70490-7

70490-7

NO. 70490-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RAMIRO RODRIGUEZ,

Appellant.

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

BRIEF OF APPELLANT

JAN TRASEN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Court of Appeals

United States Supreme Court

Washington Constitution

United States Constitution

Statutes

Other Jurisdictions

A. ASSIGNMENTS OF ERROR

1. The State did not prove all of the elements of felony harassment beyond a reasonable doubt, in violation of Mr. Rodriguez's constitutional due process rights.

2. The trial court violated Mr. Rodriguez's constitutional right to a public trial by taking peremptory challenges during a private, unreported bench conference.

3. The trial court violated the public right to access all court proceedings by taking peremptory challenges during a private unreported bench conference.

4. The trial court violated Mr. Rodriguez's constitutional right to be present at all critical stages of trial.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove the crime of felony harassment, the State must prove beyond a reasonable doubt not only that the defendant uttered a threat to kill, but also that the threat caused the listener to fear the defendant would kill her. Did the State sustain its burden of proof, where there was insufficient evidence that the threat caused the alleged victim to fear the defendant had made an actual threat to kill her?

2. The right of the public and the accused to a public trial may only be restricted in the most unusual of circumstances, and if so, after a trial court considers the Bone-Club[1] factors and finds it necessary. Voir dire is a critical stage of trial that must be open to the public. During jury selection, the court called the parties to a private bench conference without analysis or opportunity for objection, during which the parties apparently made juror-specific challenges. The proceeding was not recorded. Because the trial court did not make any Bone-Club assessment or findings before conducting this important portion of jury selection in private, did the court violate Mr. Rodriguez's and the public's constitutional right to a public trial?

3. An accused has a fundamental right to be present at all critical stages of a trial, including voir dire and the empanelling of the jury. Did Mr. Rodriguez's absence from the bench conference during which his jury was selected violate his constitutional right to be present at all critical stages of the trial?

C. STATEMENT OF THE CASE

Ramiro Rodriguez became involved in a long-distance relationship with Zulema Barragan. 5/14/13 RP 5. The two wrote

[1] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

letters for over a year before they met in person, after which Ms. Barragan almost immediately invited Mr. Rodriguez to move into her apartment with her, her three children, and her mother. Id. at 5, 60-61.

Once Mr. Rodriguez and Ms. Barragan became romantically involved, they started to learn more about each other, and their relationship began to have its ups and downs. Mr. Rodriguez disclosed to Ms. Barragan that he had a history of mental illness, and had been diagnosed as a sociopath; he encouraged her to look it up on the internet if she didn't know what that meant. Id. at 43-44, 48-49. Once Mr. Rodriguez moved in with Ms. Barragan, he was surprised by how much time she spent working and taking care of her children; he told her he wanted to spend more time with her. Id. at 50-51. He was also frustrated by the lack of privacy in Ms. Barragan's two-room apartment, and the fact that the children did not have their own bedrooms and were encouraged to sleep with their mother and him, rather than in their grandmother's room. Id. at 15.

In this context, Mr. Rodriguez told Ms. Barragan that she had better keep her children under control, or he would do so. Id. at 36. He also told Ms. Barragarn that he had left bruises on a former girlfriend's

child, and had "busted [the girlfriend's] lip open," which made Ms. Barragan feel concerned. Id. at 36-37.

Later, Ms. Barragan overheard Mr. Rodriguez on the phone with his stepmother, telling her that if Ms. Barragan left him, he would light her apartment on fire. Id. at 25, 31, 75-76. He also allegedly threatened to stab Ms. Barragan. Id. at 30. In describing these incidents at trial, however, Ms. Barragan did not indicate that she was afraid that Mr. Rodriguez was threatening her life. In fact, in response to the fire comments, Ms. Barragan stated, "I just thought that was weird ... [it] got me thinking." Id. at 25.

