 598, 334 P.3d 1088 (2014), the defendant challenged the dismissal of four prospective jurors in chambers, based upon

answers to a jury questionnaire, before the actual questioning of the jury panel began. Id. at 600. Slert argued that that the public trial right applied to jury selection, but the court said that "the mere label of a proceeding is not determinative." Id. at 604. The Slert opinion quoted with approval language from State v. Wilson, 174 Wn. App. 328, 338, 298 P.3d 148 (2013):

> Existing case law does not hold that a defendant's public trial right applies to every component of the broad "jury selection" process (which process includes the initial summons and administrative culling of prospective jurors from the general adult public and other preliminary administrative processes). Rather, existing case law addresses application of the public right related *only* to a specific component of jury selection—i.e., the "voir dire" of prospective jurors who form the venire (comprising those who respond to the court's initial jury summons and who are *not* subsequently excused administratively).

Slert, 181 Wn.2d at 605 (emphasis in original). Voir dire is that component of the jury selection process in which prospective jurors are questioned for the purpose of exposing biases and partiality. Wilson, 174 Wn. App. 340, n. 12.

Concluding that the question of whether or not challenges for cause implicate the public trial right has not been previously decided, the Anderson opinion then moved on to an analysis of the experience and logic test of Sublett. Anderson, *slip op.* at 7. The

United States Supreme Court originally developed the experience and logic test to determine whether the public's right to access trials attaches under the First Amendment. *See* Press-Enter. Co. v. Superior Court, 478 U.S. 1, 7, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press II). The experience prong of the test "asks 'whether the place and process have historically been open to the press and general public." Sublett, 176 Wn.2d at 73. The court engages in an inquiry to determine whether a type of procedure is one that has traditionally been open to the public. The logic prong addressed "'whether the public access plays a significant positive role in the functioning of the particular process in question.'" Id. at 73, (quoting Press II, 478 U.S. at 8). Relevant to the logic inquiry are the overarching policy objectives of having an open trial, such as ensuring fairness to the accused by permitting public scrutiny of the proceedings. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980); State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). If both prongs of the experience and logic test are implicated, the public trial right attaches and the Bone-Club factors must be considered before the proceeding may be closed to the public. Sublett, 176 Wn.2d at 73.

a. Logic prong.

The Supreme Court has reasoned that the public has little, if any, role where the parties and the court all agree that a potential juror is disqualified from a case. Slert, 181 Wn. 2d at 607. CrR 6.4(2)(d) provides that when there is an exception to a challenge for cause, the court shall conduct a mini-trial on the issue, determine the facts and the law, and make a ruling. In that event, there is a more compelling argument that the inquiry should be held in the hearing of the public, but that did not occur in Anderson's case. There was no dispute about the challenges for cause. Trial RP 12-13.

Even if members of the public cannot hear what is being said at sidebar, they can observe the individuals involved. They can make inquiries later. Where, for example, the challenges for cause are conducted in a way that the spectators can hear what is being said, those spectators cannot do anything at the moment. A spectator who tries to interject himself into jury selection is likely to find himself being summarily escorted out of the courtroom by security. The court in Anderson does not explain why the public right or ability to know what takes place in the courtroom is hindered where a record is made later of the challenges for cause,

whether in open court, as occurred in this case, or in a written record filed with the clerk. As with the question from a deliberating jury, and the answer to that question, as discussed in Sublett, the public's right to know is protected. And it is the public's ability to see what the courts are doing that provides the protection for the defendant—nothing is done in secret even if it is not contemporaneously available to the public. There is no "significant positive role," Sublett, 176 at 73, for the public to play at the moment the challenges to the jury venire are made.

b. Experience prong.

The Anderson court acknowledged that challenges for cause have been made and ruled upon at sidebar, "particularly in recent years." Anderson, *slip op.* at 9. It found significant, however, that in "earlier times" challenges at sidebar were rare. Id. The court listed a number of cases to support this assertion, Id., although in several of those cases it is unclear that the challenge for cause was made in public. *See* State v. Davis, 141 Wn.2d 798, 836, 10 P.3d 977 (2000); State v. Murphy, 9 Wash. 204, 206-08, 37 P. 420 (1894); State v. Parnell, 77 Wn.2d 503, 504, 463 P.2d 134 (1969); Wash. v. City of Seattle, 170 Wash. 371, 373, 16 P.2d 597 (1932). In one of the cases cited by the Anderson court, challenges for

cause occurred in both open court and in chambers. State v. Wilson, 16 Wn. App. 348, 352, 555 P.2d 1375 (1976).

It is not apparent why more recent cases are excluded from the historical analysis. Methods and procedures evolve, and if the practice many years ago was to take challenges for cause in open court, but that practice changed to taking challenges at sidebar, the more recent practice is still "historical." The experience prong of the experience and logic test is an elastic concept. A practice that extends back a quarter of a century is sufficient to satisfy the history portion of the experience prong. *See* State v. Sykes, 182 Wn.2d 168, 175, 339 P.3d 972 (2014) (closure of drug court staffings supported by a history extending back to 1989).

