

No. 44205-1-II

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

FILED  
COURT OF APPEALS  
DIVISION II  
2013 JUL 12 AM 11:54  
STATE OF WASHINGTON  
BY DEPUTY

\_\_\_\_\_  
STATE OF WASHINGTON,  
Respondent,

v.

HENRY URQUIJO,  
Appellant.

\_\_\_\_\_  
APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

\_\_\_\_\_  
THE HONORABLE GORDON GODFREY, JUDGE

\_\_\_\_\_  
BRIEF OF RESPONDENT

\_\_\_\_\_  
H. STEWARD MENEFEE  
Prosecuting Attorney  
for Grays Harbor County

BY: *Gerald R Fuller*

GERALD R. FULLER  
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## RESPONDENT'S COUNTER STATEMENT

### **Procedural Background.**

The defendant was charged by Information on August 29, 2012, with Felony Violation of a No Contact Order. RCW 26.50.110(4)(5). The State alleged, in the alternative, that the defendant had assaulted the victim, Jennifer Lee Gonzalez, in Violation of a No Contact Order issued by the Auburn Municipal Court and that the defendant had gone to the residence of Jennifer Lee Gonzalez in Violation of the Order, the defendant having been previously convicted of Violation of a No Contact Order on two prior occasions. (CP 1-3). The jury, by verdict and special verdict found the defendant guilty of Felony Violation of a No Contact Order by reason of the fact that the defendant went to the residence of the protected person and that the defendant had two or more prior convictions for Violation of a No Contact Order. (CP 29, 30).

The Court employed the "struck" system for jury selection (CP 52-53). The court had a Master Jury List prepared by the clerk. (Appendix 1). The Court asked the jurors a number of general questions. (RP 10/30/2012 p. 7-21). The parties were then each given an opportunity to address questions to the entire panel and to individual jurors. In the courtroom, in the presence of the defendant and the judge, each side exercised its peremptory challenges by striking jurors from the Master Jury List. When all the peremptory challenges had been used or the panel

accepted, the Court had a list that showed which jurors had been stricken the names of the remaining jurors who would hear the case.

The process of striking jurors took place in the courtroom in the presence of anyone who wished to be present. The jurors themselves were told that they could take a break, but were instructed by the Judge to remain in the courtroom. (RP 59).

**Factual Background.**

The defendant has not raised any issue concerning the underlying facts in this matter. Nor has the defendant challenged the sufficiency of the evidence. The facts are sufficiently set forth in the Declaration of Probable Cause in support of the warrant of arrest. (CP 49-51).

**RESPONSE TO ASSIGNMENTS OF ERRORS**

**1. The trial court did not “close” the courtroom during voir dire. (Response to Assignment of Error number 1.)**

In order to properly rule on this matter, this Court must understand the jury selection process used in Grays Harbor County. It is not unlike the various systems used in other counties. See Jones, infra, at p. 10-11. At the beginning of the trial, the parties are provided with jury questionnaires containing the names and information for the jurors who have been summoned and a Master Jury List. The list assigns a number to each juror. The jurors are seated in the courtroom and arranged according to their numbers. Following general questions from the Court, each party is allowed to question the panel as a whole, directing questions to either all

jurors or any particular juror. The challenges for cause are exercised during this time.

Once the parties complete the questioning, peremptory challenges are exercised by striking jurors from the original Master Jury List maintained by the Court. The Judge, the attorneys, and the defendant sit at a table in the courtroom.<sup>1</sup> The list is passed back and forth as each party exercises its peremptory challenges. When the process is complete, the jurors who have been selected to serve on the jury are called and placed in the jury box. As indicated, this is all done in the presence of the jurors and anyone else who wishes to be present in the courtroom.

The courtroom was never closed during jury voir dire. No one was asked to leave. No one was prevented from entering the courtroom. No portion of the process was conducted outside the view of individuals in the courtroom. No portion of the process took place in chambers or outside the courtroom. See, for example, State v. Jones, Court of Appeals, Division II, # 41902-5-II decided June 4, 2013, (defendant granted a new trial when it was determined that the clerk, during a recess outside the presence of the parties and the defendant, and outside the courtroom, selected alternate jurors).

