

NO. 45749-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

BRYAN PATRICK BEST,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR

The Honorable David L. Edwards, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence failed to establish the fair market value of stolen property at greater than \$750.

2. The trial court violated Mr. Best's constitutional right to a public trial by taking peremptory challenges at sidebar.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Mr. Best's conviction for Possession of Stolen Property in the Second Degree should be dismissed when the State failed to prove the fair market value of the stolen property was greater than \$750?

2. During jury selection, the prosecutor and Mr. Best made peremptory challenges and dismissed jurors at a private sidebar. As the trial court did not analyze the *Bone-Club*¹ factors before conducting this important portion of jury selection in private, did the court violate Mr. Best's constitutional right to a public trial?

C. STATEMENT OF THE CASE

On January 4, 2013, William Dotson returned to his Elma home to find that his house, barn, and two outbuildings had been broken into. RP Trial² 55-57. Property items were strewn throughout the home, the other buildings, and the yard. RP Trial 55, 58. Grays Harbor County Sheriff's

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

² "RP Trial" refers to the verbatim report of proceedings for the November 13, 2013 trial.

Deputy Richard Ramirez responded to Mr. Dotson's 911 call. RP Trial 80-82. While Deputy Ramirez was at the home conducting an investigation, Mr. Dotson's wife, Amy Sakson, arrived home. RP Trial 71-72. Together, the couple put together a list of missing property and provided it to Deputy Ramirez. RP Trial 83.

A few hours later, around 1 a.m., Elizabeth Miller was returning home from work. RP Trial 51. She noticed a truck being pushed by four or five people and thought it was strange. RP Trial 52. She called 911. RP Trial 53.

Deputy Ramirez responded to the call. RP Trial 86. A preliminary review of the truck's open bed informed Deputy Ramirez the truck held much of the property stolen from the Dotson-Sakson home. RP Trial 87.

Bryan Best stood at the truck's driver door. RP Trial 87. He seemed extremely nervous. RP Trial 87. He told Deputy Ramirez he owned the truck. He said most of the property in the truck belonged to his deceased grandfather. He had taken it from the grandfather's storage unit in Westport. RP Trial 88. He could not provide Deputy Ramirez with the specific location of the storage unit and denied having a key to the unit. RP Trial 88.

Mr. Dotson and Ms. Sakson came to look at the truck's contents. They recognized much of what was in the truck as their stolen property. RP Trial 62-63, 74, 91.

Deputy Ramirez arrested Mr. Best. RP Trial 91. Mr. Best was taken to jail. RP Trial 91. Mr. Best told another deputy he would like to speak to Deputy Ramirez again. RP Trial 93. Deputy Ramirez obliged Mr. Best and talked to him at the jail. RP Trial 93. Deputy Ramirez interviewed Mr. Best and wrote a statement. RP Trial 94-97. Mr. Best signed the statement. RP Trial 94. Mr. Best explained that Matthew Smith and Suzy Rin offered to get him high in exchange for him driving them around. Smith directed him to a rural home near Elma and had him park some distance away. RP Trial 94. Smith left the truck leaving Mr. Best and Rin behind. About an hour later, Smith called Mr. Best and told him to drive to a specific house and park behind the barn. RP Trial 95. When he arrived, Smith had property stacked up and ready to load into the truck. Mr. Best helped Smith load the property. Mr. Best saw Smith go into the house and come out with a box of frozen food. The box collapsed. Smith left the food in the yard and they departed. RP Trial 95.

The State charged Mr. Best by an amended information with Residential Burglary³ and Possession of Stolen Property in the Second Degree.⁴ CP 1-2. A jury heard the case. RP Trial 4-128. During voir dire, peremptory challenges were taken privately at sidebar without objection. RP Trial 42-43.