The Anderson court acknowledged that evidence is slim regarding how juror challenges have historically been exercised, *slip op.* at 9, which indicates that defendants have not historically found the procedures constitutionally objectionable. The court in Love interpreted that paucity of evidence to mean that the logic prong of the test had not been established. Love, 176 Wn. App. at 918. The Anderson court concluded the opposite, based upon cases which, as mentioned above, are not, in most cases, crystal clear that the challenges were conducted in the hearing of

spectators. The State maintains that if the evidence is weak, the experience prong of the experience and logic test has not been met.

The court in Anderson distinguished between "traditional" practices and "historically required practices." *Slip op.* at 10. The court's rationale seems to imply that if a practice is required, traditionally ignoring it nullifies the requirement. The State argues that this is a distinction without a significant difference. The court in Anderson was incorrect in finding that the experience prong of the Sublett test was met.

2. Sidebars do not constitute a closure of the courtroom.

The Court of Appeals in Anderson cited to State v. Gomez, 183 Wn.2d 29, 347 P.3d 876 (2015), for the proposition that a closure can occur "when the public is excluded from particular proceedings within a courtroom." Anderson, *slip op.* at 4. In Gomez, however, the Supreme Court, which was primarily addressing the lack of a record regarding the alleged closure, said, "[T]he appellant must supply a record that reveals that the court took actions amounting to a closure, such as explicitly issuing an order completely closing the proceedings or moving the

proceedings to chambers." Gomez, 183 Wn.2d at 35. "The record must establish that the courtroom and proceedings were closed by express direction of the judge." Id. The Anderson court equates holding a sidebar with an order closing the proceeding or moving the proceeding to chambers. While acknowledging that the trial court did neither of these things, the Court of Appeals concludes that the sidebar presented such an obstacle to public oversight of the challenges for cause that it constituted a courtroom closure. Anderson, 45497-1-II, slip op. at 5-6. There are no Supreme Court or Court of Appeals decisions holding that sidebars for any purpose constitute a courtroom closure.

In State v. Sadler, 147 Wn. App. 97, 193 P.3d 1108 (2008), *review denied*, 176 Wn.2d 1032, 299 P.3d 19 (2013), the trial court had heard a Batson[3] challenge in chambers. Division II held that moving the proceedings out of the courtroom was equivalent to closing the courtroom, but it disagreed with the State's argument that the chambers hearing was the equivalent of a bench conference. Id. at 113-14. In Anderson, the same court found that the sidebar, or bench conference, is the equivalent of moving the proceeding into chambers.

---

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

The court in Anderson cited to Sadler for the principle that "public scrutiny is essential where challenges to prospective jurors may be abused." *Slip op.* at 12. However, the Batson challenges in Sadler occurred in chambers, not in an open courtroom where spectators could observe the parties even if they could not hear them. 147 Wn. App. at 107. The State does not dispute that addressing challenges in chambers is the equivalent of closing the courtroom. That did not happen in Anderson. The court was incorrect that the logic prong of the Sublett test was met.

VI. CONCLUSION.

Review of the instant case is appropriate; the decision of the Court of Appeals conflicts with another decision of the Court of Appeals and raises a significant question of law under the Constitutions of both Washington and the United States. The State respectfully requests that this court stay consideration of this petition pending a decision in State v. Love, and grant review as appropriate.

Respectfully submitted this 15th day of June, 2015.

Carol La Verne, WSBA# 19229
Attorney for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,	No. 46008-4-II
v.	
DANIEL MICHAEL PIERRE,	UNPUBLISHED OPINION

WORSWICK, P.J. — A jury returned verdicts finding Daniel Pierre guilty of third degree assault, felony harassment, and bail jumping. Pierre appeals his convictions, asserting that the trial court violated his public trial right by addressing for-cause challenges to potential jurors at sidebars, and that the trial court's harassment to-convict jury instruction relieved the State of its burden of proof by omitting an essential element of the offense. Following our recent decision in *State v. Anderson*, No. 45497-1, 2015 WL 2294961 (Wash. Ct. App. May 19, 2015), we hold that the trial court violated Pierre's public trial right by addressing for-cause juror challenges at sidebars without first conducting a *Bone-Club*[1] analysis. We also hold that the trial court erred by giving a harassment to-convict jury instruction that omitted an essential element of the offense and that the error was not harmless beyond a reasonable doubt. Accordingly, we reverse Pierre's convictions and remand for a new trial.

[1] *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

FACTS

The State charged Pierre with third degree assault, felony harassment, and bail jumping. The matter proceeded to jury trial.

During the jury selection process, the trial court addressed for-cause challenges to potential jurors at sidebar and later stated on the record:

> [Trial court]: . . . I want to go ahead and put the sidebars on the record. During jury selection, we had two sidebars. At the first sidebar, we all agreed that Juror No. 25 should be dismissed for cause based upon a health issue that Juror No. 25 described during the course of jury selection briefly.
>
> The defense made a motion to dismiss Number 1 for cause. [The State] indicated that he would leave it to the court and the court's recollection of what Juror No. 1 indicated. I dismissed Number 1 for cause based upon her statements of being a victim 20 years ago and that it was still affecting her. And then she talked about that and brought it up more than one time during the course of the jury selection process.
>
> There was a second sidebar after jury selection had started, and that was the defense requesting that Juror No. 10 be dismissed for cause based upon the fact that he had disclosed that he was good friends with Officer Winner's brother and that Officer Winner's brother was his supervisor. [The State] objected and indicated that he had not made an unequivocal statement that he could not be fair. I ultimately agreed with [the State's] argument. I too did not hear a definitive statement, so I denied the request for cause as to Juror No. 10.

