NO. 46445-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

RYAN EFFINGER,

Appellant.

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

The Honorable Anne Hirsch, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY[1]

1. REVERSAL IS REQUIRED BECAUSE FOR CAUSE AND PEREMPTORY CHALLENGES WERE CLOSED IN VIOLATION OF EFFINGER'S RIGHT TO A PUBLIC TRIAL.

The courtroom is closed for purposes of the right to a public trial when "the public is excluded from particular proceedings within a courtroom." State v. Anderson, ___ Wn. App. ___, 350 P.3d 255, 258 (No. 45497-1-II, filed May 19, 2015) (citing State v. Gomez, 183 Wn.2d 29, 34-35, 347 P.3d 876). In Anderson, the for-cause challenges were exercised at a sidebar conference. Although the public was not excluded from the courtroom and the sidebar was not in a physically inaccessible location, this Court nonetheless found a closure. Anderson, 350 P.3d at 257. The Court explained that the entire purpose of the sidebar is to prevent the public from hearing what is being said. Anderson, 350 P.3d at 258. "Taking juror challenges at sidebar in this way thwarts public scrutiny just as if they were done in chambers or outside the courtroom." Id. The court held the sidebar conference "constituted a closure of the juror selection proceedings because the public could not hear what was occurring." Id.

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[1] The State's arguments regarding the improper opinion testimony and ineffective assistance of trial counsel for failing to object to the improper opinion testimony have been anticipated and sufficiently addressed in the Brief of Appellant and need not be challenged further on reply.

There is no reason to differentiate the for-cause challenges at sidebar in Anderson from the for-cause and peremptory challenges held at sidebar in this case. In both cases, an essential part of jury selection occurred in such a way as to "thwart[] public scrutiny." Anderson, 350 P.3d at 258. The public could not hear or see which potential jurors were challenged by which party. Just as in Anderson, Effinger's convictions must be reversed and the case remanded for a new trial. Anderson, 350 P.3d at 262.

The State also argues, based on State v. Love, 176 Wn. App. 911, 915, 309 P.3d 1209 (2013), review granted in part, 181 Wn.2d 1029 (2015) and Sublett's experience and logic test, that challenges conducted at sidebar do not implicate the public trial right. BOR at 20-28. But Anderson expressly rejects the reasoning from Love that the State relies on in this case. Anderson, 350 P.3d at 260-62. The State argues that the experience prong is met only if traditionally the proceeding was required to be held in public. BOR at 25-26 (citing Love, 176 Wn. App. at 919). But, as Anderson points out, the correct inquiry is whether the proceeding was traditionally open to the public, not whether it was historically required to be. Anderson, 350 P.3d at 260-61. Like for-cause challenges, peremptory challenges have traditionally been exercised in open court,

subject to public scrutiny. State v. Wilson, 174 Wn. App. 328, 344, 298 P.3d 148 (2013).

The "logic" portion of the Sublett test also indicates peremptory challenges must be open. As the Anderson court explains, a proceeding should logically be open to the public when public scrutiny can act as a check against abuses. That is particularly the case for peremptory challenges. Anderson, 350 P.3d at 261. The court noted that the for-cause challenges at issue in Anderson were "less prone to arbitrary or improper exercise than peremptory challenges." Anderson, 350 P.3d at 261. Nevertheless, the court held the public has "a vital interest" in overseeing even the for-cause challenges. Id. Moreover, it serves the appearance of fairness to ensure that for-cause challenges are subject to public scrutiny. Id. at 261-62. The same is true for peremptory challenges, which are even more susceptible to abuse. Anderson, 350 P.3d at 261.

Both logic and experience dictate that for-cause and peremptory challenges implicate the right to a public trial and may not be shielded from view without careful application, on the record, of the Bone-Club factors. With no suggestion that the court considered the competing interests at stake before holding the for-cause and peremptory challenges at sidebar, this Court should hold that Effinger's right to a public trial was violated and reverse his convictions.

