

64823-3

64823-3

NO. 64823-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

GABRIEL NIGHTINGALE,

Appellant.

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

The Honorable Charles R. Snyder, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Insufficient evidence supports appellant's felony harassment conviction.

2. Insufficient evidence supports one of the appellant's convictions for intimidating a public servant.

3. The trial court violated appellant's constitutional right to a public trial by deciding pretrial motions in chambers.

Issues Pertaining to Assignments of Error

1. The appellant was charged with four counts of felony harassment, one for each of four law enforcement officers. Because there was insufficient evidence that one of the officers actually feared the appellant would carry his threat, must one harassment conviction be reversed?

2. State v. Montano¹ establishes that merely threatening an arresting police officer does not satisfy the "attempt to influence" element of the crime of intimidating a public servant. Because the evidence supported threats, but not an attempt to influence, must the appellant's intimidation conviction be reversed?

¹ State v. Montano, __ Wn.2d ___, 239 P.3d 360 (2010).

3. Before trial, the appellant argued his case should be dismissed because the time for trial had expired, and the State moved to amend the information to reinstate a charge included on a previous charging document. Without explanation, comment, or offering an opportunity to object, the trial judge decided these motions in chambers and away from the public view. Where the trial court did not analyze the Bone-Club² factors before holding closed proceedings, did the court violate appellant's constitutional right to a public trial?

B. STATEMENT OF THE CASE³

1. Charges, verdicts, and sentence

The Whatcom County prosecutor charged Gabriel Nightingale with four counts of felony harassment for threatening to kill two police officers and two border patrol agents. The prosecutor also charged Nightingale with intimidating a public servant for events occurring the same evening. CP 73-75, 100-02. A jury convicted Nightingale as charged, and the court sentenced him within the standard range. CP 15-25, 28-29.

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

³ This brief refers to the verbatim report of proceedings as follows: 1RP – 5/23/09; 2RP – 6/25 and 9/17/09; 3RP – 7/2/09; 4RP – 10/22/09; 5RP – 12/7/09; 6RP – 12/9/09 (morning); 7RP – 12/9/09 (afternoon); 8RP – 12/10/09; and 9RP – 12/09/09.

2. Pre-trial in-chambers hearing

Trial started December 9, 2009 after several continuances. Before jury selection began, Nightingale moved pro se to dismiss the charges based on a speedy trial violation. 5RP 16. The court recessed and, without additional comment, heard argument in chambers with only the parties, clerk, and court reporter present. Supp. CP __ (sub no. 41, Jury trial minutes, at 2-3); 5RP 16.

Once in chambers, Nightingale told the court he had objected to various trial dates that fell beyond his speedy trial deadline and that the multiple continuances prejudiced him because a crucial witness, Marla Mobley, had died in the nine months between the incident and trial. The court acknowledged Nightingale had consistently objected to continuance motions. The court denied the motion, however, surmising that the time for trial reset after Nightingale returned from a competency evaluation and, in any event, the record suggested that each continuance was based on “good cause.”⁴ 5RP 17-25.

⁴ It appears the court’s analysis, if not its ultimate decision, was incorrect. Trial was originally set for May 26, 2009, but was continued to July 6 on the defense’s motion. See 1RP 3 (defense counsel’s statements contradicting Nightingale’s in-chambers statements that he objected to the continuance to July 6). On July 2, 2009, with 34 days remaining for speedy trial, the court ordered a competency evaluation. 3RP 3-4. At the hearing in chambers, the court incorrectly concluded the 60-day time for trial period recommenced once Nightingale was deemed competent on

Still in chambers, the court heard argument on the State's motion to withdraw its amended information and reinstate the original information, which included an additional charge related to Mobley. 5RP 26; CP 100-02. After Nightingale objected, the court denied the motion, finding that amending the information would prejudice Nightingale because it would necessitate a continuance. 5RP 28-30. After a recess, the parties left chambers and jury selection followed. Supp. CP __ (sub no. 41, supra)

3. Trial testimony

Mobley approached border patrol agent Adan Gonzales and complained she feared her roommate Nightingale.⁵ 7RP 5. Gonzales radioed Blaine police officer Michael Munden, who obtained additional details from Mobley. 6RP 55-56; 7RP 6. Mobley claimed Nightingale threatened to kill her if she did not give him money for drugs. 6RP 57.

