

**NO. 44061-0-II**

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

LEE R. McCLURE, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Linda Lee

No. 11-1-01384-9

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**SECOND SUPPLEMENTAL BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO COURT OF APPEALS REQUEST FOR ADDITIONAL BRIEFING.

1. Whether the trial court's procedure in jury challenges for cause violated the requirements of a public trial under Article 1, §§10 or 22 of the Washington Constitution?
2. Whether excusing two jurors for cause at a sidebar violated the requirements of public trial where both jurors had been examined, and challenges, motions, and argument regarding the challenges, were all in open court?

B. STATEMENT OF THE CASE.

1. Procedure

The parties in this case have filed opening and supplemental briefs. The Court has heard oral argument. At argument, the Court had questions regarding the procedure the trial court used to conduct challenges and excusals of jurors for cause. The Court stayed decision pending decision of a group of cases regarding the public trial right were being considered in the Supreme Court. This brief is in response to the Court of Appeals request for additional briefing.

2. Facts

The venire in this case consisted of 50 jurors. CP 795-797. Fifteen jurors were excused by peremptory challenge. CP 798. Fourteen were

excused for cause. CP 795-797. Twelve jurors and three alternates were sworn and seated. *Id.*, 818. The remainder of the venire was excused because they were not needed after all the challenges were taken. CP 797.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT CLOSE THE COURTROOM OR VIOLATE THE REQUIREMENT OF A PUBLIC TRIAL AT ANY POINT DURING CHALLENGES FOR CAUSE.

a. Jurors excused for cause orally on the record.

Juror #10 was excused for cause on the record. 8/6/2012 RP 53.

The parties and the court examined her in open court prior to excusing her. 8/6/2012 RP at 31-40. The defense moved to excuse her and the State concurred. 8/6/2012 RP 52.

Juror #12 was excused for cause on the record. 8/7/2012 RP 60.

The parties and the court examined her in open court prior to excusing her. 8/6/2012 RP 41-51, 8/7/2012 RP 37-38. The parties agreed to excuse her. *Id.*, at 59.

Juror #14 was excused for cause on the record. 8/7/2012 RP 58.

The parties and the court examined her in open court prior to excusing her. 8/6/2012 RP 54-67, 8/7/2012 RP 30. The parties agreed to excuse her. *Id.*, at 57.

Juror # 18 was excused for cause on the record. 8/6/2012 RP 88. The parties and the court examined him in open court prior to excusing him. 8/6/2012 RP 68-71.

Juror #23 was excused for cause on the record. 8/7/2012 RP 3. The parties and the court examined him in open court prior to excusing him. 8/6/2012 RP 97-107. The State moved to excuse him for cause. 8/7/2012 RP 2. The defense concurred. *Id.*

Juror #27 was excused for cause on the record. 8/7/2012 RP 59. The parties and the court examined him in open court prior to excusing him. 8/6/2012 RP 115-123, 8/7/2012 RP 34. The parties agreed to excuse him. *Id.*, at 58.

Juror # 29 was excused for cause on the record. 8/7/2012 RP 61. The parties and the court examined him in open court prior to excusing him. *Id.*, at 22, 34-37. The defense moved to excuse him. *Id.*, at 60

Juror #33 was excused for cause on the record. 8/7/2012 RP 4. After examination on the record (8/6/2012 RP 139-146), the State moved to excuse her and the defense concurred. 8/7/2012 RP 4.

Juror # 37 was excused for cause on the record. 8/7/2012 RP 10. The parties and the court agreed in open court to excuse her because the juror had a pre-planned vacation. *Id.*, at 9-10.

Juror # 41 was excused for cause on the record when he failed to appear for jury duty. 8/6/2012 RP 14.

Juror #45 was excused for cause on the record when he failed to appear and was also found to be legally disqualified. 8/7/2012 RP 11-13.

Juror # 47 was excused for cause on the record. 8/7/2012 RP 90. The parties and the court examined her in open court prior to excusing her. *Id.*, at 27.

To succeed in a public trial claim, a defendant must first show “the courtroom was actually closed.” *In re Personal Restraint of Yates*, 177 Wn.2d 1, 27, 296 P.3d 872 (2013); *see, also State v. Njonge*, -Wn.2d-, - P. 3d-(2014)(2014 WL 4792046 at \*5). The courtroom was never closed during jury selection in this case. The court excused jurors for cause in open court, following examination, reasoning and argument, which also occurred in open court. Except for Jurors #1 and #15, the court excused jurors for cause orally. The defendant cannot demonstrate that the courtroom was ever closed, or that his public trial right under Article 1, §22 was violated.

b. Excusing two jurors for cause at sidebar did not violate the requirements of a public trial.

Two jurors were excused for cause during a sidebar, after they had been fully examined in open court. Jurors #1 and #15 were excused at a sidebar. CP 803; 8/7/2012 RP 119.

During general questioning of the venire, Juror #1 expressed strong negative views regarding child molesters. 8/7/2102 RP 39-40. Juror #1 also strongly expected an innocent person to testify and deny the

allegations. Juror #1 was not sure she could or would follow the instructions regarding that. 77-79, 85, 110-111. Wisely, the defense moved to excuse Juror #1 for cause. *Id.*, at 91. The court reserved ruling at the time. *Id.*, at 92.