Mr. Dotson and Ms. Sakson described the missing property at trial:

- a “very inexpensive” stereo, RP Trial 64
- a Dyson ball vacuum cleaner that had been consistently used since its purchase two years earlier for \$399 online, RP Trial 74-75
- lawn ornaments consisting of a bronze frog with an umbrella and hand blown glass mushrooms, purchased for \$30 and \$40-\$45 respectively, RP Trial 77
- two “not real expensive” television sets, one with an approximate 28-30” screen, and one with an approximate 20” screen, purchased three to four years earlier, about eight months apart, for roughly \$400 and \$200-\$250 respectively, one of which was a flat screen, RP Trial 65, 69-70, 88
- an old Coke bottle collection, RP Trial 60

³ RCW 9A.52.025

⁴ RCW 9A.56.160

- two laptop computers, specifically a Dell Entertainment with a 15” screen purchased in 2008 for about \$2,000, and an HP with a 14” screen purchased in February 2010 for about \$1,400, RP Trial 72-73, 76
- some old fishing reels and lures, RP Trial 61
- two sets of golf clubs purchased ten years earlier and currently stored in their barn, about \$900 was paid for one set consisting of a Calloway golf club bag with graphite shaft Cleveland clubs, RP Trial 60, 64, 68
- a jewelry armoire with no jewelry in it, RP Trial 73

All the missing items were returned except the two laptops, RP Trial 63.

Deputy Ramirez took photos of the property in the truck bed. The jurors saw pictures of the Dyson vacuum, the golf clubs and golf bag, the inexpensive stereo, the frog lawn ornament, the two televisions, and the Coke bottle collection. RP Trial 63-69.

The couple had since purchased a new television for \$350 and paid \$850-900 for a new laptop. RP Trial 78.

Mr. Best did not testify and presented no witnesses. RP Trial 108. At the conclusion of the evidence, Mr. Best argued the possession of

stolen property should be dismissed as the State failed to prove value over \$750. RP Trial 109. The court denied the motion. RP Trial 115.

The court instructed the jury they could also consider whether Mr. Best was guilty of the lesser charge of possession of stolen property in the third degree. Supplemental Designation of Clerk's Paper's, Court's Instructions to the Jury, sub. nom 73 (Instructions Nos. 12 and 13). In closing, Mr. Best argued he was not guilty of the burglary and asked the jury to convict him only of possession of stolen property in the third degree.

The court instructed the jury as to the legal definition of value in Instruction 9.

Value means the market value of the property at the time and in the approximate area of the act.

Supp. DCP, Court's Instructions to the Jury.

The jury found Mr. Best guilty as charged. CP 3, 4.

At sentencing, the court again discussed the value of the stolen property and held the evidence sufficient to support value over \$750. RP Sentencing⁵ 2-4. The court imposed a high-end 12 month sentence. RP Sentencing 8; CP 6.

⁵ "RP Sentencing" refers to the report of proceedings prepared for the December 2, 2013, sentencing hearing.

Best now appeals all portions of his judgment and sentence. CP 13-14.

D. ARGUMENT

1. THE EVIDENCE FAILED TO PROVE THE VALUE OF THE STOLEN PROPERTY EXCEEDED \$750.

The State failed to present evidence that the stolen property had a combined value of greater than \$750. Mr. Best's conviction for Possessing Stolen Property in the Second Degree must be dismissed.

The standard for determining sufficiency of the evidence on appeal is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In challenging the sufficiency of the evidence, the defendant admits the truth of the State's evidence and all inferences that can reasonably be drawn from it. *State v. McNeal*, 145 Wn.2d 352, 360, 37 P.3d 280 (2002). Circumstantial and direct evidence have equal weight. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). The State bears the burden of proving all the elements of the crime charged beyond a reasonable doubt. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004); *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983).

To prove Mr. Best guilty of possessing stolen property in the second degree, the State was burdened with proving the value of the Dotson-Sakson stolen property was greater than \$750. RCW 9A.56.160. “Value” for the purpose of possessing stolen property means the market value of the property at the time and in the approximate area of the possession. RCW 9A.56.010(21); See also Jury Instruction 9. Market value is the price that “a well-informed buyer would pay to a well-informed seller.” *State v. Longshore*, 141 Wn.2d 414, 429, 5 P.3d 1256 (2000) (quoting *State v. Kleist*, 126 Wn.2d 432, 435, 895 P.2d 398 (1995)). Market value is not based on “the value thereof to any particular person,” but rather on an objective standard. *Kleist*, 126 Wn.2d at 438.