In another comment allegedly made by Mr. Rodriguez, that he would beat Ms. Barragan in the head with a flashlight, Ms. Barragan testified again that her response was, "I don't know, it was weird." Id. at 29. When asked by the prosecutor if this threat made her uncomfortable, she replied, "Yeah." Id. at 30. "Kind of scared?" Id. "Mm-hmm." Id. She did not testify she feared for her life.

The most that Ms. Barragan said, in reference to her fear of Mr. Rodriguez, was that the stabbing comment "freaked me out." Id. at 30. She also testified that after Mr. Rodriguez allegedly threatened to burn down her apartment and told her that he had a lighter in his pocket (that

she did not actually see), she felt "kind of" scared. Id. at 31. When the prosecutor asked her again about her level of fear, Ms. Barragan stated, "Yeah, a little ... I was getting there." Id.

Mr. Rodriguez was charged with threats to bomb or injure property (domestic violence); felony harassment (domestic violence); and taking a motor vehicle without permission in the second degree. CP 15-16.[2]

Following a jury trial, Mr. Rodriguez was found guilty of threats to bomb or injure property and felony harassment, but acquitted of taking a motor vehicle; the jury also found that Mr. Rodriguez and Ms. Barragan were in a domestic relationship. CP 43-46.

Mr. Rodriguez appeals. CP 58-59.

---

[2] Mr. Rodriguez later took the truck that the couple shared to Auburn, to see his own daughter and take her roller skating. 5/14/13 RP 94-99. Ms. Barragan testified at trial that she called and texted Mr. Rodriguez, demanding that he return immediately with the truck; she then reported the truck stolen. Id. at 41-44. Following his visit with his daughter, Mr. Rodriguez drove the truck home. Id. at 98.

D. ARGUMENT

1. THE STATE DID NOT PROVE ALL OF THE ELEMENTS OF FELONY HARASSMENT, AS THE STATE PRESENTED NO EVIDENCE TO SHOW THE THREATS TO KILL ACTUALLY CAUSED MS. BARRAGAN TO FEAR MR. RODRIGUEZ WOULD KILL HER.

An essential element of the crime of felony harassment is that the threat placed the person threatened in reasonable fear the threat to kill would be carried out. 9A.46.020(1)(b). Because the State did not prove this element beyond a reasonable doubt, presenting insufficient evidence to show Ms. Barragan was afraid for her life, the conviction for felony harassment must be reversed and the charge dismissed.

a. To convict for felony harassment, the State must prove that the threat placed the person threatened in reasonable fear the threat to kill would be carried out. It is a fundamental principle of constitutional due process that the State must prove every element of a charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

Mr. Rodriguez was charged with and convicted of felony harassment, RCW 9A.46.020(1), (2).[3] CP 15-17; 44-45. The statute provides that a person is guilty of harassment if "[w]ithout lawful authority, the person knowingly threatens . . . [t]o cause bodily injury immediately or in the future to the person threatened or to any other person," and "[t]he person by words or conduct places the person threatened in reasonable fear that the threat will be carried out." RCW 9A.46.020(1), CP 30, 33, 44-45. To "threaten" is "to communicate,

---

[3] The harassment statute provides in full:

> (1) A person is guilty of harassment if:
> (a) Without lawful authority, the person knowingly threatens:
> (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or
> (ii) To cause physical damage to the property of a person other than the actor; or
> (iii) To subject the person threatened or any other person to physical confinement or restraint; or
> (iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.
> (2) (a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.
> (b) A person who harasses another is guilty of a class C felony if either of the following applies: (i) The person has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a no-contact or no-harassment order; or (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

RCW 9A.46.020.

directly or indirectly the intent . . . [t]o cause bodily injury in the future to the person threatened or to any other person." RCW 9A.04.110(27)(a); CP 30, 33, 82. The crime is elevated to a felony if the threat to cause bodily injury is a threat "to kill the person threatened or any other person." RCW 9A.46.020(2)(b).

