NO. 43932-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MATTHEW DAVID AHO, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Beverly G. Grant, Judge

No. 11-1-00546-3

SUPPLEMENTAL BRIEF OF RESPONDENT ADDRESSING *STATE v. ANDERSON*, ___ Wn. App. ___ 350 P.3d 255 (2015)

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

1. Whether Defendant's right to a public trial was sustained where the Washington State Supreme Court's recent decision in ***State v. Love***, ___ Wn.2d ___, ___ P.3d ___ (2015) (No. 89619-4), confirms that the trial court did not close the courtroom by hearing one challenge for cause and the peremptory challenges at sidebar in this case.

B. STATEMENT OF THE CASE.

The following statement of the case is limited to that portion of the procedural history directly relevant to the issue above.

On August 20, 2012, the parties conducted *voir dire* of the venire in open court. 08/20/2012 RP 24-35, 48-102.

There were four challenges for cause. CP 137-39.

First, Defendant challenged venire member number 4 for cause and the court granted that motion. 08/20/2012 RP 40-41.

Then, the parties jointly moved to excuse venire members 18 and 35 for cause, and that motion was granted. 08/20/2012 RP 43-44, 47-48.

Finally, the following exchange took place:

> [DEPUTY PROSECUTOR]: Your Honor, I do have one challenge for cause.
>
> THE COURT: All right. Why don't we do this. ***I am going to have you come back to chambers***. I don't whisper well. So [Defense Counsel and Deputy Prosecutor], if you would come back briefly and then we'll put it on the record later.

> (***WHEREUPON, sidebar was had.***)
>
> THE COURT: All right. Juror No. 23, we thank and you are excused from this panel. Thank you and report downstairs. Thank you.

08/20/2012 RP 102-03 (emphasis added); CP 134 (original jury panel selection list).

During a subsequent sidebar, the parties exercised their peremptory challenges by writing them on a paper titled "Peremptory Challenges," which was filed with the court the same day. 08/20/2012 RP 103; CP 136. The defendant did not object to this procedure. *See* 08/20/2012 RP 102-03. The State exercised four peremptory challenges and the defendant exercised six. CP 136. The court then seated the jury as selected by the parties, administered the oath, and read initial instructions. 08/20/2012 RP 104-05.

A more complete procedural and factual history is set forth in the Statement of the Case, §B of the State's Brief of Respondent, p. 2-23, and that statement is hereby incorporated herein.

C. ARGUMENT.

1. DEFENDANT'S RIGHT TO A PUBLIC TRIAL WAS SUSTAINED GIVEN THAT THE WASHINGTON STATE SUPREME COURT'S RECENT DECISION IN ***STATE V. LOVE***, ___ Wn.2d ___, ___ P.3d ___ (2015) (No. 89619-4), CONFIRMS THAT THE TRIAL COURT DID NOT CLOSE THE COURTROOM BY HEARING ONE CHALLENGE FOR CAUSE OR THE PEREMPTORY CHALLENGES AT SIDEBAR.

The Washington State Supreme Court very recently affirmed that

> [a] three-step framework guides [its] analysis in public trial cases. First, [it] ask[s] if the public trial right attaches to the proceeding at issue. Second, if the right attaches [it] ask[s] if the courtroom was closed. And third, [is] ask[s] if the closure was justified. ***State v. Smith***, 181 Wn.2d 508, 513-14, 334 P.3d 1049 (2014) (*citing* ***State v. Sublett***, 176 Wn.2d 58, 92, 292 P.3d 715 (2012)(Madsen, C.J., concurring)). The appellant carries the burden on the first two steps; the proponent of the closure carries the [burden with respect to the] third.

State v. Love, ___ Wn.2d ___, ___ P.3d ___ (2015) (No. 89619-4; 2015 WL 4366419).

In ***State v. Anderson***, this Court considered whether "the trial court violated [D]efendant's] right to a public trial 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." ***State v. Anderson***, ___ Wn. App. ___ 350 P.3d 255 (2015).

With respect to the first step of the analytical framework described above, the ***Anderson*** Court "h[e]ld that juror challenges for cause implicate a criminal defendant's public trial right." ***Anderson***, 350 P.3d at 262.

With respect to the second step, it "h[e]ld that the sidebar conference constituted a closure of the jury selection proceedings because the public could not hear what was occurring." ***Anderson***, 350 P.3d at 258.

