COA No. 310507

No. 90329-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

BENITO GOMEZ,

Respondent.

PETITION FOR REVIEW

PETITIONER'S BRIEF

Respectfully submitted:

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I. IDENTITY OF PETITIONER

The State of Washington, represented by the Walla Walla County Prosecutor, is the Petitioner herein.

II. CITATION TO COURT OF APPEALS DECISION

The State seeks review of the Unpublished Opinion, filed March 27, 2014 and Order Denying Motion for Reconsideration, filed April 29, 2014. A copy of the decision is in the Appendix at pages A-1 through A-11. A copy of the order denying petitioner's motion for reconsideration is in the Appendix at page A-12.

III. ISSUE PRESENTED FOR REVIEW

1. Was there a courtroom closure when a courtroom of spectators was present at the trial?
2. Does a judge's comment regarding general courtroom protocol constitute a ruling sufficient to overturn a trial?
3. May a criminal defendant raise a public trial challenge for the first time on appeal where there is no record of manifest error?
4. When a challenge is raised for the first time on appeal, did the court of appeals err by shifting the burden in requiring the State to demonstrate the absence of manifest error?
5. Shall the State be afforded the benefit of this Court's pending

decisions on a related matter?

IV. STATEMENT OF THE CASE

The Defendant Benito Gomez has been convicted by jury of murder in the second degree and six counts of assault in the first degree. CP 205-19, 237-38. The court of appeals has reversed the convictions, finding a violation of the public trial right. App. 1-11.

The facts of the offense are incorporated from the Respondent's Brief in 31050-7-III. Many neighbors and the Defendant's own gang members identified him as the lone shooter. RP 276, 288, 293, 296, 392-95, 398.

The trial judge's solicitousness for the public in the courtroom is apparent on the record. "This is a public courthouse. Everyone in the public is entitled to appear in this courthouse for appropriate matters, as either litigators or spectators or witnesses and in fact the courtroom is rather full today of spectators concerning this case." RP 150. The judge assisted the public in following the hearings as they moved between courtrooms. RP 140.

Prior to trial, the Defendant made a motion to change venue based on pretrial publicity and courthouse security. RP 141-42. In ruling on the motion, the Honorable Judge Schacht explained the security precautions

which had been taken. RP 147-58.

A month before trial and a few days after the Trayvon Martin killing, a store owner in Walla Walla had shot and killed intruder Cesar Chavira. RP 156. There had been local protests or tributes, and the judge was not sure whether or how the highly charged and emotional issues might "flow over" into the trial from another courtroom. RP 152-53, 156. There had already been public protests in front of the courthouse in support of the Defendant "up to and including Monday night," two days before trial. RP 148.

One of the jurors had asked to be excused out of concern for her safety, and the judge was concerned that the jury not be intimidated or influenced by public demonstrations. RP 145, 149, 151. He arranged for the jury panel to park off-site and be transported to and from the courthouse. RP 151.

The judge was also concerned that a trial regarding a rival gang confrontation could result in responsive violence as it had in the past. RP 150. Both the judge and prosecutor noted that there was an unusual number of spectators present for this trial. RP 147, 150.

Judge Schacht acknowledged his shared responsibility in creating a safe environment for the trial. RP 148. He was acutely aware that three

months before trial, a judge had been stabbed and a sheriff's deputy shot in the Grays Harbor County Courthouse in Montesano, Washington. RP 155. The judge had instructed the sheriff to take appropriate security precautions related to the needs of this particular trial. RP 158.

In this 12-page long discussion (RP 147-58), the judge explained that the precautions were minimally intrusive and not unlike standard courtroom procedures. RP 153. The Defendant would not be shackled or otherwise visibly restrained and he would be provided a writing instrument and paper. RP 154. Other incarcerated witnesses also would not be shackled and would be provided street clothes. RP 154-55. The judge then went on to explain standard courtroom protocol. RP 153. Spectators are instructed to leave their weapons, cell phones, and other electronic devices in their cars. *Id.* There is a courtroom dress code. *Id.* Parties are expected to arrive on time. *Id.* And spectators are expected not to disrupt testimony by entering and exiting. *Id.* ("We do not allow people to come into the courtroom after the court is in session for not only security reasons but as well as the distraction that that causes when people come in.")

For the first time on appeal, the Defendant has alleged that this characterization of protocol effected a courtroom closure. Appellant's

Brief at 14. There is no objection in the record. There is no record that a message of exclusion was posted or otherwise communicated to any latecomer and no record that any person was excluded from the trial.

