

62971-9

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NO. 62971-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

NICOLAI L. GOLODIUC

Appellant.

REC'D  
JAN 08 2010  
KING COUNTY SUPERIOR COURT  
APPELLANT'S OFFICE

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

The Honorable Jeffrey Ramsdell  
The Honorable Cheryl B. Carey (Omnibus)

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE STATE APPLIES THE WRONG CONSTITUTIONAL STANDARD IN ITS ATTEMPT TO ARTIFICIALLY CONSTRAIN THE BROAD RIGHT TO AN OPEN PUBLIC TRIAL.

The State initially argues the conferences held in chambers in this case did not effectuate a closure. Brief of Respondent (BOR) at 12. In this, the State relies on this Court's decision in .<sup>1</sup> BOR at 12 n.2.

In Momah, this Court determined no closure had occurred because the trial court had never explicitly ordered a closure. Momah, 141 Wn. App. at 714. This Court then reasoned a proceeding was not "closed" for purposes of analyzing the public trial right simply by being moved into the judge's chambers. Id. at 714-16. This Court specifically declined to follow Division Three's reasoning in State v. Frawley,<sup>2</sup> to the extent that all in-chambers proceedings are per se closed to the public. Id. at 716.

The Supreme Court, however, looked at the same facts and concluded a closure had been effected when the trial court moved the proceedings outside of the courtroom. See State v. Momah, 167 Wn.2d 140, 151-52, 219 P.3d 321 (2009) (noting Momah had affirmatively assented "to the closure," and "the trial judge closed the courtroom to

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<sup>1</sup> State v. Momah 141 Wn. App. 705, 171 P.3d 1064 (2007).

<sup>2</sup> 140 Wn. App. 713, 167 P.3d 593 (2007).

safeguard Momah’s constitutional right to a fair trial by an impartial jury”); see also Id. at 161(Alexander, J., dissenting) (questioning prospective jurors in the privacy of chambers with the doors closed to the public is “a de facto courtroom closure”); and see State v. Strode, 167 Wn.2d 222, 231-32, 217 P.3d 310 (2009) (Fairhurst, J., concurring) (discussing Momah and the necessity of the closure).

While the Supreme Court never specifically addressed this Court’s reasoning that no closure had occurred in Momah, every justice has either authored, or signed on to, an opinion that states holding procedures in chambers constitutes a closure requiring either Bone-Club<sup>3</sup> analysis or procedures sufficiently similar to protect the open public trial right. The in-chambers conferences held by the court below here constituted a closure of trial proceedings.

The State then argues without authority the in-chambers conferences here are not “‘proceedings’ that implicate the public trial right.” BOR at 13. The State asserts “brief contacts in chambers” are not “proceedings” or “hearings.” Id. The State is wrong on two grounds. First, the conferences at issue here included: discussions on one of Golodiuc’s motions in limine regarding an evidentiary issue; discussions about the adequacy of the charging document; and the court’s ruling on

the State's request to address prior instances of domestic violence. See Brief of Appellant (BOA) at 20-22 (describing the court's record of in-chambers hearings). Matters of substance were addressed and a closure was effected by conducting those hearings in chambers. See State v. Heath, 150 Wn. App. 121, 127-29, 206 P.3d 712 (2009) (conducting portions of pre-trial hearing on motions in limine without Bone-Club analysis requires reversal).

The State is also wrong if it suggests these matter are too trivial to warrant Bone-Club analysis. BOR at 13. As the Supreme Court said most recently in Strode, "This court, however, 'has never found a public trial right violation to be [trivial or] de minimis.'" Strode, 167 Wn.2d at 230.

The State attempts to bolster its position by reference to cases, which address due process and Sixth Amendment<sup>4</sup> rights to be present during trial proceedings. BOR at 13-16. Because most of these cases do not address the right to a public trial in any way, they are not applicable here. For example, the State relies on In re Personal Restraint of Lord<sup>5</sup> to define artificial limits on the nature of proceedings covered by the open

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<sup>3</sup> State v. Bone-Club, 128 Wn.2d 254, 906, P.2d 325 (1995).

<sup>4</sup> The Sixth Amendment provides in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, . . . [and] to be confronted with the witnesses against him[.]"

