

No. 44650-2-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TRAVIS COUNTS,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



By:

SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

TABLE OF CONTENTS

TABLE OF AUTHORITES iii

I. ISSUES.....1

II. STATEMENT OF THE CASE1

III. ARGUMENT

 A. THE TRIAL COURT DID NOT VIOLATE COUNTS’
 PUBLIC TRIAL RIGHT5

 1. Standard Of Review.....6

 2. Counts Did Not Preserve The Error And Therefore
 Cannot Raise It For The First Time On Appeal.....6

 a. Standard of review7

 b. Counts failed to object to the sidebars and the
 error is not manifest7

 i. Counts cannot meet the burden to show
 this Court that the sidebar during voir
 dire was a manifest error8

 ii. Counts cannot meet the burden to show
 this Court that the sidebar during Ms.
 Dodge’s rebuttal testimony was a
 manifest error10

 3. The Public Trial Right Is Not Implicated By Every
 Matter Or Discussion Taken Up Between The Trial
 Court and The Parties.....12

 4. The Courtroom Was Not Closed.....21

B.	THE TRIAL COURT DID NOT VIOLATE COUNTS’ RIGHT TO BE PRESENT FOR ALL CRITICAL STAGES OF THE PROCEEDINGS BY CONDUCTING TWO SIDEBARS	22
1.	Standard Of Review.....	22
2.	Counts Did Not Preserve The Error And Therefore Cannot Raise It For The First Time On Appeal.....	22
3.	Counts Was Present When The Sidebars Occurred	23
C.	COUNTS RECEIVED EFFECTIVE ASSISTANCE FROM HIS TRIAL COUNSEL	27
1.	Standard Of Review.....	27
2.	Counts’ Trial Counsel Was Not Ineffective In Regards To Preserving The Record Of The Sidebar Conferences	27
D.	THE STATE CONCEDES THAT THE TRIAL COURT APPLIED THE WRONG LEGAL STANDARD REGARDING THE GRANTING OF AN APPEAL BOND AND THEREFORE ABUSED ITS DISCRETION	31
IV.	CONCLUSION.....	33

TABLE OF AUTHORITIES

Washington Cases

<i>Farmer v. Farmer</i> , 172 Wn.2d 616, 259 P.3d 256 (2011)	31
<i>In re Eaton</i> , 110 Wn.2d 892, 757 P.3d 961 (1988)	32
<i>In re Lord</i> , 123 Wn.2d 296, 868 P.2d 835 (1994).....	18, 24, 26
<i>In re Yates</i> , 177 Wn.2d 1, 296 P.3d 872 (2013).....	15
<i>Popoff v. Mott</i> , 14 Wn.2d 1, 126 P.2d 597 (1942).....	16
<i>State v. Bennett</i> , 168 Wn. App. 197, 275 P.3d 1224 (2012)	29
<i>State v. Bone-Club</i> , 128 Wn.2d 254, 906 P.2d 325 (1995) 12, 13, 21	
<i>State v. Brightman</i> , 155 Wn.2d 506, 122 P.3d 150 (2005).....	6, 13
<i>State v. Easterling</i> , 157 Wn.2d 167, 137 P.3d 825 (2006)	6
<i>State v. Edwards</i> , 169 Wn. App. 561, 280 P.3d 1152 (2012).....	7
<i>State v. Gregory</i> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	21
<i>State v. Harris</i> , 148 Wn. App. 22, 197 P.3d 1206 (2006).....	32
<i>State v. Horton</i> , 116 Wn. App. 909, 68 P.3d 1145 (2003).....	28
<i>State v. Irby</i> , 170 Wn.2d 874, 246 P.3d 796 (2011).....	22, 23, 24, 25
<i>State v. Koloske</i> , 100 Wn.2d 889, 676 P.2d 456 (1984)	16
<i>State v. Lormor</i> , 172 Wn.2d 85, 257 P.3d 624 (2011)	21
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	7, 8, 27, 28
<i>State v. Momah</i> , 167 Wn.2d 140, 217 P.3d 321 (2009).....	6, 13

<i>State v. Nguyen</i> , 134 Wn. App. 863, 142 P.3d 1117 (2006)	30
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009)	7, 8, 22
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004).....	27, 28
<i>State v. Ross</i> , 152 Wn.2d 220, 95 P.3d 1225 (2004).....	32
<i>State v. Sadler</i> , 147 Wn. App. 97, 193 P.3d 1108 (2008)	14, 19
<i>State v. Slert</i> , 169 Wn. App 766, 282 P.3d 101 (2012)	24, 25
<i>State v. Smith</i> , 84 Wn.2d 498, 527 P.2d 674 (1974).....	31
<i>State v. Smith</i> , Supreme Court No. 85809-8.....	16
<i>State v. Sublett</i> , 176 Wn.2d 58, 292 P.3d 715 (2012)	14, 15, 16, 18, 19
<i>State v. Swenson</i> , 62 Wn.2d 259, 382 P.2d 614 (1963)	16