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<sup>1</sup> This procedure is not a “side bar.” A side bar typically involves a meeting between counsel and the judge in the courtroom outside the hearing of the defendant and the jury to argue a legal matter. State v. Wilson, 141 Wn.App. 597, 171 P.3d 501(2007). The defendant herein was present at the table and participated in the exercise of peremptory challenges.

A “closure” occurs, for instance, when all spectators are barred from the courtroom during voir dire. In Re: Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004). A “closure” may also occur when a portion of the voir dire is conducted in chambers away from the public. People v. Harris, 10 Cal. App. 4<sup>th</sup> 672, 12 Cal. Rptr. 2d 758 (1993); State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009).

Our courts have identified what constitutes a “closure.” State v. Lorimor, 172 Wn.2d 85, 93, 257 P.3d 624 (2001).

Rather, a “closure” of a courtroom occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave. This does not apply to every proceeding that transpires within a courtroom but certainly applies during trial, and extends to those proceedings that cannot be easily distinguished from the trial itself. This includes pre- and post-trial matters such as voir dire, evidentiary hearings, and sentencing proceedings.

The State acknowledges that the right to a public trial is violated when jury selection is conducted in chambers rather than in an open courtroom without consideration of the Bone-Club factors. State v. Strobe, 167 Wn.2d 222, 227, 217 P.3d 310 (2009). The defendant tries to analogize the current circumstances to a voir dire examination conducted in chambers. This reasoning is flawed.

The courtroom was never closed. All proceedings during voir dire were done in open court. Challenges for cause were made and decided in open court. Peremptory challenges were not contested. There was no

need for the court to rule on any of the peremptory challenges. Indeed, it is the “essential nature” of a peremptory challenge that it is “... exercised without a reason stated, without a reason, and without being subject to the court’s control” State v. Salinas, 87 Wn.2d 112, 549 P.2d 712 (1976).

Nothing occurred beyond the verbal communication, by counsel to the court, of the names of the prospective jurors each counsel had decided to excuse by the right of peremptory challenge. Presumably this communication could have just as easily have been made by having each counsel write the name on a slip of paper and hand it to the Judge. The State is unaware of any requirement that each challenge must be exercised out loud.

In State v. Sublett, 176, Wn.2d 58, 71, 292 P.3d 715 (2012). The court adopted the so-called “experience and logic” test announced by the United States Supreme Court in Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 Sup. Ct. 2735, 92 L.Ed.2d 1 (1986). In Sublett the court found that there was no violation of the right to a public trial when the court considered a jury question in chambers noting that “none of the value is served by the public trial right is violated under the facts of this case... the appearance of fairness is satisfied by having the question, answer and any objections placed on the record.” Sublett, supra, 176 Wn.2d at p. 77.

The reasoning in Sublett applies to the case at hand. The parties were simply involved in the ministerial act of striking jurors by use of



peremptory challenge. The Master Jury List with the record of the peremptory challenges exercised by the parties was maintained and placed in the court file.

Historic and current practices dictate that the selection of jurors take place in open court. State v. Jones, supra, at p. 11. That is exactly what occurred here. The procedure herein was fair to the defendant. He was present in the courtroom and participated in the selection process in the presence of all who wished to attend his trial. The court insured that the voir dire process took place in public. This system comports with current practice and passes the so-called “logic and experience” test. State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715 (2012); Jones, supra, p. 6-10.

To expand the definition of “closure” as advocated by the defendant would lead to an absurd result. Apparently now, the public would be entitled to not only be present during all the proceedings, but also be privy to all conversations taking place in the courtroom. Perhaps members of the public are entitled to hear the conversation between the prosecutor and the lead investigator concerning who should be stricken from the jury, or, for that matter, the conversation between the attorney and his client over how to best exercise a peremptory challenge. The law does not require that members of the public be able to hear each party make each peremptory challenge or see each individual written strike as it is placed on paper. This would lead to an absurd result.