Thus, in order to prove the elements of harassment, the State must show the defendant's words or conduct placed the person threatened in reasonable fear the threat would be carried out. State v. J.M., 144 Wn.2d 472, 482, 28 P.3d 720 (2001); RCW 9A.46.020(1). The State must show the person threatened was placed in reasonable fear of the actual threat made. State v. C.G., 150 Wn.2d 604, 610, 80 P.3d 594 (2003) ("the State must prove that the victim is placed in reasonable fear that the threat made is the one that will be carried out."). Thus, because felony harassment requires proof that the threat made was a threat to kill, the State must also show the person threatened was placed in reasonable fear the threat to kill would be carried out. Id. at 609-10, 612. In other words, the State must show the threat caused the victim actually to fear the defendant would kill her. Id. It is not enough for the State to show the threat caused the victim to fear some lesser harm, such as the threat of injury. Id.

The State's burden to prove the threat to kill actually caused the victim to fear for her life arises from the Legislature's primary purpose in criminalizing threats -- to address the harm caused to the victim. C.G., 150 Wn.2d at 610. A person placed in fear of being killed is, in general, harmed more than a person threatened with bodily injury. Id. This greater harm accords with the Legislature's elevation of a threat to kill to a felony. Id. Thus, in order to prove the felony, the State must show the threat actually caused the victim to fear being killed. Id.

In C.G., while being disciplined at school, C.G. said to the vice-principal, "I'll kill you Mr. Haney, I'll kill you." Id. at 606-07. At the adjudicatory hearing, Haney testified C.G.'s threat caused him "concern" and made him fear C.G. might try to harm him or someone else in the future, but he never testified the threat caused him to fear for his life. Id. at 608. The Washington Supreme Court reversed the adjudication, finding the State had not proved all the elements of the crime. The court explained the statute requires proof of reasonable fear that the threat to kill would be carried out as an element of the offense. Id. at 612. Because the victim did not testify the threat caused him to fear for his life, the adjudication for felony harassment could not be sustained. Id. at 607, 612.

b. The State did not prove all the elements of felony harassment, as the State did not prove Ms. Barragan feared being killed by Mr. Rodriguez. As discussed, to prove the charge of felony harassment, the State was required to prove beyond a reasonable doubt that the threats caused Ms. Barragan reasonably to fear for her life. C.G., 150 Wn.2d at 612; State v. Kiehl, 128 Wn. App. 88, 94, 113 P.3d 528 (2005).

In reviewing the sufficiency of the evidence to uphold the conviction, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Even when viewed in the light most favorable to the State, the evidence is insufficient to prove felony harassment in this case. When Ms. Barragan testified at trial, her statements fell far short of showing fear that Mr. Rodriguez would kill her. Ms. Barragan testified only that Mr. Rodriguez's comments about burning her apartment were "weird" and that they "got me thinking." 5/14/13 RP 25. She did not state that she feared for her life. Ms. Barragan also stated that when Mr.

Rodriguez allegedly threatened to beat her in the head with a flashlight, her response was, "I don't know, it was weird." Id. at 29. Again, Ms. Barragan notably did not testify that she was afraid for her life.

Even the allegedly most threatening remarks, about stabbing Ms. Barragan in the neck, did not provoke much response from her. Although Ms. Barragan testified that this comment "freaked me out," she did not state that she believed Mr. Rodriguez would kill her, and she did not, in fact, leave him. Id. at 30-31.

c. Because the State failed to prove an essential element of felony harassment, reversal with prejudice is required. Ms. Barragan was not afraid that Mr. Rodriguez would kill her, and did not testify to such a fear at trial. 5/14/13 RP 25, 29, 30-31. As in C.G., Ms. Barragan stated that the comments she heard gave her some "concern." 150 Wn.2d at 608; 5/14/13 RP 36-37. Even if Ms. Barragan felt her children were at risk of injury due to Mr. Rodriguez's impatience with them, or his disclosure that he had "left bruises" on a former girlfriend's child, this does not rise to the level required by felony harassment, which is a specific threat to kill. See C.G., 150 Wn.2d at 612. As the Supreme Court held in C.G., without a reasonable fear that a threat to kill will be carried out, the State has only proved fear of

bodily injury, a misdemeanor. Id. at 611. Because the State failed to prove this essential element, the conviction for felony harassment must be reversed and the charge dismissed.