Report of Proceedings (RP) (Jan. 21, 2014) at 37-38.

The trial court provided the jury with the following harassment to-convict instruction:

> To convict the defendant of the crime of harassment as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about July 24, 2012, the defendant knowingly threaten [sic] Jason Winner immediately or in the future;
>
> (2) That the words or conduct of the defendant placed Jason Winner in reasonable fear that the threat would be carried out;
>
> (3) That at the time the threat was made Jason Winner was a criminal justice participant who was performing his official duties;
>
> (4) That the defendant acted without lawful authority; and
>
> (5) That the threat was made or received in the State of Washington.

> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 80. The jury returned verdicts finding Pierre guilty of third degree assault, felony harassment, and bail jumping. Pierre appeals from his convictions.

ANALYSIS

I. PUBLIC TRIAL RIGHT

Pierre first contends that the trial court violated his public trial right by addressing for-cause challenges to potential jurors at sidebars without first considering the factors set forth in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). Following our recent decision in *Anderson*, No. 45497-1, 2015 WL 2394961, we agree that the trial court's consideration of for cause challenges at sidebars violated Pierre's public trial right. Accordingly, we reverse Pierre's convictions and remand for a new trial. Because we reverse Pierre's convictions and remand for a new trial based on the violation of his public trial right, we need not address his remaining claims of instructional error and ineffective assistance of counsel.[2]

II. TO-CONVICT JURY INSTRUCTION

Next, Pierre contends that the trial court's harassment to-convict jury instruction relieved the State of its burden of proof by omitting an essential element of the offense. We agree.

We review challenges to the adequacy of to-convict jury instructions de novo. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). In general, to-convict jury instructions must

[2] Although we need not review Pierre's remaining claims of error, we address Pierre's challenge to the trial court's harassment to-convict jury instruction as an alternative basis for reversing his harassment conviction.

contain every essential element of the offense. *Mills*, 154 Wn.2d at 7. "The jury has a right to regard the 'to convict' instruction as a complete statement of the law and should not be required to search other instructions to add elements necessary for conviction." *State v. Oster*, 147 Wn.2d 141, 147, 52 P.3d 26 (2002). Although jury instructions relieving the State of its burden to prove every element of the crime charged beyond a reasonable doubt require automatic reversal, "not every omission or misstatement in a jury instruction relieves the State of its burden." *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). Accordingly, an instruction omitting an essential element may be harmless beyond a reasonable doubt if the omitted "element is supported by uncontroverted evidence." *Brown*, 147 Wn.2d at 341 (citing *Neder v. United States*, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

To convict Pierre of harassment as charged here, the State was required to prove beyond a reasonable doubt that Pierre (1) without lawful authority (2) knowingly threatened (3) to cause bodily harm immediately or in the future (4) to a criminal justice participant performing official duties at the time the threat was made and (5) the criminal justice participant had a reasonable fear that the threat would be carried out. RCW 9A.46.020(1)(a)(i), (2)(b)(iii). The State acknowledges that the trial court's to-convict jury instruction for harassment omitted the essential element that Pierre's threat was *to cause bodily harm immediately or in the future*, but the State argues that the omission of this essential element was harmless beyond a reasonable doubt because the uncontroverted evidence at trial showed that Pierre threatened to cause bodily harm to Winner. We agree that the to-convict instruction omitted an essential element, but disagree that the error here was harmless.

The State asserts that the evidence at trial demonstrated that there was no dispute as to what words Pierre used to threaten Winner, and that those words irrefutably constituted a threat to cause bodily harm.[3] But the record belies the State's assertion. Pierre did not concede in his testimony that he threatened to "beat or kick Winner's ass," as the State asserts. Instead, although Pierre agreed that he was irate and uttered something threatening at Winner, he stated that he did not recall the exact words that he used to threaten Winner:

> [Defense counsel]: Okay. Did you have any intention in the future to cause any bodily harm to—
>
> [Pierre]: No.
>
> [Defense counsel]:—Officer Winner or follow through with anything that you said?
>
> [Pierre]: I'm sorry. What do you mean? As to what I said?
>
> [Defense counsel]: That you were going to beat him up or going to kick his ass or—
>
> [Pierre]: Um, I—I don't recall the exact words that I said, but it was something along the lines of the fact that he came in the bathroom and pointed the pistol at me and told me to get the fuck on the ground—or get the fuck—put you fucking hands up. And at some point along afterwards, it—the female had had the Taser pointed at me and said that were [sic] going to tase me, and I was just irate at this point.
>
> [Defense counsel]: Here's the—here's the—here's a question, an important one. I'm sure we're wondering. Why did you say those things at that time?
>
> [Pierre]: I was irate.
>
> [Defense counsel]: You were upset?
>
> [Pierre]: And I was being assaulted.

RP (Jan. 22, 2014) at 398-99.