In his questionnaire, Juror #15 stated that his family had a previously-planned event for which tickets had been purchased. So, before general questioning, the state and defense agreed that he should be excused. 8/7/2012 RP 8-9. During general questioning of the venire, he confirmed that information. 8/7/2012 RP 20. The State asked that he be excused for cause. 8/7/2012 RP 88. The court wanted to reserve ruling, and requested that the State remind the court and renew the motion before peremptory challenges were taken. *Id.*, at 88.

Recently, the Washington Supreme Court issued several opinions regarding the right to a public trial and open courts. One of the cases, *State v. Smith*, -Wn.2d -, -P.3d- (2014)(2014 WL 4792044), specifically addressed the issue of whether sidebar conferences implicate a criminal defendant's right to a public trial under article I, section 22 of the Washington Constitution. *Id.*, at \*1. The Court summarized its holding:

We hold that sidebars do not implicate the public trial right. This court uses the experience and logic test to evaluate whether a particular proceeding implicates the public trial right. *State v. Sublett*, 176 Wash.2d 58, 73, 292 P.3d 715 (2012). Sidebars are not subject to the public trial right under the experience and logic test because they have not historically been open to the public and because

allowing public access would play no positive role in the proceeding.

*Id.* (emphasis added). The Court went on to adopt a three-part analysis for public trial right cases:

1) whether the public trial right is implicated at all; 2) whether, if the public trial right is implicated, there is in fact a closure of the courtroom; and 3) if there is a closure, whether the closure was justified.

*Id.*, at \*2, citing *State v. Sublett*, 176 Wn.2d 58, 92, 292 P.3d 715 (2012) (Madsen, C.J., concurring).

The public trial right under the State Constitution includes jury selection. See *State v. Shearer*, -Wn. 2d -, -P.3d-(2014)(2014 WL 4792048); *State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012). However, as argued in the State's first Supplemental Brief of Respondent, the actual excusal of a potential juror need not be announced orally, so long as the inquiry and questioning are conducted in open court and the determination is part of the public record. Suppl. Brf. of Resp. at 8-9.

In the very recent case of *Shearer*, the defendant was charged with felony harassment and fourth degree assault arising from a domestic violence incident. *Shearer*, at \*1. A prospective juror indicated that she was a victim of, and a witness to, domestic violence, but said she did not want to talk about it. *Id.* The judge offered to discuss it in chambers, and

the juror agreed to do so. The trial judge did not conduct a *Bone-Club*<sup>1</sup> analysis. *Id.*

During the conference, the juror disclosed that her grandson had been killed by his father in the family home and that she felt her experience would affect her view of the case. The court excused the juror for cause on the defendant's motion. *Id.* In the light of *State v. Momah*, 167 Wn.2d 140, 150–52, 217 P.3d 321 (2009) and *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009), this procedure was improper.

The facts of the present case are significantly different than those of *Shearer*, *Momah*, and *Strode*. The examination of Jurors #1 and #15 were conducted in open court with the rest of the venire, not in chambers or in the jury room. In open court, the parties made clear their motions or intent to challenge or excuse these jurors for cause. The court hesitated, perhaps waiting to see how many jurors would ask to be excused for hardships, as Juror #15 was being considered. All that remained was the final yes or no, which occurred at sidebar just before the peremptory challenges were taken. CP 803. The final ruling was also recorded in the public record. CP 795, 796.

The procedure used to excuse Jurors #1 and #15 is little different than the procedure used for peremptory challenges in this case. Excusing

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<sup>1</sup> *State v. Bone-Club*, 128 Wn.2d 254, 258–59, 906 P.2d 325 (1995).

Jurors #1 and #15 and the peremptories occurred silently and were recorded on paper for the record. CP 795, 796, 798. In fact, the public could see and know more about why Jurors #1 and #15 were excused than why the 16 jurors were excused for peremptory challenges. The parties gave reasons and arguments for excusing Jurors #1 and #15 in open court, on the record. No reasoning or argument was necessary for the peremptory challenges. Any spectator who had attended jury selection would know why these two jurors had been excused for cause.

In *Wise, supra*, our Supreme Court quoted *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) in saying: “A public trial helps assure that the trial is fair; it allows the public to see justice done, and it serves to hold the justice system accountable.” *Wise*, 176 Wn.2d at 17. In *Waller*, the United States Supreme Court also said:

Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings.

*Waller*, 467 U.S. at 46 n. 4.

In the present case, the important purposes of public trials, as articulated by the United States Supreme Court in *Waller* and our Supreme Court in *Sublett*, and *Wise, supra*, and *State v. Brightman*, 155 Wn.2d 506, 122 P. 3d 150 (2005) were honored and preserved. All of the

jury questioning and selection, including that of Jurors #1 and 15, was conducted in open court for any member of the public to see and hear. The final determinations were recorded on paper and available for public inspection in the court file. There was no violation of the right to public trial under either Article I, §10 or §22.

D. CONCLUSION.

The courtroom, and all procedures regarding excusing jurors for cause, was open to the public in this trial. Under the September 25, 2014 decision in *State v. Smith*, excusing two jurors for cause at sidebar following complete examination and argument in open court does not violate the right to public trial. The State respectfully requests that the conviction be affirmed.

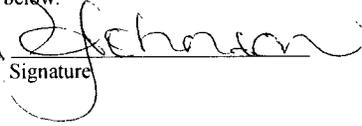
DATED: October 21, 2014.

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Certificate of Service:

The undersigned certifies that on this day she delivered by <sup>refile</sup> ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/21/14   
Date Signature

**PIERCE COUNTY PROSECUTOR**

**October 21, 2014 - 11:19 AM**

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