

64823-3

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No. 64823-3-I

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

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**STATE OF WASHINGTON, Respondent,**

**vs.**

**GABRIEL NIGHTINGALE, Appellant.**

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**BRIEF OF RESPONDENT**

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**A. ASSIGNMENTS OF ERROR**

None.

**B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether taking the evidence in the light most favorable to the State there was sufficient evidence for a rational juror to find beyond a reasonable doubt that the border patrol agent feared the defendant's threat to kill him and eat his heart where the agent testified that he believed the defendant could attempt to carry out the threat against him in the future although at the time he wasn't afraid of the threat because there were four officers present and the defendant was handcuffed.
2. Whether taking the evidence in the light most favorable to the State there was sufficient evidence for a rational juror to find beyond a reasonable doubt that the defendant attempted to influence the police officer's decision to arrest him where when the officer was attempting to get the defendant's side of the story, the defendant stood up, with his arms raised and fists clenched, in a fighting posture, and threatened to kill the officer and said "either arrest me or get the fuck out," and the officer believed that the defendant was trying to intimidate him into not arresting the defendant.
3. Whether the court's in chambers discussion with the defendant regarding his impromptu questions about his speedy trial time and denial of the State's motion to amend the information violated the defendant's right to a public trial where the court did not resolve any disputed facts during the discussion, the defense attorney explicitly stated she was not moving for dismissal based on speedy trial grounds and the court made the discretionary decision to deny the amendment, the second motion that day, because it was untimely.

## **C. FACTS**

### **1. Procedural Facts.**

On March 27, 2009 Appellant Gabriel Nightingale was charged with five counts of felony Harassment, in violation of RCW 9A.46.020(1)(A)(I and (2)(B), and one count of Intimidating a Public Servant, in violation of RCW 9A.76.180(1) and RCW 9A.040.100(25), for his actions on or about the 24<sup>th</sup> of March 2009. CP 100-102. That information was amended pretrial to remove one count of felony Harassment.<sup>1</sup> CP 73-75. Nightingale was tried by a jury and found guilty of all counts. CP 15, 28-29. Nightingale had an extensive misdemeanor history and an offender score of 6 and faced a standard range of 22-29 months. CP 16-17. The judge sentenced him to 29 months on all counts, to run concurrently. CP 20.

### **2. Substantive Facts.**

On March 24, 2009 around 10:30 p.m. a woman, Marla Mobley, contacted Border Patrol Agent Adan Gonzales near the duty free parking area at the border and asked if he could help her. 6RP 56, 7RP 5.<sup>2</sup>

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<sup>1</sup> The amended information also specified the victims for each of the counts.

<sup>2</sup> The verbatim report of proceedings are referred to as 1RP for the proceedings on May 13, 2009; 2RP for those on June 25 and September 17, 2009; 3RP for those on July 2, 2009; 4RP for those on October 22, 2009; 5RP for those on December 7, 2009; 6RP for those on December 9, 2009; 7 RP for the continuation of the trial proceedings on December 9, 2009; 8RP for those on December 10, 2009; and 9RP for the sentencing proceedings on December 29, 2009.

Mobley told him she was afraid of a person who was living with her, that she had asked him to leave, and that she was concerned he was a danger to others because he was off his medication. Id. Agent Gonzales contacted the Blaine Police to respond since it was not his jurisdiction. 7RP5-6. Officer Munden of the Blaine Police Department responded soon thereafter and spoke with Mobley who noticed that Mobley appeared distraught and shaking, had difficulty speaking, and a trembling voice. 6RP 56-57. After Munden calmed her down, Mobley told him that she was frightened, that her roommate Nightingale had threatened to break her legs or kill her if she didn't give him \$500 for drugs. 6RP 57, 59.

Mobley said that she believed he would carry out this threat because of his current state of mind, and that when he gets in an episode, he is unpredictable and she becomes very frightened. 6RP 59. She explained that she had known Nightingale for years, that he had threatened her before and that he had been living with her for some time. Id. Mobley wanted Munden to go talk to Nightingale, to talk him into going into the hospital so he would get back on his medication, but warned the officer that Nightingale had a fantasy of being killed by police and wanted to put himself in a position so the police would kill him. 6RP 57-58. She also said she was afraid to return to her own home because she thought he would still be there. 6RP 58. Officer Munden explained to Mobley that if

Nightingale had committed a crime, Nightingale would be going to jail instead of a hospital and Mobley responded that she was okay with that. 6RP 58.

