

No. 47947-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

KENNETH D. BARRETT,

Appellant.

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

The Honorable Erik D. Price, Judge  
Cause No. 14-1-00826-4

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BRIEF OF RESPONDENT

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## A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the prosecutor's comments in closing argument that Barrett had engaged in some kind of discussion with a judge about his court dates constitute prosecutorial misconduct, and if so, whether Barrett received ineffective assistance of counsel because defense counsel failed to object to those comments.

2. Whether taking juror challenges for cause at sidebar violated Barrett's right to a public trial.

## B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the substantive and procedural facts of the case.

## C. ARGUMENT.

1. There was evidence in the record to permit a reasonable inference that Barrett had had some discussion with the judge who set the court date for which he failed to appear. There was no prosecutorial misconduct. Defense counsel was not ineffective for failing to object to the prosecutor's closing argument.

Barrett failed to appear for a status hearing on November 12, 2014. RP 115.<sup>1</sup> He assigns error to two comments made by the prosecutor, one in closing argument and one in rebuttal. In the first instance, the prosecutor said:

These are his court dates. They're not his brother's court dates. And more importantly, he's already had notice of those court dates. He signed for them. He's talked to the judge about them.

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<sup>1</sup> Unless otherwise noted, references to the Verbatim Report of Proceedings are to the two-volume trial transcript dated February 4 and 5, 2014.

RP 272. In the second instance, the prosecutor said:

He signed those documents, and he had conversations with the Court and his attorney DPA Jones talked to you about. That happens every time.

RP 290.

a. Standard of Review.

A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). “Any allegedly improper statements should be viewed within the context of the prosecutor’s entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions.” Dhaliwal, 150 Wn.2d at 578. Prejudice will be found only when there is a “substantial likelihood the instances of misconduct affected the jury’s verdict.” Id. A defendant’s failure to object to improper arguments constitutes a waiver unless the statements are “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” Id.

The absence of an objection by defense counsel “strongly suggests to a court that the argument or event in question did not

appear critically prejudicial to an appellant in the context of the trial.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

A prosecutor has wide latitude in arguing inferences from the evidence. It is not misconduct to argue facts in evidence and suggest reasonable inferences from them. Spokane County v. Bates, 96 Wn. App. 893, 901, 982 P.2d 642 (1999).

While it is true that a prosecutor must act in a manner worthy of his office, a prosecutor is an advocate and entitled to make a fair response to a defense counsel’s arguments. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). See also State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005). A prosecutor has a duty to advocate the State’s case against an individual. State v. James, 104 Wn. App. 25, 34, 15 P.3d 1041 (2000).

b. Evidence.

A senior deputy prosecuting attorney, John Jones, testified for the State about the manner in which court hearings are held, the different kinds of hearings, and specifically the status hearing at which Barrett failed to appear. He explained the way that cases are called on a calendar, or docket. RP 92. When a defendant’s case is called he goes up before the judge’s bench. RP 92-93. At arraignment, hearings are scheduled, including a trial date, and

those dates are announced to the defendant, his attorney, and the prosecutor, in addition to the paper copy which is given to the defendant. RP 94, 98. When a trial date must be continued, Jones testified:

[T]he parties come before the Court just as they did the first time when those dates were set and put their request before the judge, the presiding judge, and then the judge will decide whether or not those dates can be adopted. And if they are, they're set forth in writing and then everyone signs off on that document.

. . . .

[T]he assigned prosecutor to the case, the assigned defense attorney and the defendant would all come up before the Court and address the Court in regard to the matter that is at hand, which is whether or not the judge will allow these dates to be scheduled for differently than they already are.

RP 104.

Jones was describing the way that court calendars work in general; he was not addressing specifically Barrett's case. However, because the cases were routinely handled in this manner, it was a fair for the prosecutor to infer that Barrett had spoken to the judge who set his court dates and had the opportunity for input as well as to hear the dates announced aloud.

Barrett testified in his defense. On cross-examination, he was asked specifically about the documents he signed.

PROSECUTOR: And you recall being in front of the judge signing documents, correct:

DEFENDANT: Yeah

PROSECUTOR: And you recall having a conversation with the judge about what you were signing?

DEFENDANT: Yeah, and they pointed out where I sign that too.

PROSECUTOR: When you had that conversation with your judge about what you are signing, your counsel was present with you, correct?