Other State Cases

<i>Bridges v. State</i> , 207 So.2d 48, (Florida, 1968).....	17
<i>Fuller v. Lemmons</i> , 167 OK 106, 434 P.2d 145, (1967).....	17
<i>Johnson v. State</i> , 61 Tex. Crim. 635, 136 S.W. 259, (1911).....	17
<i>People v. O'Bryan</i> , 132 Cal. App. 496, 23 P.2d 94 (1933).....	17
<i>State v. Reyes</i> , 99 Ariz. 257, 408 P.2d 400 (1965).....	17
<i>State v. Wolfe</i> , 343 S.W.2d 10, (Missouri, 1961)	17
<i>Territory of Hawaii v. Pierce</i> , 43 Haw. 287 (1959)	17
<i>Westfall v. State</i> , 243 Md. 413, 221 A.2d 646 (1966)	17
<i>Wilson v. State</i> , 244 Ark. 562, 426 S.W.2d 375 (1968).....	17

Federal Cases

Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed.2d 1 (1986) 14

Press-Enterprise Co v. Superior Court, 464 U.S. 501, 104 S.Ct. 819, 78 L. Ed.2d 629 (1984) 19

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 L. Ed.2d 973 (1980) 17, 20

Rovinsky v. McKaskle, 722 F.2d 197, (5th Cir. 1984) 18

Rushen v. Spain, 464 U.S. 114, 104 S.Ct. 453, 78 L. Ed.2d 267 (1983) 23

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 674 (1984) 27, 28

United States v. Gagnon, 470 U.S. 522, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985) 24, 26

United States v. Smith, 787 F.2d 111 (3rd Cir. 1986) 18

Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) 14

Washington Statutes

RCW 10.73.040 31, 32, 33

Constitutional Provisions

Washington Constitution, Article I, § 10 12

Washington Constitution, Article I, § 22 12

U.S. Constitution, Amendment IV 12

U.S. Constitution, Amendment VI 23

Other Rules or Authorities

CrR 3.231, 32, 33

ER 609.....18

RAP 2.56, 7, 22, 29

RAP 9.29

I. ISSUES

- A. Did the trial court violate Counts' public trial right by conducting two sidebar conferences?
- B. Did the trial court violate Counts' right to be present during the sidebar conferences?
- C. Did Counts receive ineffective assistance from his trial counsel?
- D. Did the trial court err when it required Counts to post bond with two sureties to secure his release pending appeal?

II. STATEMENT OF THE CASE

Carrie Dodge returned to Washington State in 2010 and looked up an old high school friend, Travis Counts. RP 24, 26. Ms. Dodge began hanging out with Counts at the end of July 2010 and the two eventually began dating towards the end of the year. RP 27. Ms. Dodge and Counts had a rocky relationship. RP 29. The two had heated, angry verbal arguments that included name calling by both Ms. Dodge and Counts. RP 29, 34-35. Ms. Dodge drank approximately a six-pack of beer daily and used marijuana on average twice a week. RP 23-24. According to Ms. Dodge, Counts also drank and used marijuana. RP 27.

Ms. Dodge moved into Counts' home, located on Boone Road in Lewis County, around Christmastime in 2011. RP 28. Ms. Dodge, Counts, and Counts' 17 year old son, Levi, lived in the

home. RP 29. Counts did not work but paid the mortgage and utilities. RP 30, 141. Ms. Dodge cleaned houses and while she did not pay rent, Ms. Dodge cleaned Counts' home, did the laundry, cooked, and contributed food to the household. RP 34, 141. Ms. Dodge and Counts got into a heated argument and she moved out of the residence on February 14, 2012. RP 30.

Ms. Dodge moved back into Counts' house in May 2012. RP 31-32. According to Ms. Dodge, Counts was grumpy, had irritable bowel syndrome, and would just lay on the couch all day long. RP 33. When Ms. Dodge would leave for cleaning jobs she would get phone calls from Counts asking her where she was at, what was going on, and when would she be home. RP 34. Ms. Dodge described the status of the relationship like being on pins and needles. RP 34. The two continued to argue and Counts told Ms. Dodge to move out and Ms. Dodge agreed to leave. RP 36.

Ms. Dodge moved back into Counts' home a third time. RP 36. Ms. Dodge hoped this time would be different because there would be less tension in the home because Levi had moved out. RP 38. Ms. Dodge lived at Counts' house until July 31, 2012. RP 39.

Counts reportedly had 18 loaded firearms located throughout his home. RP 39-40. The guns were located behind the front door, next to the buffet, next to the sliding glass door, in the dining room, and several other locations throughout the house. RP 40. The guns belonged to Counts, one of Counts' sons, and a friend of Counts. RP 39-40.

On July 31, 2012 Ms. Dodge and Counts began arguing when Ms. Dodge got up that morning. RP 47-49. Ms. Dodge went to work, stopped to pick up groceries, and got gas for the vehicle she was driving. RP 51. Ms. Dodge arrived back home around 4:30 to 5:00 p.m. RP 51. Ms. Dodge and Counts resumed arguing and Ms. Dodge had a couple beers and took a nap. RP 52. When Ms. Dodge woke up Counts was gone and she could not find him. RP 52. When Counts returned home the screaming argument from earlier continued with lots of hateful, colorful language, and name calling. RP 53-54. Counts then grabbed a gun, later determined to be fully operational Ruger mini .14 rifle, and pointed it at Ms. Dodge's head. RP 74, 150-53, 159. Ms. Dodge stated the rifle actually touched her head. RP 74. Counts then extracted the bullet that was in the chamber and Ms. Dodge picked up the bullet and later gave it to Deputy Zimmerman. RP 74-75, 79.