On cross-examination, Pierre stated that he did not recall whether he had told Winner that he would "beat his ass," and he specifically denied threatening Winner in other ways to which Winner had testified:

> [State]: . . . Did you tell [Winner] you were going to beat his ass?

---

[3] RCW 9A.04.110(4)(a) defines "bodily harm" as "physical pain or injury, illness, or an impairment of physical condition."

[Pierre]: I don't recall.

[State]: Okay. Did you tell him you were going to find him on the streets and hunt him down? Did you tell him that?

[Pierre]: No.

[State]: You didn't—you don't recall, or you didn't say that?

[Pierre]: No. I never said that.

[State]: Okay. Did you tell him you didn't care if he had a badge; you were going to come after him?

[Pierre]: No. I told him I didn't care if he had a badge. He has no try [sic] right to try to sit there and assault me.

[State]: Okay. And did you tell him, quote, you don't know who you're messing with, unquote? Did you tell him that?

[Pierre]: No, I don't believe so.

. . . .

[State]: You weren't threatening him at any time—

[Pierre]: Nope.

[State]:—in that exchange—

[Pierre]:—no.

[State]:—so "beat my ass" was not a threat—or to beat his ass?

[Pierre]: No. There was something said along the lines of—with the scuffle, after he had told me to get the fuck on the ground. And it was at some point, I'll beat your ass. And then that's when I repeated you're going to come into my house and tell me you're going to beat my ass and shoot me?

[State]: So he told you he was going to beat your ass?

RP (Jan. 22, 2104) at 433-34.

At best, Pierre's testimony established that he had made a vague threat toward Winner while Winner was attempting to restrain him and, thus, the evidence at trial did not definitively establish that Pierre's threat was to inflict bodily harm. Therefore, we cannot conclude that the jury would have returned the same verdict of guilt as to Pierre's harassment charge had it been properly instructed that it must have found beyond a reasonable doubt that Pierre's threat to

Winner was to inflict bodily harm on him. *Brown*, 147 Wn.2d at 341. Accordingly, we reverse Pierre's harassment conviction and remand for a new trial.[4]

CONCLUSION

We hold that because the trial court violated Pierre's public trial right by addressing for-cause juror challenges at sidebars without first conducting a *Bone-Club* analysis, his convictions must be reversed and remanded for trial. We also hold that the trial court's error in giving a harassment to-convict jury instruction that omitted an essential element of the offense is an alternative basis for reversing his harassment conviction. Accordingly, we reverse Pierre's convictions and remand for a new trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, P.J.

We concur:

Maxa, J.

Lee, J.

[4] Because we reverse Pierre's convictions and remand for a new trial, we decline to address his remaining claims of error.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CALVERT R. ANDERSON, JR., Appellant.	No. 45497-1-II PUBLISHED OPINION

MAXA, P.J. — Calvert Anderson appeals his convictions for third degree assault and obstructing a law enforcement officer. During voir dire, Anderson successfully challenged four prospective jurors for cause at a sidebar conference. We hold that the trial court violated Anderson's constitutional right to a public trial by allowing counsel to make juror challenges for cause at a sidebar conference without first conducting a *Bone-Club*[1] analysis. Therefore, we reverse Anderson's convictions and remand for a new trial.

FACTS

The State charged Anderson with third degree assault and obstructing a law enforcement officer after he scuffled with police officers. A jury convicted Anderson of both crimes.

[1] *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

During voir dire, Anderson challenged four prospective jurors for cause at a sidebar conference. The trial court dismissed all four challenged prospective jurors.[2] No transcription of the sidebar conference appears in the record, but the trial court later noted the challenges and resulting dismissals for the record. The trial court did not conduct a *Bone-Club* analysis before the sidebar conference.

Anderson appeals his convictions.

ANALYSIS

Anderson argues that the trial court violated his public trial right by allowing him to challenge prospective jurors for cause at a sidebar conference, when spectators in the courtroom presumably could not hear what was occurring.[3] We agree and hold that (1) the sidebar conference addressing juror challenges for cause constituted a closure of courtroom proceedings because the public could not hear what occurred, (2) under the experience and logic test, challenging jurors for cause implicates the public trial right, and (3) the trial court did not establish any justification for closing the for cause juror challenge proceedings.

A. PUBLIC TRIAL RIGHT – GENERAL PRINCIPLES

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a defendant the right to a public trial. *State v. Wise*, 176

---

[2] The court later dismissed a fifth prospective juror for cause at a second sidebar conference, apparently sua sponte.

[3] Anderson's own successful challenges for cause form the basis for this appeal, and he did not object to the process below. However, a defendant does not waive a public trial right claim on appeal by failing to object to a court closure below. *State v. Wise*, 176 Wn.2d 1, 15, 288 P.3d 1113 (2012).

Wn.2d 1, 9, 288 P.3d 1113 (2012). In general, this right requires that certain proceedings be held in open court unless the trial court first applies on the record the five-factor test set forth in *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995), and finds that a closure of the courtroom is justified. A public trial right violation is structural error, and we presume prejudice where a trial court closes trial proceedings without conducting a *Bone-Club* analysis. *Wise*, 176 Wn.2d at 13-14.