2. THE TRIAL COURT VIOLATED MR. RODRIGUEZ'S RIGHT TO A PUBLIC TRIAL BY CONDUCTING PEREMPTORY CHALLENGES IN A PRIVATE BENCH CONFERENCE.

a. The federal and state constitutions provide parties the right to a public trial and also guarantee the public access to court proceedings. Public trials are a hallmark of the Anglo-American justice system. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-73, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980); State v. Coe, 101 Wn.2d 364, 380, 679 P.2d 353 (1984), quoting Craig v. Harney, 331 U.S. 367, 374, 67 S.Ct. 1249, 91 L.Ed.2d 1546 (1947).

In the criminal context, the Sixth Amendment[4] to the federal constitution and article I, section 22[5] of the Washington Constitution guarantee an accused the right to a public trial. Presley v. Georgia, 558

[4] The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ."

[5] Article I, section 22 also guarantees "[i]n criminal prosecutions, the accused shall have the right to . . . a speedy public trial."

U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 629 (1995).

Likewise, Article I, section 10 recognizes that the public has a vital interest in access to the court system: "Justice in all cases shall be administered openly, and without unnecessary delay." This clear constitutional provision entitles the public and the press to openly administered justice. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); Federated Publications Inc. v. Kurtz, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980).[6] The First Amendment's guarantees of free speech and a free press also protect the right of the public to attend trials. Globe Newspaper, 457 U.S. at 603-05; Richmond Newspapers, 448 U.S at 580 (plurality).

Although a defendant's right to a public trial and the public's right to open access to the court system are different, they serve "complementary and interdependent functions in assuring the fairness of our judicial system." Bone-Club, 128 Wn.2d at 259.

> 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

[6] Our Supreme Court recently noted that article I, section 22, with its requirement of speedy and open justice, has no exact parallel in the federal constitution. State v. Wise, 176 Wn.2d 1, 9 n.2, 288 P.3d 1113 (2012).

> sense of their responsibility and to the importance of their functions.

Id.(quoting In re Oliver, 333 U.S. 257, 270 n.25, 68 S.Ct. 499, 92 L.Ed. 682 (1948)).

Whether a trial court procedure violates the right to a public trial is a question of law that is reviewed de novo. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006); Bone-Club, 128 Wn.2d at 256. State v. Strode, 167 Wn.2d 222, 229-30, 217 P.3d 310 (2009) (holding the defendant cannot waive the public's right to open proceedings).

b. Washington courts apply a five-part test when addressing a request for full or temporary exclusion of the public from a trial. In order to protect the accused's constitutional right to a public trial:

> a trial court may not close a courtroom without, first, applying and weighing five requirements as set forth in Bone-Club and, second, entering specific findings justifying the closure order.

Easterling, 157 Wn.2d at 175 (emphasis added).

The constitutional right to a public trial is not waived by counsel's failure to object. Id. at 176 n.8 ("explicitly" holding "a defendant does not waive his right to appeal an improper closure by failing to lodge a contemporaneous objection."); State v. Brightman,

155 Wn.2d 506, 514-15, 122 P.3d 150 (2005); Strode, 167 Wn.2d at 229-30; Bone-Club, 128 Wn.2d at 257.[7]

The presumption of openness may be overcome only by a finding that closure is necessary to "preserve higher values" and the closure must be narrowly tailored to serve that interest. Waller v. Georgia, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (citing Press-Enterprise I, 464 U.S. at 510). Moreover, the trial court must enter specific findings identifying the interest so that a reviewing court may determine if the closure was proper. Id.