Ms. Dodge was frightened, as she had never seen a look like that in Counts' eyes before, so she called Joanne Brown, one of her former foster parents. RP 22, 76. According to Ms. Brown, she could tell Ms. Dodge was afraid on the phone, "the tone in her voice was more like she was afraid to not say something and wasn't sure what she could get away with saying. They were arguing back and forth. She was telling him to get the gun out of her face." RP 61.

Ultimately the police responded to the Boone Road address. RP 216, 157. The deputies found Counts sitting on the tailgate of his pickup truck. RP 157, 216. The deputies described Counts demeanor as calm, in contrast to Ms. Dodge who was upset. RP 158, 216-18. Counts told Deputy Wallace he had unloaded the mini .14 because Ms. Dodge had experience shooting the rifle. RP 160-61. According to Ms. Dodge she had only fired two or three of Counts' firearms, and the mini .14 was not one of them. 41-42.

Counts acknowledged that he and Ms. Dodge were having an argument and he got up to unload the rifle. RP 263-64. According to Counts he unloaded the rifle because Ms. Dodge was so irate and belligerent and he believed he needed to unload it for his safety. RP 265. Counts acknowledged there were several other

firearms in the house that he did not unload. RP 265. Counts denied pointing the rifle at Ms. Dodge. RP 269.

The State charged Counts with Assault in the Second Degree with special allegations that he was armed with a firearm and he committed the crime against a family or household member (domestic violence). CP 11-13. Counts had his case tried to a jury and was found guilty as charged. RP, CP 41-43. Counts was sentenced to 42 months in prison. CP 44-51. Counts requested an appeal bond, which was granted by the trial court. RP 403-04. The trial court required two sureties for the bond, each in the amount of 150,000 dollars for a total bond of 300,000 dollars. RP 403-04. Counts timely appeals his conviction. CP 56-64.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE TRIAL COURT DID NOT VIOLATE COUNTS' PUBLIC TRIAL RIGHT.

Counts alleges his public trial right was violated on two occasions by the trial court conducting sidebar conferences. Brief of Appellant 5-13. Counts did not preserve this issue for appeal. If Counts is able to raise this issue for the first time on appeal, the right to public trial is not implicated by the trial court holding sidebar

conferences in the manner they were held in this case. The trial court did not violate Counts' right to a public trial.

1. Standard Of Review.

Whether a trial court has violated the public trial right is a question of law and reviewed de novo. *State v. Momah*, 167 Wn.2d 140, 147, 217 P.3d 321 (2009).

2. Counts Did Not Preserve The Error And Therefore Cannot Raise It For The First Time On Appeal.

Counts did not object to either of the sidebar conferences he now raises as issues for the first time on appeal. RP 17,¹ 303-04. Counts has cited to *State v. Easterling* and *State v. Brightman* for the premise that the constitutional right to a public trial is not waived by failing to contemporaneously object to a courtroom closure. Brief of Appellant 6, citing *State v. Easterling*, 157 Wn.2d 167, 176 n.8, 137 P.3d 825 (2006); *State v. Brightman*, 155 Wn.2d 506, 514-15, 122 P.3d 150 (2005). The State argues that this Court must consider RAP 2.5(a)(3) and apply the manifest constitutional error analysis in order for this Court to consider the issue for the first time on appeal.

¹ This is the only reference to the sidebar that is contained within the verbatim report of proceedings. Counts did not request to have voir dire transcribed so there is no record available when the first the sidebar actually occurred.

a. Standard of review.

A claim of a manifest constitutional error is reviewed de novo. *State v. Edwards*, 169 Wn. App. 561, 566, 280 P.3d 1152 (2012).

b. Counts failed to object to the sidebars and the error is not manifest.

An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O'Hara*, 167 Wn.2d at 98. The exception to this rule is “when the claimed error is a manifest error affecting a constitutional right.” *Id.*, citing RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, “an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension.” *Id.* (citations omitted).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional

interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *O'Hara* 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id.* (*citations omitted*). No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id.*

i. Counts cannot meet the burden to show this Court that the sidebar during voir dire was a manifest error.

Counts argues a sidebar that apparently took place during voir dire was a violation of his right to a public trial and requires reversal of his conviction. Brief of Appellant 5-13. While an alleged violation of the right to a public trial would be a constitutional error, the error² in this case is not manifest and therefore, not reviewable on appeal.

² The State maintains, and will argue below, that there was no error as the sidebars were not a violation of Counts' right to a public trial.

