

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

**STATE OF WASHINGTON,
Appellant,**

v.

**BENITO MICHAEL RODRIGUEZ
Respondent.**

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the defendant may assert a violation of his constitutional right to public trial where defense counsel specifically stated he did not object to going into chambers to voir dire one prospective juror regarding her inability to serve on the jury, and that juror was excused by agreement of the parties.
2. Whether there is sufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that the defendant caused physical damage to a truck when he unlawfully entered the truck to steal items from inside where the window that the defendant entered through was broken within a 2½ hour time frame, defendant was the only one seen entering the truck, a witness saw a light shining through the tinted window of the truck right after the defendant exited through the window which she had not seen before he entered the truck, even though the witness did not hear the window break.

C. STATEMENT OF THE CASE

1. Procedural Facts

On May 20, 2009 Appellant Benito Rodriguez was charged with Malicious Mischief in the Second Degree, in violation of RCW 9A.48.080(1)(a), Vehicle Prowl in the Second Degree, in violation of RCW 9A.52.100(1) and Theft in the Third Degree, in violation of RCW 9A.56.050(1) and RCW 9A.56.020, for acts he committed on or about May 16, 2009. CP61-63. He was found guilty as charged by jury and the

court imposed a standard range sentence of 29 months on the malicious mischief felony, 365 days on the vehicle prowling and 90 days on the theft third, and \$850.42 in restitution. CP 16-28.

2. Substantive Facts

On May 16, 2009 sometime between 11 p.m. and 1:00 a.m., Cassandra Curry, who was visiting Bellingham, was sitting in her car parked near the Royal Club in downtown Bellingham waiting for a friend. RP 4, 11.¹ About 20 feet away she saw a guy climb onto the cover of the back of a large pick-up truck and slide across towards the back window. RP 4-5. The truck was a Dodge Ram truck, with a hard tonneau cover on the back and a three paned rear window that had a “slider” pane in the center. RP 15, 32, 67, 71, 76; Ex. 3, 4. The guy slid open the window and then slid into the interior of the truck. RP 5-6. Ms. Curry saw him rummaging around through the passenger compartment, but initially didn’t think anything of it, assuming he was either the owner or a friend of the owner’s. RP 6. The guy opened the center console and appeared to take something from the roof of the interior. RP 6-7. About two minutes later the guy exited through the rear window again. RP 6. At this point, she

¹ RP refers to the verbatim report of proceedings for the trial and sentencing, August 24, 25 and Sept. 15, 2009. VDRP refers to the report of proceedings for the voir dire on August 24, 2009.

didn't think the guy was the owner any more, and as he exited the truck she pretended to be taking a picture with her cell phone. RP 7, 9.

As he walked away she noticed that after he passed a police officer he kept looking back over his shoulder. RP 9. She followed the guy in her car and then flagged down a police officer, Sgt. Vanderyacht, around 1:20 a.m. RP 7, 11, 22-23, 27. She told Sgt. Vanderyacht she had seen someone breaking into a truck and gave a description of the guy, including that he had been wearing an unusual black and white speckled shirt. Ms. Curry had actually seen the same person about 15 minutes before she saw him break into the truck when she'd been driving into town. RP 7-8, 11-12, 23.

About a block away Sgt. Vanderyacht found a guy whose clothes matched the description and went to contact him. RP 24. The guy joined up with a male and female couple, pretending to know them, but they didn't know who he was. RP 24. Sgt. Vanderyacht identified the guy as Benito Rodriguez and detained him in order to see if Ms. Curry could identify him. RP 25-26. Sgt. Vanderyacht went to get Ms. Curry while another officer, Officer Crass, stayed with Rodriguez. RP 12-13, 26. Ms. Curry identified Rodriguez as the guy she had seen entering the truck and

was 100% positive at the time. RP 13.² When Rodriguez was searched after he was arrested, an employee badge for “Fernando Nava” was found in his possession, along with a small flashlight, a key fob and a black beanie that he had been wearing on his head. RP 26-27, 87. The badge and beanie belonged to the owner of the truck, Fernando Nava. RP 27, 73-75.