Finally, with respect to the third step, whether "the closure was justified," ***Love***, ___ Wn.2d ___, ___ P.3d ___ (2015) (No. 89619-4; 2015 WL 4366419), ***Anderson*** found that because the "trial court did not expressly consider the ***Bone-Club***[1] factors before holding the sidebar conference" and because "there [wa]s no basis in the record for concluding that these factors ha[d] been satisfied through a balancing process,.... the trial court was not justified in hearing juror challenges for cause at a sidebar conference." ***Anderson***, 350 P.3d at 262.

However, since the opinions in ***Anderson*** were issued, the Washington State Supreme Court has rendered a decision in ***State v. Love***, ___ Wn.2d ___, ___ P.3d ___ (2015) (No. 89619-4), for which the present case was previously stayed.

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

Love considered whether the exercise of (1) "for cause challenges orally at the bench" and (2) "peremptory challenges silently by exchanging a list of jurors and alternatively striking names from it" violated Defendant's right to a public trial. ***Love***, ___ Wn.2d ___, ___ P.3d ___ (2015) (No. 89619-4; 2015 WL 4366419). Thus, it analyzed the same issue confronted by ***Anderson*** and two of the issues at play in the present case.

With respect to the first step in the analysis above, the conclusion of ***Love*** was consistent with that in ***Anderson***, but the analysis used to reach it differed. In ***Anderson***, the Court found that "[b]ecause Anderson's challenges were not part of the actual questioning of jurors, they were not part of voir dire," and hence, that "our Supreme Court has not yet addressed whether juror challenges for cause implicate the public trial right." ***Anderson***, 350 P.3d at 259. However, the Supreme Court in ***Love*** found that its "prior cases hold it 'well settled that the right to a public trial... extends to jury selection,'" and "affirm[ed] that the right attaches to jury selection, including for cause and peremptory challenges." ***Love***, ___ Wn.2d ___, ___ P.3d ___ (2015) (No. 89619-4; 2015 WL 4366419). While the ***Anderson*** Court reached this conclusion, at least with respect to for cause challenges, it did so through an independent ***State v. Sublett***, 176 Wn.2d 58, 71, 292 P.3d 715 (2012), experience and logic analysis.

Anderson, 350 P.3d at 259-62. Nevertheless, it is clear that the answer to the first step of the public trial right analysis is that the right to a public trial attaches to the exercise of both for cause and peremptory challenges.

The second step in the analysis assumes the right attaches and asks "if the courtroom was closed." ***Love***, ___ Wn.2d ___, ___ P.3d ___ (2015) (No. 89619-4; 2015 WL 4366419). It is this step that is vital to the analysis of the present case, and it is this step on which the Supreme Court's analysis in ***Love*** departed from that in ***Anderson***.

Whereas ***Anderson*** "h[e]ld that the sidebar conference constituted a closure of the jury selection proceedings because the public could not hear what was occurring," 350 P.3d at 258, our Supreme Court reached the opposite conclusion in ***Love***. There, it found that:

> the public had ample opportunity to oversee the selection of Love's jury because no portion of the process was concealed from the public; no juror was questioned in chambers. To the contrary, observers could watch the trial judge and counsel ask questions of potential jurors, listen to the answers to those questions, see counsel exercise challenges at the bench and on paper, and ultimately evaluate the empaneled jury.

Love, ___ Wn.2d ___, ___ P.3d ___ (2015) (No. 89619-4; 2015 WL 4366419). Therefore, the Court held that exercising for cause and peremptory challenges at sidebar was not a "courtroom closure[,]" and that [t]he public was present for and could scrutinize the selection of

Love's jury from start to finish, affording him the safeguards of the public trial right[,]" and affirmed.

Because this Court is "bound to apply Washington law as interpreted by the Washington Supreme Court," ***State v. McComas***, 186 Wn. App. 307, 316, 345 P.3d 36 (2015)(*citing* ***State v. Gore***, 101 Wn.2d 481, 487, 681 P.2d 227 (1984)), ***Anderson***'s holding that taking for cause challenges at a "sidebar conference constitute[s] a closure of the jury selection," ***Anderson***, 350 P.3d at 258, can no longer be the law.

Rather, as the Supreme Court subsequently held, exercising for cause and peremptory challenges at sidebar, at least as was done in ***Love***, is not a courtroom closure, and therefore, cannot be violative of a defendant's right to a public trial. ***Love***, ___ Wn.2d ___, ___ P.3d ___ (2015) (No. 89619-4; 2015 WL 4366419).