In Washington, a court faced with a request for closure must perform a test based upon the five criteria adopted in Bone-Club and Ishikawa. Bone-Club, 128 Wn.2d at 259-60.[8] Although it is

---

[7] This case is distinguishable from State v. Momah, in which the courtroom closure was suggested by defense counsel, and in which the closure was promoted to protect Momah's other constitutional rights, such as to an impartial jury. 167 Wn.2d 140, 151-52, 217 P.3d 321 (2009).

[8]
> 1. The proponent of closure or sealing must make some showing [of a compelling state 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;

conceivable that a court might find circumstances exist to justify some form of courtroom closure, the factors justifying any such limitation of public access must be articulated with specificity. E.g., Presley, 558 U.S. at 213-14; State v. Lormor, 172 Wn.2d 85, 91-92, 257 P.3d 624 (2011).

The accused's right to a public trial under both the federal and state constitutions applies to voir dire. Presley, 558 U.S. at 213-14; State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009); State v. Orange, 152 Wn.2d 795, 812, 100 P.3d 291 (2004). Washington courts have repeatedly held that jury selection conducted in chambers violates the right to public trial. See, e.g., Strode, 167 Wn.2d at 226-29 (Alexander, C.J., lead opinion); 167 Wn.2d at 231-36 (Fairhurst, J., concurring); State v. Paumier, 155 Wn. App. 673, 679, 685, 230 P.3d 212, review granted, 169 Wn.2d 1017 (2010); State v. Heath, 150 Wn. App. 121, 125-29, 206 P.3d 712 (2009).

Exercising peremptory challenges is a vital part of voir dire. See State v. Wilson, 174 Wn. App. 328, 343, 298 P.3d 148, 156 (2013) (observing that unlike hardship strikes made by clerk, "voir dire"

---

5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59, quoting Eikenberry, 121 Wn.2d at 210-11.

involves trial court and counsel questioning prospective jurors to determine their ability to serve fairly and to enable counsel to exercise informed challenges for cause and peremptory challenges); State v. Vreen, 99 Wn. App. 662, 668, 994 P.2d 905 (2000) (recognizing "it is the interplay of challenges for cause and peremptory challenges that assures the fair and impartial jury"), aff'd, 143 Wn.2d 923 (2001); People v. Harris, 10 Cal. App. 4th 672, 684, 12 Cal. Rptr. 2d 758 (Cal. App. 1992) (exercising peremptory challenges in chambers, "tracking" them on paper, and then announcing in open court the names of the stricken prospective jurors, violated federal and state public trial rights, even where such proceedings were reported).[9] Because the peremptory challenge process is an integral part of voir dire, the constitutional public trial right also extends to that portion of criminal proceedings.

c. The trial court conducted peremptory challenges in a private bench conference, off the record, without making specific findings or employing the required five-part *Bone-Club* test. The trial court here effectively closed the courtroom when it conducted peremptory challenges at the bench, in the absence of oral or written findings explaining the need for such a procedure, or any apparent

[9] Unlike in Harris, the peremptory challenges in Mr. Rodriguez's case were not reported. 5/13/13 RP 123.

analysis of the rights and interests at stake or the alternatives available. 2RP 133-34.

The report of proceedings from the relevant portion of voir dire appears as follows:

> COURT: With that, ladies and gentlemen, we are ready to continue with your selection process, and you can talk among yourselves again, if you wish. Sorry for the interruption.
>
> (BENCH CONFERENCE OFF THE RECORD.)
>
> COURT: Ladies and gentlemen, if I could have your attention, please. Thank you. Just want to remind you that the attorneys had up to seven strikes each for no particular reason, so please don't take offense. Please don't celebrate too loudly if you are excused. That will hurt the feelings of those remaining behind.