September 17. 5RP 19; CrR 3.3(b)(5), (e)(5), and (f). Rather, CrR 3.3(e)(1) provides that competency proceedings are "excluded" from the time for trial, rather than resetting time for trial. Cf. CrR 3.3(c)(2) (listing events that reset time for trial). Thus, Nightingale's time for trial properly expired on October 21. But Nightingale never objected to the previous October 26 trial date, as required to preserve the objection under CrR 3.3(d)(3) and (4). On October 22, defense counsel requested a continuance, which the court granted, finding good case and a lack of prejudice. 4RP 3-7.

⁵ The court instructed the jury it could consider Mobley's statements for the limited purposes of assessing the state of mind of the officers who later dealt with Nightingale. CP 38 (Instruction 6).

Mobley feared Nightingale when he had such “episodes.” 6RP 59, 86. Mobley did not want Nightingale arrested but hoped the police could talk him into going to the hospital for mental health treatment. 6RP 58, 87.

Munden arranged for Gonzales, as well as Officer Tom Erickson and Agent Patrick Fuller, to provide backup at Mobley and Nightingale’s apartment. Munden notified the officers that Mobley feared Nightingale, who threatened to kill her.⁶ 6RP 60.

Inside the apartment, Munden announced “police” but received no response. In the dim light, Munden noticed the glow of a television coming from a bedroom. Nightingale was sitting on a mattress, eating from a bowl. 6RP 63. When Munden explained why he was there, Nightingale responded, “[s]hut the f--- up” and continued eating 6RP 64. The conversation continued in a similar vein until Nightingale stood up and told Munden, “F--- you, man, get the f--- of my house or shoot me in the head. If you don’t, I’m going [to] kill you. I’ll kill all of you.” 6RP 67, 71. He also stated, “Either arrest me or get the f--- out.” 6RP 75.

Munden found Nightingale “imposing” based on his height of six foot seven inches and opined Nightingale’s statements and stance

⁶ Mobley also told Munden that Nightingale had a fantasy of being killed by a police officer, but the others did not recall Munden sharing that information. 6RP 60; 7RP 13, 28, 31-32, 39.

indicated a challenge, not submission to arrest. 6RP 72-73. After Munden aimed his Taser, Nightingale allowed himself to be handcuffed. 6RP 75.

While being led to a waiting patrol car, Nightingale told the four officers he would hunt them down, kill them, and eat their hearts. 6RP 76, 78. Each officer heard Nightingale's comments. 7RP 10, 25, 36.

C. ARGUMENT

1. INSUFFICIENT EVIDENCE SUPPORTS ONE OF NIGHTINGALE'S FOUR FELONY HARASSMENT CONVICTIONS.

Due process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. XIV; State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Evidence is sufficient to support a conviction only if, when viewed in the light most favorable to the State, a rational trier of fact could find each element of the crime beyond a reasonable doubt. State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005).

The felony harassment statute provides a person is guilty of harassment if:

(1)(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 [and]

....

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out

(2) . . . (b) A person who harasses another is guilty of a class C felony if . . . (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.

The State must prove the person threatened was actually placed in reasonable fear that the threat to kill would be carried out. State v. C.G., 150 Wn.2d 604, 612, 80 P.3d 594 (2003). The person threatened must subjectively feel fear, and such fear must be reasonable. State v. E.J.Y., 113 Wn. App. 940, 953, 55 P.3d 673 (2002).

In C.G., a juvenile defendant was convicted of felony harassment based on her threats to a school vice-principal. She told him, “I’ll kill you, Mr. Haney. I’ll kill you.” At trial, Haney testified that C.G.’s threats caused him concern, and he thought C.G. might try to harm him or someone else in the future. Haney did not, however, testify that he feared for his life. A jury nonetheless convicted C.G.

