

74951-0

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Court of Appeals
Division I
State of Washington

74951-0

NO. 74951-0-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

EFRAIN ELIAS ALVARADO,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Brian L. Stiles, Judge

BRIEF OF RESPONDENT

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I. SUMMARY OF ARGUMENT

Efrain Alvarado appeals from his conviction for Unlawful Possession of a Firearm in the First Degree, contending his right to a public trial was violated by a portion of the trial being conducted at a side bar conference.

The only matter which was conducted at the side bar was consideration of objections made during the State's rebuttal closing argument. Counsel did not seek to put the rulings on the record. There is no manifest error in the record. Side bar conferences are historically matters which are not open to the public.

Also, appellate costs are appropriate here since the trial court determined the defendant had the ability to pay discretionary costs.

The defendant's conviction should be affirmed and ordered to pay appellate costs.

II. ISSUES

1. Must a defendant make a record as to an objection made during closing argument in order to preserve a claim of error?
2. Is a sidebar on an objection made during closing argument a matter which is subject to the right to public trial?
3. Where the trial court determined that given the defendant's work history, youth and relatively short sentence, that that defendant had

the ability to pay discretionary costs, should appellate costs be imposed?

III. STATEMENT OF THE CASE

On October 22, 2015, Efrain Elias Alvarado was charged with Unlawful Possession of a Firearm in the First Degree alleged to have occurred on October 6, 2015. CP 44.

A renter reported the discharge of a firearm in a house from the room she was renting. CP 3. She found a hole in the outside glass window of her children's bedroom and a corresponding baseball-sized hole in the room of her sub-tenant. CP 3. When the renter looked inside, she saw her sub-tenant, her child, and the defendant inside the room. CP 4. The defendant was sitting on the floor in the bedroom closet with a shotgun sitting on the floor next to the defendant only a few inches away. CP 4. The sub-tenant and her child were on the floor a number of feet away from where Alvarado was sitting. CP 4. Alvarado texted the renter writing, among other things, "that the gun was in my closet." CP 4. Alvarado had a prior juvenile conviction for Assault in the Second Degree. CP 5. By the time the officers obtained a search warrant, the shotgun and the defendant were gone. CP 5.

On February 22, 2016, the case proceeded to trial.¹

During the closing argument there were two objections made to closing argument by defense, but in neither instance was there a ruling from the court on the objection. The portion of the transcript read as follows:

And Ms. Candler talked about constructive possession. Right now, I am in actual possession of this Kleenex box. If somebody can -- if this is my desk and somebody comes and sets that Kleenex box on my desk, now even without my touching it, I am in constructive possession of that Kleenex box. Okay? This is -- this is not -- the charge in this --

MS. CANDLER: Objection, Your Honor. May we approach?

THE COURT: Yeah, you'll need to. Why don't you come this way, folks.

(Sidebar held off the record.)

2/23/16 RP 222-3.

What I was starting to say before is, again, based on defense argument, this charge is unlawful possession of a gun, of a firearm. It is not unlawful ownership of a firearm. It does not matter who owned that firearm.

What matters is he possessed that firearm. These are two different things. Anybody can own that firearm. Does not matter. What is unlawful is for him to possess it.

MS. CANDLER: Objection, Your Honor. May we approach?

MR. NIELSEN: I'm done if that's --

¹ The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

2/19/16 RP	Motions in Limine (in volume with 2/22/16)
2/22/16 RP	Trial Day 1 (in volume with 2/19/16)
2/23/16 RP	Trial Day 2 (in volume with 3/17/16)
3/17/16 RP	Sentencing (in volume with 2/23/16).

THE COURT: Let's have the sidebar anyway.

(Sidebar held off the record.)

THE COURT: Sounds like Mr. Nielsen has completed.
Thank you, Mr. Nielsen.

MR. NIELSEN: Yes. Thank you, Your Honor.

2/23/16 RP 224. When the trial court invited counsel if there was “[a]nything else we need to cover?” there was no response from defense counsel. 2/23/16 RP 227.