5/13/13 RP 122-23. The trial court then recites 13 names and fills the box with the 13 jurors, including the alternate, that have been chosen during the bench conference. Id.

By requiring counsel to exercise peremptory challenges at the bench, the trial court violated Mr. Rodriguez's right to a public trial to the same extent any in-chambers conference or other courtroom closure would have. Even though the bench conference occurred in an otherwise open courtroom, it by definition occurred privately, outside the public's scrutinizing eyes and ears, and thus violated Mr.

Rodriguez's right to a fair and public trial. State v. Slert, 169 Wn. App. 766, 774 n. 11, 282 P.3d 101 (2012) (rejecting argument that no violation occurred if jurors were dismissed at sidebar rather than in chambers), review granted, 299 P.3d 20 (2013); State v. Leyerle, 158 Wn. App. 474, 483, 242 P.3d 921 (2010) (questioning juror in public hallway outside courtroom is a closure despite the fact courtroom remained open to public). The bench conference was not recorded, could not be heard by the public, and no record memorializes which peremptory strike was made, in which order. By failing to first apply the Bone-Club factors before hearing the peremptory challenges at the bench, the trial court violated Mr. Rodriguez's constitutional right to a public trial.

d. Reversal is required. The remedy for a violation of the public's right of access is remand for a new trial. Easterling, 157 Wn.2d at 179-80. In Easterling, the court rejected the possibility that a courtroom closure may be de minimus, even for a limited closure. 157 Wn.2d at 180 ("a majority of this court has never found a public trial right violation to be de minimus"). Where a portion of the proceedings are fully closed to the public, the closure is not trivial or subject to harmless error analysis and requires reversal. Id. at 174, 180-81.

Because the court's violation of Mr. Rodriguez's right to a public trial constitutes structural error, prejudice is presumed and reversal is required. Strode, 167 Wn.2d at 231; Bone-Club, 128 Wn.2d at 257.

3. THE TRIAL COURT VIOLATED MR. RODRIGUEZ'S RIGHT TO BE PRESENT AT ALL CRITICAL STAGES BY CONDUCTING PEREMPTORY CHALLENGES AT A PRIVATE BENCH CONFERENCE.

"A criminal defendant has a fundamental right to be present at all critical stages of a trial." State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). This includes the right to be present during voir dire and empanelling of the jury. Diaz v. United States, 223 U.S. 442, 455, 32 S. Ct. 250, 56 L. Ed. 500 (1912). The right to be present derives from the Confrontation Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. Id.[10]

Jury selection is "'the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability.'" Irby, 170 Wn.2d at 884 (quoting Gomez v. United

[10] In situations in which the accused is not actually confronting witnesses or evidence against him, this right is protected by the Due Process. Irby, 170 Wn.2d at 880-81 (quoting United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)).

States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989)). "[A] defendant's presence at jury selection 'bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend' because 'it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether.'" Irby, 170 Wn.2d at 883 (quoting Snyder v. Massachusetts. 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934), overruled on other grounds by Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)). This right attaches from the time empanelment of the jury begins. Irby, 170 Wn.2d at 883.

This case resembles Irby in important respects. In Irby, both counsel exercised their challenges by email while the accused was in custody, unable to hear or participate. Id. at 878-79. Here, the trial court took peremptory challenges at sidebar, and there is no indication that Mr. Rodriguez was present or permitted to participate in the proceedings. See Lewis v. United States, 146 U.S. 370, 372, 13 S. Ct. 136, 36 L. Ed. 1011 (1892) ("[W]here the [defendant's] personal presence is necessary in point of law, the record must show the fact."); see also People v. Williams, 858 N.Y.S.2d 147, 52 A.D.3d 94, 96-97 (2008) (exclusion of defendant from sidebar conference where jurors

excused by agreement violates right to be present; court refuses to speculate that defendant could overhear conversations).