In analyzing whether the trial court has violated a defendant's public trial right, we must determine whether (1) the trial court closed the proceedings to the public, (2) the proceedings implicate the public trial right, and (3) the closure was justified. *State v. Smith*, 181 Wn.2d 508, 513-14, 334 P.3d 1049 (2014).[4] Whether the trial court has violated a defendant's right to a public trial is a question of law that we review de novo. *Id.* at 513.

B. CLOSURE OF PROCEEDINGS

Anderson argues that the trial court effectively closed the proceedings by allowing him to challenge jurors for cause at a sidebar conference, even though the courtroom remained open to the public. We agree.

[4] Our Supreme Court in *Smith*, 181 Wn.2d at 513, and *State v. Gomez*, No. 90329-8, 2015 WL 1590302, at *2 (Wash. Apr. 9, 2015), stated that the first step in the analysis of a public trial right claim is determining whether the proceedings implicate the public trial right, and the second step in that analysis is assessing whether the trial court closed the proceedings. However, where a genuine question exists as to whether a closure occurred, that issue may be addressed first. For instance, in both *State v. Andy*, 182 Wn.2d 294, 301, 340 P.3d 840 (2014) and *State v. Njonge*, 181 Wn.2d 546, 556-58, 334 P.3d 1068, *cert. denied*, 135 S. Ct. 880 (2014), the court addressed whether a closure had occurred before determining whether the proceedings implicated the defendant's public trial right.

A defendant's public trial right can be violated only if there has been a closure of court proceedings. *State v. Njonge*, 181 Wn.2d 546, 556, 334 P.3d 1068, *cert. denied*, 135 S. Ct. 880 (2014) (stating that "[a] defendant asserting violation of his public trial rights must show that a closure occurred.").

It is clear that "[a] closure occurs 'when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.' " *Smith*, 181 Wn.2d at 520 (quoting *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011)). But such a closure of the entire courtroom is not the only action that constitutes a closure. A closure also occurs when the public is excluded from particular proceedings within a courtroom. *State v. Gomez*, No. 90329-8, 2015 WL 1590302, at *2 (Wash. Apr. 9, 2015); *Lormor*, 172 Wn.2d at 92. As a result, holding proceedings in areas inaccessible to the public, such as the judge's chambers, also qualifies as a closure.[5] *Id.*; *State v. Strode*, 167 Wn.2d 222, 226, 217 P.3d 310 (2009); *see also State v. Leyerle*, 158 Wn. App. 474, 483, 242 P.3d 921 (2010) (holding that proceedings conducted in a hallway adjacent to the courtroom were closed to the public).

The record here shows that the trial court neither barred the public from the courtroom during the sidebar conference nor held the conference in a physically inaccessible location. However, the entire purpose of a sidebar conference is to prevent anyone other than those present at the sidebar – an audience typically limited to the judge, counsel, and perhaps court staff –

[5] Although our Supreme Court held in *Smith* that sidebar conferences on evidentiary matters do not implicate the public trial right, it declined to review whether such conferences constituted a closure. 181 Wn.2d at 520-21.

from hearing what is being said. The question we must decide is whether preventing the public from hearing a proceeding rises to the level of a closure.[6]

To determine whether the trial court closed the proceedings, we examine whether the trial court's action actually impeded public scrutiny. *See, e.g., In re Pers. Restraint of Orange*, 152 Wn.2d 795, 808-09, 100 P.3d 291 (2004). In *State v. Andy*, our Supreme Court addressed closure in this manner, focusing on the question of whether public access actually was thwarted. 182 Wn.2d 294, 301-02, 340 P.3d 840 (2014). The court examined the impact of a sign placed outside the courtroom stating that the courtroom would be closed at times it was in fact still in session. *Id.* at 300-301. To determine whether this misleading placement of the sign was a closure, the court analyzed whether the public actually was excluded from the proceedings. The court noted that the trial judge made express findings that "the public was able to access the courtroom at all times during Andy's trial and that no member of the public was deterred" from entry. *Id.* at 301. The court concluded that where the trial court's action "presented no obstacle to members of the public who wished to attend the trial," there was no closure. *Id.* at 302.

Unlike the sign in *Andy*, the sidebar conference here presented a clear obstacle to public scrutiny of Anderson's challenges. While the trial court did not physically restrict access to the courtroom, it did prevent meaningful access to the proceedings by conducting the challenges for cause in a manner such that the public could not hear what was occurring. Taking juror challenges at sidebar in this way thwarts public scrutiny just as if they were done in chambers or

[6] Our Supreme Court in *Smith* suggested in dicta that the experience and logic test (discussed below) bears on the closure question. 181 Wn.2d at 520. However, the court in *Gomez* clarified that this test applies only to whether the public trial right attaches to a particular proceeding. 2015 WL 1590302, at *4 n.3.

outside the courtroom. We hold that the sidebar conference constituted a closure of the juror selection proceedings because the public could not hear what was occurring.