DEFENDANT: I guess.

RP 201-02.

Barrett testified that he had a conversation with the judge. Jones testified that this procedure was routine. It was not misconduct for the prosecutor to argue that Barrett had engaged in a conversation with the judge.

Barrett claims prejudice because he testified that he is blind and cannot read the documents he signed. However, there was evidence that Barrett had other court appearances. RP 95-96 (Exhibit 35, order and notice setting trial date and other hearings); RP 100 (Exhibit 36, release order). There was evidence that he appeared for arraignment and the omnibus hearing. RP 98, 102, 107. Jones testified that the judge announced aloud the dates or

release conditions that were memorialized on the orders. RP 94, 98, 99. The order setting dates was not the only notice that Barrett received. When Barrett testified, the jury may well have found him not credible when he testified that he was not aware of his court date because his brother manages his calendar.<sup>2</sup> RP 166-57. On cross examination, his antagonism toward the prosecutor is clear even from the written transcript. His answers were often unresponsive. For example:

PROSECUTOR: That's not my question, sir.

DEFENDANT: I don't want to answer.

RP 201.

PROSECUTOR: . . . [T]hose are your dates, correct? They're not anyone else's court dates. They're not your brother's court dates.

DEFENDANT: I don't know.

RP 203.

PROSECUTOR: When was the last time you'd seen Robert before that?

DEFENDANT: Years.

PROSECUTOR: But you two weren't on good speaking terms, were you?

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<sup>2</sup> Deputy Ditrich testified that when he handed Barrett his business card, Barrett appeared to read it and asked him for the correct pronunciation of his name. RP 221, 226.

DEFENDANT: What's this got to do with the price of tea in China?

PROSECUTOR: That's not my question, sir.

DEFENDANT: That's my answer.

RP 204-05 (testifying about the malicious mischief charge).

While Barrett is correct that there was evidence that he could not read the documents, that evidence all came from him. There was substantial evidence that he had notice of his court dates and that he appeared for at least two of them before the failure to appear that resulted in the bail jumping charge. Barrett cannot show any prejudice resulting from the State's comments, even if they had constituted misconduct. They did not, he was not prejudiced, and there was no prosecutorial misconduct.

c. Ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). First, deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S.

1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). For example, "[o]nly in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995) (internal quotation omitted).

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984).

Barrett bears the burden of first showing that his counsel at trial was deficient, meaning that his performance "fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251, 1256 (1995).

Counsel in Barrett's case did not object to the prosecutor's remarks because they were not objectionable. Further, Barrett cannot show that the outcome of the trial would have been different

had his counsel objected. It seems unlikely that the court would have sustained the objection. There was neither deficient performance nor prejudice.

2. The court did not violate Barrett's right to a public trial by taking for cause challenges to the jury venire at sidebar.

Barrett argues that his right to a public trial, guaranteed by both the Washington Constitution article 1, § 22, and the Sixth Amendment to the United States Constitution, was violated when the court heard and decided challenges for cause and excused four jurors at sidebar. The court made a record of that sidebar, with no objection from either party. 02/04/15 RP 7-10.

Barrett sets forth in his opening brief at 15-17 the verbatim record of much of that sidebar. It is found at 02/04/15 RP 7-9. After the recitation of the for cause excusals, the court asked the parties if they had anything to add and neither did. 02/04/15 RP 9. The court then indicated that it had offered to take additional motions for hardship or for cause challenges, but neither party made any motions and the court directed the parties to exercise their peremptory challenges with the clerk. 02/04/15 RP 9-10. The court concluded by making a record of a further sidebar in which scheduling matters were discussed. 02/04/15 RP 10. Barrett

claims a violation of his public trial rights because the court reporter did not make a record of the for cause challenges and excusals.

A defendant may raise a public trial claim under article 1, § 22 for the first time on appeal. If the right to a public trial has been violated, prejudice will be presumed. In re Pers. Restraint of Ticeson, 159 Wn. App. 374, 382, 246 P.3d 550 (2011). “Whether the right to a public trial has been violated is a question of law reviewed de novo. State v. Lormor, 172 Wn.2d 85, 90, 257 P.3d 624 (2011).