Officer Munden then asked Blaine Police officer, Officer Erickson, and Agents Gonzales and Fuller, another Border Patrol agent, to assist him and briefed them about what Mobley had told him, that Mobley was afraid because Nightingale had threatened to kill her and that Nightingale had a fantasy to be killed by officers.<sup>3</sup> 6RP 60, 89; 7RP 6. Officer Munden testified that he took Nightingale's statements about wanting to be killed by officers seriously because others have done that, and the person sometimes will attack the officer in order to be shot. 6RP 60-61.

When all four officers arrived at Mobley's residence, Agent Gonzales went around back while Officers Munden, Erickson and Agent Fuller went to the front door. 6RP 61, 7RP 7. Mobley refused to go back inside the residence with the officers. 6RP 58. Officer Munden knocked and announced themselves. 6RP 61. After no one came to the door, Officer Munden announced himself again and then entered through the unlocked door. 6RP 62. As he entered the residence he yelled, "Police officers!" 6RP 63. The apartment was dark except for a glow from a

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<sup>3</sup> Agents Gonzales and Fuller, however did not recall nine months later at trial having been told this information. 7RP 14, 28.

bedroom whose door was slightly ajar. 6RP 63. He heard the sound of a television at low volume coming from the bedroom. Id.

Officer Munden went to the bedroom, said “police” again, and pushed open the door. 6RP 63. As soon as he opened the door, he saw Nightingale sitting on the floor on a mattress. As he entered the room, Nightingale pointed a flashlight, light on, at him, but didn’t say anything.<sup>4</sup> 6RP 63-64. Officer Munden started to explain to Nightingale why he was there, but Nightingale told him to “shut the fuck up.” 6RP 64. When Officer Munden continued to try to explain, Nightingale just kept reiterating, “Shut the fuck up.” When the officer explained that Mobley was afraid of him because he had threatened to hurt her and he was there to get Nightingale’s side of the story, Nightingale said that Mobley had brain cancer and then went into a long rant such that the officer couldn’t understand what he was saying. 6RP 65.

Nightingale just kept eating from a bowl and wouldn’t look at the officers and wouldn’t respond to them except to say “fuck you.” 6RP 65-66, 7RP 33. Nightingale was getting angrier and more forceful each time he said, “fuck you,” until he finally said, “Fuck you, man, get the fuck out of my house or shoot me in the head. If you don’t, I’m going to kill you.

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<sup>4</sup> Officer Munden believed he had turned on the light as he entered the room. 6RP 64.

I'll kill all of you." 6RP 67, 91. When he said that, he stood up, and Officer Munden, who had never had contact with Nightingale before, saw that he was over 6'7" tall and well over 200 pounds. 6RP 67, 71.

Nightingale turned to face him and said "Either arrest me or get the fuck out." Nightingale stood with his hands up and clenched by his sides, in a fighting posture. 6RP 72, 92-93. It appeared to Officer Munden that Nightingale was daring him to arrest Nightingale and trying to intimidate him into not arresting Nightingale, and that Nightingale purposefully stood up and struck the stance he did in an effort to intimidate Officer Munden into not arresting him. 6RP 73, 96. Officer Munden decided not to try to fight Nightingale, but pulled out his Taser, turned it on and pointed it at Nightingale. 6RP 73, 7RP 35. He told Nightingale, "This is it. Either you turn around and place your hands behind your back or I'm going to Tas (sic) you." 6RP 73. Nightingale then complied with Officer Munden's command, turned around and was handcuffed by Officer Erickson. 6RP 75, 7RP 35.

Nightingale, however, continued his aggressive tone and words while he was being escorted by all four officers to Officer Erickson's patrol car. 7RP 10. While he was being escorted down the stairs, Nightingale kept threatening to kill all of the officers. 6RP 76, 7RP 37. He told them he would hunt them down, hunt down their families, find

them and kill them. 6RP 78, 7RP 10, 37. When they neared the patrol car, Nightingale told them, "I will kill you and eat your hearts." 6RP 76, 7RP 10, 37. Officer Erickson had one of the agents accompany him in transporting Nightingale to jail in case he needed to use force against Nightingale because he felt Nightingale was still a risk to him. 7RP 42.