Mr. Nava testified when he had parked and locked the truck around 10:30 p.m. that night, the truck had been in good condition, with no damage to the rear window. RP 67, 70, 81. When he returned to his truck around 2:00 a.m., he saw an officer near his truck who informed him that his truck had been broken into. RP 69, 81. The left pane of the rear window had been broken, permitting access to the locking clasp to the center slider pane. RP 32-33, 69, 76, Ex. 3, 4. Sgt. Vanderyacht estimated the cost to replace the rear window alone at \$643. RP 53.

After the State rested, defense brought a half time motion alleging insufficient evidence that Rodriguez was the one who broke the window. RP 91-93. The court denied the motion finding that there was sufficient evidence of Rodriguez’s guilt given the short time frame between the time the owner left the truck and the time it was seen broken. RP 94.

² She wasn’t able to identify him in court.

D. ARGUMENT

Rodriguez asserts that his constitutional right to a public trial, under the Sixth Amendment and Article 1 §10 and §22 of the State Constitution, was violated when the judge questioned one juror in chambers regarding her ability to sit on the jury after she requested to be heard in private. Rodriguez explicitly waived any objection to the in chambers questioning when defense counsel informed the court he had no objection to hearing the juror's concerns in chambers. Even if his waiver wasn't sufficient to be effective, Rodriguez is obliged to demonstrate a manifest error affecting his constitutional right to a public trial and that this constitutional right was implicated by the brief in chambers questioning of one juror. Under the facts of this case, he cannot do so. Moreover, even if the in chambers questioning here implicated his right to public trial, under Momah,³ reversal of his conviction would not be the appropriate remedy because his trial was not rendered fundamentally unfair by this limited closure. Finally, Rodriguez does not have standing to assert an Article 1 §10 violation of the public's right to open proceedings regarding this in chambers questioning where he specifically waived his own right to a public trial.

³ State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009).

Rodriguez also asserts that there was insufficient evidence to prove that he was the one who broke the window on the truck, and therefore he should not have been convicted of second degree malicious mischief. Taken in the light most favorable to the State, the circumstantial evidence provided sufficient evidence for a rational trier of fact to find Rodriguez guilty beyond a reasonable doubt. The window was broken within approximately a two to two and a half hour time period. While the witness did not see or hear Rodriguez breaking the glass of the truck, the truck's window was broken out only in one small area, near the lock for the slider, and the witness testified that she could not see any light coming through the truck window before Rodriguez slid into the truck, but that she could afterwards. This coupled with the fact that Rodriguez was the only one seen entering the truck and that he did so in order to steal items from inside the truck is sufficient evidence.

- 1. Rodriguez cannot assert for the first time on appeal a violation of his right to a public trial when his attorney informed the judge that he did not object to the in-chambers questioning of the one juror.**

Rodriguez asserts that his right to public trial under the state and federal constitutions was violated when the trial court heard one prospective juror's concerns about her conflict with serving in chambers. He also asserts that he may raise a violation of Art. 1§10, the public's right

to open proceedings. Rodriguez waived the ability to assert a violation of his right to public trial and he has no standing to assert a violation of the public's open proceedings right. Even if he hadn't waived his right, he cannot demonstrate manifest error of constitutional magnitude or that his constitutional right was implicated here where only one juror's concerns were heard in chambers and the juror was ultimately excused by agreement of the parties. Even if Rodriguez could demonstrate that his right to public trial was implicated by this very limited closure, under Momah reversal would not be appropriate because the closure did not render his trial fundamentally unfair.

In alleging a violation of the right to public trial, the reviewing court first determines whether the trial court's ruling implicates the defendant's right to public trial, and if so, whether the trial court properly considered the Bone-Club⁴ factors. State v. Lormor, 154 Wn. App. 386, 391, 224 P.3d 857 (2010). In determining whether there was an order closing the courtroom, the court looks at the plain language of the trial court's ruling. State v. Brightman, 155 Wn.2d 506, 516, 122 P.3d 150 (2005). A trial court's decision to close courtroom proceedings is subject to de novo review. Brightman, 155 Wn.2d at 514.

