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Court of Appeals
Division I COA No. 73553-5-I
State of Washington

N THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MAXIMO BERNAL-ROSAS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF SKAGIT COUNTY

The Honorable John M. Meyer

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in closing the courtroom by conducting a sidebar during closing argument, which was not recorded nor later placed on the record.

2. The closure of the courtroom violated Mr. Bernal-Rosas's right to a public trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in closing the courtroom by conducting an unrecorded sidebar during closing argument, where objections to prosecutorial misconduct are a proceeding that implicates the right to a public trial?

2. Was there a closure of the proceeding that violated Mr. Bernal-Rosas's right to a public trial under the Sixth Amendment to the United States Constitution and art. I, § 22 of the Washington State Constitution?

C. STATEMENT OF THE CASE

1. Procedural history. Mr. Bernal-Rosas was charged with taking a motor vehicle without permission, eluding a police officer, and driving under the influence, based on an incident in which he began acting mentally disturbed after a Christmas party and then

inexplicably drove off in a police vehicle belonging to officers who had come to his location to provide assistance. CP 1-4, 77-78

Mr. Bernal-Rosas interposed a defense of insanity. CP 26; 1/16/15RP at 33-64. The jury found him guilty on two counts, but found him not guilty by reason of insanity as to count 2, the charge of taking a motor vehicle. CP 130-32; 1/16/15RP at 80-82.

Mr. Bernal-Rosas was sentenced to standard range terms based on the absence of any prior convictions. CP 5-7, 65-76; 5/22/15RP at 89-91. He timely appeals. CP 113-25.

2. Facts. Relatives and friends of Mr. Bernal-Rosas's telephoned 911 and reported that he had been drinking alcohol with them as part of the family's Christmas celebration. Sometime in the very early morning hours of December 25, Mr. Bernal-Rosas began to behave mentally disturbed, and began breaking things in the house. Although his relatives tried to restrain him for his own safety, Mr. Bernal-Rosas ran to a neighbor's home – who he did not know – where he continued to behave in a mentally unbalanced way. 1/13/15RP at 63, 127, 162; 1/14/15RP at 30.

When the State Patrol arrived at that location, troopers were in the process of preparing to transport Mr. Bernal-Rosas to the

hospital, when he climbed into the front seat of a trooper's patrol car and drove off with it. Trooper Anthony Pasternak had to chase after Mr. Bernal-Rosas with lights and sirens activated on his vehicle, until troopers caught Bernal-Rosas when he crashed into a fence. Mr. Bernal-Rosas was then transported to the emergency room, and then admitted to the hospital, where he had his blood drawn and was diagnosed with a serious Sepsis infection. 1/13/15RP at 15, 22, 32, 52, 76, 87; 1/14/15RP at 6, 13. According to the WSPCL forensic toxicologist, Mr. Bernal-Rosas's blood alcohol level was 0.084 at the time of the blood draw, which was several hours after his arrest. 1/14/15RP at 25.

According to Mr. Bernal-Rosas, he drank a normal amount of alcohol at the family party that night, but at some point later in the evening, he began to feel nervous and fearful. He could not recall much of anything that happened later, through to the next day. 1/15/15RP at 41-45. 47-54, 58. During the time he took the patrol car, however, he recalled believing, "I just need to get out of here, I need to find a way to escape and not be harmed." 1/15/15RP at 63.

Defense expert Dr. Anthony Eusanio, a psychologist, was asked to assess Mr. Bernal-Rosas's mental condition and health

during the incidents, based on testimony, reports, interviews, and other evidence. Dr. Eusanio testified that Mr. Bernal-Rosas was plainly suffering from Sepsis-associated delirium, with the Sepsis coming from an upper-respiratory infection and fever. Indeed, Dr. Eusanio stated that the emergency-room personnel who diagnosed Mr. Bernal-Rosas with Sepsis likely saved his life. 1/14/15RP at 39, 71-72, 78, 94-95, 103, 107. Dr. Eusanio stated that the delirium was exacerbated by alcohol, and that Mr. Bernal-Rosas, at the time of the incidents, could not understand right from wrong. 1/14/15RP at 106-08.