<sup>5</sup> 123 Wn.2d 296, 868 P.2d 835 (1994).

and public trial guarantees. In Lord, the Court addressed Lord's right to be present during court hearings and proceedings. From the case, it appears two of the hearings Lord had not attended occurred in open court – the pretrial hearings on April 28, and May 20, 1987. Id. at 306. Thus, it appears the right to be present is not governed by the same considerations as the right to an open public trial. After all, if these hearings were being held in open court, the judge would have had to engage in Bone-Club analysis to legitimately effect a closure.

The source of the State's confusion regarding what proceedings are subject to the open public trial rights can be found in United States v. Gagnon,<sup>6</sup> which was relied upon by the Washington Supreme Court in Lord.<sup>7</sup> In Gagnon, the Court addressed a Fifth Amendment<sup>8</sup> due process claim regarding an in-chambers discussion between the judge, one of the defense counsel, and a juror who had noticed one of the defendants drawing portraits of the jurors. Gagnon, 470 U.S. at 523-24. Explaining why the right to be present was not violated by this in camera discussion, the Court explained:

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<sup>6</sup> 470 U.S. 522, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985).

<sup>7</sup> 123 Wn.2d at 306.

<sup>8</sup> The Fifth Amendment provides in part, "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]

The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him. . . . The presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only. . . . [T]he exclusion of a defendant from a trial proceeding should be considered in light of the whole record.

Gagnon, 470 U.S. at 526-27 (citations omitted).

Thus, unlike the right to an open public trial, the right to be present is intimately identified with the right of confrontation, and may be limited according to its origins. The right to an open and public trial in Washington, however, is not so constrained. “The public trial right protected by both our state and federal constitutions is designed to ‘ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.’” Strode, 167 Wn.2d at 226.

Indeed, the central aim of any criminal proceeding must be to try the accused fairly. Thus, the requirement of a public trial is primarily 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 the responsibility and to the importance of their functions.

Momah, 167 Wn.2d at 148.

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Clearly the broad purposes enunciated for the open public trial right are incompatible with the constrained analyses of right-to-presence cases. This becomes obvious when one considers the right to presence can be waived by the defendant merely refusing to come to court. See State v. Thomas, 123 Wn.2d 877, 881, 872 P.2d 1097 (1994) (when court finds a voluntary waiver of the right to be present, the trial may continue without the defendant). In contrast, the ability of a defendant to waive the open public trial right – if such ability exists – is heavily constrained by the court’s need to balance the defendant’s right against the public’s right to observed the judicial proceedings. See Momah, 167 Wn.2d at 156 (closure without explicitly weighing the Bone-Club factors not a “structural” error where closure occurred to protect defendant’s right to an impartial jury); cf. Strode, 167 Wn.2d at 230 (defendant cannot waive public’s right to open proceedings); but see Strode, 167 Wn.2d at 316 (Fairhurst, J., concurring) (criticizing lead opinion for conflating right of defendant with the media and public). In any event, even if Golodiuc had waived his right to presence by voluntarily refusing to attend court, the trial would still be required to be conducted in the open and in public.

Despite the obvious distinction between the right to be present and the open trial right, this Court adapted a right-to-presence analysis to an

open public trial issue in State v. Rivera.<sup>9</sup> At issue in Rivera was court closure to deal with a juror's complaint about the personal hygiene of a fellow juror. Rivera, 108 Wn. App. at 652. Constraining the public trial right to "the evidentiary phases of the trial, and to other 'adversary proceedings,'" the Rivera Court relied on Ayala v. Speckard, 131 F.3d 62 (2d Cir. 1997). Ayala, however, does not support such a constrained interpretation of the public trial right.

The issue in Ayala was closure of three trials during the testimony of undercover police officers who purchased the drugs that were the bases of the prosecutions. Ayala, 131 F.3d at 64-65. Discussing the Sixth Amendment right to a public trial, the Ayala Court said, "That basic right has a long and distinguished history. It applies not only to the evidence phase of a criminal trial, but also to other adversary proceedings, such as a pretrial suppression hearing." Id. at 69 (citations omitted). The Ayala Court then analyzed the case under the federal public trial standard. Id. at 69-72.

Clearly, the Ayala Court was not attempting to define the limits of an open public trial. Rather, it was dealing with closures during testimony, which is central to the trial proceedings. In like manner, Rivera was clearly dealing with a ministerial matter – a hearing on a juror's

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<sup>9</sup> 108 Wn. App. 645, 32 P.3d 292 (2001).

personal hygiene. Neither case addressed the in-chambers hearings involving argument by both counsel at issue here.