In *State v. Ehrhardt*, 167 Wn. App. 934, 945, 276 P.3d 332 (2012), this court reversed a second degree theft conviction because the State presented insufficient evidence that the fair market value for stolen property exceeded \$750. On one hand, the State did present adequately detailed information as to the fair market value of an air compressor and a pressure washer. The air compressor was purchased five years earlier for \$100 but had never been used and was in new condition. The pressure washer was purchased within the year for \$199. In contrast, original purchase prices were an inapplicable measure for rotary hammers and nail

guns used in the construction trade for three years. The State failed to present the jury with a used tool fair market value.

Here, as in *Ehrhardt*, the State presented no testimony on the current market value of the used stolen property. The Dyson vacuum was two years old, had been used for those two years, and no evidence told of its condition when stolen. The two televisions had not been expensive sets when purchased, were three to four years old, and their current condition went unexplained. The golf clubs were at least 10 years old and had been stored in a barn. No evidence told of their current condition or value. Computer technology changes at lightning speed. The laptops were three and five years old. No evidence told of either computer's condition or current market value among laptop users. Evidence of retail price alone may be sufficient to establish value. *Longshore*, 141 Wn.2d at 430. Evidence of the price paid for an item is entitled to great weight. *State v. Hermann*, 138 Wn. App. 596, 602, 158 P.3d 96 (2007). But such evidence must not be too remote in time. *State v. Melrose*, 2 Wn. App. 824, 831, 470 P.2d 552 (1970). Here the prices paid for the computers, the televisions, and the gold clubs are all too remote in time to establish current market value.

Additionally, evidence other than market value, such as replacement cost, is inadmissible unless it is first shown that the property

has no market value. *Ehrhardt*, 167 Wn. App. at 945. As such, the cost to buy a new replacement television and laptop is irrelevant as the State never produced evidence that the stolen televisions and laptops had no market value.

Finally, no effort was made to establish any value or condition of the “very inexpensive” stereo, the Coke bottle collection, the old fishing reels and lures, and the empty jewelry armoire. It was unclear if there is any current market value for a weathered bronze frog and glass mushrooms. Value need not be proved by direct evidence. *Hermann*, 138 Wn. App. at 602. The jury may draw reasonable inferences from the evidence, including changes in the condition of the property that affect its value. *Melrose*, 2 Wn. App. at 831. But the inferences the jury is allowed to draw must still be based on some evidence of the property’s current condition. Pictures taken to document the recovery of an item are generally not so specific as to document the current condition of the recovered property.

Because the State failed to establish a value greater than \$750 for the Dotson-Sakson property, Mr. Best’s possession of stolen property conviction must be reversed with instructions to dismiss. To do otherwise would violate Double Jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United

States Constitution “forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding”), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

2. THE TRIAL COURT VIOLATED MR. BEST’S RIGHT TO A PUBLIC TRIAL BY CONDUCTING PEREMPTORY CHALLENGES AT SIDEBAR.

The trial court heard peremptory challenges at the bench in sidebar. This private conference, intentionally made unavailable to the public, denied Mr. Best his constitutionally guaranteed right to a public trial. Consequently, Mr. Best’s convictions should be reversed and his case remanded for a new trial.⁶

The Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington Constitution guarantee the accused a public trial by an impartial jury.⁷ *Pressley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 724, 175 L.Ed.2d 675 (2010); *Bone-Club*, 128 Wn.2d at 261-62. Additionally, Article I, Section 10 of the Washington Constitution provides that “[j]ustice in all cases shall be administered openly, and

⁶ This argument is made in the alternative especially as to the possession of stolen property conviction. That charge should be dismissed with prejudice for lack of evidence. If the court does not dismiss for insufficiency, Mr. Best asks that both charges be reversed and remanded on the public trial error.

⁷ The Sixth Amendment provides in pertinent part that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury....” Article I, section 22 provides that “[i]n criminal prosecutions the accused shall have the right ... to a speedy public trial by an impartial jury....”

without unnecessary delay.” This later provision gives the public and the press a right to open and accessible court proceedings. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

The public trial requirement is for the benefit of the accused; it allows the public to ensure the accused is tried fairly and to keep the court and the parties keenly aware of their responsibilities and the importance of their roles. *Bone-Club*, 128 Wn.2d at 259. As the United States Supreme Court observed:

The open trial...plays as important a role in the administration of justice today as it did for centuries before our separation from England....Openness...enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence.

Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). The right to a public trial includes “circumstances in which the public’s mere presence passively contributes to the fairness of the proceedings, such as determining deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny.” *State v. Slett*, 169 Wn. App. 766, 772, 282 P.3d 101 (2012), *review granted in*

part, 176 Wn.2d 1031 (2013)⁸ (quoting *State v. Bennett*, 168 Wn. App. 197, 202, 275 P.3d 1224 (2012)).

While the right to a public trial is not absolute, a trial court may restrict the right only “under the most unusual circumstances.” *Bone-Club*, 128 Wn.2d at 259. Before a trial judge can close any part of a trial, it must first apply on the record the five factors set forth in *Bone-Club*.⁹ *In re Personal Restraint of Orange*, 152 Wn.2d 795, 806-07, 809, 100 P.3d 291 (2004). A violation is presumed prejudicial and is not subject to harmless error analysis. *State v. Wise*, 176 Wn.2d 1, 16-19, 288 P.3d 1113 (2012); *State v. Strode*, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); *State v. Esterling*, 157 Wn.2d 167, 181, 137 P.3d 825 (2006); *Orange*, 152 Wn.2d at 814.

⁸ In *Skert*, this Court reversed Skert’s convictions, holding that an in-chambers conference at which various jurors were dismissed based on their answers to a jury questionnaire violated Skert’s right to a public trial. 169 Wn. App. at 778-79.

⁹ The *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 an accused’s right to a fair trial, the proponent must show a ‘serious and 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.” (quoting *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 210–11, 848 P.2d 1258 (1993)).

The accused's right to a public trial under both the federal and the state constitutions applies to voir dire. *Pressley*, 130 S. Ct. at 724; *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009). Washington courts have repeatedly held that jury selection conducted in chambers violates the right to a public trial. See, e.g., *Strode*, 167 Wn.2d at 226-29 (Alexander, C.J., lead opinion); 167 Wn.2d at 231-36 (Fairhurst, J., concurring); *State v. Paumier*, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012); *State v. Heath*, 150 Wn. App. 121, 125-29, 206 P.3d 712 (2009); *State v. Frawley*, 140 Wn. App. 713, 718-21, 167 P.3d 593 (2007).

The right to challenge a potential juror via a peremptory challenge is an integral part of a "fair trial." *People v. Rhodus*, 870 P.2d 470, 474 (Colo. 1994). Thus, the constitutional public trial right must extend to that portion of criminal proceedings as well. *People v. Harris*, 10 Cal.App.4th 672, 684, 12 Cal.Rptr.2d 758 (1992) (holding peremptory challenges conducted as sidebar violate public trial right, even when such proceedings are reported). The trial court violated Mr. Best's constitutional right to a public trial by taking peremptory challenges during a private sidebar. Because the error is structural, prejudice is presumed, and thus reversal is required. *Strode*, 167 Wn.2d at 231.

Division Three of this court, in *State v. Love*, 176 Wn. App. 911, 309 P.3d 1209 (2013), reached a contrary result, as has this division in

State v. Dunn, 180 Wn. App. 570, 321 P.3d 1283 (2014) and *State v. Webb*, No. 43179-3-II, WL 4212735 at 1 (August 26, 2014).

In *Love*, the trial court heard for cause challenges at sidebar. Like Mr. Best, defendant Love argued the sidebar voir dire denied him his right to a public trial. In holding that Love’s public trial right was not denied, the court applied the “experience and logic” test announced in *State v. Sublett*, 176 Wn.2d 58, 141, 292 P.3d 715 (2012). The “experience and logic” test requires courts to assess the necessity for courtroom closure by consideration of both history (experience) and the purposes of the open trial provision (logic). *Sublett*, 176 Wn.2d at 73.¹⁰ The experience prong asks whether the practice in question historically has been open to the public, while the logic prong asks whether public access is significant to the functioning of the right. *Id.* If both prongs are answered affirmatively, then the *Bone-Club* test must be applied before the court can close the courtroom. *Sublett*, 176 Wn.2d at 73.