⁴ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

The right to public trial extends to jury selection. State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009). That right is not absolute, however, and the presumption for an open courtroom may be overcome by an overriding interest if the court finds that a closure is necessary to preserve higher values and is narrowly tailored to serve that interest. *Id.* To protect a defendant's right to public trial, a court should address and make specific findings regarding five factors:

“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.”

Id. at 149 (*quoting Bone-Club*, 128 Wn.2d at 258-59). While the *plurality opinion*⁵ in Strode,⁶ cited by Rodriguez, opined that the trial

⁵ State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009).

court was required to make specific findings except in exceptional circumstances, the majority opinion in Momah disagreed stating that the “better practice” was to do the balancing and make the findings before closing the courtroom. Momah, 167 Wn.2d 152 n.2. The court’s failure to balance the factors on the record and to make specific findings was not fatal in that case.

If the court on appeal “determines that the defendant’s right to public trial has been violated, it devises a remedy appropriate to the violation.” Momah, 167 Wn.2d at 149. Not all courtroom closure errors will result in a new trial. *Id.* at 150. If the error is structural, automatic reversal is warranted. *Id.* at 149. An error is only structural though if the error “necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” *Id.* (*quoting* Washington v. Recuenco, 548 U.S. 212, 218-19, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)). In those cases where a new trial has been ordered on appeal, prejudice was sufficiently clear from the record, and the closures in those cases impacted the fairness of the proceedings and were ordered without seeking input from the defendant. *Id.* at 151.

⁶ “A plurality opinion has limited precedential value and is not binding on the courts.” In re Isadore, 151 Wn.2d 294, 303, 88 P.3d 390 (2004).

a. *Rodriguez waived any public trial right error below*

Rodriguez waived the ability to assert a violation of his right to public trial by defense counsel affirmatively stating that defense did not object to the in chambers questioning of the juror. A defendant's failure to object to a courtroom closure will not in and of itself constitute a waiver of the right to public trial. Brightman, 155 Wn.2d at 517. In general in order for a waiver to be effective, it must be knowing, intelligent and voluntary. State v. Castro, 141 Wn. App. 485, 490, 170 P.3d 78 (2007). "The requirements for a valid waiver differ based on the nature of the right at issue." *Id.* For example, there is no need for an on-the-record colloquy with a defendant regarding whether he is waiving his constitutional right to testify. *See, State v. Thomas*, 128 Wn.2d 553, 557, 559, 910 P.2d 475 (1996) ("a trial judge is not required to advise a defendant of the right to testify in order for a waiver of the right to be valid" and no on-the-record waiver is required to waive the right to testify). To require an on-the-record waiver can result in the trial court unnecessarily, and perhaps detrimentally, intruding upon the attorney-client relationship and defense counsel's strategy with respect to voir dire. *See, State v. Singleton*, 28 P.3d 1124, 1129 (N.M. 2001), *cert. den.* 28 P.3d 1099 (2001) ("the right to excuse or retain a juror is a right tied closely to a tactical decision."). The

right to public trial need not be waived expressly and personally by the defendant him or herself on the record.

Other courts have held that a defendant's attorney can waive the defendant's right to a public trial. *See, Berkuta v. State*, 788 So.2d 1081, 1082-83 (Fla. 2001), *rev. den.*, 816 So.2d 125 (2002) ("A defense counsel's affirmative representation to the court that the defendant consents to excluding persons otherwise entitled to be present in the courtroom is sufficient to effectively waive the defendant's right to a public trial"); *People v. Webb*, 642 N.E.2d 871, 958-59 (Ill. 1994), *rev. den.* 647 N.E. 2d 1016 (1995) (defense counsel can waive defendant's right to public trial); *State v. Butterfield*, 784 P.2d 153, 156-57 (Utah 1989); *cf., Singleton*, 28 P.3d at 1128 (defense attorney can waive fundamental constitutional right to fair and impartial jury, waiver need not be on the record); *U.S. v. Durham*, 139 F.3d 1325, 1333 (10th Cir. 1998), *cert. den.*, 525 U.S. 866 (1998) ("[w]hen a defense attorney decides for reasoned strategic purposes not to make a constitutional or statutory objection to the composition of a petit jury, the defendant is bound even if the attorney fails to consult him or her about the choice").