The court of appeals has reversed the Defendant's convictions on public trial grounds because of dictum, the trial court's description of general protocol, occurring in the middle of a venue ruling that occupies 12 pages of transcript. The court of appeals ruled that this comment "completely and purposefully prohibits the public from entering the courtroom after trial proceedings begin." Unpublished Opinion at 5. The court also ruled that a public trial challenge may be raised for the first time on appeal and that the State then has the burden of proving that this comment did not result in any exclusion. *Id.* at 4, 6.

V. ARGUMENT

The State's Petition for Review demonstrates conflicts of court decisions, significant conflict of constitutional rights, and issues of substantial public interest. RAP 13.4(b).

A. THE PUBLIC TRIAL RIGHT IS NOT VIOLATED WHEN A COURTROOM OF SPECTATORS WATCHED THE TRIAL.

Some closures are too trivial to implicate the Sixth Amendment right to a public trial. *United States v. Ivester*, 316 F.3d 955, 959-60 (9th

Cir. 2003). *See also* Statement of Additional Authority (filed 6/24/2013). There must be a complete closure. "[A] 'closure' of a courtroom occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no may leave." *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). Here it is apparent that the courtroom was full of spectators. If a latecomer was delayed in entering until a lull in testimony, something that the Defendant has not demonstrated, such a delay of less than every spectator cannot be considered a complete closure.

In *State v. Lormor*, there was no closure where an individual was actually removed from the courtroom for the entire trial. *State v. Lormor*, 172 Wn.2d 85. How much less offensive then are the facts here? In the instant case, there is not even an actual exclusion, only a presumptive one. In the instant case, there is no allegation that any late arriving person would have been excluded from the entire trial, but only such portion where the entrance would have been disruptive.

In finding no closure, the *Lormor* court reviewed *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010), which found a closure is one which excludes all spectators. *State v. Lormor*, 172 Wn.2d at 91 ("What mattered to the Court was that the entire process of choosing a jury was excluded to *all* potential spectators"). Again, that did

not happen here.

Ultimately, the *Lormor* court found that there had been no closure where the trial was conducted in a courtroom open to the public generally. *State v. Lormor*, 172 Wn.2d at 92-93. No class of spectator was excluded as the defendant's family had been in *In re Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004). No entire portion of proceedings was closed to the public as the suppression hearing had been *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995) or had been conducted in an inaccessible location (such as a judge's chambers) as in *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009) and *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009). The defendant was not excluded from proceedings as had happened in *State v. Easterling*, 157 Wn.2d 167, 137 P.3d 825 (2005).

Our Washington case law does not differ from other American jurisdictions on the definition of a closure. Other jurisdictions' authority demonstrates that when a trial court reasonably controls public access in order to limit disruption, this is not a closure of the courtroom. *See United States v. Scott*, 564 F.3d 34 (1st Cir. 2009) (finding no closure where public was barred from entering or exiting during charging of the jury); *McCrae v. State*, 908 So. 2d 1095 (Fla. App. 2005)(locked doors were a reasonable restriction upon the time and manner of public access to trial);

Commonwealth v. Dykens, 784 N.E.2d 1107 (Mass. 2003)(no closure where court closed courtroom during the reading of the jury instructions in order to avoid distractions during a difficult phase); *People v. Woodward*, 4 Cal. 4th 376, 841 P.2d 954, 14 Cal. Rptr. 2d 434 (1992) (locked doors and "do not enter" sign during closing argument was not a closure); *Davidson v. State*, 591 So.2d 901, 903 (Ala.Crim.App.1991) (no closure where doors were locked to prevent disruptive noise of people entering and exiting); *Spencer v. Commonwealth*, 393 S.E.2d 609, 614 (Va. 1990) (no closure where locking of doors occurs after public has entered); *People v. Colon*, 71 N.Y.2d 410, 526 N.Y.S.2d 932, 521 N.E.2d 1075, 1079 (1988) (no closure where court restricts ingress and egress of tardy spectators); *State v. Williams*, 742 S.W.2d 616, 621 (Mo. App. 1987) (no closure where court permitted spectators to enter and exit only during periods of recess).

The Unpublished Opinion is anomalous when viewed against the great weight of case law across the country. *See* 55 ALR 4th 1170 at 3 ("exclusion of public from state criminal trial in order to prevent disturbances by spectators or defendant").