Voir dire was not transcribed and there has been no motion filed by Counts to have voir dire transcribed. It is the appellant's duty to provide a record sufficient to review the alleged error. RAP 9.2(b). The contemporaneous record at the time of the sidebar is missing. The record we do have, which took place after the jury was seated but prior to taking testimony, is as follows:

When the court was reading out the charge, it indicated assault in the second degree, domestic violence, while armed with a firearm, and that, of course, clicked in my mind, and I was going to say something after the fact with regard to that, but then Mr. Halstead, when he started addressing the panel, started talking about domestic violence, and that's when I asked if we could approach the court, and we had a little side-bar.

And at that point I believe at that time I asked for - - I know at that time I asked for a mistrial based on those comments, and I would on the record request a mistrial based on the comments from the court and from Mr. Halstead during jury selection with regard to domestic violence.

RP 17. The deputy prosecutor then responded to the request for a mistrial and the request was denied. RP 17-19.

Counts cannot show he was prejudiced by the alleged error in any way. First, the contents of the sidebar discussion were placed upon the record. Second, a jury was seated but testimony had not begun. There was full argument on defense counsel's motion for a mistrial, which was ultimately denied. RP 17-19. This

argument and ruling was on the record and in open court. There is no prejudice, and therefore, the error is not manifest. Because the alleged error is not manifest, Counts may not raise the alleged error for the first time on appeal.

ii. Counts cannot meet the burden to show this Court that the sidebar during Ms. Dodge's rebuttal testimony was a manifest error.

The second sidebar Counts assigns error to was during Ms. Dodge's rebuttal testimony. Brief of Appellant 5-13. Again, as argued above, the alleged error may be of constitutional magnitude but it is not manifest, and therefore may not be raised for the first time on appeal.

Counts assigns error to a sidebar, as ordered by the trial court, during Ms. Dodge's rebuttal testimony. Brief of Appellant 4-13, citing to RP 303-04. The following exchange occurred between the deputy prosecutor and Ms. Dodge:

Q Good afternoon, Carrie. I just have a couple questions for you.

A Okay.

Q One time, if I understand your testimony correctly, the sheriff or law enforcement was called to have you removed from his residence; is that correct?

A Yes.

Q Were there any other times other than the one time?

A No.

Q You're sure about that?

A Promise.

Q Now, do you know whether or not Mr. Counts smoked marijuana while you and he were dating?

A Yes.

Q And how do you know that?

MR. BLAIR: I'm going to object.

A Because --

MR. BLAIR: This is not rebuttal.

MR. HALSTEAD: Absolutely it is.

THE COURT: Well, I'm going to allow some limited inquiry here, so let's see what the answer is.

A Yes.

Q Okay.

A And how do I know? Because we would stand there outside and do it together.

Q Outside where?

A Outside the house.

Q And how often would that happen?

THE COURT: All right. Now may I see counsel at the bench, please.

(SIDE-BAR CONFERENCE.)

Q Did Mr. Counts ever drive you to your jobs?

A Once in a while.

RP 303-04. There was no discussion on the record after the sidebar to memorialize what was discussed. RP 304. Regardless, it is obvious from the deputy prosecutor's abandonment of his line of questioning regarding Counts' marijuana usage that he was told by the trial court that any further inquiry regarding Counts' marijuana usage would not be allowed and to move on. See RP 304. This is clearly demonstrated by the deputy prosecutor not demanding an answer to his question, "[a]nd how often would that happen?" RP 304. Counts cannot show he was prejudiced by this sidebar and therefore has not met the burden of showing the error was manifest. Counts cannot raise the alleged error for the first time in this appeal.

3. The Public Trial Right Is Not Implicated By Every Matter Or Discussion Taken Up Between The Trial Court and The Parties.

The United States Constitution and the Washington State Constitution guarantees that a criminal defendant has the right to a public trial. U.S. Const. amend. IV; Const. art. I, § 22. The Washington State Constitution also requires that "[j]ustice in all

cases shall be administered openly and without undue delay.” Const. art. I, § 10. A court must weigh the five *Bone-Club* factors prior to closing a courtroom in a criminal hearing or trial. *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). The five *Bone-Club* factors are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than the accused’s right to a fair trial, the proponent must show a “serious imminent threat” to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59. A criminal defendant’s public trial rights are violated if there is a closed proceeding that is subject to the public trial right and the trial court fails to conduct the *Bone-Club* inquiry. *Brightman*, 155 Wn.2d at 515-16.

The public trial requirement is primarily for the benefit of the accused. *Momah*, 167 Wn.2d at 148. “[T]he right to a public trial serves to ensure a fair trial, to remind the prosecutor and judge of

their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.” *State v. Sublett*, 176 Wn.2d 58, 72, 292 P.3d 715 (2012) (citations omitted). The right to a public trial is closely linked to the defendant’s right to be present during critical phases of the trial. *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008) (citations omitted).

The Supreme Court adopted the use of the experience and logic test to determine if a public trial right violation occurred. *Sublett*, 176 Wn.2d at 72-78. The Supreme Court adopted this rule, formulated by the United States Supreme Court, “to determine whether the core values of the public trial rights are implicated.” *Id.* at 73.

