70490-7

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NO. 70490-7-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

RAMIRO RODRIGUEZ, JR.,
Appellant.

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

The Honorable Dave Needy, Judge

RESPONDENT'S BRIEF

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2. The bench conference to exercise peremptory challenges in open court did not violate the right to a public trial under the experience and logic test.

3. The bench conference in open court to exercise peremptory challenges did not violate Mr. Rodriquez's right to be present or the violation was of such short duration as to be harmless and benefitted Mr. Rodriguez.

II. ISSUES

1. Was there sufficient evidence for a reasonable juror to find that Ms. Barragan was afraid of Mr. Rodriquez's threats to kill when she stated she was freaked out that he would stab her in the neck and watch her lying in a pool of blood and that he would burn her, and she moved her children to a location unknown to Mr. Rodriguez when she reported this to the police and Mr. Rodriguez had a key to her residence?

2. Was there a court closure during the bench conference in open court and the attorneys approached the bench to exercise peremptory challenges where the courtroom was open throughout the proceedings and people could enter and leave the courtroom during the bench conference?

3. Was there a violation of Mr. Rodriguez's right to be present when Mr. Rodriguez was present in court with counsel throughout the voir dire questioning and still present in court during the bench conference where peremptory challenges were exercised?

III. STATEMENT OF THE CASE

The State Supplements Appellants Statement of facts as follows. On March 13, 2013, voir dire occurred in Skagit County Superior Court. The trial court explained to the jury that the attorneys would approach the bench to take challenges. "Ladies and Gentleman, the attorneys are going to review their notes and for probably five to ten minutes, and then they are going to come up

here, and we're going to go through the selection process." RP 5/13/13 119-120. [1]

The jurors were in the courtroom while this process occurred as indicated by the statement of the trial court.

> So, during this time, I will allow you to stand, if you want, in the area you are seated in. And a lot of their notes and memories are based on where you are located in the courtroom. You can talk quietly among yourselves also, but don't get up and start wandering around, or you will really give them fits. And with that, you can talk quietly if you wish, but you cannot talk about this case, of course and you can stay seated, stand as you wish also. Counsel, when you are ready, come on up and take the time you need.

RP 5/13/13 at 120.

Additional voir dire occurred. RP 5/13/13 at 121-123. The trial Court further explained the selection process:

> With that, ladies and gentleman, we are ready to continues with your selection process, and you can talk among yourselves, if you wish. Sorry for the interruption. (BENCH CONFERENCE OFF THE RECORD). Ladies and Gentleman, 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.

RP 5/13/13 122-123.

Zulema Barragan is 24 years old and is the mother of three children. 5/14/13 RP 3 She met Ramiro Rodriguez through his

[1] The State will refer to the verbatim report of proceedings by "RP" followed by the date and page number.

sister. Id at 5. They corresponded by letters and phone before they met in person. Id at 5-6. In March of 2013 Mr. Rodriguez visited her and stayed with her. Id. At 7-8. During that visit Mr. Rodriguez threw a plate across the room. Id. at 11. About a week after this visit, Mr. Rodriguez came to live permanently with Zulema Barragan. Id at 12-13. On Friday, March 8 of that week Mr. Rodriguez picked up Ms. Barragan from her work and she noticed he was drinking. Id. at 17. They went out to a movie. Id. at 19. After the movie was over they had an argument and he threw her phone, breaking it. Id at 20. They then go into a vehicle where he stated that "when people piss him off he's already planning their death." Id at 20. Ms. Barragan drove because Mr. Rodriguez had been drinking. Id at 20. In the car he told her that she wasn't "getting it", that if she left him "he would do something about it." Id at 21. She asked him what he meant and he mentioned a guy on the street who could do a deed for him. Id at 22. She thought it meant that he would harm her. Id.

The next day, Mr. Rodriguez and Ms. Barragan and her children went to the aquarium. As soon as they returned home Ms. Barragan overheard Mr. Rodriguez speaking with his step-mother. Id at 25. She overheard him say "if she leaves, I will light her on fire." Id at 25, Id at 76.