The Unpublished Opinion is inconsistent with case law which finds de minimis exclusions are not complete closures. Many Washington

opinions explain that partial or de minimis exclusions do not constitute complete closures. *In re Copland*, 176 Wn. App. 432, 309 P.3d 626 (2013)(even when the entire public is excluded from in-chambers jury voir dire, this is only a partial closure which does not violate the public trial right or require reversal); *State v. Sublett*, 176 Wn.2d 58, 111-12, 292 P.3d 715 (2012) (Madsen, J., concurring) (limited private questioning of jurors does "not even implicate[]" the values served by the public trial right); *State v. Easterling*, 157 Wn.2d at 183-84 (Madsen, J., concurring) (after weighing the closure against the values advanced by the right, courts "have found a closure to be de minimis and too trivial to constitute a violation of the right to a public trial"); *State v. Brightman*, 155 Wn.2d 506, 517, 122 P.3d 150 (2005) ("a trivial closure does not necessarily violate a defendant's public trial right"); *State v. Rivera*, 108 Wn. App. 645, 653, 32 P.3d 292 (2001), *review denied* 146 Wn.2d 1006 (2002) (the right to a public trial is not implicated in a chambers conference discussing a juror complaint). The issue of de minimis exclusions is also raised in the pending case of *State v. Shearer*, No. 86216-8, Petition for Review at 11-14 and Supplemental Brief of Petitioner at 12-18.

In *United States v. Scott*, 564 F.3d 34 (1st Cir. 2009), the opinion applies the de minimis closure standard. The trial court advised the

spectators that no one would be permitted to enter or leave during the charging of the jury. The federal circuit held that the fact that hypothetical members of the public may have been barred from courtroom by this instruction did not undermine the public nature of the proceedings as they were actually conducted. *United States v. Scott*, 564 F.3d at 38. The public was actually present, invited to enter or remain, and there was no evidence of exclusion. *Id.* Therefore, the defendant actually received the protections of the constitutional public trial provision. "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller v. Georgia*, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed2d 31 (1984) (quoting *In re Oliver*, 333 U.S. 257, 270, n. 25, 68 S.Ct. 499, 92 L.Ed. 682 (1948)). A reasonable limitation on late entrants does not undermine the protections intended in the constitutional provision.

If any member of the public were delayed in entering the courtroom, surely such a delay would have been a trivial limitation on the public's right to attend. It would only affect those late-arriving parties. Other members of the public were already present. The delay would have

been momentary, only until such moment as entry would not have disrupted testimony. RP 153-54.

There are other rights to be balanced. RAP 13.4(b)(3)(significant constitutional questions will be accepted for review). The parties have a right to due process, to have their evidence heard by the finder of fact. WASH. CONST. art. 1, sec. 3. The right to have the finder of fact actually hear the evidence must trump an individual, hypothetical spectator's right to attend a hearing in a rude and disruptive manner where other members of the public are already present. Crime victims have a constitutional right to be treated with respect and dignity. WASH. CONST. art. 1, sec. 35. *See State v. Cusumano*, 848 A.2d 869 (N.J. App. 2004) (balancing public trial right with victim's right to be treated with a modicum of sensitivity and finding no public trial right violation where spectators were prohibited from entering or exiting during victim's testimony). If a bailiff delayed a spectator's entrance during testimony, it would have served the purpose of enforcing another constitutional right: due process. In furtherance of that right, a trial court is vested with inherent power and broad discretion to provide for order in the courtroom. *State v. Hartzog,* 96 Wn.2d 383, 401, 635 P.2d 694 (1980); *State v. Sanchez*, 171 Wn. App. 518, 568, 288 P.3d 351 (2012).

If a de minimis closure can be the basis for reversal of an entire trial of significant magnitude, then the Unpublished Opinion presents an issue of substantial public interest. RAP 13.4((b)(4). Not only were the offenses most serious (RCW 9.94A.030(32)(a)), but the testimony (by the Defendant's own gang members) was difficult to procure. The cost to the public of a reversal, despite the fact that the public was present, despite the absence of any objection or proof of actual exclusion, and despite the judge's appropriate security concerns, is significant.

All parts of the trial were open to the public. The public was present – in significant numbers. The public could enter and exit. But the public was not permitted to be disruptive. The only restriction on spectators was a normal, common, and appropriate exercise of the court's discretion, namely an advisement that spectators should act with good sense so as not to be disruptive of proceedings. The common sense rules of decorum repeated by the trial judge in the instant case do not effectuate a general closure.

B. THERE WAS NO RULING EXCLUDING THE PUBLIC FROM THE COURT.

For a court to have closed a courtroom, the judge must have taken some affirmative act. *United States v. Shyrock*, 342 F.3d 948, 974 (9th Cir.