The first part of the test, the experience prong, asks whether the place and process have historically been open to the press and general public. The logic prong asks ‘whether public access plays a significant role in the functioning of the particular process in question. If the answer to both is yes, the public trial attaches and the *Waller*^[3] or *Bone-Club* factors must be considered before the proceeding may be closed to the public.

Id. at 73 (internal quotations omitted), citing *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7-8, 106 S. Ct. 2735, 92 L. Ed.2d 1 (1986). The reviewing court is also required to “consider whether

³ *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

openness will enhance both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” *Id.* at 75 (citations and internal quotations omitted). The appellant bears the burden of establishing a violation under this test. *In re Yates*, 177 Wn.2d 1, 29, 296 P.3d 872 (2013).

In *Sublett*, the Supreme Court considered whether the right to a public trial was violated when the trial court answered a jury question in chambers with only the judge, deputy prosecutor and defense counsel present. *Id.* at 70, 75-78. Employing the experience and logic test to determine, the Court asked if jury questions regarding jury instructions had historically been open to the general public. *Id.* at 75. The Court analyzed this question by looking at proceedings for jury instructions in general, finding that jury instruction proceedings have not historically been required to be conducted in an open courtroom and therefore the public trial right was not implicated by the answering of the jury question in chambers. *Id.* at 75-78. The Court further explained:

None of the values served by public trial right is violated under the facts of this case. No witnesses are involved at this stage, no testimony is involved, and no risk of perjury exists. The appearance of fairness is satisfied by having the questions, answer, and any objections placed on the record pursuant to CrR 6.15... This is not a proceeding so similar to the trial itself that the same rights attach, such as the right to

appear, to cross-examine witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence.

Id. at 77.

In the instant case, this Court should find there is no showing under the experience and logic test that sidebar conferences violate the right to a public trial.⁴ The State is unaware of any authority to support a claim that a sidebar between the judge and attorneys, which cannot be heard by the jury or the public, violates the right to a public trial. Further, the sidebar that took place during voir dire enjoys an advantage over many sidebars, namely that the contents of the conference was put on the record and preserved for public and appellate review. See *State v. Koloske*, 100 Wn.2d 889, 896, 676 P.2d 456 (1984).

When examining the experience prong, it is apparent that the use of sidebar conferences, outside the hearing of the jury and public, to resolve evidentiary objections, housekeeping matters, and other issues, is a longstanding practice in Washington and the United States. In *State v. Swenson*, 62 Wn.2d 259, 272, 382 P.2d 614 (1963), the trial record included a sidebar conference to

⁴ The State would note that there are several open courts cases in front of the Supreme Court Fall session 2013 and at least one case regarding the public trial right and sidebars, *State v. Smith*, Supreme Court No. 85809-8, which will be argued October 15, 2013.

address concerns about a witness' comfort while testifying. Similarly, in *Popoff v. Mott*, 14 Wn.2d 1, 9, 126 P.2d 597 (1942), the trial record describes a sidebar during voir dire on whether to excuse a juror for cause. Such proceedings are regularly described in trials from other States as well. See *People v. O'Bryan*, 132 Cal. App. 496, 23 P.2d 94, 97 (1933) (evidentiary objection); *Johnson v. State*, 61 Tex. Crim. 635, 136 S.W. 259, 259 (1911) (scope of cross examination of defendant); *Bridges v. State*, 207 So.2d 48, 49 (Florida, 1968) (jury instructions); *Wilson v. State*, 244 Ark. 562, 426 S.W.2d 375, 377 (1968) (defense mistrial motion); *Fuller v. Lemmons*, 167 OK 106, 434 P.2d 145, 146 (1967) (motion to strike testimony); *Westfall v. State*, 243 Md. 413, 221 A.2d 646, 652 (1966) (evidentiary objection); *State v. Reyes*, 99 Ariz. 257, 408 P.2d 400, 404 (1965) (scope of impeachment); *State v. Wolfe*, 343 S.W.2d 10, 14 (Missouri, 1961) (objection during voir dire); *Territory of Hawaii v. Pierce*, 43 Haw. 287, 288 (1959) (exceptions to jury instructions).

The federal courts have recognized that the public has no right to attend or listen to sidebar conferences. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 598 n. 23, 100 S.Ct. 2814, 65 L. Ed.2d 973 (1980); Justice Brennan recognized in his

concurrence that “when engaging in interchanges at the bench, the trial judge is not required to allow public or press intrusion upon the huddle.” See also *United States v. Smith*, 787 F.2d 111 (3rd Cir. 1986); *Rovinsky v. McKaskle*, 722 F.2d 197, 201 (5th Cir. 1984).

The Washington State Supreme Court has long recognized that sidebars are not proceedings to which the defendant or the public must be granted access. This Court considered an argument that the defendant had a right to be present at numerous conferences between the lawyers and the judge, including a pretrial hearing in which the court deferred ruling on an ER 609 motion, granted a motion to allow a haircut and trial clothing for the defendant, settled on the wording of the jury questionnaires and the pretrial instructions, and set a time limit on the testing of certain evidence *In re Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994); see also *Sublett*, 176 Wn.2d at 140 J. Stephens concurring (approving use of sidebars to address matters outside the jury’s presence.)