C. IMPLICATION OF PUBLIC TRIAL RIGHT

1. General Principles

If a proceeding has been closed to the public, we next must determine whether that proceeding implicates the public trial right. *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). "[N]ot every interaction between the court, counsel, and defendants will implicate the right to a public trial or constitute a closure if closed to the public." *Id.*

To address whether there was a court closure implicating the public trial right, we employ a two-step process. *State v. Wilson*, 174 Wn. App. 328, 335-37, 298 P.3d 148 (2013). First, we consider whether the particular proceeding at issue "falls within a category of proceedings that our Supreme Court has already acknowledged implicates a defendant's public trial right." *Id.* at 337; *see also Wise*, 176 Wn.2d at 11-12. Second, if the proceeding at issue does not fall within an acknowledged category implicating the public trial right, we determine whether the proceeding implicates the public trial right using the "experience and logic" test our Supreme Court adopted in *Sublett*. *Wilson*, 174 Wn. App. at 335.

2. Juror Challenges Distinguished from Voir Dire

Anderson argues that challenges for cause fall within a category of proceedings to which the public trial right attaches under existing case law. Anderson bases his argument on Supreme Court cases establishing that voir dire implicates a defendant's public trial right. *See, e.g.*, *Wise*, 176 Wn.2d at 11; *Strode*, 167 Wn.2d at 227. He argues that challenges for cause are part of the

voir dire process and that the public trial right therefore attaches to such challenges as well. We disagree.

Contrary to Anderson's position, challenges for cause are not part of voir dire. In *Wilson*, we held that only the voir dire aspect of jury selection automatically implicates the public trial right. 174 Wn. App. at 338-40. We used the term "voir dire" as synonymous with the actual questioning of jurors, referring to the " 'voir dire' of prospective jurors who form the venire." *Wilson*, 174 Wn. App. at 338; *see also State v. Slert*, 181 Wn.2d 598, 605, 334 P.3d 1088 (2014) (plurality opinion quoting this language with approval). In *State v. Marks*, we relied in part on this language from *Wilson* in holding that peremptory challenges are not part of voir dire. 184 Wn. App. 782, 787-88, 339 P.3d 196, *petition for review filed*, No. 91148-7 (Wash. Dec. 29, 2014). Like the peremptory challenges at issue in *Marks*, challenges for cause constitute a distinct proceeding that does not involve the questioning of jurors. *See* CrR 6.4 (distinguishing voir dire from both peremptory challenges and challenges for cause).

Here, the record neither shows nor suggests that the sidebar conference involved any questioning of jurors. Because Anderson's challenges were not part of the actual questioning of jurors, they were not part of voir dire. Therefore, our Supreme Court has not yet addressed whether juror challenges for cause implicate the public trial right.

3. Experience and Logic Test

Because our Supreme Court has not addressed the issue, we must apply the *Sublett* experience and logic test to determine whether the exercise of juror challenges for cause

implicates a defendant's public trial right.[7] This test requires us to consider (1) whether the process and place of a proceeding historically have been open to the press and general public (experience prong), and (2) whether access to the public plays a significant positive role in the functioning of the proceeding (logic prong). *Sublett*, 176 Wn.2d at 73. If the answer to both prongs is yes, then the defendant's public trial right "attaches" and a trial court must consider the *Bone-Club* factors before closing the proceeding to the public. *Sublett*, 176 Wn.2d at 73.

a. Application of Test to Sidebar Conferences

In *Smith*, our Supreme Court concluded after applying the experience and logic test that the sidebar conference in that case did not implicate the public trial right. 181 Wn.2d at 511. The court broadly stated that "sidebars do not implicate the public trial right." *Id.* However, *Smith* involved legal argument on evidentiary issues at a sidebar conference. *Id.* at 512. The court framed the issue as addressing whether "sidebar conferences *on evidentiary matters*" implicate the right. *Id.* at 513 (emphasis added). We view the Supreme Court's holding in *Smith* as limited to that issue, and rule that *Smith* is not controlling here. Therefore, we must apply the experience and logic test.

b. Experience Prong

The experience prong of the *Sublett* test asks us to examine whether a particular practice or proceeding historically has been accessible to the public in the courts of this state. *See Sublett*, 176 Wn.2d at 73. Because most of the opinions referencing juror challenges for cause

[7] In *Marks* we applied the experience prong and held that the exercise of peremptory juror challenges does not implicate the public trial right. 184 Wn. App. at 788-89. However, whether the exercise of juror challenges *for cause* implicates the public trial right involves a different issue.

show that historically such challenges were made in open court, we conclude that the experience prong supports a holding that such challenges do implicate the public trial right.

It is difficult to apply the experience prong to juror challenges for cause because the evidence regarding how trial courts historically have handled such challenges is slim. We are not aware of any cases or secondary authorities that discuss whether the traditional practice over the years has been to address for cause juror challenges in public or in private, or even whether there was a traditional practice.

However, what evidence we do have indicates that juror challenges for cause historically have been addressed in public. The published opinions of Washington courts show that challenges for cause have been exercised and ruled on in open court throughout the history of our state. *See, e.g.*, *State v. Beskurt*, 176 Wn.2d 441, 447, 293 P.3d 1159 (2013); *State v. Davis*, 141 Wn.2d 798, 836, 10 P.3d 977 (2000); *State v. Moser*, 37 Wn.2d 911, 917, 226 P.2d 867 (1951); *State v. Stentz*, 30 Wash. 134, 135-37, 70 P. 241 (1902); *State v. Murphy*, 9 Wash. 204, 206-08, 37 P. 420 (1894); *State v. Biles*, 6 Wash. 186, 188, 33 P. 347 (1893); *see also State v. Parnell*, 77 Wn.2d 503, 504, 463 P.2d 134 (1969); *Wash. v. City of Seattle*, 170 Wash. 371, 373, 16 P.2d 597 (1932); *State v. Croney*, 31 Wash. 122, 128, 71 P. 783 (1903); *State v. Rutten*, 13 Wash. 203, 204-07, 43 P. 30 (1895); *State v. Wilson*, 16 Wn. App. 348, 352, 555 P.2d 1375 (1976).