2003) (quoting *United States v. Al Smadi*, 15 F.3d 153, 155 (10th Cir. 1994). Here there was no act. There was no motion to exclude the public. There was no ruling to exclude the public. There was no instruction to any party. There is no record that anyone was excluded from the courtroom. There is only dictum in the context of the venue motion, in which the trial judge explained some general protocol. There was no judicial act but only a comment on common courtroom decorum. It shocks the conscience that this could be the reason for reversal of such a hard fought and serious case. RAP 13.4(b)(4).

C. THERE IS NO MANIFEST ERROR WHICH WOULD PERMIT AN APPELLATE COURT TO REVIEW A CLAIM MADE FOR THE FIRST TIME ON APPEAL.

"The general rule is that appellate courts will not consider issues raised for the first time on appeal." *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007); *State v. Davis*, 41 Wn.2d 535, 250 P.2d 548 (1953). An error is waived if not preserved below unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3).

Under federal law, an unpreserved open courtroom claim will not be considered on appeal. *Puckett v. U.S.*, 556 U.S. 129, 129 S. Ct. 1423, 1428-29, 173 L. Ed. 2d 266 (2009); *Waller v. Georgia*, 467 U.S. at 42 n. 2 (1984); *Levine v. United States*, 362 U.S. 610, 619, 80 S. Ct. 1038, 4 L.Ed.2d 989

(1960). This is also true in the states. *See, e.g., People v. Bradford*, 14 Cal.4th 1005, 1046-47, 60 Cal.Rptr.2d 225, 929 P.2d 544, 570, *cert. denied* 522 U.S. 953 (1997); *People v. Thompson*, 50 Cal.3d 134, 785 P.2d 857 (1990) (claim that chambers voir dire on jurors' position on the death penalty violated open courts guarantee not reviewable on appeal absent objection); *State v. Butterfield*, 784 P.2d 153, 157 (Utah 1989); *Wright v. State*, 340 So.2d 74, 79-80 (Ala.1976); *Commonwealth v. Wells*, 360 Mass. 846, 274 N.E.2d 452, 453 (1971); *People v. Marathon*, 97 A.D.2d 650, 469 N.Y.S.2d 178, 179 (N.Y.App.Div.1983); *Dixon v. State*, 191 So.2d 94, 96 (Fla. 2d DCA 1966). This is also the law in Washington. *State v. Collins*, 50 Wn.2d 740, 748, 314 P.2d 660 (1957) (ruling that where a reasonable number of people are in attendance and there has been no partiality or favoritism in their admission, a defendant who does not object when the ruling is made waives his right to raise the issue thereafter).

Failure to make a timely objection robs the trial court of its ability to clarify a misunderstanding or to consider and resolve mistakes. When claims of error can be raised for the first time on appeal, plaintiffs may be robbed of justice because they cannot afford retrial and/or cannot obtain witnesses repeatedly over many years.

There is no evidence on the record that the trial judge's off-hand comment regarding general courtroom policies actually or manifestly

resulted in the exclusion of any party. Unpub. Op. at 5-6. The Defendant made no objection to the comment. RP 153-61. If there had been a *Bone-Club* discussion, a tardy party would not have been present to make an objection. Accordingly, there can be no manifest error of constitutional magnitude, and this Court should decline to reverse a jury's convictions after trial on such a tenuous and de minimis basis. RAP 2.5(a).

In *State v. Momah*, 167 Wn.2d at 156, the majority opinion held that only those errors which render a trial "fundamentally unfair or an unreliable vehicle for determining guilt or innocence constitute structural error." Here, it is clear that not only was the public present, but the courtroom was "rather full [ ] of spectators." RP 150. It is not clear that anyone was prohibited from entering. This record does not provide a basis for structural error or a presumption of such error.

The Defendant waived this challenge by failing to raise it below.

D. THE UNPUBLISHED OPINION IMPROPERLY SHIFTS THE BURDEN OF PROOF TO THE STATE.

According to *State v. Bone-Club*, 128 Wn.2d 254, 261-62, 906 P.2d 325 (1995), prejudice is presumed once closure is found. The unpublished opinion would presume closure as well. Unpub. Op. at 5 (strongly presuming that a comment within the context of a venue ruling

had the effect of a ruling resulting in closure). The opinion suggests that the State should "attempt to overcome this presumption by proving the ruling was not carried out." Unpub. Op. at 6. This shifts the legal burden.

