

FILED

MAY 29 2013

COURT OF APPEALS
OF THE STATE OF WASHINGTON
BY _____

Consol. No. 30809-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

UNTERS L. LOVE, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

SUPPLEMENTAL BRIEF OF RESPONDENT

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I.

INTRODUCTION

Respondent, State of Washington, respectfully submits this supplemental brief as requested by the Court in a ruling dated May 22, 2013.

II.

ISSUE PRESENTED

- (1) What is the effect of the Supreme Court's rulings in *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 7159 (2012), (in particular the application of the "experience and logic test") on Mr. Love's first assignment of error?

III.

STATEMENT OF THE CASE

In an appeal filed on October 31, 2012, the appellant urged several assignments of error, the first of which claims that the "trial court violated Love's right to a public trial by conducting for-cause and peremptory challenges at sidebar. Brf. Of App. Pg. 9.

This court sent the State a letter on May 22, 2013, asking the State to provide supplemental briefing regarding the application of the "experience and logic test" from *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 7159 (2012) as such test

applies to the appellant's first assignment of error. This response is submitted in compliance with this court's request.

IV.

ARGUMENT

The Court in *Sublett*, promulgated a two part test for the purpose of determining whether any particular court procedure actually "closed" the courtroom, thus requiring the application of a *Bone-Club* analysis.

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." *Press-Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986). The logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* If the answer to both prongs is yes, the public trial right attaches and the *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984), or *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995) factors must be considered before the proceeding may be closed to the public.

The appellant argues that conducting side-bars are the equivalent of closing the courtroom. He also contends that such closings are a violation of his right to a public trial.

The Court in *Sublett, supra*, cited to “*People v. Virgil*, 51 Cal.4th 1210, 1237-38, 253 P.3d 553 (2011) (not every sidebar conference rises to the level of a constitutional violation; brief bench conferences during jury selection about sensitive subjects when the courtroom itself was open to the public and the defendant was present did not deprive the defendant of his right to a public trial), *cert. denied*, -- U.S. --, 132 S. Ct. 1636, 182 L. Ed. 2d 237 (2012).” *Sublett, supra* at 93.

That is the situation here. The defendant does not claim that the courtroom was closed in the “usual” sense of the word. Applying the test from *Sublett*, it is plain that the defendant’s arguments are without merit. The “experience prong” asks whether the process in question has historically been open to the press and general public. Obviously, the answer here is a resounding “no.” Sidebars only exist for the purpose of providing privacy to inter-party communications.

The second part of the test or the “logic prong” asks whether “public access plays a significant positive role in the functioning of the process in question.” *Sublett, supra* at 73. In this case, the appellant would have to argue that the public should hear the side-bars and all the items the parties might want to keep private. Side-bars have traditionally been used to communicate between the parties without the public overhearing. This would be ludicrous.

Under the test as outlined in *Sublett*, sidebars during juror selection pass neither of the prongs of the test. Under *Sublett*, sidebars would not be expanded to the point that courts that employ sidebars are considered closed and subject to *Bone-Club* requirements.

V.

CONCLUSION

The analysis of the Court in *Sublett* renders the defendant's first assignment of error without validity.

Dated this 29th day of May, 2013.

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