The Court also considered whether defendant had the right to be present during a proceeding where the court announced its rulings on evidentiary matters which had previously been argued, ruled that the jurors could take notes, and directed the State to provide the defense with summaries of its witnesses’ testimony. *Id.*

In rejecting the claim a criminal defendant had a right to be present at these purely legal discussions between the court and counsel, this Court held:

The core of the constitutional right to be present is the right to be present when evidence is being presented. Beyond that, the defendant has a right to be present at a proceeding whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.... The defendant therefore does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters, at least where those matters do not require a resolution of disputed facts.

Id (citations and internal quotations omitted).

The public's right to be present is directly tied to the defendant's right to be present:

The public trial right applies to the evidentiary phases of the trial, and to other adversary proceedings. . . . The right to public trial is linked to the defendant's constitutional right to be present during the critical phases of trial; thus, a defendant has a right to an open court whenever evidence is taken, during a suppression hearing, ... during voir dire, and during the jury selection process. . .

Sadler, 147 Wn. App. at 114 (citations and internal quotations omitted). Notably, the United States Supreme Court has also noted the connection between the rights of defendants and the public to be present. *Press-Enterprise Co v. Superior Court*, 464 U.S. 501,

508, 104 S.Ct. 819, 78 L. Ed.2d 629 (1984). See also *Sublett*, 176 Wn.2d at 95, C.J. Madsen concurring.

Thus, sidebar conferences have long been used to resolve evidentiary objections and other issues at trial. The long held understanding is that the public and press have no right to be present at such proceedings. See *Richmond*, 448 U.S. at 598. Given this, Counts cannot establish that experience shows sidebars “have historically been open to the press and general public.” *Sublett*, 176 Wn.2d at 73. As failure on either prong is fatal to the Counts’ claim, he cannot establish the public trial right attaches in this situation. *Id.*

Addressing, for the purposes of argument, the logic prong, the question is whether public access “plays a significant positive role in the functioning of the particular process in question.” *Id.* at 73. Here, as with jury questions, it is unclear how the public being present during either of the sidebar conferences would play any positive role. The public would clearly play no role in the mistrial argument advanced to the court. Nor would the public play a role in the trial court’s warning to counsel to cease further questioning on a topic. The sidebars here were done in open court with the jury and members of the public present, but unable to hear. Counts cannot

show under the logic prong that the public trial right attaches to these proceedings. Since neither prong of the test can be met, there is no public trial violation and Counts' conviction should be affirmed.

4. The Courtroom Was Not Closed.

The State disputes Counts' claim that the courtroom was closed by the trial judge and the attorneys engaged in sidebar conferences. Brief of Appellant 9-13. The courtroom remained open to the public. If there was no closure of the courtroom, the right to a public trial is not implicated. Here, even if the public trial right were to attach to sidebar conferences, despite the wealth of authority and tradition otherwise, such a process does not amount to a closure of the courtroom that would require a *Boneclub* analysis. A closure occurs "when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). Conducting a sidebar conference plainly does not qualify as a closure under this standard. See also *State v. Gregory*, 158 Wn.2d 759, 815-16, 147 P.3d 1201 (2006) (distinction between full closures of a courtroom and acts not amounting to a full closure).

B. THE TRIAL COURT DID NOT VIOLATE COUNTS' RIGHT TO BE PRESENT FOR ALL CRITICAL STAGES OF THE PROCEEDINGS BY CONDUCTING TWO SIDEBARS.

Counts is claiming his right to be present during a critical stage of the proceedings was violated when the trial court held two sidebars. Brief of Appellant 13-16. Neither sidebar was conducted outside of Counts' presence, as he was in the courtroom during both sidebars. There was no violation of Counts' right to be present during all critical stages of the proceedings.

1. Standard Of Review

A claim of a violation of the right to be present during all critical stages of the proceedings is reviewed de novo. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011).

2. Counts Did Not Preserve The Error And Therefore Cannot Raise It For The First Time On Appeal.

Counts did not object to either of the sidebar conferences he now raises as issues for the first time on appeal. RP 17, 303-04. As argued above in the public trial rights portion, the State maintains that Counts cannot raise the alleged violation of his right to be present for the first time on review absent his showing that the error was a manifest constitutional error. See RAP 2.5(a)(3); *O'Hara*, 167 Wn.2d 97-98. While an alleged error regarding the right to presence would be a constitutional error, Counts has not shown how he was

prejudiced by the alleged errors in this case and therefore the alleged errors are not manifest. Counts was present and in the courtroom during both sidebar conferences. RP 17, 303-04. Counts does not explain what advice or suggestions he could have possibly gave his defense counsel in regards to either sidebar conferences, both which dealt with legal matters and legal arguments. Counts cannot meet his burden to show he was prejudiced and he therefore cannot raise the right to presence issue for the first time on appeal.