The Unpublished Opinion relies on *State v. Brightman*, 155 Wn.2d at 516 for this presumption of closure. In *Brightman*, there were more facts from which to draw such a presumption. The judge actually instructed the attorneys to "tell the friends, relatives, and acquaintances of the victim and defendant that the first two or three days for selecting the jury the courtroom is packed with jurors, they can't observe that." *Brightman*, 155 Wn.2d at 511. But here, the judge instructed no one in his comment at RP 153. The *Brightman* instruction would have resulted in attorneys conversing with potential spectators before they ever showed for court – in other words, something that was unlikely to be part of the record. In the instant case, if the tardy spectators were excluded from the courtroom, the exclusion would have happened right at the doors of the courtroom, where evidence might have entered the record. But most importantly, ***Brightman* did not address RAP 2.5.** Under this rule, it becomes the Defendant's burden to show alleged error is manifest and actually affecting a constitutional right.

There can be no presumptions of any kind when the Defendant

fails to make a timely objection. When no timely objection is made at the trial level, it is the Defendant's burden to demonstrate how the alleged error was manifest, not merely presumptive, so as to actually, not merely presumptively, have prejudiced his rights. *State v. McDonald,* 138 Wn.2d 680, 691, 981 P.2d 443 (1999). *See also State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (requiring an appellant to make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case); *State v. Kirkman*, 159 Wn.2d at 926-27 (requiring an appellant to show how the alleged error actually affected the appellant's rights at trial). The Defendant has not met his burden.

The record is limited in an appeal. RAP 9.1. The record does not demonstrate anyone was excluded. When no timely objection was made below, the State is not required to supplement the record on appeal with a new fact-finding process at the trial level to prove a negative. The State is not required to request a delay for a reference hearing. "If facts necessary to adjudicate the claimed error are not in the record on appeal, no prejudice has been shown and the error is not manifest." *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). If more information is needed, then the Defendant's remedy is in a personal restraint petition. The failure of the Defendant to meet his burden after

failing to timely object results in waiver of the challenge on direct appeal, not a new trial.

E. THE STATE SHOULD BE AFFORDED THE BENEFIT OF THIS COURT'S DECISIONS ON PENDING, RELATED CASES.

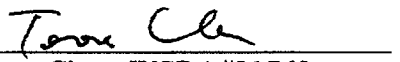
This Court's decisions, regarding whether a public trial challenge may be raised for the first time on appeal, are pending in *State v. Joseph Njuguna Njonge*, No. 86072-6, *State v. Gregory Pierce Shearer*, No. 86216-8, and *State v. Henry Grisby, III*, No. 87259-7 argued October 15 and 17, 2013. The State should be afforded the benefit of those decisions.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court accept review.

DATED: May 29, 2014.

Respectfully submitted:



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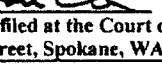
Jill S. Reuter <jill@gemberlaw.com> <admin@gemberlaw.com>	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED May 29, 2014, Pasco, WA  **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**

APPENDIX

FILED
MARCH 27, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. BENITO GOMEZ, Appellant.	)	No. 31050-7-III UNPUBLISHED OPINION

BROWN, J.—Today, we reverse Benito Gomez's convictions for second degree murder and six separate first degree assaults because the trial court, while sincerely concerned about courtroom safety, nevertheless failed to provide a public trial when it closed entry into the courtroom after court sessions began. We reject Mr. Gomez's evidence sufficiency challenge. Accordingly, we reverse and remand for a new trial without reaching Mr. Gomez's other error claims.

FACTS

On May 17, 2011, Mr. Gomez joined his fellow 18th Street gang members, Michael Mercado, Alberto Ramirez, and Andres Solis, in an alley brawl with 13th Street gang members, Julio Martinez, Miguel Saucedo, and Joseph de Jesus. Jessica Glasby and David Cloyd lounged on the porch of a nearby apartment building, while Patricia

Nelson and Roberto Cuevas slept in a first floor room. Mr. Gomez shot and killed Mr. Martinez. Ms. Glasby, Mr. Cloyd, Mr. de Jesus, and Mr. Saucedo ran into the apartment building, through the hallway, and up the stairs to the second floor while Mr. Gomez shot at them, firing at least two bullets through the hallway. The first bullet penetrated the door to the room at the end of the hallway and lodged in clothing near the bed where Ms. Nelson and Mr. Cuevas had slept. The second bullet lodged in the doorframe of the room at the beginning of the hallway.