On appeal, C.G. argued the harassment statute requires proof the victim actually feared the threat to kill would be carried out. C.G., 150 Wn.2d at 606. The Supreme Court agreed and reversed C.G.’s conviction. Id. at 610.

As in C.G., this Court should reverse one of the harassment convictions because the State failed to prove at least one of the officers actually feared Nightingale would carry out his threat to kill. There was, arguably, sufficient evidence as to three of the officers following leading questions from both the prosecutor and defense counsel.

Officer Munden, for example, testified he was concerned Nightingale would attempt to carry out his threat. 6RP 78. Likewise, the prosecutor asked Officer Erickson, “[W]ere you concerned, based on his threats, that if he were . . . to attempt to carry out those threats, you might see him someplace near your house or some other place, and he might actually try to kill you?” Erickson answered, “That’s correct.” 7RP 38-39.

Agent Gonzales’s testimony was less clear, but arguably supported the harassment charge. Gonzalez did not fear Nightingale would carry out his threat immediately because Nightingale was handcuffed and surrounded by four officers. The prosecutor asked Gonzales if he was concerned about a future possibility. He testified, “Well. . . . an officer always has to keep those things in mind, and a person who makes a threat and has the ability and the size and strength to be able to carry that out causes some, you know, concern.” The prosecutor then asked if Gonzalez believed “there was a possibility that Mr. Nightingale would . . . carry out

his threat to find you and kill you?” 7RP 11. Gonzales stated, “You know what? . . . I didn’t think that far ahead. My main concern was just getting out of the apartment where this lady was, so I didn’t think that far ahead.” 7RP 11. On cross-examination, Gonzales repeated this statement. 7RP 16.

Attempting to rehabilitate Gonzales, the prosecutor asked whether, despite wearing a bulletproof vest and carrying a firearm, he could still be killed. 7RP 12. Not surprisingly, Gonzales answered yes. 7RP 12. The prosecutor then asked, “And no matter what that likelihood or possibility is, did you believe that that was a possibility whether [sic] Mr. Nightingale was making the threats that he was making?” 7RP 12. Gonzales answered, “Yes, absolutely. My concern would not have been at the time that we made the arrest, but after he was released from custody. I would be concerned.” 7RP 12.

In contrast, Agent Fuller never testified he feared Nightingale would act on his threat to kill. Like Gonzales, Fuller testified he had no fear of immediate harm. 7RP 25-26. The prosecutor then asked, “Based on his demeanor and your contact and observations . . . were you concerned at all of future harm that might come to you or the other officers based on his threats?” 7RP 26. Fuller responded, “Like if I met

him on the street? . . . Yes, he is a big man. I believe he could carry out or try to carry out his threats.” 7RP 26.

During cross-examination, Fuller testified he perceived Nightingale’s threats to be “[anger] that he was being arrested, and he’s venting.” 7RP 29. Defense counsel asked, “[W]hen he made the statement, did you have a concern based on all the circumstances, and your thought that he was just venting, did you have an actual concern, a belief that this was something that he was going to carry out in the future?” 7RP 30. Fuller answered, “It’s possible, yes.” 7RP 30. Defense counsel followed up, “But your interpretation at the time was that he was angry and venting and not all there?” 7RP 30. “Yes.” 7RP 30.

The harassment statute requires proof that the victim actually be placed in reasonable fear that the threat to kill would be carried out. C.G., 150 Wn.2d at 606, 610; E.J.Y., 113 Wn. App. at 953. Fuller testified he considered Nightingale to be physically capable of killing a police officer, but not that he actually feared Nightingale would carry out his threat to kill. C.G., 150 Wn.2d at 606, 610. And while Fuller acknowledged it was “possible” that Nightingale would carry out the threat, he immediately clarified that he believed Nightingale was merely angry and venting.

Because the State failed to prove an element of the crime beyond a reasonable doubt, this Court should reverse and dismiss Nightingale's felony harassment conviction as to Agent Fuller. Smith, 155 Wn.2d at 505.