D. ARGUMENT

A SIDEBAR HELD DURING CLOSING ARGUMENT ON A DEFENSE OBJECTION TO MISCONDUCT BY THE PUBLIC PROSECUTOR VIOLATED THE DEFENDANT'S RIGHT TO A PUBLIC TRIAL UNDER STATE V. SMITH, WHERE IT WAS NOT PLACED ON THE RECORD.

1. A sidebar held during closing argument went unrecorded and unmemorialized.

During the State's closing argument, the defense objected when the deputy prosecuting attorney appeared to argue to the jury, in violation of the State's burden in all criminal cases, that the defendant had a burden to prove not just the affirmative insanity

defense, but with regard to any exonerating version of the facts.

1/16/15RP at 29-30; see In re Winship, 397 U.S. 358, 361, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amend. 14.

The trial court called for a sidebar, which was not recorded, but merely described in the transcript as “[BENCH CONFERENCE OFF THE RECORD]”. 1/15/15RP at 30. The contents of the sidebar was not later placed on the record. Mr. Bernal-Rosas argues that his public trial right was violated, an issue he may raise for the first time on appeal. See State v. Brightman, 155 Wn.2d 506, 514–15, 122 P.3d 150 (2005).

2. The proceeding at issue implicates Mr. Bernal-Rosas's public trial right.

Where the sidebar went unrecorded, Mr. Bernal-Rosas's public trial right was implicated. The Sixth Amendment to the United States Constitution and art. I, § 22 of the Washington State Constitution guaranteed Mr. Bernal-Rosas the right to a public trial. State v. Wise, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). Generally, this right requires the trial court to hold proceedings in open court unless it first applies the five-factor Bone–Club test and determines that these factors support the courtroom closure. See State v. Bone–

Club, 128 Wn.2d 254, 258–59, 906 P.2d 325 (1995). Whether a courtroom closure violated a defendant's right to a public trial is a question of law that is reviewed *de novo*. Wise, 176 Wn.2d at 9; State v. Easterling, 157 Wn.2d 167, 173–74, 137 P.3d 825 (2006).

The threshold determination when addressing this question is whether the proceeding at issue implicates the defendant's public trial right in the first place. State v. Sublett, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). “[N]ot every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public.” Sublett, 176 Wn.2d at 71. Mr. Bernal-Rosas has the burden of establishing an alleged public trial right violation. See Sublett, 176 Wn.2d at 75; State v. Wilson, 174 Wn. App. 328, 346–47, 298 P.3d 148 (2013).

Although the doctrine of the public trial right continues to evolve in the Washington Courts, to address whether there was a court closure implicating the right, a reviewing court first considers whether the particular proceeding at issue “falls within a category of proceedings that our Supreme Court has already acknowledged implicates a defendant’s public trial right.” Wilson, 174 Wn. App. at 337; see also Wise, 176 Wn.2d at 11.

The Supreme Court has ruled in State v. Smith, 181 Wn.2d 508, 512, 518–19, 334 P.3d 1049 (2014), that sidebars addressing evidentiary matters do not implicate the defendant's public trial right. Smith, at 518. The case does not address sidebars involving challenges of the sort raised by the defendant in closing argument in the present case. In addition, in Smith, the sidebar at issue was placed on the record by the court and parties shortly afterwards during the trial; together, these pivotal distinctions show both (a) that Smith has not categorized closing argument sidebars as unprotected by the public trial right; and (b) strongly suggests that closed proceedings with those dual characteristics in this case implicate the right, and establish a closure. See Smith, at 518; see Part 3, infra.

If the proceeding at issue does not fall within an already acknowledged protected category, the reviewing court next attempts to determine for itself whether the proceeding implicates the public trial right, using the Sublett experience and logic test. Sublett, 176 Wn.2d at 73; Wilson, 174 Wn. App. at 335.

3. The experience and logic test demonstrates that the public trial right attaches, and there was a closure; thus the court was required to conduct a *Bone-Club* analysis, which it did not.