The Rivera Court further relied on State v. Bremer<sup>10</sup> for the proposition that a defendant does not have a right to be present at a chambers hearing or a bench conference, and concluded, “Because the defendant has no constitutional right to be present during a chambers conference, there can be no constitutional right to have the public present.” Rivera, 108 Wn. App. at 653. As discussed above, the right to be present derives from the Sixth Amendment right of confrontation and not the right to a public trial. Cases addressing the right to be present do not address the greater public interests Washington courts have found in the interplay between Article 1, §10<sup>11</sup> and Article 1 §22<sup>12</sup> of our state constitution. See BOA at 18-20 (and cases cited therein).

While the interests protected by the open public trial right accrue to the defendant, they also serve the significant social and judicial functions of permitting the public to ascertain whether the defendant has

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<sup>10</sup> 98 Wn. App. 832, 991 P.2d 118 (2000).

<sup>11</sup> Const. art. 1, § 10 provides, “Justice in all cases shall be administered openly, and without unnecessary delay.”

<sup>12</sup> Const. art. 1, § 22 provides in part, “In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed[.]”

been fairly dealt with and of keeping the triers focused on their responsibilities. Momah, 167 Wn.2d at 148. “[P]ublic trials embody a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings.” Strode, 167 Wn.2d at 226 (citing Waller v. Georgia, 467 U.S. 39, 46 n.4, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (internal quotations omitted)). These social and judicial functions cannot be fulfilled if the right to a public trial is constrained by the defendant’s right to be present.

Thus, the State’s reliance on State v. Sadler<sup>13</sup> to draw the limits of an open public trial is also misplaced. BOR at 15. In Sadler, the Court addressed the closure of a Batson<sup>14</sup> hearing, which the Court said “involves both factual and credibility determinations and is relevant to the fairness and integrity of the judicial process as a whole.” Sadler, 147 Wn. App. at 118. Thus, Sadler falls in the center of the open trial right and does not define the line between ministerial judicial operations and those proceedings that require the court to perform a Bone-Club analysis before operating outside of public scrutiny.

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<sup>13</sup> 147 Wn. App. 97, 193 P.3d 1108 (2008).

<sup>14</sup> Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

Even if this Court were to find the right to an open and public trial constrained by the defendant's right to be present, at least one of the hearings conducted in chambers here involved Golodiuc's right to be present. In Matter of Personal Restraint of Benn,<sup>15</sup> the Court found the defendant did not have a right to be present during a hearing on a motion for a continuance. Benn, 134 Wn.2d at 920. Discussing the limits of the right to be present, the Court said, "The motion for continuance involved no presentation of evidence, nor was the purpose of the hearing on the motion to determine the admissibility of evidence or the availability of a defense or theory of the case." Id. Here, one of the in-chambers hearings addressed the admissibility of evidence related to prior incidents of domestic violence between Golodiuc and Visharenko. 6RP 34. Thus, even under the constrained right-to-presence standard in Benn, the court conducted an in-chambers hearing in violation of Bone-Club.

As discussed above, however, the right to be present and the right to have an open and public trial are distinct rights, derived from different traditions of analysis and to some extent serving different purposes. Appellant urges this Court to distinguish between the right to be present and the right to an open and public trial.

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<sup>15</sup> 134 Wn.2d 868, 952 P.2d 116 (1998).

The State also relies on two civil cases<sup>16</sup> for the principle that justice can be openly administered while the judge is sitting in his chambers. BOR at 16-18. Such civil cases, however, are largely irrelevant in a criminal proceeding. The constitutional rights at issue here derive from the interplay of Const. art. 1, § 10, which provides, “Justice in all cases shall be administered openly[;]” and Const. art. 1, §22, which provides, “In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury[.]” There is no way the chambers hearing on the property issue in Peterson or the divorce action in Meisenheimer implicate the criminal defendant’s right to a “speedy public trial.” Those cases simply do not apply here.

The State also places weight on the fact the results of these hearings were placed on the record in open court. BOR at 18. Such recitations may create a record adequate for purposes of review. They do not, however, substitute for holding the hearing in open court. If they did, it would be possible for the court to justify closure of voir dire in chambers by creating a public record when the jury is empanelled in public. After all, in both instances, the results of the behind-the-scenes hearing are subsequently made public in open court. As Strode

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<sup>16</sup> Peterson v. Dillon, 27 Wash. 78, 67 P. 397 (1901), and Meisenheimer v. Meisenheimer, 55 Wash. 32, 104 P. 159 (1909).

demonstrates, an after-the-fact report of the closed proceedings does not cure a failure to engage in the proper closure procedures. Strode, 167 Wn.2d at 227 (the number of potential jurors questioned and the number challenged for cause were known, but the in-chambers proceeding still violated the trial court's requirement to hold an open public trial).

