

NO. 60015-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TINH LAM,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

**SUPPLEMENTAL BRIEF OF RESPONDENT
RE: OPEN COURTROOM ISSUE**

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A. ISSUES

1. Did a defendant receive a public trial where the entire trial was open to the public, with the exception of a brief conversation with a single juror regarding the juror's safety concerns, *after* the jury had been selected and sworn?

2. Has a defendant preserved a public trial claim for appellate review where there was no contemporaneous objection?

3. Is questioning a single juror who had safety concerns in chambers a *de minimus* closure that does not violate the constitution?

B. STATEMENT OF RELEVANT FACTS

Tinh Lam was charged on May 13, 2005 with first degree murder.

CP 1. Numerous hearings and proceedings were held over the ensuing 22 months. His trial began on March 12, 2007 and ended on March 27, 2007. CP 98-113. A jury convicted him as charged and he was sentenced on April 27, 2007. CP 74-81.

Jury selection occurred on March 14-15, 2007. 3RP 9-149; 4RP 2-65. The verbatim report of proceedings shows that the jury was seated and sworn on March 15th, an introductory instruction was then read to the jury, and opening statements followed. 4RP 66. A clerk's minute entry shows that the jury was sworn and impaneled on March 15th and the jurors are listed by name. CP 102. The clerk's minute entry also shows:

Juror #10 is questioned outside the presence of the jury. Court holds in chamber conference with court reporter, Juror #10 and respective counsel. . . . Court continued until Monday, March 19, 2007 at 9:00 a.m.

CP 103. The minute entry says nothing about the court reading an introductory instruction to jurors or about opening statements being delivered by counsel. The verbatim report of proceedings says nothing about an in-chambers discussion with a juror.

A supplemental verbatim report of proceedings was prepared, however, and it shows that a hearing was held in chambers with Juror Number 10, who is identified by name. Supp. RP 2. Present were the judge, the prosecutor, both defense lawyers, and a court reporter. Supp. RP 2. The record suggests that the conference was triggered by a request from Juror No. 10. He said:

I'm sorry for causing any disruption . . . The concern I have is because of the nature of the trial and the potential outcome for the defendant. My name is very, very unusual. . . . And what I'm concerned about is that . . . it would be very easy for somebody who was angry or upset to find me or somebody in my family. . . . Again because of the nature of the trial, it concerns me.

Supp. RP 2. The court listened to Juror No. 10's concerns, explained that juror names were not usually reported in the press, and confirmed that Juror No. 10 would not let his worries interfere with his deliberations on the case. Supp. RP 2-5. The court then asked, "is there is anything else

you want to discuss while we've got the chance here? Is that pretty much the sum and substance of it, sir." Supp. RP 5. Juror No. 10 replied:

Absolutely. There were two issues I raised with Charlotte [the bailiff]. One is my name and whether or not it would be released. The other is a good friend is a prosecutor. The question never came up so it didn't seem like a big deal. But they are sort of linked.

Supp. RP 5-6. The prosecutor and one defense lawyer asked Juror No. 10 some questions, he left the room, and the parties and the judge agreed the juror could continue to serve. Supp. RP 8-12.

C. SUPPLEMENTAL ARGUMENT

Lam argues that his right and the public's right to an open trial were violated, so his murder conviction must be reversed. His argument should be rejected. The trial court did not close *voir dire* in this case; *voir dire* was wholly open. Instead, the court simply handled a seemingly delicate mid-trial inquiry from a juror who was concerned about his personal safety, and the inquiry was done in chambers to protect the juror's privacy interests. Reversal is not warranted under these facts.