The experience and logic test requires the Court to consider (1) whether the process and place of a proceeding historically have been open to the press and general public (experience prong) and (2) whether access to the public plays a significant positive role in the functioning of the proceeding (logic prong). Sublett, 176 Wn .2d at 73.

If the answer to both prongs is yes, then the defendant's public trial right “attaches” and a trial court must apply the Bone-Club factors before closing the proceeding to the public. Sublett, 176 Wn.2d at 73.

(a) The experience prong. Under the first part of the test, the experience prong, the place and process have historically been open to the press and general public. Sublett, 176 Wn.2d at 73.

The Smith Supreme Court’s analysis of sidebar conferences on evidentiary matters under the court rules including the Evidence Rules, and on witness issues, noted that these discussions have historically occurred outside the view of the public. Smith, at 515.

For example, the Court cited State v. Swenson, 62 Wn.2d 259, 279, 382 P.2d 614 (1963), as an instance of a sidebar called merely to address witness concerns about comfort while testifying. Smith, at 515. This analysis accords with the traditionally very broad discretion that trial courts have been accorded in these areas. See ER 611(a) and State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997) (regarding the court’s discretion on issues of presentation of evidence, witnesses, and general control of the courtroom).

The opposite analysis applies in the present case. The sidebars at issue in the Smith case involved routine evidentiary matters during that phase of the trial, which the Court deemed did not implicate the public trial right. Smith, at 512, 516. The Supreme Court specifically referred to the legal issue as involving “sidebar conferences on evidence[.]” Smith, at 516. Further addressing the experience prong, the Court offered an additional example in the case of In re Det. of Ticeson, 159 Wn. App. 374, 378, 384–86, 246 P.3d 550 (2011), noting that Ticeson was a case in which the defendant claimed a “public trial right to challenge an in-chambers conference on the admissibility of ‘certain deposition testimony.’ ” Smith, 181 Wn. 2d at 515. Those cases involved purely ministerial

and legal issues as to which public scrutiny would be an intrusion without corresponding benefit.

In the present case, the sidebar in question was called for purposes of an objection raised by the defense to the State's attorney's closing argument – an objection that was plainly centered around a grave concern that the public prosecutor had misstated the allocation of the burden of proof that is the central aspect of a fair criminal trial under the Due Process guarantee. 1/16/15RP at 19-20; see In re Glasmann, 175 Wn. 2d 696, 713, 286 P.3d 673 (2012) (“Shifting the burden of proof to the defendant is improper argument, and ignoring this prohibition amounts to flagrant and ill intentioned misconduct”).

This is a misconduct issue, not a routine evidentiary matter. Public access undeniably promotes fairness in this area, and open proceedings ensure that scrutiny.

For example, earlier in closing argument, the trial court addressed in open court a defense objection that the prosecutor had commented on Mr. Bernal-Rosas's exercise of his right to silence. 1/16/15RP at 30; see, e.g., State v. Knapp, 148 Wn. App. 414, 421, 199 P.3d 505 (2009) (prosecutor committed misconduct in closing

argument by impermissibly commenting on Knapp's right to remain silent, protected by Fifth Amendment).

The experience of the Washington Courts is that significant objections made by counsel in closing argument as to these important constitutional issues such as burden of proof and reasonable doubt have traditionally been made on the record, in open court, with the jury easily removed if necessary. See, e.g., State v. Monday, 171 Wn. 2d 667, 671, 257 P.3d 551 (2011) (trial court addressed defense counsel's objection to prosecutor's misconduct, in violation of the 6th Amendment right to jury trial, in open court); State v. George, 150 Wn. App. 110, 116, 118, 206 P.3d 697, 700 (2009) (jury removed for open court argument regarding defense attorney's objection that the state prosecutor's questioning invaded the ultimate issue for the jury to decide contrary to U.S. Const. amends. 6, and 14 and United States v. La Pierre, 998 F.2d 1460, 1465 (9th Cir.1993)).

The "experience" prong of the Sublett test militates strongly in favor of constitutional challenges to State's attorney misconduct being held in open court.

(b) The logic prong. The logic prong asks whether public access plays a significant positive role in the functioning of the particular process or proceeding in question. Sublett, 176 Wn.2d at 73. With this prong, the guiding principle is whether openness will enhance both the basic fairness of the criminal proceeding, and the appearance of fairness that is so essential to public confidence in the system. Sublett, at 75.