This assignment of error must be denied.

2. **The trial court may not impose a sentence in which the term of confinement and term of community custody exceed the maximum term for the offense. (Response to Assignment of Error number 2).**

Felony violation of a No Contact Order is a Class C felony punishable by a maximum term of 5 years in prison. RCW 26.50.110(5); RCW 9A.20.021(1)(c). Because of the defendant's lengthy criminal history, his standard range of punishment was 51 to 60 months in prison. (CP 34-43). The Court chose to impose a term of confinement of 60 months.

RCW 9.94A.701(9) provides as follows:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided, in RCW 9A.20.021.

The courts have interpreted this statute literally. Prior to the enactment of this particular statute in 2009 a notation limiting the term of community custody to the length of earned early release was held to be sufficient to set a term of community custody in such cases. In Re: Personal Restraint of Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009). The courts have since held that the statute simply means that the court must set a specific term of community custody and that the combination of that term and the length of confinement may not exceed the maximum term for

the offense. State v. Boyd, 174 Wn.2d 470 (2012). If, for example, the court imposed a 51 month sentence, the term of community custody would be nine months. Accordingly, since the term of confinement in the case at hand is 60 months, there will be no community custody.

**CONCLUSION**

The conviction must be affirmed. The matter should be remanded to strike the term of community custody.

DATED this 11 day of July, 2013.

Respectfully Submitted,

By: *Gerald R Fuller*  
GERALD R. FULLER  
Chief Criminal Deputy  
WSBA #5143

GRF/ws

# APPENDIX

PANEL N

JURY MASTER

Judge: Gordon L Godfrey

Clerk: B. McKealley

Case Title: ST OF WA VS HENRY J URQUIJO

FILED  
GRAYS HARBOR COUNTY  
C. BROWN, CLERK

Color: White  
Date: 10/30/2012  
Number of Days: 1.5

2012 OCT 30 PM 4: 59

2012 OCT 30 PM 4: 59

- 1: SHANNON PETERSON \*
- 2: FILEMON GAMEZ \*
- 3: CHRISTINE M ROBERTS \*
- 4: LU CADY
- 5: SHAWNIE GRAHAM
- 6: REBECCA JONES
- 7: RICHARD MURRAY
- 8: MICHAEL BARNES \*
- 9: NICOLE MUSIC-HAWK \*
- 10: GREGORY SIMERA
- 11: STEVEN NORMAN
- 12: PEGGY REINHART
- 13: KEITH ROMAN
- 14: DELORES EHLERS
- 15: RAMIL SERRANO \*
- 16: RENEE VOLZ
- 17: JONATHAN REYNOLDS
- 18: SCOTT BUSZ \*
- 19: CHRISTINE LAMBERT \*
- 20: KAREN HARP
- 21: PATRICIA KOENEN
- 22: PATRICIA OLEACHEA \*
- 23: BETH UTTO-GALARNEAU
- 24: LOUISE LOUGHLIN
- 25: EDWARD MAYS \*
- 26: BOBBY BURNS
- 27: AMBER VESSEY \*
- 28: JOHN WRIGHT
- 29: JULIA DYCHE \*
- 30: KIMBERLY EHLY
- 31: TIMOTHY JONES
- 32: THOMAS HRISKO
- 33: MARJORIE ROBEY \*
- 34: DOUGLAS KUHLMANN
- 35: ROBERT HANSEN \*
- 36: STEVE COLEMAN
- 37: JEFFREY KLINGER \*
- 38: BRIANNE MILES
- 39: WILLIAM KRIEGSMAN
- 40: DONALD STOVER
- 41: CAROL GOEN \*