Finally, the State relies on State v. Collins<sup>17</sup> for the proposition that this Bone-Club challenge was not preserved for appeal. BOR at 19-22. Collins is inapplicable here. In Collins, the court ordered the doors locked to prevent people coming and going during the prosecutor's closing argument. Collins, 50 Wn.2d at 745-46. While the trial court said the order was issued so counsel would be free from interruption, the Supreme Court said the real reason was so the jury would not be disturbed. Id. at 746. Observing that there were a reasonable number of people in attendance, without partiality or favoritism in their admission, the Court found it was a matter of discretion whether the court could properly constrain the flow of people into and out of the courtroom. Id. at 748. Thus, the Collins Court ruled, absent an objection, the issue was waived. Id.

The State here contends Collins is binding precedent. BOR at 19-20. Collins, however, was decided 25 years before Seattle Times v.

Ishikawa<sup>18</sup> established the closure guidelines under art. 1, § 10, and 38 years before Bone-Club held the violation of those guidelines in criminal trials were a structural error requiring reversal. While Collins has never been explicitly overturned, Bone-Club and its progeny have gutted its waiver analysis. In Bone-Club, the Court distinguished Collins as being based solely on Const. art. 1, § 22, an area lacking precedential rigor when compared with the “well-defined standard for closing a hearing” under Const. art. 1, § 10. Bone-Club, 128 Wn.2d at 257-58. Discussing Collins, the Bone-Club Court characterized the holding in that case as addressing a “partially closed hearing [that] did not rise to the level of a constitutional violation.” Id. at 258. Addressing the same argument as the State presents here under Collins, the Bone-Club Court said, “We also dismiss the State’s argument that Defendant’s failure to object freed the trial court from the strictures of the closure requirements.” Id. at 261. Instead, the Court said, “The motion to close, not Defendant’s objection, triggered the trial court’s duty to perform the weighing procedure.” Id. This duty is triggered even when that motion originates sua sponte with the trial court. See Heath, 150 Wn. App. at 128 (trial court’s sua sponte decision to close triggers need for Bone-Club analysis).

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<sup>17</sup> 50 Wn.2d 740, 314 P.2d 660 (1957).

<sup>18</sup> 97 Wn.2d 30, 640 P.2d 716 (1982).

Even under State v. Momah waiver analysis, the defendant's failure to object is insufficient to constitute a waiver of the open, public trial right. Momah, 167 Wn.2d at 155-56 (failure to object does not preclude hearing trial closure issues for the first time on appeal, regardless of the outcome). Rather, waiver of the open, public trial right requires affirmatively advocating for the closure, arguing for its expansion, and benefiting from it. Id. at 156; see also, Strode, 167 Wn.2d at 234 (Fairhurst, J., concurring) (discussing Momah: failure to object does not alone constitute waiver of right to public trial; rather record must show intentional relinquishment of a known right).

In any event, Collins is distinguishable on its facts. Collins represented a partial closure because those members of the public locked in the courtroom were able to observe the proceedings in numbers sufficient to satisfy the requirements of a public trial under Const. art. 1, § 22. Here, the court simply called a recess and held a hearing on the admissibility of evidence in chambers. 6RP 34. While the State characterizes this as the court memorializing its sidebar ruling,<sup>19</sup> the court below made it clear that an evidentiary hearing had happened in chambers while the jury was at recess, saying, "It all happened in chambers[.]" and

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<sup>19</sup> BOR at 18.

discussing a memo the prosecutor had provided during the hearing. 6RP 32-36. Regardless of how many people may have been sitting in the courtroom, the evidentiary hearing in chambers was closed to them.

Because the trial court conducted in-chambers hearings without engaging in the mandatory closure procedures, this Court should reverse and remand for a new trial.

2. CONTRARY TO THE STATE'S TREATMENT OF THE RECORD, A PROPER OBJECTION WAS LAID TO THE PHYSICIAN'S TESTIMONY WHERE HE COULD NOT REMEMBER IF HE RELIED ON A TRANSLATOR.