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

The federal and state constitutions guarantee criminal defendants the right to be present at trial. State v. Irby, 170 Wn.2d 874, 880-881, 246 P.3d 796 (2011). This includes the right to be present for the selection of one's jury. See Lewis v. United States, 146 U.S. 370, 373-374, 13 S. Ct. 136, 36 L. Ed. 1011 (1892); Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989); State v. Wilson, 141 Wn. App. 597, 604, 171 P.3d 501 (2007). Effinger contends his right to be present was violated when he was excluded from the sidebar conference at which jurors were discussed and struck for cause. Supplemental Brief of Appellant (SBOA) at 16-22.

The State does not dispute that Effinger was absent from the sidebar discussions, but nonetheless maintains Effinger's right to be present was not violated because he was not absent from the courtroom during jury selection. BOR at 31, 33. Contrary to the State's assertion, the *apparent* opportunity for input is not sufficient to satisfy the right to be present, where the record shows the defendant's absence at a critical stage. Lewis, 146 U.S. at 372 ("where the [defendant's] personal presence is necessary in point of law, the record must show the fact."); Irby, 170 Wn.2d at 884 (same).

Moreover, the required opportunity to provide input includes the possibility the defendant may not only give advice, but "supersede his lawyers." Wilson, 141 Wn. App. at 604 (quoting Snyder, 291 U.S. at 106). Accordingly, that Effinger's counsel may have successfully challenged jurors for cause is irrelevant, where the record fails to show that Effinger himself was present during the challenges.

The State also cites United States v. Thomas, 724 F.3d 632, 646 (5th Cir. 2013), cert. denied, 134 S. Ct. 1040 (2014), to suggest that Effinger cannot show his absence had a prejudicial impact on jury deliberations. BOR at 33-34. But, this is not the test. When a defendant is excluded from a portion of jury selection, reversal is required unless the State proves the violation was harmless beyond a reasonable doubt. Irby, 170 Wn.2d at 886. The only way to accomplish that task is to show that no juror excused in violation of the defendant's rights had a chance to sit on the jury. If a prospective juror in question fell within the range of jurors who ultimately comprised the jury, reversal is required. Id.; SBOA at 21-22.

The constitutional error in excluding Effinger from the exercise of for-cause challenges was manifest, as there was a possibility jurors 6, 9, 12, 13, 18, 22, and 26 could have served on the jury. All of these jurors fell within the range of jurors who ultimately comprised the jury, as the

twelfth juror was number 27, and the alternate juror was number 29. The denial of Effinger's presence at this critical stage of jury selection therefore had practical and identifiable consequences. The error was not harmless beyond a reasonable doubt. Reversal is required. SBOA at 21-22.

3. THE COURT FAILED TO MAKE AN INDIVIDUALIZED INQUIRY INTO EFFINGER'S ABILITY TO PAY BEFORE IMPOSING A DISCRETIONARY DOMESTIC VIOLENCE ASSESSMENT FEE.

Trial courts may order payment of LFOs as part of a sentence. RCW 9.94A.760. But RCW 10.01.160 (3) specifies courts "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." As discussed in the opening brief, the record does not show the trial court in fact considered Effinger's ability or future ability before it imposed a discretionary domestic violence fee. BOA at 21-25.

The State neither disputes that the domestic violence fee is discretionary, nor that the trial court failed to consider Effinger's ability or future ability to pay before it imposed the fee. BOR at 11-15. Instead, the State argues Effinger can challenge the fee at the time the State attempts to collect it. BOR at 13-14. But this time-of-enforcement rationale does not account for the Supreme Court's recognition that the accumulation of interest begins at the time costs are imposed, causing significant and

enduring hardship. State v. Blazina, 182 Wn.2d 827, 836-37, 344 P.3d 680 (2015); see also RCW 10.82.090(1) ("[F]inancial obligations imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments."); CP 78 (order 4.1) (portion of judgment and sentence stating financial obligations will bear interest). Moreover, indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); State v. Mahone, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (holding that because motion for remission of LFOs is not appealable as matter of right, "Mahone cannot receive counsel at public expense"). Expecting indigent defendants to shield themselves from the State's collection efforts or to petition for remission without the assistance of counsel is neither fair nor realistic. The Blazina court also expressly rejected the State's ripeness claim that "the proper time to challenge the imposition of an LFO arises when the State seeks to collect." 182 Wn.2d at 832 n.1; Compare State v. Lyle, ___ Wn. App. ___, ___ P.3d ___, 2015 WL 4156773 (No. 46101-3-II, filed July 10, 2015), slip op. at 3., (declining to consider challenge to LFO's for first time on appeal).