Here, the judge informed jurors, without objection, that if the jurors needed to speak privately about something they could if it were necessary. VDRP 8. When the court inquired whether there was anything

in the jurors' personal or professional lives that would make it difficult for them to sit on the jury given the amount of time the judge estimated the trial would take, juror no. 12 expressed a desire to speak privately. VDRP

12. At the end of the general voir dire, the judge stated:

THE COURT: ... Ladies and gentlemen, I know Juror Number 12 indicated there were some issues on a conflict she had with hearing the case and she prefers to talk in chambers. Anybody have a problem with us going back in chambers with Juror Number 12? Apparently no one has a problem. We'll meet with Juror Number 12 in chambers real briefly.

MR. SAWYER: Is the court finding this is the least restrictive way to accomplish this?

THE COURT: It is.

MR. SAWYER: No objection by defense either?

MR. HENDRIX: No.

Here Rodriguez did not simply fail to object to the in chambers questioning, his attorney explicitly informed the court he had no objection. Rodriguez waived his right to have the one juror questioned in public regarding her conflict.

Even if an express on-the-record personal waiver by defendant were required to waive the right to public trial, Rodriguez still must demonstrate that the extremely limited in chambers questioning here constitutes a manifest error of constitutional magnitude given his failure to object below and his counsel's affirmative statement that defense did not object. Under RAP 2.5(a), an error is waived if not preserved below unless it is a "manifest error affecting a constitutional right." RAP

2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988); State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). It is the defendant's burden to show how the alleged constitutional error was manifest, i.e., how it actually prejudiced his rights. State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999). While some assertions of violations of the right to public trial have been permitted for the first time on appeal,⁷ and most recently in Momah and Strode, the Supreme Court has also held that a defendant can waive the right to public trial issue by failing to assert it below. State v. Collins, 50 Wn.2d 740, 314 P.2d 660 (1957). The court in Collins held that the defendant could not raise the court's closure of the courtroom due to overcrowding for the first time on appeal, noting that "a trial court is entitled to know that its exercise of discretion is being challenged; otherwise, it may well believe that both sides have acquiesced in its ruling." *Id.* at 748.

Rodriguez should be required to demonstrate that any constitutional error was *manifest*, i.e., prejudicial, particularly given the holding in Momah that not all errors regarding a defendant's right to public trial result in structural error and automatic reversal. In Strode the plurality opinion relied on the right to public trial being an issue of "such

⁷ See, e.g., Bone-Club, *supra*, In re Orange, 152 Wn.2d 75, 100 P.3d 291 (2004), State v.

constitutional magnitude” that it could be raised for the first time on appeal. Strode, 167 Wn.2d at 229. In Orange, relied upon by Strode for this proposition, the court assumed that the constitutional error would have been prejudicial per se and therefore it could be raised for the first time on appeal. *See, In re Orange*, 152 Wn.2d 795, 800, 100 P.3d 291 (2004). Now, however, post-Momah, violations of the right to public trial are not always structural error and prejudicial per se.

Given the extremely brief questioning of the juror, the lack of objection from Rodriguez and defense counsel’s declaration that defense did not object to the in chambers questioning of the one juror, Rodriguez should be required to demonstrate that any violation of his public trial right was manifest, *i.e.*, how he was prejudiced by the in chambers questioning of one juror.

b. Hearing one juror’s concern in chambers about her conflicts with serving did not implicate the defendant’s right to a public trial.

Rodriguez cannot establish that the in chambers questioning of one juror here constitutes a manifest error of constitutional magnitude because the closure that occurred was so minimal that it did not implicate his right to public trial. Closures that have a de minimis effect on a proceeding do

Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006).

not necessarily violate the right to public trial. Brightman, 155 Wn.2d at 515; *see also*, Lormor, 154 Wn. App. at 391, 394 (assuming trial court's actions constituted a closure, the closure did not implicate the defendant's right to public trial). In order to determine whether the right to a public trial is implicated by a closure, the court looks to whether the principles underlying the right to public trial are negatively impacted by the closure.