2. INSUFFICIENT EVIDENCE SUPPORTS NIGHTINGALE'S CONVICTION FOR INTIMIDATING A PUBLIC SERVANT.

A person commits the crime of intimidating a public servant if, "by use of a threat, he attempts to influence a public servant's vote, opinion, decision, or other official action as a public servant." RCW 9A.76.180; State v. Montano, __ Wn.2d ___, 239 P.3d 360, 361 (2010). The statute "protects public servants from threats of substantial harm based upon the discharge of their official duties." State v. Stephenson, 89 Wn. App. 794, 803, 950 P.2d 38 (1998). It prohibits only those threats related to future decision making, not other threats of harm. Id.

The Montano Court held the State failed to present a prima facie case of intimidating a public servant.⁷ Montano, 239 P.3d at 360. An officer saw Montano shove another man. When the officer stopped to investigate, Montano became agitated and walked away, despite the officer's attempts to pull Montano by his coat. The officer eventually

⁷ The Court reversed the Court of Appeals opinion that had, in turn, reversed the superior court's dismissal of the charge under State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986).

grabbed Montano's wrist and announced he was under arrest. Montano broke free, grabbed the officer's wrist, and attempted to pull him down. A second officer arrived and tased Montano, who continued to struggle. Id. at 360-61.

The first officer handcuffed Montano and led him to the patrol car. Montano pulled away and angrily told the officer, "I know when you get off work, and I will be waiting for you." As they walked toward the car, Montano continued, "I'll kick your ass," "I know you are afraid, I can see it in your eyes," and he called the officer "punk ass." On the way to jail, Montano told the officer: "[Y]ou need to retire. I see your gray hair." Montano repeated that the officer was scared and Montano could see it in his eyes. Id. at 361.

In reversing the Court of Appeals, Montano relied on State v. Burke, 132 Wn. App. 415, P.3d 1095 (2006), a case also involving angry threats and physical intimidation. There, an officer saw underage people drinking beer in front of a house. He followed them to the back porch, where he met Burke. Burke yelled "fighting threats" and "belly bump[ed]" and swung his fists at the officer. Id. at 417-18. He was later found guilty of intimidating the officer and appealed. Id. at 418.

The Court of Appeals reversed Burke's conviction. Although Burke's actions demonstrated his anger at the officer, the evidence failed

to show an attempt to influence the officer's actions. The Court concluded, "Evidence of anger alone is insufficient to establish intent to influence [a public servant's] behavior." Id. at 422; see also Stephenson, 89 Wn. App. at 807 ("attempt to influence" element of the crime cannot be satisfied by threats alone).

The Montano Court reasoned that as in Burke, Montano's physical and verbal violence demonstrated he was angry at being arrested. It did not, however, establish an attempt to influence the officer. Specifically, the State failed "to link the defendant's behavior to an official action that the defendant wishe[d] to influence." Montano, 239 P.3d at 363.

Montano is indistinguishable from Nightingale's case and thus requires reversal. The State may have proved Nightingale was irate that Munden was in his home and incensed at the prospect of being arrested, but it did not prove he attempted to influence an official action. Montano, 239 P.3d at 363. And while Munden testified he found Nightingale's stance "imposing," mere angry threats are insufficient even when accompanied by physical intimidation or violence. Montano, 239 P.3d at 363; Burke, 132 Wn. App. at 421-22.

Because the State failed to prove attempt to influence official action, this Court should reverse and dismiss Nightingale's intimidation conviction. Smith, 155 Wn.2d at 505.

3. THE TRIAL COURT VIOLATED NIGHTINGALE'S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL BY CONDUCTING A PRETRIAL HEARING IN CHAMBERS.

Under the state and federal constitutions, an accused has a constitutional right to a speedy and public trial. Const. art. 1, § 22; U.S. Const. amend. VI. Additionally, the public and press have an implicit First Amendment right to a public trial. U.S. Const. amend. I; Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L.Ed.2d 31 (1984). A violation is presumed prejudicial and is not subject to harmless error analysis. State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006); In the Matter of the Personal Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

The constitutional public trial right is the right to have a trial open to the public. Id. at 804-05. "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." Bone-Club, 128 Wn.2d at 259 (citing In re Oliver, 333 U.S. 257, 270 n. 25, 68 S. Ct. 499, 92 L. Ed. 682 (1948))

(quoting Thomas M. Cooley, *Constitutional Limitations* 647 (8th ed. 1927))).