On February 23, 2016, the jury returned a verdict of guilty on the charge of Unlawful Possession of a Firearm in the First Degree. CP 54.

On March 17, 2016, Alvarado was sentenced to 25 months of confinement. CP 34-43.

At sentencing, the State sought mandatory costs and a discretionary \$200 jury demand fee. 3/17/16 RP 233-4. The prosecutor noted that the defendant is nineteen years old, and apparently had no disabilities. 3/17/16 RP 234. The defense noted that the total amount of obligations would be \$1,000. 3/17/16 RP 234. The defense also acknowledged that the defendant had some landscaping experience and had been working part time following his release on his juvenile convictions. 3/17/16 RP 234-5.

Considering the defendant’s young age and the relatively short sentence, the trial court exercised its discretion to impose the discretionary costs, finding the defendant had the future ability to pay. 3/17/16 RP 235.

On March 24, 2016, Alvarado timely filed a notice of appeal, CP 50.

IV. ARGUMENT

1. Where defense did not preserve any ruling on the objection, there is no error manifest in the record.

The general rule in Washington is that appellate courts will not hear challenges that were not presented to the trial court. RAP 2.5(a). An exception is made for issues of “manifest error affecting a constitutional right.” RAP 2.5(a)(3). Such issues may be raised if the record is sufficient to adjudicate them. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

It is a long-standing rule that we do “not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent.” *Barker v. Weeks*, 182 Wash. 384, 391, 47 P.2d 1 (1935) (quoting 4 C.J. *Appeal and Error* § 2666 (1916)).

State v. Love, 183 Wn.2d 598, 608, 354 P.3d 841, 846 (2015).

During the closing argument, twice the defense counsel objected to closing arguments of the prosecutor in rebuttal closing. Only the word “objection” was used and defense counsel immediately asked to approach the bench. 2/23/16 RP 222-3, 224. No detail was provided as to the basis for the objections and the trial court did not provide a ruling on the objections. Defense counsel never sought to have the trial court put a ruling

on the record and when given an opportunity to make more of a record when the jury left the courtroom thereafter, nothing was done.

From the State's review of the objections, the basis of the objections is unclear. On appeal, Alvarado does not claim either argument was improper.

This supports the conclusion that the trial court addressed the legal issues of a minimal nature. Given the prosecutor's argument, it is likely there was no need for defense counsel to make a record of the content of the sidebar conference.

There is no error manifest in the record which merits review.

2. Sidebar conferences are not historically part of public trial.

The sidebar conference occurred in the courtroom with the jury and any members of the public who chose to be there present. There was no exclusion of the public from the proceedings.

Sidebars have historically *not* been open to the public. They serve the important purpose of ensuring a fair trial by insulating potentially prejudicial discussions from the jury's ears. See, e.g. *Sublett*, 176 Wn.2d at 67-68 (public trial right "does not extend to hearings on purely ministerial or legal issues that do not require the resolution of disputed facts"); *State v. Swenson*, 62 Wn.2d 259, 272, 382 P.2d 614 (1963), *overruled on other grounds by State v. Land*, 121 Wn.2d 494, 851 P.2d 678 (1993) (defendant's public trial right not implicated when holding a sidebar conference to address concerns about a witness's comfort while testifying); *Popoff v. Mott*, 14 Wn.2d 1, 9, 126 P.2d

597 (1942) (defendant's public trial right not implicated when holding a sidebar during voir dire on whether to excuse a juror for cause). *See also Love*, 176 Wn. App. at 920 (defendant's public trial right not violated by hearing for cause challenges at sidebar during jury selection); *State v. Castro*, 159 Wn. App. 340, 341, 246 P.3d 228 (2011) (defendant's public trial right not implicated when, after holding a sidebar to decide motions in limine, the trial court placed its decisions on the record in open court and counsel had an opportunity to object); *State v. Rivera*, 108 Wn. App. 645, 653, 32 P.3d 292 (2001) (defendant's public trial right not violated by closing the courtroom for a brief hearing on a juror's complaint about another juror's hygiene).