Without question, the fairness and the appearance of fairness of criminal trials cannot be ensured if the accused's challenges to unconstitutional misconduct by the public prosecutor are heard in secret. These objections by defendants are basic to the fairness of trials. As was said by the Supreme Court in State v. Monday, misconduct in closing argument can include a prosecutor throwing "the prestige of his public office" behind an improper opinion on the complainant's credibility "and the expression of his own belief of guilt into the scales against the accused." State v. Monday, *supra*, 171 Wn. 2d at 677 (citing State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956)).

In Mr. Bernal-Rosas's case, the sidebar was not placed on the record, thus the public could not assess either fairness, or judge its

appearance. The public had no opportunity to assess the basic fairness of this aspect of Mr. Bernal-Rosas's criminal trial, in which a challenge was launched by the accused, arguing that the State prosecutor committed flagrant misconduct. See also Smith, 181 Wn.2d at 543 and n. 9 (holding that pretrial suppression hearings ruling on issues with a significant impact in the community, such as police violations of privacy rights under article I, section 7, demand open proceedings, compared to evidentiary rulings under court rules); State v. Fleming, 83 Wn. App. 209, 213–14, 921 P.2d 1076 (1996) (flagrancy of State's attorney's misconduct so violative of due process that defendant may raise issue initially on appeal).

The “logic” prong of the Sublett test further weighs in favor of open proceedings.

4. This was a closure of the proceedings.

The sidebar held in this case was inaccessible to spectators, constituting a closure. See State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). It is plain from the Smith Court's subsequent analysis in this evolving area of Washington case law, that the distinction between secretive, hidden proceedings, versus publicly accessible proceedings, was crucial to both the question whether the

public trial right was implicated, and whether there was a closure. In Smith, there was a specific recording system in place that was designed to record sidebars, which needed to be taken outside the courtroom, because of courthouse layout difficulties. Smith, at 512. As Smith aptly stated of the *mere evidentiary* discussions held at sidebar:

Critically, the sidebars here were contemporaneously memorialized and recorded, thus negating any concern about secrecy. The public was not prevented from knowing what occurred. Nothing positive is added by allowing the public to intrude on the huddle at the bench in real time. Sublett, 176 Wn.2d at 97–98, 292 P.3d 715 (Madsen, C.J., concurring) (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 598 n. 23, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (Brennan, J., concurring)).

Smith, at 518-19. In accord with this well-stated policy expression, the Smith Court's decision laid down the rule that to avoid implicating a defendant's constitutional right to a public trial, sidebars must be limited in content to their traditional subject areas, should be done only to avoid disrupting the flow of trial, and must either be on the record or be promptly memorialized in the record. State v. Smith, 181 Wn. 2d 516-20. The unrecorded proceeding

here, during which the court addressed issues of unconstitutional prosecutorial misconduct, rather than routine evidence issues of the sort that arise multiple times in all trials, constituted a closure of a proceeding that was required to be open. Mr. Bernal-Rosas's right to a public trial was violated. See also State v. Love, 183 Wn. 2d 598, 599-602, 354 P.3d 841 (2015) (no closure where for-cause challenges at sidebar were on the record in the presence of the court reporter and available for scrutiny by transcript, thus comports with the public trial right's "minimum" guarantee).

There was no justification for the closure. The trial court did not offer any justifying reasons for holding this important proceeding at side-bar; certainly, the trial court did not analyze the Bone-Club factors. Without that factor analysis, or some effective, alternative manner of balancing the public trial right against other compelling identified interests, there was no justification for holding the process at side-bar and reversal is required. See State v. Paumier, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012).

E. CONCLUSION

Based on the foregoing, Maximo Bernal-Rosas requests that this Court reverse his convictions.

DATED this 29 day of January, 2016.

Respectfully submitted,

s/ OLIVER R. DAVIS.

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Respondent,)	
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v.)	NO. 73553-5-I
)	
MAXIMO BERNAL-ROSAS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF JANUARY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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