The State charged Mr. Gomez with one count of first degree murder and six counts of first degree assault, alleging he committed each crime while armed with a firearm. At trial, the court denied his change of venue motion and addressed his concerns about various security measures, stating,

> This is a public courthouse. Everyone in the public is entitled to appear in this courthouse for appropriate matters . . . and in fact the courtroom is rather full today of spectators concerning this particular case.
> . . . .
> . . . There are allegations that this incident was as a result of a rival gang confrontation. And the history of that type of activity, not only in this state, in this county and in this city is that there are often violent incidents that arise out of that type of situation.
> And so for those reasons, the Court has been proactive in . . . attempting to protect the people . . . involved in this case from any potential harm.
> . . . .
> . . . [T]here are other matters going on in the other courtroom . . . , which is just down the hallway from . . . the third floor of the courthouse . . . . And because there are other members of the public involved in those activities, it's incumbent upon this Court . . . to make sure that there is not somebody who is interested in somehow influencing the outcome of this case or interfering with the outcome of this case feigning an excuse to be in courthouse, going to that other courtroom without appropriate business there and then somehow assimilating themselves to the people involved in this particular activity without the security staff knowing that because they

> at the threshold of coming up to the third floor that was not identified and then presenting a problem for us.
>
> So the Court has considered all of these things and has made an appropriate decision concerning what security would be used here. There's no difference in security for this trial than any other trial . . . . We continue to have rules of procedure where people have to be on time for proceedings here. *We do not allow people to come into the courtroom after the court is in session* for not only security reasons but as well as the distraction that that causes when people come in.
>
> . . . [W]hen a jury is impaneled in a case such as this, it doesn't make any difference what type of case it might be, but when people come into the courtroom after the matter is in session, they stop listening to the attorneys or to the witness who is testifying and they immediately direct their attention to the person that is coming in the door. And even though that person may be very innocent in coming in late, that distracts from the proceeding. And you run the potential that whatever is being said or addressed by the testimony, by the questions, by the Court's instructions is not going to be heard by the jury or members of that jury. And again, that then leads to problems and distractions and the orderly processing of that case.

Report of Proceedings (RP) at 150-54 (emphasis added). The court made this ruling without first addressing the public trial factors enunciated in *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

Mr. Mercado and Mr. Ramirez identified Mr. Gomez as the shooter while neighbors testified they saw Mr. Gomez present at the crime scene. The jury found Mr. Gomez guilty of one count of second degree murder as a lesser included offense and six counts of first degree assault as charged, all while armed with a firearm. The court sentenced Mr. Gomez to serve nearly 115 years confinement. He appealed.

ANALYSIS

A. Public Trial

The issue is whether the trial court violated Mr. Gomez's public trial right by declaring "[w]e do not allow people to come into the courtroom after the court is in session." RP at 153. He contends the trial court did not weigh the *Bone-Club* factors on the record before closing the trial proceedings to the public. He may raise this error claim for the first time on appeal. *See* RAP 2.5(a)(3); *State v. Marsh*, 126 Wash. 142, 146, 217 P. 705 (1923); *see also State v. Wise*, 176 Wn.2d 1, 9, 16-18 & nn.10-11, 288 P.3d 1113 (2012); *State v. Paumier*, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012). We review alleged public trial violations de novo. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

Both the federal and state constitutions provide a criminal defendant the right to a public trial. U.S. CONST. amend. VI; CONST. art. I, § 22. But in *Bone-Club*, our Supreme Court held a trial court may close trial proceedings to the public after weighing five factors on the record:

> 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.

128 Wn.2d at 258-59 (alteration in original) (quoting *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)) (citing *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36-39, 640 P.2d 716 (1982); *Federated Publ'ns, Inc. v. Kurtz*, 94 Wn.2d 51, 62-65, 615 P.2d 440 (1980)); *see also Waller v. Georgia*, 467 U.S. 39, 48, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). If a trial court does not weigh the *Bone-Club* factors on the record before closing trial proceedings to the public, we must reverse and remand for a new trial because the error is structural, presumptively prejudicial, and never harmless. *Wise*, 176 Wn.2d at 14-19; *Paumier*, 176 Wn.2d at 35-37.

Trial proceedings are closed to the public "when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011); *accord State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). "[O]nce the plain language of the trial court's ruling imposes a closure," this court strongly presumes the trial proceedings were indeed closed to the public. *Brightman*, 155 Wn.2d at 516, 517 (citing *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 813-14, 100 P.3d 291 (2004)). Thus, to show a public trial violation occurred, the defendant need not prove the ruling was carried out. *Id* at 516. Rather, to show no public trial violation occurred, the State must overcome this presumption by proving the ruling was not carried out. *Id.*

Here, the plain language of the trial court's ruling, "[w]e do not allow people to come into the courtroom after the court is in session," completely and purposefully prohibits the public from entering the courtroom after trial proceedings begin. RP at 153. Therefore, we strongly presume the trial proceedings were closed to tardy

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spectators. The State does not attempt to overcome this presumption by proving the ruling was not carried out. While generally arguing other parts of the trial were open, the State does not deny the trial proceedings were closed to tardy spectators.