Later in the day, Ms. Barragan went to bed and allowed her child to sleep with her. Mr. Rodriguez was upset and asked her to sleep in her own bed in their room. Id at 26. Mr. Rodriguez left and returned with a beer and wanted Ms. Barragan to drink with him. Id at 27. He continued to drink and Ms. Barragan wanted to go to bed. He had a flashlight and asked her if she knew why he had it. He told her that if she pissed him off he would beat her on the head with it. Id at 29. He put his flashlight away. He then told her that if she left him he would stab her in the neck. Id. at 30. Ms. Barragan indicated that when he said that it "freaked her out." Id at 30. He told her that he had a knife. Id. He also said that if she left him he would light her apartment on fire. Id at 31. He also told her that he had a lighter in his pocket. Id at 31. Although she stated she was a little scared, she was crying and stated that she thought he was capable of it. Id at 31. She explained that one of the reasons she was afraid of him was that he had previously told her that he had busted open the lip of an ex-girlfriend. Id at 36. He also told her to put her children in check and made her aware of putting bruising on a one-year old child of his ex-girlfriend. Id at 36-37. Zulema Barragan was taking his threats seriously. Id. at 37. That evening he also told her that he could see her "lying in a pool of blood and that he would still fuck her because it

turns him on." Id. at 38. Ms. Zulema Barragan was "freaked out" at this statement. Id.

The next morning Ms. Zulema Barragan's brother was in the house. Mr. Rodriguez took her truck and left. After he left she texted him asking him to return the truck. He stated he would take it to Pasco and burn it.

That morning, after the threats her mother, Mario del Carman Barragan noticed that her daughter was pale, that her eyes were big and that she was crying, shaking and having a hard time speaking. Id. at 89.

After this text she took her children to her cousin's house and left them there and contacted Officer Weiss of the Burlington Police Department. Id at 43. She wanted her children in a location where Mr. Rodriguez would not know their location. Id at 44. She did this because Mr. Rodriguez had a key to her apartment and she was scared and thought he would return. Id at 43. Mr. Rodriguez had told her he was a "sociopath." Id at 44. She was afraid he would return and follow through on his threats. Id at 45.

On March 10, 2013, Officer Weiss of the Burlington Police Department spoke with Zulema Barragan. 5/13/13 RP 147. When he spoke with her she was "very, very frightened." Id *at* 148. When

she spoke with him she was hunched over. Id. Officer Weiss was shown a text message and photographed it. It indicated that Mr. Rodriguez would crash the truck if police chased him. Id. At 152.

IV. ARGUMENT

1. THE STATE PRESENTED MORE THAN SUFFICIENT EVIDENCE THAT MS. BARRAGAN WAS AFRAID THAT MR. RODRIGUEZ WOULD FOLLOW THROUGH WITH HIS THREATS TO KILL HER.

Mr. Rodriguez argues that the State did not present sufficient evidence for a jury to find that Ms. Rodriguez actually feared that Mr. Rodriguez would kill her. Mr. Rodriguez is wrong. The State presented more than sufficient evidence for a reasonable juror to find him guilty beyond a reasonable doubt.

To convict of felony harassment, the State must prove that Ms. Barragan was afraid for her life. *State v. J.M.*, 144 Wn. 2d 472, 482, 28 P.3d 720 (2001).

In determining whether there is sufficient evidence to uphold the conviction, the reviewing court views the evidence in the light most favorable to the State. *State v. Green*, 94 Wn. 2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that can be drawn from that

evidence. *State v. Salinas*, 119 Wn. 2d 192, 201, 829 P.2d 1068 (1992). Circumstantial as well as direct evidence may support the conviction. *State v. Bright* 129 Wn. 2d 257, 270, 916 P. 922 (1996). "We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Arquette,* 178 Wn. App. 273, 314 P.3d 426, 431 (2013).

"[T]he nature of the threat depends on all the facts and circumstances, and it is not proper to limit the inquiry to a literal translation of the words spoken." *State v. C.G.*, 150 Wn. 2d 604, 611, 80 P.3d 594 (2003).

In deciding whether a threat occurred, the factfinder can consider the statements in context and not just the literal words. *State v. Scherck*, 9 Wn. App. 792, 794, 514 P.2d 1393 (1973).