- 42: SUSAN HOWLETT-LEITE \*
- 43: WILLIAM SMITH \*
- 44: STASY ESPINOZA \*
- 45: EVA ROTHSCHILD
- 46: MICHAEL NELSON
- 47: LAWRENCE SKORUPA
- 48: GAYLEN BRYAN
- 49: KRISTIN BROWN \*
- 50: KATHLEEN ADAIR \*
- 51: DOUGLAS PETERSON
- 52: BRIAN MELTON
- 53: VALERIE ENGH
- 54: KENNEATH MCGIVERON ex 9446am
- 55: LYNDI SMITH
- 56: SCOTT WEHNAU
- 57: PATRICIA STAMATEOU
- 58: LOLA HALLER \*
- 59: VENUS BEAMISH
- 60: KASEY STOVER \*
- 61: CHANTEL HAYS \*
- 62: MICHAEL BAKER
- 63: SHERI MILLS
- 64: GREGORY PARKS
- 65: CELINA SMITH MOSER
- 66: MILTON JONES
- 67: JAMES PARNELL
- 68: DONNA STANFILL
- 69: KENDRA JOHNSON \*
- 70: DANIEL WEST
- 71: TANYA DOWLING
- 72: THOMAS VALENTINE \*
- 73: TERESA EVANS \*
- 74: MARGARET MCANINCH
- 75: SUSAN DRAKE \*
- 76: JOSEPH CURNOW
- 77: NATASHA HOFFMAN
- 78: JODIE WRIGHT
- 79: BILLY BURNS \*
- 80: ANNE GABRIELSON \*
- 81: GINA SALICK
- 82: JANELLE MOORHOUSE \*

\* Marks No questionnaire

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PANEL N

JURY MASTER

Color: White

Judge: Gordon L Godfrey

Date: 10/30/2012

Clerk:

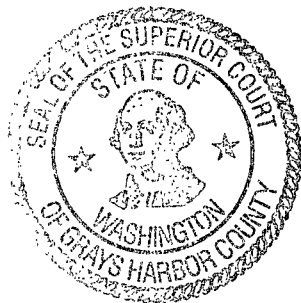
Number of Days: 1.5

Case Title: ST OF WA VS HENRY J URQUIJO 12-1-341-9

- 83: THOMAS STEVENSON
- 84: YVONNE BORDEN →
- 85: DARLENE GAINEY
- 86: ~~JAYME RUDLOFF~~
- 87: ~~RANDI LLOYD \*~~
- 88: ~~THOMAS OIEN~~
- 89: DAVID BRUNCKE
- 90: AIDEN SZTROIN
- 91: BRIAN SMITH
- 92: WILLIAM HYRE
- 93: MARGARET VER VALEN
- 94: JOSEPH MCGRAW
- 95: PAUL GOCKLEY
- 96: ~~ROXANNE ENGLER~~
- 97: ROBERT KELLEY
- 98: ~~KAREN CLARK~~
- 99: ~~MARCUS SWINDLER~~
- 100: KARLA DAVENPORT
- 101: ~~BEVERLY MILLER~~
- 102: TYSON BOLING
- 103: JUDITH BYERS
- 104: ~~CLINT PETTIS\*~~

*ex 9:11am*  
*— 46*

*Jury Panel chosen @ 10:15am*  
*Prospective jurors ex @ 10:20am*



Certificate of Clerk of the Superior Court of Washington in and for Grays Harbor County. The above is a true and correct copy of the original instrument which is on file or of record in this court.

JUL 11 2013

Done this \_\_\_\_\_ day of \_\_\_\_\_  
 Cheryl Brown, Clerk By *Cheryl Brown*  
 Deputy Clerk

\* Marks No questionnaire

FILED  
COURT OF APPEALS  
DIVISION II

2013 JUL 12 AM 11:54

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

No.: 44205-1-II

v.

**DECLARATION OF MAILING**

HENRY J. URIQUIJO,

Appellant.

**DECLARATION**

I, Laura A Harwick hereby declare as follows:

On the 11<sup>th</sup> day of July, 2013, I mailed a copy of the Brief of Respondent to Eric J. Nielsen, Nielson Broman & Koch, P.L.L.C., 1908 East Madison Street, Seattle, WA 98122-2842, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 11<sup>th</sup> day of July, 2013, at Montesano, Washington.

Laura A Harwick