When addressing a public trial question, reviewing courts follow a three-part analysis:

First, we ask if the public trial right attaches to the proceeding at issue. Second, if the right attaches we ask if the courtroom was closed. And third, we ask if the closure was justified.

State v. Love, 183 Wn.2d 598, 605, 354 P.3d 841 (2015).

The right to a public trial is not absolute, but the courtroom may be closed only for the most unusual of circumstances. State v. Heath, 150 Wn. App. 121, 715, 206 P.3d 712 (2009). The right to open proceedings extends to jury selection and some pretrial motions, and a trial court must, before closing the courtroom, conduct the analysis required by State v. Bone-Club, 128 Wn.2d

254, 906 P.2d 325 (1995). That analysis is not required unless the public is “fully excluded from the proceedings within a courtroom,” Lormor, 172 Wn.2d at 92 (citing to Bone-Club), 128 Wn.2d at 257, or when jurors are questioned in chambers. Id. (citing to State v. Momah, 167 Wn.2d 140, 146, 217 P.3d 321 (2009) and State v. Strode, 167 Wn.2d 222, 224, 217 P.3d 310 (2009)). The court then went on to define a closure:

[A] “closure” occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.

Lormor, 172 Wn.2d. at 93.

In Love, the for-cause challenges were taken at the bench, presumably out of the hearing of the jury pool and any other spectators, but on the record. There was minimal discussion.

THE COURT: Any for-cause challenges?

[DEFENSE]: Fifteen.

THE COURT: Fifteen? Any objection?

.....

[STATE] I think that’s—the state has no objection to No. 15 being struck for cause.

THE COURT: Mm-hm. Any others?

[DEFENSE]: Number 30.

THE COURT: Number 30?

[STATE]: Yeah. No objection.

Love, 183 Wn.2d at 602. The record of voir dire disclosed the responses of Jurors 15 and 30 that supported being struck for cause. Id.

The court in Love followed its previous decisions that the public trial right attaches to jury selection, including challenges for cause. Love, 183 Wn.2d at 606. It affirmed, however, because Love failed to show that the courtroom was closed. Id.

Barrett argues that the court in Love relied upon the fact that a transcript was made of the sidebar discussion. Appellant's Opening Brief at 18. However, the record in Barrett's case contained far more information about the challenges for cause than did the actual transcript in the Love trial. Both parties agreed with the recollection of the court. Rather than relying on the transcript of voir dire to determine the basis for the for cause challenges to the jurors, the court made a record of those reasons. 02/04/15 RP 8-9.

First, it cannot be said that the Love opinion relied so heavily on a transcript of the exchange at sidebar that the lack of such a transcript would turn the sidebar into a courtroom closure. The court in Love said

Yet 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. The transcript of the discussion about for cause challenges and the struck juror sheet showing the peremptory challenges are both publically available. The 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 missing in cases where we found closures of jury selection.

Love, 183 Wn.2d at 607.

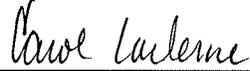
Second, as noted above, the record made by the court following the sidebar contains all of the information that would have been included in a transcript. The public should be able to reasonably rely on the accuracy of a record agreed to by both parties and the judge. Not only was that record made in open court, but the transcript is also publically available.

A sidebar is not a closure of the courtroom. Because it is not a closure, there is no requirement for the court to conduct a Bone-Club analysis. A record of what occurred at sidebar is available for inspection by the public. There was no violation of Barrett's right to a public trial.

D. CONCLUSION.

There was no prosecutorial misconduct, no ineffective assistance of counsel, and no violation of the right to a public trial. The State respectfully asks this court to affirm Barrett's conviction for bail jumping.

Respectfully submitted this 14<sup>th</sup> day of April, 2016.



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Carol La Verne, WSBA# 19229  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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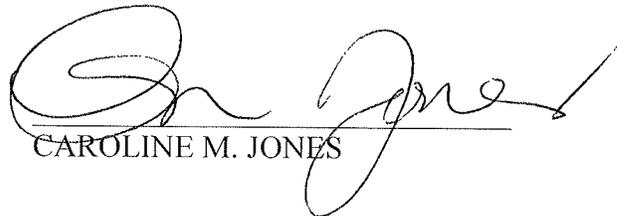
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 14 day of April, 2016, at Olympia, Washington.

  
CAROLINE M. JONES

# THURSTON COUNTY PROSECUTOR

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