In context; Mr. Rodriguez made several threats to kill Ms. Barragan. The threat to burn her apartment was a threat to kill because it was also accompanied by a threat to light her on fire. The threat to stab her neck combined with mentioning seeing her lying in a pool of blood and sexually assaulting her was also a threat to kill. The threats escalated over time. She had previously heard him say that "when people piss him off, he's already planning their death." Ms. Barragan stated that the threats "freaked her out." The threats

caused her to move her children for their safety when she reported this to police as she was concerned that he would return and carry out his threats. The inference to be drawn from Ms. Barragan's removing her children to a location unknown to Mr. Rodriguez is that she took his threats very seriously. *See State v. Gentry*, 125 Wn. 2d 570, 597, 888 P.2d 1105 (1995), ("[A] defendant who claims insufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from that evidence").

Appellant argues that because Ms. Barragan did not leave Mr. Rodriguez, she was not reasonably afraid of his threats to kill her . Appellant's brief at 11. In fact, Mr. Rodriguez's threats to burn and to stab were made in the context of her leaving him. 5/14/13 RP 25,30,76. Her actions in reporting this only after Mr. Rodriguez left and her brother had arrived the next morning are consistent with someone who believed the threats and only reported them when it was safe.

The evidence was more than sufficient for a reasonable juror to find that she was afraid that he would carry out his threats to kill her.

2. PEREMPTORY CHALLENGES IN OPEN COURT AT A BENCH CONFERENCE ARE NOT A VIOLATION OF THE DEFENDANT'S RIGHT TO PUBLIC TRIAL.

i. The bench conference where the parties exercised their challenges was not a court closure.

The Bench Conference occurred in open court with the jurors present in the Courtroom. The jurors needed to remain near their seats during the process and the Court was open. This was not a "court closure."

Article 1, Section 22 guarantees a criminal defendant the right to a public trial. *State v. Lomor*, 172 Wn.2d 85, 90-91, 257 P.3d 624 (2011). Whether there is a right to public trial violation is a question of law reviewed de novo. *State v. Momah*, 167 Wn.2d 140, 147, 217 P.3d 321 (2009). Jury selection is considered part of a criminal trial that is subject to the defendant's constitutional right to a public proceeding. *State v. Strode*, 167 Wn.2d 222, 227, 217 P.3d 310 (2009), *State v. Bennett*, 168 Wn. App. 197, 204, 275 P.3d 1224 (2102) (public trial right encompasses "circumstances in which the public's mere presence passively contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny").

To implicate the right to a public trial, a courtroom closure must have occurred. *State v. Njonge*, 161 Wn. App. 568, 575, 255 P.3d 753 (2011). Courtroom closures may be express, *State v. Easterling*, 157 Wn. 2d 167, 172, 137 P.3d 825 (2006), or implied. *State v. Strode*, 167 Wn. 2d 222, 227, 217 P.3d 310 (2009).

The right to a public trial applies to voir dire. *In re Personal Restraint of Orange*, 152 Wn. 2d 795, 804, 100 P.3d 291 (2004).

"[A] 'closure' of the courtroom occurs when the courtroom is completely and purposely 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).

Whether a particular portion of a court proceeding is encompassed by the public trial right is determined by the application of the "experience and logic" test. *State v. Sublett*, 176 Wn.2d 58,114, 292 P.3d 715 (2012). In *Sublett*, the court explained the "experience and logic" test requires courts to determine the necessity for closure by consideration of both history and the purposes of the open trial provision. *Sublett*, 176 Wn.2d at 73, 292 P.3d 715. The experience portion of the test asks whether the practice in question has historically been open to the public, while the logic portion of the test focuses on whether public access is significant to the functioning

of the public trial right. Id. If both prongs of this test are met, then the court must apply the *Boneclub* factors before the court can close the courtroom. Id.

Applying the logic and experience test in *Sublett*, the Court found that the public trial right does not attach to counsel meeting in chambers to answer a question from a deliberating jury. *State v. Sublett*, 176 Wn.2d at 75. The Court reasoned that such proceedings have not historically been done in an open courtroom and the court's answer to the jury was recorded in writing, thus becoming part of the public record, necessarily reminding the court and counsel of their responsibilities and providing necessary oversight. *See*, *State v. Sublett*, at 75-77.