1. THIS CASE INVOLVES AN EVENT MORE AKIN TO A SIDEBAR THAN A CLOSED *VOIR DIRE*; THERE WAS NO REVERSIBLE ERROR.

In arguing that his conviction must be reversed, Lam relies on a series of cases dealing with the closure of *voir dire*, including 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). Supp. Br. of App. at 1-6. In those cases, the issue was whether a portion of jury selection may be closed. The United States Supreme Court and the Washington Supreme Court have both held that closure of *voir dire* is prohibited because *voir dire* is a highly significant stage of the proceedings. Presley v. Georgia, 558 U.S. ___, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); (defendant who objected to violation of right to public trial was entitled to new trial where uncle excluded from *voir dire*); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (six weeks of *voir dire* closed). In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004) (defendant's family excluded from entire *voir dire*).

These cases are easily distinguished from Lam's case. Jury selection was held over a period of two days, entirely in public view and in the defendant's presence. It was only after the jury was selected and sworn (and perhaps after opening statements had occurred) that a single juror asked, through the bailiff, to address the court on two matters, one of which dealt with his personal safety. The Court apparently acquiesced and answered the juror's questions in private to avoid undue exposure for the juror, especially in light of the fact that the juror's fear was that he would be subject to reprisals if it became widely known that he was sitting on this jury.

The situation here is more akin to cases where the Washington Supreme Court has held that a defendant or the public do not have a right to attend. For instance, the Washington Supreme Court has recognized that sidebars and the like are not truly trial proceedings to which the defendant or the public must be granted access. In In re Personal Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994), the supreme court considered an argument that the defendant had a right to be present at numerous conferences between the lawyers and the judge, including a pretrial hearing in which the court deferred ruling on an ER 609 motion, granted a motion for funding to get Lord a haircut and clothing for trial, settled on the wording of the jury questionnaires and the pretrial instructions, and set a time limit on the testing of certain evidence. Lord, 123 Wn.2d at 306. It also considered whether Lord had the right to be present during a proceeding where the court announced its rulings on evidentiary matters which had previously been argued, ruled that the jurors could take notes, and directed the State to provide the defense with summaries of its witnesses' testimony. Id. The court held that Lord had a right to be present at none of these purely legal discussions between the court and counsel.

The core of the constitutional right to be present is the right to be present at trial proceedings like *voir dir*, or when evidence is being

presented, like during a suppression hearing. United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985) (per curiam); Press-Enterprise, supra.; State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). Beyond that, the defendant has a “right to be present at a proceeding ‘whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge....’” Gagnon, 470 U.S. at 526 (quoting Snyder v. Massachusetts, 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674, 90 A.L.R. 575 (1934)). The defendant does not, therefore, have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters, United States v. Williams, 455 F.2d 361 (9th Cir.), cert. denied, 409 U.S. 857 (1972), at least where those matters do not require a resolution of disputed facts. People v. Dokes, 79 N.Y.2d 656, 584 N.Y.S.2d 761, 595 N.E.2d 836 (1992) (right to be present during hearing on admissibility of prior conviction). Id.

Similarly, in In re Personal Restraint of Pirtle, 136 Wn.2d 467, 484, 965 P.2d 593 (1998), the court held that the defendant need not be present for discussions about the wording of jury instructions, ministerial matters, or whether a jury should be sequestered. In Pirtle, the court held that, although the defendant should have been present for a hearing where juror misconduct was discussed, his absence was immaterial where the

motion was later argued and decided in his presence. Pirtle, 136 Wn.2d at 484.

Court of Appeals decisions are similar. The open courtroom right is limited to situations where evidence is being taken or jury selection, not to purely ministerial or legal proceedings. State v. Sadler, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008). *See also*: State v. Rivera, 108 Wn. App. 645, 32 P.3d 292 (2001) (jurors complained about the hygiene of another juror); State v. Bremer, 98 Wn. App. 832, 835, 991 P.2d 118 (2000) (proposed jury instructions; no questions of fact); State v. Walker, 13 Wn. App. 545, 536 P.2d 657 (1975) (post-trial motion to determine competency because factual matters were determined).