Applying the experience prong, the *Love* court concluded, “[T]here is little evidence of the public exercise of such challenges, and some evidence that they are conducted privately.” *Love*, 176 Wn. App. at 919. Applying the logic prong, the court concluded such challenges do not need

¹⁰ Although no opinion gathered more than four votes in *Sublett*, eight of the nine justices sitting in *Sublett* approved the “experience and logic” test.

to be conducted in public because to do so does not further the goal of ensuring a fair trial. *Id.*

The court's analysis in *Love*¹¹ misses the point and ignores the historical importance of an open voir dire. It is well established that the right to a public trial extends to voir dire. *Sublett*, 176 Wn.2d at 71; *Strode*, 167 Wn.2d at 226. The process of jury selection "is itself a matter of importance, not simply to the adversaries but to the criminal justice system." *Orange*, 152 Wn.2d at 804.

Openness of jury selection clearly enhances core values of the public trial right, i.e., "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Sublett*, 176 Wn.2d at 75. For-cause and peremptory challenges are an integral part of voir dire. *Strode*, 167 Wn.2d at 230 (for-cause challenges of six jurors in chambers not de minimus violation of public trial right); *State v. Wilson*, 174 Wn. App. 328, 298 P.3d 148 (2013) (unlike potential juror excusals governed by CrR 6.3 exercise of peremptory challenges, governed by CrR 6.4, constitutes part of "voir dire," to which the public trial right attaches).

¹¹ The Supreme Court has stayed *Love*'s petition for review of Division Three's opinion pending the outcome of *State v. William Glenn Smith* (85809-8). The Court heard the *Smith* oral argument on October 15, 2013.

Accordingly, the experience and logic test is clearly met in the case of voir dire: historically, voir dire has been conducted in open court; and logically, openness clearly enhances the basic fairness of the proceeding.

In *Dunn*, the defendant argued the trial court violated his public trial right because the trial court conducted the peremptory challenges portion of jury selection at the clerk's station. *Dunn*, 180 Wn. App. at 575. This court did not engage in a separate analysis. Rather it adopted the rationale in *Love*. “We agree with Division Three that experience and logic do not suggest that exercising peremptory challenges at the clerk's station implicates the public trial right.” *Dunn*, 180 Wn. App. at 575. *Dunn* and now *Webb*, in their adoption of *Love*, rely on the same flawed reasoning of *Love*.

The procedure in Mr. Best's case violated the right to a public trial to the same extent as any in-chambers conference or other courtroom closure would have. Even though the procedure occurred in an otherwise open courtroom, any assertion that the procedure was in fact public should be rejected. The procedure was a sidebar which occurs outside of the public's hearing, and thus violates Mr. Best's right to a fair public trial. *Skert*, 169 Wn. App. at 774 n.11 (rejecting argument that no violation occurred if jurors were actually dismissed not in chambers but at a sidebar and stating, “If a side-bar conference was used to dismiss jurors, the

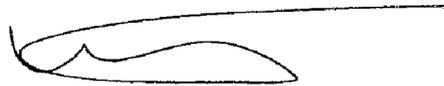
discussion would have involved dismissal of jurors for case-specific reason and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview").

E. CONCLUSION

The court should reverse Mr. Best's conviction for possession of stolen property in the second degree and remand for dismissal with prejudice and resentencing.

Because the peremptory challenges at sidebar violated Mr. Best's right to an open trial, his residential burglary conviction should be reversed and remanded for retrial.

Respectfully submitted this 25th day of September 2014.



LISA E. TABBUT/WSBA #21344
Attorney for Bryan Patrick Best

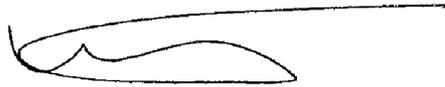
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I filed Appellant's Opening Brief with: (1) Gerald Fuller, Grays Harbor County Prosecutor's Office at gfuller@co.grays-harbor.wa.us; and (2) the Court of Appeals, Division II; and (3) I mailed it to Bryan Patrick Best, 301 Barney Drive, Westport, WA 98595.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed September 25, 2014, in Mazama, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Bryan Patrick Best

COWLITZ COUNTY ASSIGNED COUNSEL

September 25, 2014 - 3:09 PM

Transmittal Letter

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Case Name: State v. Bryan Patrick Best

Court of Appeals Case Number: 45749-1

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