The State unpersuasively stresses the trial court's ruling was a security measure ensuring courtroom safety. *See, e.g.*, *State v. Hartzog*, 96 Wn.2d 383, 400-01, 635 P.2d 694 (1981); *State v. Turner*, 143 Wn.2d 715, 725, 23 P.3d 499 (2001); *State v. Damon*, 144 Wn.2d 686, 691, 25 P.3d 418 (2001); *State v. Jaime*, 168 Wn.2d 857, 865, 233 P.3d 554 (2010). Additionally, the State unpersuasively argues the trial court's ruling was a decorum protocol ensuring courtroom order. *See, e.g.*, *People v. Colon*, 71 N.Y.2d 410, 416-17, 521 N.E.2d 1075, 526 N.Y.S.2d 932 (1988) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 n.18, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980)); *McCrae v. State*, 908 So.2d 1095, 1096-97 (Fla. Dist. Ct. App. 2005); *Spencer v. Commonwealth*, 240 Va. 78, 86-87, 393 S.E.2d 609 (1990); *Davidson v. State*, 591 So. 2d 901, 902-03 (Ala. Crim. App. 1991); *State v. Williams*, 742 S.W.2d 616, 621 (Mo. Ct. App. 1987). Considering the constitutional importance of a public trial, tardiness is a minor annoyance.

In sum, because the trial court did not weigh the *Bone-Club* factors on the record before closing the trial proceedings to the public, we must reverse and remand for a new trial. Considering our analysis, we decline to address Mr. Gomez's remaining contentions, except for his evidence sufficiency challenge.

B. Evidence Sufficiency

The issue is whether sufficient evidence supports Mr. Gomez's convictions for first degree assault of Ms. Glasby, Mr. Cloyd, Mr. de Jesus, and Mr. Cuevas. First, Mr. Gomez contends the State did not prove attempted battery because it did not show the bullets he shot into the apartment building had the apparent present ability to injure these victims. Second, he contends the State did not prove common law assault because it did not show the bullets he shot into the apartment building caused these victims to reasonably fear injury.

The State must prove all essential elements of a charged crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). And, the State cannot try a criminal defendant a second time if it failed to muster sufficient evidence the first time. *Burks v. United States*, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978). Evidence is sufficient to support a guilty finding if "'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). An evidence sufficiency challenge "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We defer to the jury's assessment of witness credibility and evidence weight. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

A person is guilty of first degree assault if, "with intent to inflict great bodily harm,"[1] he or she "[a]ssaults another with a firearm." RCW 9A.36.011(1)(a). Assault has three common law definitions: "actual battery," "attempted battery," and "common law assault." *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994) (quoting *State v. Bland*, 71 Wn. App. 345, 353, 860 P.2d 1046 (1993), *abrogated on other grounds by State v. Smith*, 159 Wn.2d 778, 786-87, 154 P.3d 873 (2007) (establishing sufficient evidence need not support all three of these definitions because they are not alternative means but "means within a means")); *see* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL (WPIC) 35.50 & cmt. at 547-50 (3d ed. 2008). Our focus is not actual battery, but attempted battery and common law assault.

Attempted battery is "an act, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented." CP at 191; RP at 597; *accord* WPIC 35.50 & cmt. at 547, 549; *see Howell v. Winters*, 58 Wash. 436, 438, 108 P. 1077 (1910) (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 278-

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[1] Intent is "the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a). Great bodily harm is "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c). "[O]nce the intent to inflict great bodily harm is established, usually by proving that the defendant intended to inflict great bodily harm on a specific person, the mens rea is transferred under RCW 9A.36.011 to any unintended victim [of the actus reus]." *State v. Elmi*, 166 Wn.2d 209, 218, 207 P.3d 439 (2009); *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994). Actus reus is "[t]he wrongful deed that comprises the physical component of a crime and that generally must be coupled with *mens rea* to establish criminal liability; a forbidden act." BLACK'S LAW DICTIONARY 41 (9th ed. 2009). Mens rea is "[t]he state of mind that the prosecution,

81 (3d ed. 1906)); *State v. Shaffer*, 120 Wash. 345, 349, 207 P. 229 (1922). Common law assault is "an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury." CP at 191; RP at 598; *accord* WPIC 35.50 & cmt. at 547, 549-50; *see State v. Frazier*, 81 Wn.2d 628, 631, 503 P.2d 1073 (1972) (quoting *United States v. Rizzo*, 409 F.2d 400, 403 (7th Cir. 1969)); *State v. Byrd*, 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995).