The right to public trial is not limited to the presentation of evidence before a jury. Easterling, 157 Wn.2d at 174. It also encompasses hearings related to a criminal prosecution, including pretrial motions. See Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 10-13, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (pretrial hearings); Easterling, 157 Wn.2d at 172 (co-defendant's motion to dismiss charges); Orange, 152 Wn.2d at 812 (voir dire); Bone-Club, 128 Wn.2d at 257 (suppression hearing); Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 32, 36, 640 P.2d 716 (1982) (motion to dismiss murder charge); State v. Heath, 150 Wn. App. 121, 125-29, 206 P.3d 712 (2009) (motions in limine).

While the right to a public trial is not absolute, a trial court may restrict the right only “under the most unusual circumstances.” Bone-Club, 128 Wn.2d at 259. Before a trial judge can close any part of a trial, it must first apply on the record the five factors set forth in Bone-Club. Orange, 152 Wn.2d at 806-07, 809.

The Bone-Club requirements are:

1. The proponent of closure . . . 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.

Bone-Club, 128 Wn.2d at 258-59 (quoting Allied Daily Newspapers of Wash. v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

Trial proceedings conducted in chambers are closed to the public and violate the right to public trial. See Strode, 167 Wn.2d at 226-229 (Alexander, C.J., lead opinion); 167 Wn.2d at 231-236 (Fairhurst, J., concurring); State v. Paumier, 155 Wn. App. 673, 679, 685, 230 P.3d 212 (2010); Heath, 150 Wn. App. at 125-29; State v. Frawley, 140 Wn. App. 713, 718-721, 167 P.3d 593 (2007).

At Nightingale's trial, the trial judge closed a portion of the proceedings by hearing and deciding in chambers (1) the defendant's pro se motion to dismiss for a speedy trial violation and (2) the State's motion to amend the information.⁸ The court did so without weighing or even mentioning the competing interests under Bone-Club. 5RP 16-30; Supp. CP __ (sub no 41, supra). Deciding pretrial motions in private violates the right to public trial. See Heath, 150 Wn. App. at 125-29 (reversing

⁸ In the first case, the court ruled against Nightingale, and in the second, it ruled in his favor. 5RP 23, 28-29.

Heath's conviction where trial court decided motions in chambers without first weighing Bone-Club factors). This Court should find a similar violation in Nightingale's case.

The State may try to argue defense counsel waived the public trial right by failing to object to the private hearing. Any such argument would be without merit. Defense counsel in Strode, Orange, and Heath also failed to object. Strode, 167 Wn.2d at 229; Orange, 152 Wn.2d at 801-02; Heath, 150 Wn. App. at 128; cf. State v. Momah, 167 Wn.2d 140, 151-55, 217 P.3d 321 (2009) (issue waived where defense actively supported closure), abrogation recognized by Paumier, 155 Wn. App. 673. Nightingale thus properly raises the issue for the first time here.

Because the pretrial motions – involving resolution of both the law and disputed facts – were decided in the judge's chambers and outside the public eye, the trial court violated Nightingale's constitutional right to a public trial. The remedy is reversal. Paumier, 155 Wn. App at 685 (citing Presley v. Georgia, ___ U.S. ___, 130 S. Ct. 721, ___ L. Ed. 3d ___ (2010)); Heath, 150 Wn. App. at 125-29.

D. CONCLUSION

This Court should reverse and dismiss with prejudice Nightingale's conviction for intimidating a public servant as well as one of the felony harassment counts. This Court should reverse the remaining counts based on the trial court's violation of Nightingale's right to a public trial and remand for a new trial.

DATED this 6TH day of December, 2010.

Respectfully submitted,

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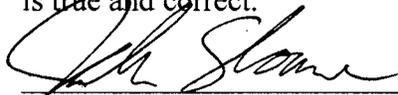
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



John Sloane

Done in Seattle, Washington

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