Challenges for cause also sometimes have been made and ruled on at sidebar, particularly in recent years. *See, e.g.*, *State v. Love*, 176 Wn. App. 911, 915, 309 P.3d 1209 (2013), *review granted in part*, 181 Wn.2d 1029 (2015). But it appears that at least in earlier times, challenges for cause at sidebar were quite rare. Only one older civil case provides a possible example of a challenge for cause exercised at sidebar, and in that case there was a compelling reason to depart

from the usual procedure – the argument for dismissing the juror would have improperly exposed prospective jurors to information about the defendants' liability insurance. *Popoff v. Mott*, 14 Wn.2d 1, 9, 126 P.2d 597 (1942). Overall, the weight of historical practice favors exercising of challenges for cause in open court.

Division Three of our court in *Love* held that challenges for cause do not satisfy the experience prong, stating that "there is no evidence suggesting that historical practices *required* [for cause] challenges to be made in public." 176 Wn. App. at 918 (emphasis added). The court's analysis in *Love* seems to redefine the *Sublett* experience prong as an inquiry into whether challenges for cause historically were *required* to be made in open court. But the court in *Love* cited no authority for this interpretation of the experience prong analysis. 176 Wn. App. at 918.

Our reading of the relevant cases indicates that the experience prong actually involves asking whether the practice *traditionally* has been open to the public, whether required or not. *E.g.*, *Smith*, 181 Wn.2d at 516 (stating that "[w]ithout any evidence the public has *traditionally participated* in sidebars, the experience prong cannot be met" (emphasis added)). This reading is consistent with the United States Supreme Court's analysis in *Press-Enterprise Co. v. Superior Court* (*Press* II), 478 U.S. 1, 8, 10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986), which guided our Supreme Court in *Sublett*. 176 Wn.2d at 73-74. The Court in *Press* II analyzed whether there was a "tradition of accessibility" surrounding the proceeding at issue, 478 U.S. at 8, 10, and this is the proper question to ask here as well. Accordingly, we reject the experience prong analysis in *Love* and look to traditional practice, rather than historical requirements.

In light of what appears to be the historical practice in Washington courts, the experience prong favors a holding that challenges for cause implicate the public trial right.

b. Logic Prong

The logic prong of the *Sublett* test asks us to examine whether public access plays a " 'significant positive role' " in the functioning of the practice or procedure at issue. *Sublett*, 176 Wn.2d at 73 (quoting *Press* II, 478 U.S. at 8). Because public access provides a check against both actual and apparent abuse of challenges for cause, we hold that the logic prong supports extension of the public trial right to the exercise of challenges for cause.

Under the logic prong, we look to the "values served by open courts" and "must consider whether openness will '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 74-75 (quoting *Press-Enterprise Co. v. Superior Court* (*Press* I), 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). We have held that this basic fairness is enhanced where "the public's mere presence passively contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny." *State v. Bennett*, 168 Wn. App. 197, 204, 275 P.3d 1224 (2012) (emphasis omitted); *see also State v. Sadler*, 147 Wn. App. 97, 116, 193 P.3d 1108 (2008) ("[T]he purposes underlying a *public* trial include ensuring that the public can see that the accused is dealt with fairly and reminding officers of the court of their responsibilities to assure that the defendant receives a fair trial" (citation omitted)). [8]

[8] In *Sublett*, our Supreme Court expressly rejected our analytical framework in *Sadler*, pointing to that opinion as an example of the categorical distinction approach we previously employed.

We previously have found that public scrutiny is essential where challenges to prospective jurors may be abused. *See Sadler*, 147 Wn. App. at 116 (holding that *Batson*[9] proceedings implicate the public trial right because "the public has a vital interest" in the issue of "whether the prosecutor has excused jurors because of their race"). Challenges for cause may be less prone to arbitrary or improper exercise than peremptory challenges because a party must offer, and the trial court must find, a legal reason for dismissing a juror for cause. However, the public still has a vital interest in determining whether parties are making, and the trial court is ruling on, challenges for cause for legitimate reasons.

Further, challenges for cause exist specifically to ensure fairness in jury selection and, ultimately, a fair trial before an impartial jury. *See State v. Fire*, 145 Wn.2d 152, 164, 34 P.3d 1218 (2001). Addressing such challenges in public enhances the appearance of fairness in this process, and may well enhance actual fairness by reminding counsel of the importance of the juror challenge process, and subjecting the trial court's rulings to public scrutiny.