The record shows the court did not consider Effinger's current and future ability to pay before imposing the discretionary domestic violence

fee. The court failed to comply with its statutory duty to consider Effinger's individual financial circumstances before imposing LFOs. Consequently, this Court should permit Effinger to challenge the legal validity of the LFO order for first time on appeal, vacate the order, and remand for resentencing. Blazina, 182 Wn.2d at 838-39.

4. EFFINGER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL COUNSEL FAILED TO OBJECT TO THE IMPOSITION OF LFOs.

Effinger argues his trial attorney was ineffective for failing to object to the imposition of discretionary LFOs. BOA at 26-28. The State maintains Effinger cannot show prejudice as a result of his attorney's failure to object because, "it can hardly be said that this failure resulted in an unfair trial." BOR at 17 (citing State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). But, Effinger need not show the trial was unfair, only that the proceeding at issue would have been different but for counsel's deficient representation. State v. Lyle, ___ Wn. App. ___, ___ P.3d ___, 2015 WL 4156773 (No. 46101-3-II, filed July 10, 2015), slip op. at 4.

Lyle is instructive in this regard. During sentencing, Lyle presented some evidence of his financial situation, alleged disabilities, and prior work history. Lyle, slip op. at 2. The trial court imposed LFO's but did not consider on the record, Lyle's ability or future ability to pay them.

Lyle's judgment and sentence contained a written boilerplate finding indicating he had the ability or future ability to pay. Id.

On appeal, Lyle argued that his attorney was ineffective for failing to challenge the LFOs. This Court agreed that Lyle had arguably shown deficient performance since Lyle's sentencing hearing occurred after this Court's opinion in State v. Blazina, 174 Wn. App. 906, 301 P.3d 492 (2013), reversed and remanded by 182 Wn.2d 827, 344 P.3d 680 (2015). Thus, Lyle's "counsel should have been aware that to preserve any issue related to the LFOs he was required to object." Slip op. at 4.

As to prejudice, this Court concluded the record was not sufficient to determine whether there was a reasonable probability that the trial court's decision would have imposed fewer or no LFOs if defense counsel had objected. Id. at 5.

Like Lyle, Effinger's sentencing occurred after this Court's opinion in Blazina, and thus, trial counsel was deficient for failing to object and preserve the issue. Unlike Lyle however, the record here demonstrates there was a reasonable probability the trial court would not have imposed the $100 domestic violence assessment fees if defense counsel had objected.

Except for the domestic violence assessment fee, the trial court imposed only mandatory LFOs, including a $500 victim assessment fee,

$200 criminal filing fee, and $100 DNA collection fee. CP 77-78 (order 4.1); Compare RCW 7.68.035(1)(a) (a five hundred dollar penalty assessment fee shall be imposed for each felony conviction); RCW 36.18.020(h) (a defendant in a criminal case shall be liable for a fee of two hundred dollars upon conviction); RCW 43.43.7541 (every sentence imposed must include a DNA fee of one hundred dollars). Thus, had defense counsel objected, there is a reasonable probability the trial court would have waived the discretionary domestic violence assessment fee in keeping with its imposition of otherwise only mandatory LFOs.

Based on the foregoing, it cannot be said this record expressly demonstrates the sentencing court would have imposed the same LFOs if defense counsel had objected and the trial court had actually taken into account Effinger's individualized financial circumstances.

B. CONCLUSION

For the reasons discussed above and in the opening brief, this court should reverse Effinger's convictions and remand for a new trial.

DATED this 15TH day of July, 2015.

Respectfully submitted,

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DIVISION TWO

STATE OF WASHINGTON	)	
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[X] RYAN EFFINGER
DOC NO. 829370
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF JULY 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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