Applying the *Sublett* logic and experience test to this case there is no evidence that the courtroom was closed to anyone at the time that the bench conference occurred. The jurors and parties were all in the same courtroom and the public could enter and leave the courtroom while the bench conference occurred. Under the *Sublett* logic and experience test, the record reflects use of a bench conference in open court does not implicate public trial rights. RP 5/13/13 119-123. Jury selection in this case was completed in open court and there is a written record of all actions taken by the court and

counsel pertaining to both peremptory and for cause challenges that were completed at the bench conference in open court. Rodriguez fails to cite to any authority that demonstrates historically for-cause and peremptory challenges have as a matter of routine, historically been done publicly. To the contrary, in *State v. Love*, 176 Wn. App. 911, 918-919, 309 P.3d 1209 (2013), *citing State v. Thomas*, 16 Wn. App. 1, 13, 553 P.2d 1357 (1976), the court pointed out that the use of written peremptory challenges was a practice used by many counties historically and that there is little evidence to demonstrate in Washington that voir dire challenges are traditionally completed in open court within earshot of the public. See also, *Popoff v. Mott*, 14 Wn.2d 1, 9, 126 P.2d 597 (1942), (where the record describes a bench conference during voir dire on whether to excuse a juror for cause); State v. Wolfe, 343 S.W.2d 10, 14 (Missouri, 1961) (objection during voir dire). That is not to say that the exercise of peremptory and for cause challenges should not be open to public scrutiny. Only that such scrutiny has historically been had through written documentation through clerk's notes or transcripts of open court where potential venire persons are not present. In this case the transcript reflects that peremptory challenges were taken at the bench conference. These actions sufficiently provide the oversight

necessary to ensure the court and counsel acted responsibly in ensuring Rodriguez obtained a fair trial by an impartial jury and in considering public trial rights.

The logic prong also does not suggest jury selection challenges should be conducted openly in public. Requiring the parties to make their peremptory challenges in open court in front of the venire panel does nothing to further the underpinnings of public trial rights such as encouraging witnesses to come forward or otherwise providing public oversight of the process. The issues presented during voir dire challenges are legal in nature and directed to the judge to decide. The trial court therefore did not erroneously close the courtroom by hearing Rodriguez's for cause and peremptory challenges at bench conference in an open courtroom.

Predicated on the analysis of *Sublett* and application of the experience and logic test, the court in *Love* determined that the right to public trial was also not implicated by peremptory or for cause challenges done at sidebar in open court. 176 Wn. App. 919-920. As in *Love*, the exercise of peremptory challenges at the bench conference in this case do not, pursuant to the experience and logic test, implicate Rodriguez's public trial rights. There is a benefit to having challenges occurring at sidebar rather than openly stated.

176 Wn. App. at 919. Rodriguez's counsel engaged in the bench conference wherein peremptory challenges were made. This record does not reflect Rodriguez's public trial rights were implicated such that *Boneclub* findings would be warranted.

ii. If the Court finds a closure, the closure was trivial and of short duration and does not merit a new trial.

Even if the bench conference bar determination peremptory challenges is construed as a closure, such closure should be construed as trivial, thus not requiring reversal.

Any infringement upon Rodriguez's right to public trial was minimal and caused at least in part by his own failure to object. While our state has yet to affirmatively recognize the concept of a de minimis violation of the right to public trial, a majority of our state Supreme Court has also not explicitly held that there can be no such exception. The Court in *State v. Brightman*, 155 Wn.2d 506, 517, 122 P.3d 150 (2005), recognized that closures that have a de minimis effect on a proceeding do not necessarily violate the right to public trial. *Brightman*, 155 Wn.2d at 517. In order to determine whether the right to a public trial is implicated by a closure, courts look to whether the principles underlying the right to public trial are negatively impacted by the closure.

> "... [W]hether a particular closure implicates the constitutional right to a public trial is determined by inquiring whether the closure has infringed the 'values that the Supreme Court has said are advanced by the public trial guarantee...' ... This analysis tends to safeguard the right at stake without requiring new trials where these values have not been infringed by a trivial closure."