“... [W]hether a particular closure implicates the constitutional right to a public trial is determined by inquiring whether the closure has infringed the ‘values that the Supreme Court has said are advanced by the public trial guarantee...’ ... This analysis tends to safeguard the right at stake without requiring new trials where these values have not been infringed by a trivial closure.”

Easterling, 157 Wn.2d 167, 183-84, 137 P.3d 825 (2006) (J. Madsen concurring); *see also*, State v. Rivera, 108 Wn. App. 645, 653, 32 P.3d 292 (2001), *rev. den.*, 146 Wn.2d 1006 (2002) (opening a chambers conference regarding a juror's complaint to the public would not further the goals of the right to public trial). “[T]he 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. In the context of a closure of voir dire, the public nature of the proceeding permits the defendant's family to contribute their

knowledge or insight to jury selection and permits the venire to see the interested individuals. Brightman, 155 Wash.2d at 515.

In addition to considering the values guaranteed by the public trial right in determining whether a closure is de minimis, courts have also considered the duration of the closure. U.S. v. Ivester, 316 F.3d 955, 960 (9th Cir. 2003); *see also*, Peterson v. Williams, 85 F.3d 39 (2nd Cir. 1996), *cert. den.*, 519 U.S. 878 (1996) (inadvertent closure of courtroom during defendant's testimony for 20 minutes met de minimis standard); Snyder v. Coiner, 510 F.2d 224, 230 (4th Cir. 1975) (short closure of courtroom during closing arguments was too trivial to implicate right to public trial). The de minimis standard has been applied in cases where closure was purposeful as well as unintentional. Easterling, 157 Wn.2d at 184-85 (J. Madsen concurring).

Division Two of the Court of Appeals acknowledged in State v. Lormor, post Momah and Strode, that a courtroom closure error allegation can be so minimal as not to implicate the defendant's right to a public trial. In that case the trial court ordered the defendant's young child who required a ventilator removed from the courtroom mainly because it was concerned that her presence, particularly given her medical condition, could distract the jury. Lormer, 154 Wn. App. at 389. It noted that the first step in analyzing a claim of a violation of the right to public trial is to

determine if the trial court's ruling implicated that constitutional right. *Id.* at 391. It found that even if a closure is determined to have occurred, it can be such that the right to public trial is not implicated. *Id.* In determining that exclusion of the defendant's daughter did not implicate his right to public trial, the court considered whether her presence would have served the purposes of the right to public trial, to ensure that the prosecutor and the judge carried out their duties responsibly, to encourage witnesses to come forward, and to assist the defendant in selecting a jury. *Id.* at 394.

The most recent Division Two Court of Appeals decision in *State v. Paumier*, ___ Wn. App. ___, 2010 WL 1675171 (April 27, 2010), does not dictate a different result. While the court in that case held that a court errs in closing a courtroom without first considering reasonable alternatives and making appropriate findings to support closure under the Sixth Amendment, the court did not address the issue of a de minimis violation or whether the defendant's right to public trial was implicated by the in chambers voir dire in that case. *Id.* at ¶23. The *Paumier* majority held that the recent U.S. Supreme Court case of *Presley v. Georgia*, ___ U.S. ___, 130 S.Ct. 721 (2010) resolved the issue left open by *Momah* and *Strode*, *i.e.*, what remedy, if any, is appropriate when the trial court does not specifically address the *Bone-Club* guidelines before ordering a

closure of the courtroom. Paumier, ___ Wn. App. at ¶19, 23. The majority held that, under Presley, the appropriate remedy when a defendant's right to a public trial is violated is automatic reversal in all cases where the trial court failed to consider reasonable alternatives or makes findings appropriately justifying the closure. *Id.* at ¶23-24.