Officer Munden testified that when he was arresting Nightingale, he had concerns for his safety, that he thought Nightingale could seriously hurt or kill him. 6RP 75-76. He also testified that he was concerned that Nightingale would carry out the threat to kill the officers. 6RP 78. He said the "eating your hearts" comment was more than he would expect from someone just trying to intimidate him. 6RP 98. While Officer Munden did not fear that Nightingale would be able to carry out his threat at that immediate time, since there were four officers there and Nightingale was in handcuffs, he did fear that Nightingale could carry out the threat in the future. 6RP 77-78.

Agent Gonzales also heard Nightingale threaten to kill the officers and to eat their hearts as they were escorting Nightingale to the patrol car. 7RP 10. While he too was not concerned that Nightingale could carry out the threat right then because there were four officers and Nightingale was handcuffed, Agent Gonzales was concerned that Nightingale would carry out the threats in the future, possibly when released from custody. 7RP

11-12, 19. He was concerned because Nightingale had the size and strength to carry out the threat and he had considered what Mobley had initially told him about Nightingale. 7RP 11-12. He found Nightingale's comment about eating their hearts disconcerting; he had never heard such a comment before in his over ten years in law enforcement. 7RP 4, 13. He explained, that usually when someone doesn't want to be arrested, they'll say something about fighting the officer or kicking their butt, but nothing as graphic as Nightingale's comment. 7RP 13.

Agent Fuller observed Nightingale's aggressive behavior as well. 7RP 24. Like Officer Munden and Agent Gonzales, he testified that he did not have an immediate concern about Nightingale's threat to kill them and to eat their hearts because there were four of them and Nightingale was in handcuffs. 7RP 26. He was concerned however that if he was to meet Nightingale on the street in the future, that Nightingale could try to carry out his threat. 7RP 26.

Officer Erickson also testified that he was not concerned about Nightingale carrying out his threats to kill them at the time because Nightingale was in handcuffs and there were four officers. 7RP 37. However, he felt that it would have been a much different situation if Nightingale hadn't been cuffed and there was only one of them. 7RP 38. He testified that he was concerned about Nightingale carrying his threats

out in the future, and that if Nightingale appeared near his house, he would do what was necessary to protect himself. 7RP 38-39.

**D. ARGUMENT**

Nightingale asserts that there was insufficient evidence to convict him of one of the felony harassment counts, the one related to Border Patrol Agent Fuller, and the intimidating a public servant count. With respect to the harassment count, Nightingale asserts there was insufficient evidence for the jury to find the element that the officer was placed in fear that the threat would be carried out. However, while the agent testified that he didn't fear that Nightingale could carry out his threat *at that time* since there were four officers present and Nightingale was handcuffed, he did believe that Nightingale could attempt to carry out the threat in the future and that it was possible Nightingale would attempt to carry it out.

With respect to the intimidating a public servant count, Nightingale asserts that there was insufficient evidence that he attempted to influence any action or decision of the officer and that Nightingale was merely irate and angry about being arrested. Officer Munden's testimony shows, however, that Nightingale's reaction, standing up and taking a purposeful fighting stance, particularly given Nightingale's size, aggressive behavior and prior threats to kill him, was an attempt to influence Officer Munden's decision as to whether or not to arrest Nightingale. The evidence, taken in

the light most favorable to the State, was sufficient to support Nightingale's convictions for felony harassment against Agent Fuller and intimidating a public servant against Officer Munden beyond a reasonable doubt.

Nightingale also asserts that the discussion in chambers regarding his "pro se" impromptu questions regarding speedy trial violated his right to public trial. His right to public trial was not implicated by that discussion because it was not the type of adversarial proceeding to which the right applies. Defense counsel explicitly indicated she was not moving for dismissal based on speedy trial despite her client's questions. No facts were in dispute or resolved by the judge. The judge informally addressed whether he perceived any legal issue regarding speedy trial based on the factual record before him, and concluded that there had been no violation of Nightingale's speedy trial rights. The State's motion to amend the information a second time that day likewise did not involve any resolution of disputed facts. The court merely made the discretionary call not to permit the second amendment of the information given the timing of the motion to amend.