The State conflates two separate objections into one and ignores the relevant cited cases in its argument on the physician's testimony reciting words attributed to Visharenko. BOR at 22-27.

The State asserts the issue of whether there was an adequate foundation for Dr. DiJulio – the emergency room physician who treated Visharenko – to testify as to what she was supposed to have said is not preserved because the objection spoken below was “hearsay” rather than lack of foundation. BOR at 22-26. In light of DiJulio's testimony prior to the objection, combined with the trial court's treatment of the hearsay objections, the State's argument places form over substance and ignores the purpose served by raising specific objections.

The purpose for requiring specific objections below is to permit the trial court to make the initial ruling and correct the error, thus avoiding a retrial. State v. Powell, 166 Wn.2d 73, 82-83, 206 P.3d 321 (2009). Where the spoken objection is not clear, however, but the nature of the objection was clearly understood and acted upon by the trial court, appellate review may be had. ER 103(a)(1);<sup>20</sup> see also Powell, 166 Wn.2d at 87-88 (Stephens, J., concurring) (appellate court should consider the issue where the trial court clearly understood the nature of the objection and acted upon it).

Here, given the context of the trial to that point, the trial court clearly understood the foundational component of the hearsay challenge raised by counsel below. The need for Russian interpreters for both Golodiuc and Visharenko had been raised at the omnibus hearing. 1RP 4-5. The trial prosecutor and the judge discussed the need for interpreters to listen to a proffered 911 tape. 3RP 2-6. The court knew L.V. was bilingual and used her Russian speaking abilities to read the letters

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<sup>20</sup> ER 103 provides:

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context[.]

Golodiuc wrote to Visharenko. 5RP 63 et seq. Also, L.V.'s bias against Golodiuc had been established. 5RP 84-87, 99-100.

Visharenko acknowledged needing to use a "language line interpreter" when she spoke with a police detective. 6RP 19. Regarding the statements to police on the night she went to the hospital, Visharenko said L.V. called the police and "told them everything." 6RP 27.

The police officer who responded was met by both Visharenko and L.V. 6RP 68-70. That officer said Visharenko had broken English and L.V. helped him to understand her. 6RP 68-70. When the trial prosecutor asked the officer to repeat what Visharenko said, counsel objected it was not clear whether those words came from Visharenko or L.V., and objected to hearsay from L.V. 6RP 68-69. Following a sidebar, when the officer said he could not distinguish which of the two women had told him what, the prosecutor dropped that line of questioning. 6RP 70-71. Subsequently, the officer said he took his statement from Visharenko at the hospital emergency room with L.V. assisting to overcome the language barrier. 6RP 79-80. The officer testified L.V. was with Visharenko and acting as her translator the entire time he was taking her statement at the hospital. 6RP 81-84.

Regarding her statements to DiJulio, Visharenko said she barely remembered the conversation. 6RP 28. Visharenko also said “Well, it seems I said something, but I didn’t have an interpreter.” 6RP 28.

Given this context, especially the earlier objection to the officer’s testimony, where the court sustained a hearsay objection regarding the words spoken by L.V. when the officer could not distinguish which statements came from Visharenko and which from L.V., the hearsay objections to DiJulio’s recitation of Visharenko’s words was sufficient to alert the court to the underlying foundational issue. In fact the court’s response after it had sustained two hearsay objections was to direct the prosecutor to “lay some foundation as to whether this came directly from her or through some intermediary[.]” 7RP 10-11.

The court ruled on a foundational issue, and this appeal assigns error to that ruling. This assignment of error is properly before this Court. The State v. Redmond<sup>21</sup> issue raised by counsel in sidebar was a separate objection, and no error was assigned to that ruling. BOA at 33 n.10.

Further, the State challenges Golodiuc’s reliance on State v. LeFever<sup>22</sup> because that case does not establish a rule that a witness must

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<sup>21</sup> 150 Wn.2d 489, 78 P.3d 1001 (2003).

<sup>22</sup> 102 Wn.2d 777, 690 P.2d 574 (1984), overruled on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989), and overruled on other grounds by State v. Collins, 112 Wn.2d 303, 771 P.2d 350 (1989).

establish whether someone assisted with interpretation of a foreign language. BOR at 26-27. The State is correct. LeFever establishes no such rule, and it was not cited for that purpose in the opening brief. BOA at 30-31. Rather it was cited for the general foundational requirement that a witness be able to identify the sources of his or her information, that the burden to lay this foundation is on the proponent, and that lack of memory regarding sources or pertinent events should result in the testimony being rejected. LeFever, 102 Wn.2d at 786-87; BOA at 30-31.