3. Counts Was Present When The Sidebars Occurred.

A criminal defendant has the right to be present during all critical stages of his or her trial. *Irby*, 170 Wn.2d at 880, citing *Rushen v. Spain*, 464 U.S. 114, 117, 104 S.Ct. 453, 78 L. Ed.2d 267 (1983). This right is not only rooted in the confrontation clause of the Sixth Amendment but also the Due Process Clause. *Id.* “A defendant has a due process right to be present at a proceeding whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge....The presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.” *United States v. Gagnon*, 470 U.S. 522, 526,

105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985) (citations and internal quotations omitted).

A defendant has no “right to be present during in-chambers or bench conferences between the court and counsel on legal matters . . . [that] do not require a resolution of disputed facts.” *In re Lord*, 123 Wn.2d at 306. In *Lord*, the defendant challenged his exclusion from several sidebar conferences and in-chambers proceedings regarding the wording of the jury questionnaire, evidentiary rulings, and the like. The court ruled that Lord had no right to be present at these proceedings, which “involved only discussion between the court and counsel on matters of law.” *Id.* at 307.

Counts likens the situation in his case to *Irby* and *State v. Slerf*, 169 Wn. App 766, 282 P.3d 101 (2012).⁵ In *Irby*, the court and parties dismissed jurors by email outside of court, without any input from the defendant or any formal court procedure whatsoever. *Irby*, 170 Wn.2d at 881-83. *Irby* distinguished the emails from sidebar or in-chambers legal discussions, of which it approved. *Id.* at 881-82; see also *In re Lord*, 123 Wn.2d at 306-07. The Supreme Court balked at a “novel proceeding” in which jurors were

⁵ The Supreme Court has accepted review of *State v. Slerf* and oral argument is set for October 17, 2013.

dismissed by email, when court was not in session, and totally without the defendant's input. *Id.* at 881-83. In *Skert* this Court held that an in-chambers conference between the judge and counsel in which four jurors were dismissed for case specific reasons violated Skert's right to be present. *Skert*, 169 Wn. App. at 755. This Court noted that the record supported that only counsel and the judge were present when this in-chambers conference occurred. *Id.*

The facts of *Irby* and *Skert* are starkly different from the facts in this case. First, Counts calls the in-chambers conference in *Skert* and the email correspondence in *Irby* sidebars, which is a classification that neither one falls into. Brief of Appellant 15. The Supreme Court in *Irby* states that the email correspondence was not a sidebar, or even similar to a sidebar. *Irby*, 170 Wn.2d at 882. Similarly, in *Skert*, an in-chambers conference which necessarily occurs outside of the courtroom, behind closed doors, is not a sidebar.

Both sidebars in this case were conducted during the trial proceedings, in the courtroom, in Counts' presence. RP 74, 303-04.⁶ Counts was able to consult with his trial counsel before and

⁶ The State acknowledges that it is assuming Counts was present during the entire voir dire proceedings because the State does not have the transcript to verify he was not removed from the courtroom.

after the sidebar conferences and able to make any necessary objections, exceptions or other business regarding the sidebars on the record if necessary. Counts does not have the right or expectation to be in the middle of a legal argument regarding a mistrial, or an admonishment by the judge to the deputy prosecutor to stop a certain line of questioning, as his presence in the huddle would not aid in his ability to fully defend against the charged offense. *Gagnon*, 470 U.S. at 526; *Lord*, 123 Wn.2d at 306-07. For Counts to now argue that because he was not up at the bench he did not have an opportunity to give advice or suggestions to his attorney regarding the issues raised during the sidebars is a gross misrepresentation of the record. The record is silent as to what Counts and his counsel may have discussed but Counts was in the courtroom and available to discuss any matters with his attorney. RP 74, 303-04.

The sidebars occurred while Counts was present in the courtroom. None of the sidebars occurred outside of the courtroom. Therefore, Counts' right to be present for all critical phases of the trial was not violated and this Court should affirm his conviction.

C. COUNTS RECEIVED EFFECTIVE ASSISTANCE FROM HIS TRIAL COUNSEL.

Counts argues his trial counsel was ineffective for failing to properly preserve the record when he failed to put the two sidebar conferences on the record. Brief of Appellant 17. Counts' trial attorney provided competent and effective legal counsel. Counts' ineffective assistance claim therefore fails.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland*, 127 Wn.2d at 335 (citations omitted).

2. Counts' Trial Counsel Was Not Ineffective In Regards To Preserving The Record Of The Sidebar Conferences.

To prevail on an ineffective assistance of counsel claim Counts must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v.*

McFarland, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, citing *Strickland v. Washington*, 466 U.S. at 694.

Counts argues that his attorney was ineffective for failing to make a proper record of the sidebars to preserve any issues for appeal. Brief of Appellant 17-23. First, his attorney did preserve the sidebar from voir dire, as evidenced by the record after the motions in limine. RP 17. While the preservation may not have been contemporaneous, it was shortly after, the jury had been picked but

no evidence had been presented. RP 1-17. The record was clear that Counts' trial counsel requested a mistrial based upon the use of the words "domestic violence." RP 17. It is also clear, because the case was still continuing, that the motion had been denied. RP 17. Further, Counts' attorney once again argued the motion, this time on the record, the deputy prosecutor responded, and the judge denied the motion. RP 17-19. The issue raised in the sidebar was preserved and the State cannot see how Counts can now argue otherwise. There was no deficient performance for failing to make a record of the voir dire sidebar because a record was made and the issue is preserved for appeal.