**1. Taking the evidence in the light most favorable to the State there was sufficient evidence to support the jury's verdicts of guilty on felony harassment and intimidating a public servant.**

Under a sufficiency of the evidence analysis, the test is “whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). In applying this test, “all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* at 339. Such a challenge admits the truth of the State’s evidence and all reasonable inferences therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is as reliable as direct evidence. State v. Cross, 156 Wn. App. 568, 581, 234 P.3d 288 (2010). The appellate court defers to the trier of fact on issues of credibility of witnesses and persuasiveness of evidence. State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

*a. Felony Harassment*

With respect to the felony harassment count involving Agent Fuller, Nightingale asserts that there was insufficient evidence of the essential element that the agent feared that the threat would be carried out. In order to prove felony harassment the State must show that the defendant

knowingly threatened to kill the person threatened and that person reasonably feared that the threat would be carried out. State v. C.G., 150 Wn.2d 604, 608-09, 80 P.3d 594 (2003); RCW 9A.46.020. Under the statute the threat may be to cause injury/death immediately or in the future. RCW 9A.46.020(1)(a)(i), (2). Threats include “conditional threats” and future threats, and are not just limited to threats to cause immediate harm. Cross, 156 Wn. App. at 582; *see also*, State v. Edwards, 84 Wn. App. 5, 11-12, 924 P.2d 397 (1996), *rev. den.* 131 Wn.2d 1016 (1997) (interpreting the plain meaning of threats under RCW 9.61.060 regarding threats to property). The threat to kill need not be literal: “the nature of a 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.” C.G. 150 Wn.2d at 611.

Fuller testified on direct that he wasn't concerned about Nightingale immediately or imminently carrying out his threat to kill them and to eat their hearts because Nightingale was handcuffed and there were four officers present. Fuller was then asked:

- Q. Based on his demeanor and your contact and observations during this time period, *were you concerned at all of future harm that might come to you or the other officers based on his threats?*
- A. Like if I meet him on the street?
- Q. Or if he were to find you on the street, sure.

A. *Yes, he is a big man.* I believe he could carry out or try to carry out his threats.

...

Q. Do you believe, then, that he can, *did you believe then that he could, at some future date, attempt to carry that out and, in fact, succeed and kill you?*

A. *Yes.*

On cross-examination Agent Fuller testified that at the time he thought Nightingale was angry and venting, and that he didn't have a fear that Nightingale would carry out the threat *at that time* given the circumstances. However, he also testified when asked if he had an actual concern, a belief that the threat was something Nightingale was going to carry out in the future, he answered "It's possible, *yes.*" 6RP 29-30.

Agent Fuller's testimony demonstrates that he was concerned about future harm that would come to him because of Nightingale's threat. He testified that he believed Nightingale could try to carry out the threat in the future and that Nightingale could, in fact, succeed in killing him. The totality of Agent Fuller's testimony shows that he was concerned about his future physical safety given his belief that Nightingale could try to carry out the threat. Given Nightingale's size, aggressive and angry demeanor, Agent Fuller's fear that Nightingale might carry out the threat to kill him in the future certainly was reasonable – all the other officers also feared that Nightingale would try to carry out his threat in the future. Taking the evidence in the light most favorable to the State there was sufficient

evidence of the element that Agent Fuller reasonably feared that the threat would be carried out. *See, Cross*, 156 Wn. App. at 584-85 (officer's testimony that he took defendant's threat seriously and that he had been assaulted by handcuffed defendants before and defendant's belligerent and assaultive conduct was sufficient evidence for a reasonable juror to find beyond a reasonable doubt that the officer was concerned for his safety and that concern was reasonable).

*b. Intimidating a Public Servant*

Nightingale also asserts there's insufficient evidence to support his intimidating a public servant conviction because there's insufficient evidence of the essential element that he attempted to influence any official action. In order to prove the offense of intimidating a public servant, the State must prove that the defendant attempted to influence a public servant's official action, by use of a threat. *State v. Montano*, 169 Wn.2d 872, 876, 239 P.3d 360 (2010). Threat as defined by RCW 9A.76.180(3) and as specifically instructed in this case, means to communicate either directly or indirectly the intent to use force immediately against a person who is present at the time, or the intent to cause bodily injury in the future to that person or any other person. RCW

9A.76.180(3)(a),(b); RCW 9A.04.110(27).<sup>5</sup> CP 49 (Inst. No. 18).

Physical behavior, not just words, can also meet the definition of threat. State v. Burke, 132 Wn. App. 415, 421, 132 P.3d 1095 (2006). Mere threats or “fighting words” are not sufficient in and of themselves to constitute an attempt to influence a public servant’s course of action; the evidence must show an attempt to influence the public servant. Montano, 169 Wn.2d at 877. “Some evidence is required to link the defendant’s behavior to an official action that the defendant wishes to influence.” Id. at 879-80. “An assault on a law enforcement officer does not, without more, imply an attempt to influence that officer’s behavior.” Burke, 132 Wn. App. at 422.