In *Love*, Division Three of our court held that challenges for cause did not satisfy the logic prong. 176 Wn. App. at 919-20. The court seemed to indicate that because challenges for cause involve legal questions, public oversight is of limited importance. *See id.* at 920 n.7. But we have noted that "even in proceedings involving purely legal matters, the public's presence

---

176 Wn.2d at 72; *see also State v. Halverson*, 176 Wn. App. 972, 977 n.2, 309 P.3d 795 (2013), *review denied*, 179 Wn.2d 1016 (2014). However, the Court in *Sublett* noted no deficiencies in our discussion of the values served by public scrutiny or on the value of publicity in deterring the abuse of challenges during jury selection. Further, the court denied review of *Sadler* after deciding *Sublett*. 176 Wn.2d at 1032.

[9] *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (holding that a party cannot exercise peremptory juror challenges on the basis of race).

may ensure the fairness of such proceedings." *Bennett*, 168 Wn. App. at 204. While the court in *Love* reasoned that making a record of the challenges "satisfies the public's interest in the case and assures that all activities were conducted aboveboard," it seemed to discount the idea that public oversight of the challenges and associated argument would enhance the appearance of fairness or deter deviation from established procedures. 176 Wn. App. at 920.

Because our Supreme Court has indicated that the appearance of fairness and deterrence of deviation from established procedures are important functions of the public trial right, we disagree with Division Three and conclude that public access plays a significant positive role in the functioning of juror challenges for cause. Therefore, the logic prong of the *Sublett* test indicates that challenges for cause implicate the public trial right.

Both the experience and logic prongs of the *Sublett* test support a holding that the exercise of juror challenges for cause should occur in open court. Accordingly, we hold that juror challenges for cause implicate a criminal defendant's public trial right.

D. JUSTIFICATION FOR CLOSURE

If the trial court has closed a proceeding to the public and that proceeding implicates the public trial right, we must determine whether the trial court was justified in closing the proceeding. In most cases, the trial court must expressly consider the five *Bone-Club* factors on the record. *Smith*, 181 Wn.2d at 520 (stating that "[a] closure unaccompanied by a *Bone-Club* analysis on the record will almost never be considered justified").

Our Supreme Court has recognized that in extremely rare circumstances, a closure could be justified without a *Bone-Club* analysis if an examination of the record shows that the trial court "effectively weighed the defendant's public trial right against other compelling interests."

Smith, 181 Wn.2d at 520. The court found no public trial right violation under such circumstances in *State v. Momah*, 167 Wn.2d. 140, 156, 217 P.3d 321 (2009). But the court has acknowledged that it is unlikely to ever again see a case like *Momah*. *Smith*, 181 Wn.2d at 520.

Here, the trial court did not expressly consider the *Bone-Club* factors before holding the sidebar conference. Further, there is no basis in the record for concluding that these factors effectively have been satisfied through a balancing process. Therefore, we hold that the trial court was not justified in hearing juror challenges for cause at a sidebar conference.

CONCLUSION

A sidebar conference addressing juror challenges for cause constitutes a closure of the juror selection proceedings, and implicates a defendant's public trial right. Here, the trial court did not conduct a *Bone-Club* analysis or otherwise provide justification for not addressing for cause juror challenges in open court. Accordingly, we hold that the trial court erred in addressing juror challenges for cause at a sidebar conference.

We reverse Anderson's convictions and remand for a new trial.

MAXA, P.J.

I concur:

LEE, J.

MELNICK, J. (concurrence) — I concur with the result the majority reaches. However, I write separately to supplement the majority's analysis under the "experience and logic" test. *See* Majority at 7-8 (analyzing *State v. Sublett*, 176 Wn.2d 58, 73-74, 292 P.3d 715 (2012)).

I believe there is additional authority in CrR 6.4 to support the majority's position. This rule delineates procedures for selecting a jury. Specifically, after examination, when challenging a juror for cause, a judge may excuse for cause that juror if grounds for the challenge exist. CrR 6.4(c).[10] If, however, the challenge for cause is denied by the opposing party, "the court shall try the issue and determine the law and the facts." CrR 6.4(d)(1). If the challenge is tried, the rules of evidence apply and the challenged juror may be called as a witness, subject to cross-examination. CrR 6.4 (d)(2). If the court finds the challenge is sufficient or true, the juror shall be excluded. CrR 6.4(d)(2). Conversely, "if not so determined or found otherwise," the challenge shall be disallowed. CrR 6.4(d)(2).

Because both the Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington Constitution guarantee a defendant the right to a public trial and because

---

[10] CrR 6.4(c)(2) references RCW 4.44.150 through 4.44.200 as governing challenges for cause. RCW 4.44.190 states,

> [a] challenge for actual bias may be taken for the cause mentioned in RCW 4.44.170(2). But on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon what he or she may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.

challenges for cause involve trials, a trial court must either hold the trials in open court or utilize the five part *Bone-Club*[11] test.

Melnick, J.

[11] *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

THURSTON COUNTY PROSECUTOR

June 16, 2015 - 8:23 AM

Transmittal Letter

Document Uploaded: 3-460084-Petition for Review.pdf

Case Name:
Court of Appeals Case Number: 46008-4

Is this a Personal Restraint Petition? Yes ● No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

● Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Tonya M Maiava - Email: maiavat@co.thurston.wa.us

A copy of this document has been emailed to the following addresses:

ted9@me.com