In *State v. Smith*, 181 Wn.2d 508, 334 P.3d 1049 (2014), we alluded to the fact that evidentiary motions may not implicate the public trial right, but because sidebars, and not evidentiary conferences, were at issue in that case we did not decide definitively one way or the other.

In re Pers. Restraint of Speight, 182 Wn.2d 103, 106, 340 P.3d 207 (2014) (bold emphasis added).

In *State v. Love*, the Supreme Court noted that convictions have been reversed in courtroom closure cases either where there was an exclusion of people from the courtroom or where a portion of the trial occurs in another place inaccessible to spectators. *State v. Love*, 183 Wn.2d 598, 606, 354 P.3d 841 (2015).

The defendant in *Love* sought to equate the peremptory challenges in that case handled at sidebar conference with actions behind closed chamber doors. The Supreme Court rejected the comparison and found no closure occurred where the peremptory challenges were made at a sidebar

conference. *State v. Love*, 183 Wn.2d at 606-7, 354 P.3d 841 (2015), see also *State v. Marks*, 185 Wn.2d 143, 339 P.3d 196 (2016) (no closure of courtroom for sidebar exercise of peremptory challenges exercised and list of challenged jurors made part of the record).

In *State v. Smith*, 181 Wn.2d 508, 513-14, 334 P.3d 1049 (2014), the Supreme Court adopted the three-step framework set forth in Justice Madsen's concurring opinion in *State v. Sublett*, 176 Wn.2d 58, 92, 292 P.3d 715 (2012) as the analytical framework to guide the court's analysis of public trial right cases. The inquiry begins by examining whether the public trial right is implicated at all, then proceeds to the question whether, if the public trial right is implicated, there is in fact a closure of the courtroom; and finally, if there is a closure, whether the closure was justified. *Smith*, 181 Wn.2d at 513-14. This court uses the experience and logic test to evaluate whether a particular proceeding implicates the public trial right. *Smith*, 181 Wn.2d at 511.

The court specifically held that sidebar conferences do not implicate the public trial right.

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 held outside the courtroom, does not implicate Washington's public trial right.

State v. Smith, 181 Wn.2d 508, 519, 334 P.3d 1049 (2014), *citing*, *State v. Sublett*, 176 Wn.2d 58, 97-8, 292 P.3d 715 (2012).

3. This Court should grant appellate costs.

RCW 10.73.160(1) vests the appellate court with discretion to award appellate costs. See *State v. Sinclair*, 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016) (sixty-six year old man serving twenty year sentence unlikely to be able to pay appellate costs since he would be unlikely to find gainful employment).

Here the record supports the trial court conclusion that the defendant is youthful, has a past work history and thus the ability to pay discretionary costs. 3/17/16 RP 233-5.

There was only an order of indigence filed to support the appointment of appellate counsel. CP 51-2. A review by the undersigned of the trial court docket did not show a supporting affidavit or declaration.

Assuming one-third good time eligibility, based upon the 25 month sentence, Alvarado would be approximately age 21 upon release, RCW 9.94A.729(3)(e).

The State contends under these circumstances, Alvarado should be required to pay appellate costs.

V. CONCLUSION

For the foregoing reasons, challenge raising a claim of a courtroom closure for a sidebar conference following objections made during closing argument must be denied. The defendant's conviction for Unlawful Possession of a Firearm in the First Degree must be affirmed. Given the appellant's youth, and work history, appellate costs should be ordered.

DATED this 25th day of October, 2016.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
ERIK PEDERSEN, WSBA#20015
Senior Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Jennifer L. Dobson, and Dana M. Nelson, addressed as Nielsen, Broman & Koch, PLLC, 1908 E Madison Street, Seattle, WA 98122. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 25th day of October, 2016.


KAREN R. WALLACE, DECLARANT