Nightingale’s actions here were more than mere fighting words or angry threats. He told Officer Munden to “get the fuck out of my house or shoot me in the head. If you don’t, I’m going to kill you.” After making this threat, Nightingale, a very imposing figure at six feet seven inches tall and over 200 pounds, stood up and struck a fighting pose, daring Officer Munden to fight him if the officer were to try to arrest him. Nightingale told him to either arrest him or get the fuck out of the residence. Officer Munden believed Nightingale’s actions were purposeful and an attempt to intimidate him into not arresting Nightingale. Nightingale’s behavior did

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<sup>5</sup> Former RCW 9A.04.110(25); the definition of threat by means of bodily injury is but

in fact influence Officer's Munden's action, he decided instead of trying to fight Nightingale that he would use his taser instead. Nightingale attempted to influence Officer Munden's decision about whether to arrest him by trying to intimidate him physically and verbally.

This evidence of the attempt to influence Officer Munden's decision to arrest distinguishes this case from Montano. In Montano after the defendant attempted to resist arrest and was arrested, he stated that he knew when the officer got off work and he would be waiting for him. He threatened to kick the officer's ass and told the officer he could tell the officer was afraid – he could see it in his eyes. On the way to jail the defendant also told the officer that he needed to retire, that he could see his gray hair and repeated that officer was scared. Montano, 169 Wn.2d at 874-75. The court held that the defendant's statements did not establish an attempt to influence the officer's actions, that the defendant's actions only reflected his anger at being arrested. *Id.* at 879. In other words, the defendant was only venting his anger when he made his statements.

Here, however, Nightingale's verbal threat came *before* he was arrested and directly related to, and attempted to influence, the officer's decision to arrest him. The testimony did show a link between Nightingale's aggressive and threatening behavior and words and

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one means of threat under that definition.

Officer's Munden's official action, and that Nightingale attempted to influence Officer Munden's decision to arrest him by those words and that behavior. Taking the evidence in the light most favorable to the State there was sufficient evidence for a reasonable jury to find Nightingale guilty beyond a reasonable doubt of intimidating a public servant.

**2. Nightingale's Right to Public trial was not implicated by the in chambers consideration of his questions about speedy trial and the State's motion to amend the information because no resolution of disputed facts was required.**

Last, Nightingale asserts that the in chambers discussion regarding his concern about his speedy trial rights violated his right to public trial. However, a defendant's right to public trial is not implicated by the type of in-chambers discussion here where the court considered the defendant's pro se objection to the trial date that was made without filing a proper motion and the court reviewed undisputed facts and made the legal conclusion that there had been no speedy trial violation.

Courts that have addressed the issue of whether in-chambers discussions not related to juror voir dire implicate a defendant's right to trial have largely held they do not. *See, In re Detention of Ticeson*, \_\_\_ Wn. App. \_\_\_, 246 P.3d 550 (2011) (in chambers conferences to discuss evidentiary objections and the court's rulings thereon did not violate the public's right to open proceedings under Art. 1 §10); *State v. Castro*, 159

Wn. App. 340, 246 P.3d 228 (2011) (right to public trial not implicated by court's in chambers decisions regarding pretrial motions on legal issues); State v. Koss, 158 Wn. App. 8, 241 P.3d 415 (2010) (right to public trial not violated by in chambers conference regarding jury instructions); State v. Sublett, 156 Wn. App. 160, 231 P.3d 231, *rev. granted*, 170 Wn.2d 1016 (2010) (right to public trial did not extend to court's conference in chambers regarding legal question of how to respond to jury's inquiry during deliberations); State v. Rivera, 108 Wn. App. 645, 653, 32 P.3d 292 (2001), *rev. den.* 146 Wn.2d 1006 (2002) (right to public trial did not extend to judge's discussion in chambers regarding a juror's complaint mid-trial); *but see*; State v. Heath, 150 Wn. App. 121, 206 P.3d 712 (2009) (defendant's right to public trial was violated by in-chambers pre-trial motions and jury voir dire); State v. Sadler, 147 Wn. App. 97, 117, 193 P.3d 1108 (2008) (defendant's right to public trial extended to in chambers discussion re *Batson* challenge because such a determination was integral part of jury selection and involved credibility determinations by the trial court).