In addition to not addressing the issue of de minimis violations, the Paumier majority's analysis of the impact of Presley was flawed, as recognized by the dissent. Paumier, ___ Wn. App. at ¶34-36 (J. Quinn-Brintnall dissenting). Presley was a per curiam decision in which the Supreme Court held the Georgia trial court violated the defendant's right to a public trial by excluding the public from the voir dire proceedings *over the defendant's objection*. Presley, 130 S.Ct. at 722 (emphasis added); *see also*, Reid v. State, 690 S.E.2d 177, 180-81 (Georgia 2010) (Presley, which held that trial courts are required to consider alternatives to closure even when they are not offered by the parties, was distinguishable because the defendant in Presley had objected to the closure of voir dire). It was only in the face of the defendant's objections that the Presley court summarily determined the defendant's right to a public trial had been violated by the exclusion of the defendant's uncle and that reversal was appropriate because the trial court had neither considered reasonable alternatives nor made findings to justify the closed

proceeding. As a per curiam decision, Presley did not announce any new law and did not redefine the scope of the right to public trial beyond that which had previously existed. *See, People v. Bui*, 183 Cal. App. 4th 675, (April 6, 2010), 2010 WL 1333436 (“As indicated by its summary per curiam disposition, we do not read *Presley* as defining any greater scope to the public trial right under either the First or Sixth Amendments than that already articulated in *Press-Enterprise* and *Waller*.”).

Therefore, Paumier’s conclusion that Presley superseded Momah’s analysis and that a trial court’s failure to address the closure factors will always result in automatic reversal, *even where there was no objection below*, is mistaken. Under the facts here, a federal court would either refuse to hear the claim because Rodriguez affirmatively waived the issue, or would at most review the issue under the demanding plain error standard of review, in which Rodriguez would bear the burden of showing a “miscarriage of justice.”⁸

⁸ Under U.S. Supreme Court precedent unpreserved claims of error are forfeited. Peretz v. United States, 321 U.S. 414, 444, 64 S.Ct. 660, 88 L.Ed. 834 (1944) (“No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal ... cases by the failure to make timely assertion of the right.”); United States v. Olano, 507 U.S. 725, 731-32, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). This principle has been applied to open courtroom claims. Levine v. United States, 362 U.S. 610, 619, 80 S.Ct. 1038, 4 L.Ed. 989 (1960). The U.S. Supreme Court recognized in the more recent case of Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed. 2d 31 (1984) that a state may refuse to provide a remedy in a courtroom closure case, even where reversible error occurred, if the defendant failed to object to the error below. Waller, 467 U.S. at 42

Presley also does not preclude a de minimis analysis. *See, People v. Bui*, 183 Cal. App. 4th 675, (April 6, 2010), 2010 WL 1333436 (“But *Presley* did not consider or address, either expressly or implicitly, the “de minimus (sic) rationale” or “triviality standard” recognized by both the California Supreme Court and several federal courts). Nothing in Strode or Momah likewise precludes this Court from finding that the closure had a de minimis effect on the proceedings and therefore Rodriguez’s right to a public trial was not implicated or violated.

Here none of the values underlying the right to a public trial is implicated by the in-chambers colloquy with one prospective juror. The juror did not wish to disclose the personal nature of her conflict in public.⁹

n. 2, *see also, United States v. Perry*, 479 F.3d 885 (DC Cir. 2007). The Supreme Court in Waller held that, where the defendant objects, the closure must meet the requirements of the *Press-Enterprise* analysis. Waller v. Georgia, 467 U.S. 39, 47, 104 S.Ct. 2210, 2216 (1984) (“In sum, we hold that under the Sixth Amendment any closure of a suppression hearing *over the objections of the accused* must meet the tests set out in *Press-Enterprise* and its predecessors.”) (emphasis added).