In the present case, the peremptory challenges seem to have been exercised almost precisely in the manner ***Love*** approved. In this case, as in ***Love***, "[a]t the conclusion of voir dire questioning, counsel... exercised peremptory challenges silently by exchanging a list[.]" *Id. Compare* CP 136; 08/20/2012 RP 102-04. Here, as in ***Love***, this process took place in a courtroom filled with the venire, open to the public, and perhaps attended by spectators that were arguably partial to the defendant. *See* 08/20/2012 RP 4-5, 1-105. There was no ruling of the court that excluded spectators or

any other person from the courtroom during jury selection. *See, e.g.,* CP 1-141. In fact, on the day of jury selection, the day the parties exercised the challenges in question, the court noted that, despite apparent disruptions from spectators:

> every person is entitled to be in the courtroom. I don't want to indicate by any means that this isn't a public courtroom but we do have some parameters that we all have to work in.

RP 32-33.

Thus, here, as in ***Love***, "[t]he public was present for and could scrutinize the selection of [Defendant]'s jury from start to finish, affording him the safeguards of the public trial right[.]" ***Love***, ___ Wn.2d ___, ___ P.3d ___ (2015) (No. 89619-4; 2015 WL 4366419). Here, as in ***Love***, the exercise of "peremptory challenges [at sidebar] by exchanging a list" was not a "courtroom closure[,]" and was "consistent with the minimum safeguards of the public trial right." *Id.*

Although the record is less clear, it also seems that challenges for cause were exercised in a manner consistent with that approved by ***Love***.

The record reflects that there were four challenges for cause. CP 137-39. The first three were clearly exercised on the record in open court, 08/20/2012 RP 40-41, 43-44, 47-48, and are not subject to challenge here. *See, e.g.,* Supp. Opening Br. of App., p. 1-8. It is the fourth for cause

challenge exercised that is at issue. That challenge was exercised as follows:

> [DEPUTY PROSECUTOR]: Your Honor, I do have one challenge for cause.
>
> THE COURT: All right. Why don't we do this. ***I am going to have you come back to chambers***. I don't whisper well. So. [Defense Counsel and Deputy Prosecutor], if you would come back briefly and then we'll put it on the record later.
>
> (***WHEREUPON, sidebar was had.***)
>
> THE COURT: All right. Juror No. 23, we thank and you are excused from this panel. Thank you and report downstairs. Thank you.

08/20/2012 RP 102-03 (emphasis added).

Hence, although the trial judge initially referred to the parties "com[ing] back to chambers," the record makes clear that the challenge for cause of venire member 23 was conducted at sidebar in an open courtroom. 08/20/2012 RP 102-03. Thus, here, as in ***Love***, "counsel exercised [this] for cause challenge[] orally at the bench[.]" ***Love***, ___ Wn.2d ___, ___ P.3d ___ (2015) (No. 89619-4; 2015 WL 4366419).

Moreover, the exercise of this challenge for cause took place in a courtroom filled with the venire, open to the public, and apparently attended by spectators, *see* 08/20/2012 RP 4-5, 1-105, and its result was immediately put on the record by the judge. 08/20/2012 RP 103.

Indeed, here, as in ***Love***,

> the public had ample opportunity to oversee the selection of [Defendant]'s jury because no portion of the process was concealed from the public; no juror was questioned in chambers. To the contrary, observers could watch the trial judge and counsel ask questions of potential jurors, listen to the answers to those questions, see counsel exercise challenges at the bench and on paper, and ultimately evaluate the empaneled jury.

Love, ___ Wn.2d ___, ___ P.3d ___ (2015) (No. 89619-4; 2015 WL 4366419).

Thus, here, as in ***Love***, "[t]he public was present for and could scrutinize the selection of [Defendant]'s jury from start to finish, affording him the safeguards of the public trial right[.]" ***Love***, ___ Wn.2d ___, ___ P.3d ___ (2015) (No. 89619-4; 2015 WL 4366419). Here, as in ***Love***, the exercise of "for cause challenges orally at the bench" was not a "courtroom closure[,]" and was "consistent with the minimum safeguards of the public trial right." *Id.*

Therefore, this Court should affirm Defendant's convictions and sentence.

D. CONCLUSION.

Given that the Washington State Supreme Court's recent decision in ***State v. Love***, ___ Wn.2d ___, ___ P.3d ___ (2015) (No. 89619-4), confirms that a trial court does not close the courtroom by hearing

challenges for cause or the peremptory challenges at sidebar, the trial court did not violate Defendant's right to a public trial by doing so in this case.

Therefore, Defendant's convictions and sentence should be affirmed.

DATED: July 31, 2015

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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/31/15 Johnson
Date Signature

PIERCE COUNTY PROSECUTOR

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