The right to public trial applies to evidentiary phases of the trial as well as adversarial proceedings, suppression hearings and the jury selection process. Castro, 246 P.3d at 230; Sublett, 156 Wn. App. at 181. The right does not extend to in chambers or bench conferences regarding

legal or ministerial issues, issues not involving the resolution of disputed facts. Rivera, 108 Wn. App. at 653; Sadler, 153 Wn. App. at 114. “The resolution of ‘purely ministerial or legal issues that do not require the resolution of disputed facts’ is not an adversary proceeding.” In re Ticeson, 246 P.3d at ¶ 25.

In Castro, the defendant asserted that his right to public trial was violated when his pretrial motions were heard in chambers, which motions he asserted “dealt exclusively with issues related to trial, including the State’s witnesses and the admissibility of evidence.” Castro, 246 P.3d at 230. The issues that the defendant raised included “(1) whether to exclude witnesses; and (2) whether the State could impeach Mr. Castro with his prior criminal history. Further, the court admonished the State to avoid hearsay and improper opinion.” Id. at 230. The court determined that those were legal issues, ones that did not involve any fact finding required to be open to the public, and concluded the defendant’s public trial right had not been violated. Id.

Here, during pretrial motions the court discussed with the parties and addressed in open court an issue related to scheduling of the trial given that a jury panel had been called in but defense counsel still needed to interview some of the witnesses. 5RP 4-10. During that discussion there was a discussion about how much speedy trial time was left and

defense counsel indicated that there had been a couple continuances granted at her request for good cause, over Nightingale's objection, and that speedy trial had been tolled while Nightingale had been evaluated for competency. 5RP9-10. After some discussion regarding motions in limine and the court announced that it would be in recess, Nightingale, in open court, asked if he could ask a couple questions and defense counsel explained that Nightingale just wanted to make sure his speedy trial objections were preserved. 5RP 15. The court indicated they were. *Id.*

When the court and counsel returned from recess they appeared, along with the defendant, in chambers. CP 106-07; 5RP 16. The court noted there were two issues he had been apprised of that needed to be addressed, the State's motion to amend the information back to what it had been before that morning's amendment and a question that Nightingale had. 5RP 16. Without having filed any motion, Nightingale wanted to review his speedy trial date. 5RP 17-18. Seeking clarification of what the defendant was requesting, the prosecutor inquired whether the defendant was making a motion to dismiss based on speedy trial, to which defense counsel indicated she was not making any such motion. 5RP 18. The court then reviewed the dates of the continuances that appeared in the file with defense counsel on the record. 5RP 18-20. Nightingale apparently was objecting to one of the continuances or tolling of the speedy trial

clock because he wasn't in court that day. 5RP 20. The judge then indicated based on his review of the file there had been no speedy trial violation. 5RP 21. Nightingale then reiterated that a number of the continuances had been over his objections, and the court explained to him that the trial date nonetheless complied with the law regarding speedy trial and that he could otherwise raise his issue on appeal if he were convicted. 5RP 22-25.

After that discussion, the State moved to amend, and/or withdraw its earlier amendment that morning, back to the information that existed before that morning. 5RP 26-27. After receiving input from defense counsel, the judge concluded that the State couldn't withdraw the amended information filed that morning. 5RP 29-30.

Nightingale asserts that the court resolved disputed facts, but does not identify any in his briefing. The record is clear that the court did not resolve any factual disputes during the period in question. In fact the discussion of the speedy trial issue for the defendant's benefit was not really even in dispute, defense counsel agreed that there was no issue regarding speedy trial. While Nightingale didn't understand why there wasn't a speedy trial violation, and why his objections to the continuances didn't affect the speedy trial calculation, the court's attempt to elucidate this for him does not render the discussion an adversarial proceeding. The

court's denial of the State's request to amend the information did not involve any fact-finding, but merely a legal conclusion as to whether the court was going to permit a second amendment of the information right before trial, which decision was a discretionary call. The resolution of the issues did not involve or constitute an adversary proceeding. Neither issue was required to be heard in an open courtroom, therefore Nightingale's right to public trial was not violated.

**E. CONCLUSION**

Based on the foregoing the State requests this Court deny Nightingale's appeal and affirm his convictions for felony harassment and intimidating a public servant.

Respectfully submitted this 14<sup>th</sup> day of March, 2011.



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Attorney for Respondent

**CERTIFICATE**

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, JENNIFER WINKLER, addressed as follows:

NIELSEN, BROMAN & KOCH, PLLC  
1908 E. Madison Street  
Seattle, WA 98122

*Sydney A. Kass*  
\_\_\_\_\_  
NAME

*03/14/2011*  
\_\_\_\_\_  
DATE