Finally, it is clear the Framers always understood that some judicial business could occur in chambers without violating the principle that justice be administered openly. When the state constitution was adopted, judges "at chambers" had broad powers to entertain, try, hear and determine all actions, causes, motions, demurrers, and other matters not requiring a trial by jury, all of which could occur in the judge's chambers. Peterson v. Dillon, 27 Wash. 78, 84, 67 P. 397 (1901) (*citing* Section 2138, Code of 1881 -- commissioner could exercise duties of judge at chambers). *See also* Meisenheimer v. Meisenheimer, 55 Wash. 32, 42-43,

104 P. 159 (1909) (dissolution order is valid; judge exercised authority in chambers rather than in open courtroom).

The brief, mid-trial, in-chambers conference that occurred here with a single juror, at the juror's request, was much more akin to the proceedings described above than it is to *voir dire*. Indeed, both parties in this case had already participated in a full *voir dire* where potential jurors, including Juror No. 10, were vetted in public and in the defendant's presence. The inquiry of Juror No. 10 was simply a housekeeping matter.

2. LAM FAILED TO PRESERVE THIS CLAIM FOR APPELLATE REVIEW.

Ordinarily, an appellate court will consider a constitutional claim for the first time on appeal only if the claim is truly constitutional, and manifest. RAP 2.5(a)(3). "Failure to object deprives the trial court of [its] opportunity to prevent or cure the error." State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). One of the key issues in State v. Momah, was whether Momah had preserved his public trial claim for appellate review. The Court in Momah held that a violation of article I, section 10 of the Washington constitution could be raised for the first time on appeal but the court also recognized that defense counsel's efforts to bring about a closure, and his strategic participation in a closed proceeding, could be relevant to whether the issue was preserved. Momah, at 150-56.

As explained above, this case does not involve a violation of article I, section 10 because the inquiry made in chambers was ministerial; it was not a closure of *voir dire*. And, nothing in the record suggests that Lam clearly objected to the in-chambers inquiry of Juror No. 10. Indeed, it is possible that he asked for the inquiry or expressly encouraged the court to hold it. Counsel certainly actively participated in questioning Juror No. 10, suggesting that counsel believed the private questioning was necessary for a fair trial. Supp. RP 7-8.

In any event, absent any record on the subject, the defendant cannot establish that he is entitled to automatic reversal of his conviction. Rather, the usual rule under RAP 2.5(a) should apply here. There was no objection, so there should be no review of this claim.

3. ANY VIOLATION OF THE RIGHT TO OPEN COURTS
WAS *DE MINIMUS*.

The Washington Supreme Court has observed that “a trivial [courtroom] closure does not necessarily violate a defendant’s public trial right.” State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150 (2005). However, several justices have cautioned in dicta that the Court has never actually found such a closure to be trivial. State v. Easterling, 157 Wn.2d 167, 180-81, 137 P.3d 825 (2006). Justice Madsen has argued that Washington should recognize the *de minimus* closure standard, which

“applies when a trial closure is too trivial to implicate the constitutional right to a public trial. . . i.e., no violation of the right to a public trial occurred at all.” Easterling, 157 Wn.2d at 183-84 (Madsen, J. concurring). The standard can apply to either inadvertent or deliberate closures. Id. Other justices have argued that “the people deserve a new trial” each and every time a courtroom is closed, no matter how insignificant. Id. at 185 (Chambers, J. concurring). Thus, whether a closure can be *de minimus* under Washington law is an open question. This court should hold that the brief closure of proceedings in this case was *de minimus*.

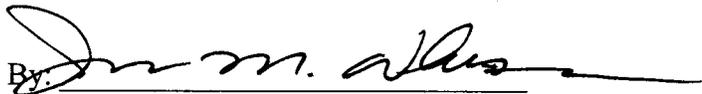
D. CONCLUSION

For the foregoing reasons, this court should reject Lam’s open courtroom challenge and affirm his conviction.

DATED this 12th day of April, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Supplemental Brief of respondent, in STATE V. TINH LAM, Cause No. 60015-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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Done in Seattle, Washington

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