The State has not addressed those cases, cited in the opening brief, which address the foundational and hearsay issues involving extrajudicial statements that came to a witness through an interpreter. See BOA at 31 (discussing State v. Lopez, 29 Wn. App. 836, 839, 631 P.2d 420 (1981) and State v. Garcia-Trujillo, 89 Wn. App. 203, 207, 948 P.2d 390 (1997)). Golodiuc relies on their treatment in the opening brief.

The record here is clear: L.V. had been acting as an interpreter for Visharenko while she was at the hospital; Visharenko said she did not have an interpreter, but she also did not remember what she told the doctor; DiJulio did not remember anything about how he came to receive the statements he attributed to Visharenko. The burden was on the State as the proponent of those statements to establish that he got those statements from Visharenko herself and not through L.V. or anyone else.

As discussed in the opening brief, DiJulio's recitation of statements he attributed to Visharenko was highly prejudicial. BOA at 35-36. This Court should reverse.

3. THE STATE CONCEEDS A NEW TRIAL IS REQUIRED FOR TWO OF THE FOUR WITNESS TAMPERING COUNTS, BUT ALL FOUR COUNTS SHOULD BE REVERSED.

The State concedes Count VI – alleging witness tampering based on the July 11, 2008 letter – must be reversed because only one alternative means is established. BOR at 31-32. The State further concedes Count VII – alleging witness tampering based on the July 18, 2008 letter – must be reversed because only two of the three alternative means are established. BOR at 32-34. Both concessions are well taken.

The State, however, contends all three alternative means are established for Count V – alleging witness tampering based on the March 25, 2008 letter. BOR at 30-31. The State also contends all three alternatives are established for Count VIII – alleging witness tampering based on the undated letter. BOR at 34-35. These letters are addressed in the opening brief. BOA 40-41 (addressing Count V) and BOA 43 (addressing Count VIII).

It bears stressing the ambiguous nature of Golodiuc's request that Visharenko change her telephone number. As discussed in the opening

brief, that request could be related to his concern that Visharenko is calling him in jail in violation of the no-contact order. BOA at 41, 43.

In addition, there is nothing to establish Golodiuc would reasonably believe Visharenko had any additional information to provide the police by the time he wrote the letters. By the time he has written the letters, Golodiuc is aware Visharenko had already spoken with police. This awareness can be seen in the March 25<sup>th</sup> letter, where he says “if you decided that you don’t need me anymore, then confirm your testimony in court[.]” This also renders his request that Visharenko not “talk to anyone on the phone” – March 25<sup>th</sup> letter in Count V – and “don’t talk to anyone” – undated letter in Count VIII – ambiguous regarding any intent to induce her to withhold relevant information.

As discussed above and in the opening brief, the letters alleged in Count V and Count VIII do not establish each of the alternative means of witness tampering, and those counts – along with the conceded Counts VI and VII – must be reversed.

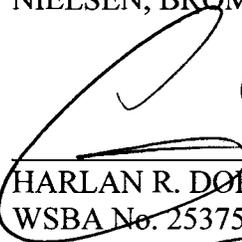
B. CONCLUSION

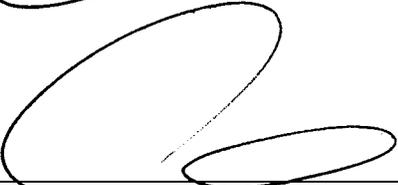
For the reasons stated in the Brief of Appellant and above, this Court should reverse.

DATED this 8th day of January 2010.

Respectfully submitted,

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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 62971-9-I
	)	
NICOLIA GOLODIUC,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 8<sup>TH</sup> DAY OF JANUARY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X]     NICOLIA GOLODIUC  
          DOC NO. 327322  
          AIRWAY HEIGHTS CORRECTIONS CENTER  
          P.O. BOX 1899  
          AIRWAY HEIGHTS, WA 99001

2010 JAN -8  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
FILED  
PATRICK MAYOVSKY

**SIGNED** IN SEATTLE WASHINGTON, THIS 8<sup>TH</sup> DAY OF JANUARY, 2010.

x Patrick Mayovsky