Under the Sixth Amendment, where the defendant failed to object below, a claim of a violation of the right to public trial is reviewed solely under the demanding plain error standard of review. United States v. Bucci, 525 F.3d 116, 129 (1st Cir. 2008). Under this standard, a defendant must show: 1) there is an error or defect that the appellant has not affirmatively waived; 2) the error is clear or obvious; 3) the error affected the appellant’s substantial rights, i.e., affected the outcome of the proceedings; and 4) if those factors are satisfied, the reviewing court has the discretion to remedy the error only if it seriously affects the fairness, integrity or public reputation of the judicial proceedings. Olan, 507 U.S. at 732-36. Furthermore, the Court has held that the plain error standard can bar review even in cases where the unpreserved error constituted structural error. Johnson v. United States, 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997).

⁹ The juror’s conflict was that she had a situation at home where she was going to be caring for two grandchildren, one of whom had been physically violent with the other one

None of the public expressed any objection to the in chambers questioning. Minimal questioning occurred in chambers. VDRP 32-33. The juror was ultimately excused by agreement of the parties. Supp CP ___, Sub Nom 18. Requiring the one juror to state her concerns in public would not have encouraged any witnesses to come forward, would not have assisted the defendant in selecting a jury, and there is no indication that it would have helped to ensure that the prosecutor and the judge carried out their duties responsibly. Such a de minimis closure does not implicate Rodriguez's right to public trial.

c. Even if Rodriguez's right to public trial was implicated by the in chambers questioning of one juror, under Momah reversal of his conviction is not warranted.

Although the trial court did not make specific findings regarding the Bone-Club factors, Rodriguez's attorney explicitly stated there was no objection to the procedure and there is no showing of prejudice to the defendant here as there was in Orange and Easterling. As such, no structural error warranting reversal occurred. As the court summarized in Momah:

in the past and who was supposed to be on medication and was due to be off probation soon. VDRP 32.

... courts grant automatic reversal and remand for a new trial only when errors are structural in nature. An error is structural when it necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. In each case, the remedy must be appropriate to the violation.

217 P.3d at 155-56.

Here, the court announced its reason for going into chambers, to address the juror's personal conflict, inquired if any of the persons present had any objection to it, and defense counsel indicated Rodriguez didn't have an objection. The court found that going into chambers was the least restrictive alternative to address the juror's concern. While the court may not have made the recommended specific findings, it certainly was cognizant of them and addressed most of them. In this regard, although there was no extensive discussion, this case is similar to Momah. Where, as here, there was no objection by anyone present and defense counsel specifically asserted no objection, a new trial would not be an appropriate remedy because the closure here did not render Rodriguez's trial fundamentally unfair.

d. Rodriguez does not have standing to assert the Art. 1 §10 public's right to open proceedings.

Rodriguez also asserts a violation of the public's right to open proceedings under Art. I §10,¹⁰ but he does not have standing to raise the public's right of access. "The general rule is that a person does not have standing to vindicate the constitutional rights of a third party." State v. Gutierrez, 50 Wn. App. 583, 591-592, 749 P.2d 213, *rev. den.* 110 Wn.2d 1032 (1988); *accord*, State v. Wise, 148 Wn. App. 425, 441-42, 200 P.3d 266 (2009); Paumier, ___ Wn. App. at ¶39 ("standing doctrine generally prohibits a party from suing to vindicate another's rights") (J. Quinn-Brintnall dissenting); *cf.*, U.S. v. Hickey, 185 F.3d 1064 (9th Cir. 1999) (government did not have third party standing to assert public's interest in right to access sealed documents). A defendant's interest is not necessarily co-extensive with the public's right to open proceedings. *See*, Wise, 148 Wn. App. at 436 (defendant could not assert public's open proceedings right because defendant was not just an observer in the trial, but had participated in the private voir dire and had benefitted from that questioning and therefore his interest diverged from that of the public's);

¹⁰ Art. 1 §10 states: "Justice in all cases shall be administered openly, and without unnecessary delay."

see also, Commonwealth v. Horton, 753 N.E.2d 119, 128 (Mass. 2001) (defendant could not assert public's interest in open public proceedings as that interest is distinct from defendant's and defendant had not demonstrated that he had standing to assert the public's right). As is reflected in the Bone-Club balancing test, sometimes a compelling interest, the defendant's or otherwise, may supersede the public's interest and access to an open proceeding.