Ms. Glasby testified she was the first to run up the stairs, followed immediately by Mr. Cloyd. She heard Mr. Gomez fire several shots at the group during their ascent. The bullets flew past the group and splintered wood at the bottom of the stairs. The group thought Mr. Gomez was following the group up the stairs to shoot more bullets at them. Mr. Cloyd recounted he was the last to run up the stairs. When he was at the bottom of the stairs, about three or four strides up, he heard Mr. Gomez fire several shots at the group through the hallway. The bullets sounded like they were coming from outside the apartment building and hitting the walls and the bottom of the stairs. Mr. Cloyd later recounted he had already reached the top of the 15 to 20 steps when Mr. Gomez fired these shots. The group was scared they would have to violently confront Mr. Gomez at the top of the stairs.

Mr. de Jesus testified he was the last to run up the stairs, where he found Ms. Glasby and Mr. Cloyd. Mr. Saucedo followed but stopped at the bottom of the stairs,

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to secure a conviction, must prove that a defendant had when committing a crime;

flattened himself against the wall, and shut the door leading into the stairs. Mr. Saucedo recounted he initially ran down the alley along with Mr. Martinez, who Mr. Gomez shot as they fled. Mr. Saucedo then stopped on the porch to survey the incident. When Mr. Gomez came into view, he fired two shots at Mr. Saucedo that came right in his face. Mr. Saucedo stepped backward into the door leading into the stairs and waited several seconds. Mr. Gomez left.

Ms. Nelson testified she was sleeping in bed with Mr. Cuevas when she awoke to the sound of Mr. Gomez firing several shots. Someone outside the room made racket and said "they are coming." RP at 236. Ms. Nelson and Mr. Cuevas jumped out of bed. After they did, she heard a bullet penetrate the door to the room and lodge in clothing near the bed. The bullet would have hit Ms. Nelson in the forehead if she had not moved. Mr. Cuevas related he was sleeping in bed when he awoke to the sound of emergency sirens. He found a bullet had earlier penetrated the door to the room and lodged in clothing near the bed.

Viewing this evidence in the light most favorable to the State, a rational jury could find Mr. Gomez assaulted Ms. Glasby, Mr. Cloyd, Mr. de Jesus, and Mr. Cuevas beyond a reasonable doubt. We reject Mr. Gomez's arguments and defer to the jury's assessment of witness credibility and evidence weight. We conclude the State produced sufficient evidence to show either attempted battery or common law assault supporting Mr. Gomez's convictions for first degree assault of Ms. Glasby, Mr. Cloyd, Mr. de Jesus, and Mr. Cuevas.

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criminal intent." *Id.* at 1075. This case concerns actus reus but not mens rea.

Reversed and remanded for a new trial.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public records pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Siddoway, A.C.J.

Fearing, J.

FILED
APRIL 29, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

STATE OF WASHINGTON,	)	**No. 31050-7-III**
	)	
Respondent,	)	**ORDER DENYING MOTION FOR RECONSIDERATION**
	)	
v.	)	
	)	
BENITO GOMEZ,	)	
	)	
Appellant.	)	

THE COURT has considered respondent's motion for reconsideration of this court's decision of March 27, 2014, and having reviewed the records and files herein, is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, respondent's motion for reconsideration is hereby denied.

DATED: April 29, 2014

PANEL: Jj. Brown, Korsmo, Siddoway

FOR THE COURT:

Laurel H. Siddoway, CJ

LAUREL H. SIDDOWAY
CHIEF JUDGE

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WALLA WALLA COUNTY PROSECUTOR

May 29, 2014 - 11:55 AM

Transmittal Letter

Document Uploaded:	310507-Petition for Review.pdf
Case Name:	State v. Benito Gomez
Court of Appeals Case Number:	31050-7
Party Respresented:	State of Washington
Is This a Personal Restraint Petition?	☐ Yes ☑ No

Trial Court County: Walla Walla - Superior Court # 11-1-00181-1

Type of Document being Filed:

- ☐ Designation of Clerk's Papers
- ☐ Statement of Arrangements
- ☐ Motion: ____
- ☐ Response/Reply to Motion: ____
- ☑ Brief
- ☐ Statement of Additional Authorities
- ☐ Affidavit of Attorney Fees
- ☐ Cost Bill
- ☐ Objection to Cost Bill
- ☐ Affidavit
- ☐ Letter
- ☐ Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: ____ Hearing Date(s): _____
- ☐ Personal Restraint Petition (PRP)
- ☐ Response to Personal Restraint Petition
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Comments:

No Comments were entered.

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