The second sidebar at issue, the one that occurred during direct of Ms. Dodge's rebuttal testimony. RP 303-04. While Counts is correct, that no record was made of the sidebar discussion, this deficiency was not prejudicial. The State acknowledges an attorney should make an adequate record of any off the record discussions to obtain effective review of the issues raised during those discussions. *State v. Bennett*, 168 Wn. App. 197, 206, 275 P.3d 1224 (2012). It is true that failure to adequately make a record could potentially affect the ability of a defendant to seek review of an issue. RAP 2.5. Therefore, the State would concede it was

deficient for Counts' trial counsel to not make a record of the second sidebar discussion.

Deficient performance alone is not enough for Counts to prevail on an ineffective assistance of counsel claim. Counts must show he was prejudiced by his trial attorney's deficient performance, which he cannot do in this case.

First, the appropriate "remedy for defects in the record is to supplement the record with affidavits regarding the missing information from either the trial judge or trial counsel." *State v. Nguyen*, 134 Wn. App. 863, 872, 142 P.3d 1117 (2006). Counts has not requested to supplement the record to correct any such defect.

Second, Counts exaggerates in his unconstitutional waiver argument, stating, "Without a complete record of proceedings, appellate counsel cannot determine what occurred during the **numerous sidebar conversations**, much less raise issues related to those sidebar conversations." Brief of Appellant 22 (emphasis added). The State is unsure what numerous sidebar conversations Counts is now referring to as he only asserted issues with two sidebars and one of those sidebar conversations had a record of what was discussed. See RP 17. Finally, to state that there could

even potentially be an appellate issue with the trial court limiting the deputy prosecutor's examination of a rebuttal witness, who was testifying about Counts' marijuana usage, is ridiculous. See RP 303-04. The record makes it clear what occurred by the questions asked by the deputy prosecutor, the objections raised by Counts' trial attorney, the timing of the judge's request to approach, and the deputy prosecutor's abandonment of the line of questioning when returning from the sidebar. RP 303-04. Upon this record, Counts has not shown he was prejudiced by his attorney's deficient performance. Therefore, Counts' ineffective assistance of counsel argument fails and his conviction should be affirmed.

D. THE STATE CONCEDES THAT THE TRIAL COURT APPLIED THE WRONG LEGAL STANDARD REGARDING THE GRANTING OF AN APPEAL BOND AND THEREFORE ABUSED ITS DISCRETION.

A trial court abuses its discretion when it bases its decision on an error of law. *Farmer v. Farmer*, 172 Wn.2d 616, 624, 259 P.3d 256 (2011). Counts argues that the trial court abused its discretion when it applied RCW 10.73.040 over CrR 3.2(h) and required Counts to use two sureties to post his appeal bond. Brief of Appellant 23-26. Counts cites to *State v. Smith*, 84 Wn.2d 498, 527 P.2d 674 (1974), for the premise that to the extent that RCW

10.73.040 conflicts with CrR 3.2(h) the court rule controls. Brief of Appellant 25. The State agrees with this analysis.

It is clear from the record the trial court believed it was required to follow the statute. RP 402-04. The decision to even allow a bond to be posted was guided by this mistaken understanding as evidenced by the judge's comments. RP 402-03. The court rule contains no requirement that two sureties be used, although the State would argue that it is within the trial courts discretion to order two sureties to be used. See CrR 3.2(h).

The State agrees that a remedy would be remand back for reconsideration on the appeal bond. That being said, it is clear that the issue will be moot upon a decision in this case because this court will either affirm the conviction, ending the appeal, or reverse and remand for retrial at which time Counts will be entitled to argue bail pending his new trial. An issue on appeal is moot if the reviewing court can no longer provide the party effective relief. *State v. Harris*, 148 Wn. App. 22, 26, 197 P.3d 1206 (2006), *citing State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004). An issue that is moot will not be considered unless "it involves matters of continuing and substantial public interest." *In re Eaton*, 110 Wn.2d 892, 895, 757 P.3d 961 (1988).

V. CONCLUSION

The public trial right was not violated and Counts was present for every critical stage of the proceedings. Counts' trial attorney was not ineffective. The state concedes that the trial court erred when it mistakenly believed that RCW 10.73.040 controlled release of a person pending an appeal over CrR 3.2(h). The State is however, unsure of what possible remedy this Court would be able to provide to Counts as a decision on this appeal would render the issue moot. For the foregoing reasons, this Court should affirm Counts' convictions.

RESPECTFULLY submitted this 11th day of October, 2013.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

LEWIS COUNTY PROSECUTOR

October 11, 2013 - 5:00 PM

Transmittal Letter

Document Uploaded: 446502-Respondent's Brief.pdf

Case Name: State of Washington vs. Travis B. Counts

Court of Appeals Case Number: 44650-2

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: Respondent's

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: Teresa L Bryant - Email: teri.bryant@lewiscountywa.gov

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

liseellnerlaw@comcast.net