Only the plurality opinion in Strode would permit Rodriguez to assert someone else's right in order obtain a new trial. "Where there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds." State v. Zakel, 61 Wn. App. 805, 808, 812 P.2d 512 (1991) *affirmed*, 119 Wn.2d 563, 834 P.2d 1046 (1992). The concurrence in Strode specifically rejected the plurality's merging of the public's right to open proceedings under Article 1 §10 and the defendant's right to a public trial under Article 1 §22. *See*, Strode, 167 Wn.2d at 232, 236 (J. Fairhurst concurring). In Momah, the majority only addressed whether there was a violation of and structural error regarding a violation of the defendant's right to public trial under Art. 1 §22. *See*, Momah, 167 Wn.2d at 147 . While the opinion referenced Art. 1 §10, it did so only in the context of the development of

the Bone-Club factors test, which was borrowed from civil cases addressing allegations of Art. 1 §10 violations. *Id.* at 147-48.

Here, Rodriguez explicitly stated he had no objection to the in chambers questioning of the one juror, thereby waiving his right to public trial. He should not be permitted to waive his public trial right and then turn around on appeal and assert a violation of the public's right to open proceedings. *See, Wise*, 148 Wn. App. at 436 (defendant lacked standing to assert public's right to open proceedings under Art. 1 §10 where he waived his own right to public trial); Hutchins v. Garrison, 724 F.2d 1425, 1431-32 (4th Cir. 1983), *cert. den.*, 464 U.W. 1065 (1984) (defendant could not raise First Amendment right of public and press to attend the closed hearing where he waived his Sixth Amendment right to a public trial because the defendant could not rely on the rights of third parties to bring an issue before the court). Rodriguez has failed to demonstrate that he has standing to assert the public's interest in open proceedings and he should not be permitted to raise a violation of Article 1 §10 for the first time on appeal.

2. Taking the evidence in the light most favorable to the State there was sufficient evidence for a rational trier of fact to have found that Rodriguez was the one who broke the truck's window.

Rodriguez contends that there was insufficient evidence for the court to find that he committed malicious mischief in the second degree because there wasn't sufficient evidence to prove that he broke the truck's window. 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 the test, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Joy, 121 Wn.2d 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. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997). The [trier of fact] "is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference." State v. Bencivenga, 137 Wn.2d 703, 707, 974 P.2d 832 (1999) (*quoting State v. Jackson*, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989)).

Rodriguez asserts that there was insufficient evidence to support the conclusion that he caused the physical damage to the truck. In order to prove malicious mischief in the second degree as charged herein, the State had to prove that the defendant knowingly and maliciously cause physical damage to the property of another in an amount exceeding \$250. RCW 9A.48.080 (2009). The evidence showed that the window of the truck was in good condition when the owner parked and locked the truck around 10:30 p.m. that night. About two to two and a half hours later Rodriguez entered the truck in order to steal items out of the truck. In his pocket he had a small flashlight that could have been used to break the window in order to access the locking clasp to open the slider pane. The witness testified that Rodriguez was the only person she saw near the truck and that as or after Rodriguez was sliding back out through the rear window she saw a small light shining through the tinted rear window that she hadn't seen before he entered the truck. While she didn't hear the window being broken, the hole in the window was not large and it was right next to the locking clasp for the slider pane. Taking the evidence in the light most favorable to the State, there was sufficient evidence for a rational trier of fact to conclude that Rodriguez was the one who broke the window, in order to gain access to the interior of the truck, beyond a reasonable doubt.

E. CONCLUSION

Based on the foregoing, the State respectfully requests that Rodriguez's convictions be affirmed.

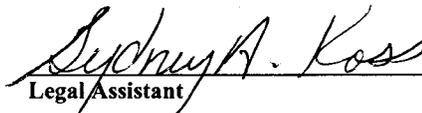
Respectfully submitted this 12th day of May, 2010.


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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 counsel, Lila J. Silverstein, addressed as follows:

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Legal Assistant

05/13/2010
Date