State v. Easterling, 157 Wn.2d 167, 183-84, 137 P.3d 825 (2006) (J. Madsen concurring). "[T]he right to public trial serves to ensure a fair trial, to remind prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." *State v. Sublett*, 176 Wn.2d at 72. In the context of a closure of voir dire, the public nature of the proceeding permits the defendant's family to contribute their knowledge or insight to jury selection and permits the venire to see the interested individuals. *Brightman*, 155 Wn.2d at 515.

In addition to considering the values guaranteed by the public trial right in determining whether a closure is de minimis, courts have also considered the duration of the closure. *U.S. v. Ivester*, 316 F.3d 955, 960 (9th Cir. 2003); *see also*, *Peterson v. Williams*, 85 F.3d 39 (2nd Cir. 1996), *cert. den.*, 519 U.S. 878 (1996) (inadvertent closure of courtroom during defendant's testimony for 20 minutes met de minimis standard); *Snyder v. Coiner*, 510 F.2d 224, 230 (4th Cir.

1975) (short closure of courtroom during closing arguments was too trivial to implicate right to public trial); U.S. v. Al-Smadi, 15 F3d 153 (10th Cir. 1994) (brief, unintentional closing). The de minimis standard has been applied in cases where closure was purposeful as well as unintentional. *Easterling*, 157 Wn.2d at 184-85 (J. Madsen concurring).

Here, none of the values underlying the right to a public trial is implicated by the bench conference in this case. A bench conference by its very nature is brief and is done in open court, albeit outside of earshot of those in the courtroom, which in contrast to a hearing in chambers or in a locked courtroom still allows oversight by observers based on observations in conjunction with announced decisions and court records. Having the challenges at bench conference and not presented to the potential venire panel enabled Rodriguez to exercise his rights to ensure a fair impartial jury panel without potentially tainting a potential jurors with knowledge that Rodriguez did not want them to serve on his jury. Thus, the side bar in this instance advanced his right to a fair trial, and did not detract from it.

3. THE BENCH CONFERENCE IN OPEN COURT DID NOT VIOLATE THE DEFENDANT'S RIGHT TO BE PRESENT.

Mr. Rodriguez claims that the bench conference in open court violated his right to be present during voir dire. Mr. Rodriguez is wrong. Mr. Rodriguez was present in open court during all of the questioning and the bench conference also occurred in open court.

An accused has the right to be present during voir dire. *State v. Strode*, 167 Wn. 2d 222, 227, 217 P.3d 310 (2009); *State v. Irby*, 170 Wn 2d 874, 246 P. 3d 796 (2011). Mr. Rodriguez argues that this case is like *Irby.* In *Irby* an exchange of e-mails between the Judge and counsel resulted in removing several jurors from the panel. When these exchanges occurred there was no questioning in open court and Mr. Irby was in jail and there was no record of his being consulted before responding to the e-mails.

Here, Mr. Rodriguez was present during all of the questioning and could consult with counsel before counsel approached for the bench conference. Mr. Rodriguez was present and had the opportunity to participate throughout the voir dire process.

If the bench conference violated Mr. Rodriguez's right to be present, the violation was minimal and harmless beyond a reasonable doubt. *In re Personal Restraint of Benn,* 134 Wn. 2d 868, 921, 952 P.2d 116 (1998). Under the authority cited above in discussing the short nature of the alleged closure, the time that Mr.

Rodriguez was not immediately present but still in the open courtroom during the bench conference should be harmless beyond a reasonable doubt.

V. CONCLUSION

More than sufficient evidence allowed the jury to find that Ms. Barragan was afraid that Mr. Rodriguez's would follow through on his several threats to kill.

The bench conference in open court was not a court closure. If the Court finds a court closure, it was minimal.

Mr. Rodriguez was physically present throughout the voir dire questioning. The brief bench conference to exercise peremptory challenges benefitted Mr. Rodriguez in open court. The short duration of the bench conference should be considered harmless as to his right to be present.

DATED this 21 day of March, 2014.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: _____

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DECLARATION OF DELIVERY

I, Vickie Maurer, declare as follows:

I sent for delivery by; [X]United States Postal Service; [ ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Jan Trasen, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 21st day of March, 2014.

Vickie Maurer, DECLARANT