It is clear from the portions of the record that were reported that Mr. Rodriguez was not present at the bench conference where his jury was selected. Several times, the trial court instructs the potential jurors that "the attorneys are going to review their notes," and then "they're going to come up here, and we're going to go through the selection process." 5/13/13 RP 119-20. Immediately before the unreported bench conference, the court continues, "Counsel, come on up and take the time you need." Id. at 120. At no time did the court invite Mr. Rodriguez to approach the bench to participate in the conference, violating his right to be present. Williams, 52 A.D.3d at 96-97 (exclusion of defendant from bench conference where jurors were excused by agreement violates right to be present).

The fundamental purpose of a defendant's right to be present during jury selection, including the exercise of peremptory challenges, is to allow him to give advice or suggestions to counsel or even to supersede counsel's decisions. Irby, 170 Wn.2d at 888; Gomez, 490 U.S. at 874. Here, as in Irby, because Mr. Rodriguez was not present for this portion of jury selection, he was unable to exercise that right.

See Commonwealth v. Owens, 414 Mass. 595, 602, 609 N.E.2d 1208 (1993) (defendant "has a right to be present when jurors are being examined in order to aid his counsel in the selection of jurors and in the exercise of his peremptory challenges") (citing Lewis, 146 U.S. at 372).

Nonetheless, violation of the right to be present is subject to harmless error analysis. Irby, 170 Wn.2d at 885. The State bears the burden of proving beyond a reasonable doubt that the error is harmless. Id. at 886.

The Irby Court found Irby's absence from the portion of jury selection at issue was not harmless:

> [T]he State has not and cannot show that three of the jurors who were excused in Irby's absence ... had no chance to sit on Irby's jury. Those jurors fell within the range of jurors who ultimately comprised the jury, and their alleged inability to serve was never tested by questioning in Irby's presence . . . . Therefore, the State cannot show beyond a reasonable doubt that the removal of several potential jurors in Irby's absence [was harmless].

Id. at 886-87.

Thus, the Irby Court considered whether the same jurors would have inevitably sat on the jury regardless of Irby's participation and concluded the answer was no. Accordingly, the State could not show the error was harmless. Id. As in Irby, the State cannot show that the

venire members excused during the proceedings at sidebar had no chance to sit on this jury; indeed, since the peremptory challenge process was not reported, there is no record of what transpired in the bench conference. Peremptory challenges are largely based on subjective decision-making, albeit with some limitations.[11]

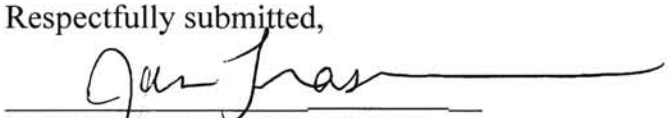
Accordingly, the State cannot show that Mr. Rodriguez's absence during this critical stage was harmless beyond a reasonable doubt. Reversal and a new trial are required. Irby, 170 Wn.2d at 886-87.

E. CONCLUSION

For the reasons stated above, Mr. Rodriguez respectfully asks this Court to reverse his conviction and remand for a new trial.

DATED this 17th day of December, 2013.

Respectfully submitted,



JAN TRASEN (WSBA 41177)
Washington Appellate Project (WSBA 91052)
Attorney for Appellant

[11] Batson v. Kentucky, 476 U.S. 79, 85-86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The unreported peremptory challenge proceedings here would make a race-based Batson challenge nearly impossible, for example.

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70490-7-I
v.	)	
	)	
RAMIRO RODRIGUEZ,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF DECEMBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	ERIK PEDERSEN, DPA SKAGIT COUNTY PROSECUTOR'S OFFICE COURTHOUSE ANNEX 605 S THIRD ST. MOUNT VERNON, WA 98273	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	RAMIRO RODRIGUEZ DOC 786283 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF DECEMBER, 2013.

X _____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711