Supreme Court No. 91001-4

(Court of Appeals No. 70490-7-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent

v.

RAMIRO RODRIGUEZ, JR.,
Petitioner.

PETITION FOR REVIEW

JAN TRASEN
Attorney for Petitioner
WSBA # 41177

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Court of Appeals

United States Supreme Court

Washington Constitution

United States Constitution

Statutes

Rules

A. IDENTITY OF PETITIONER

Ramiro Rodriguez, appellant below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Rodriguez appealed from his Skagit County Superior Court conviction for felony harassment and threats to bomb or injure property. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUES PRESENTED FOR REVIEW

1. To prove the crime of felony harassment, the State must prove beyond a reasonable doubt not only that the defendant made a threat to kill, but also that the threat caused the listener to fear the defendant would kill her. Where there was insufficient evidence presented that the alleged victim feared the defendant had made an actual threat to kill her, does the Court of Appeals decision conflict with decisions of this Court, requiring review?

2. The right of the public and the accused to a public trial may only be restricted in the most unusual of circumstances, and if so, after a trial court considers the Bone-Club[1] factors and finds it necessary. Voir dire is a critical stage of trial that must be open to the public. Where

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

peremptory challenges were conducted at the bench and off the record, without a Bone-Club assessment or findings by the trial court, did the court violate Mr. Rodriguez's and the public's constitutional right to a public trial, requiring review?

3. An accused has a fundamental right to be present at all critical stages of a trial, including voir dire and the empanelling of the jury. Did Mr. Rodriguez's absence from the bench conference during which his jury was selected violate his constitutional right to be present at all critical stages of the trial, requiring review?

D. STATEMENT OF THE CASE

Ramiro Rodriguez became involved with Zulema Barragan and eventually moved into the apartment she shared with her children and her mother. 5/14/13 RP 5, 60-61.

One day, after Mr. Rodriguez had become frustrated with the lack of privacy in the apartment, Ms. Barragan overheard him on the phone with his stepmother saying that if Ms. Barragan left him, he would light the apartment on fire. Id. at 25, 31, 75-76. He also purportedly threatened to stab Ms. Barragan. Id. at 30. In describing these incidents at trial, however, Ms. Barragan did not indicate that she was afraid that Mr. Rodriguez was actually threatening her life. In fact, in response to the fire comments, Ms. Barragan only stated, "I just thought that was weird ... [it] got me thinking."

Id. at 25. Asked about another comment allegedly made by Mr. Rodriguez, that he would beat Ms. Barragan in the head with a flashlight, Ms. Barragan testified at trial that her response was, "I don't know, it was weird." Id. at 29. When asked by the prosecutor if this threat made her uncomfortable, she replied, "Yeah." Id. at 30. "Kind of scared?" Id. "Mm-hmm." Id. She did not testify she feared for her life. The most that Ms. Barragan said regarding her fear of Mr. Rodriguez was that the stabbing comment "freaked me out." Id. at 30. She also testified that after Mr. Rodriguez allegedly told her directly that he would burn down the apartment, she felt "kind of" scared. Id. at 31. When the prosecutor asked her again about her level of fear, Ms. Barragan stated, "Yeah, a little ... I was getting there." Id. Mr. Rodriguez was charged with threats to bomb or injure property (domestic violence); felony harassment (domestic violence); and taking a motor vehicle without permission in the second degree. CP 15-16.[2]

Following a jury trial, Mr. Rodriguez was found guilty of threats to bomb or injure property and felony harassment, but was acquitted of taking a motor vehicle; the jury also found that Mr. Rodriguez and Ms. Barragan were in a domestic relationship. CP 43-46.

[2] Mr. Rodriguez later took the truck that the couple shared to Auburn, to see his own daughter and take her roller skating. 5/14/13 RP 94-99.

Mr. Rodriguez appealed, arguing there was insufficient evidence of an essential element of felony harassment, in that the alleged threats did not cause Ms. Barragan to actually believe Mr. Rodriguez would kill her. Mr. Rodriguez also argued that his right and the public's right to a public trial -- as well as his right to be present -- were violated by the peremptory challenge procedure which took place at an unrecorded bench conference.

On October 6, 2014, the Court of Appeals affirmed Mr. Rodriguez's convictions. Appendix.

Mr. Rodriguez seeks review in this Court. RAP 13.4(b)(1).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT, AND INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST. RAP 13.4(b)(1), (4).

a. The State must prove all essential elements of felony harassment – specifically that the alleged victim fears a defendant will follow through on his threats to kill. It is a fundamental principle of constitutional due process that the State must prove every element of a charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

Mr. Rodriguez was charged with and convicted of felony harassment, RCW 9A.46.020(1), (2). CP 15-17; 44-45. The statute provides that a person is guilty of harassment if "[w]ithout lawful authority, the person knowingly threatens . . . [t]o cause bodily injury immediately or in the future to the person threatened or to any other person," and "[t]he person by words or conduct places the person threatened in reasonable fear that the threat will be carried out." RCW 9A.46.020(1), CP 30, 33, 44-45. To "threaten" is "to communicate, directly or indirectly the intent . . . [t]o cause bodily injury in the future to the person threatened or to any other person." RCW 9A.04.110(27)(a); CP 30, 33, 82. The crime is elevated to a felony if the threat to cause bodily injury is a threat "to kill the person threatened or any other person." RCW 9A.46.020(2)(b).

Thus, in order to prove the elements of harassment, the State must show the defendant's words or conduct placed the person threatened in reasonable fear the threat would be carried out. State v. J.M., 144 Wn.2d 472, 482, 28 P.3d 720 (2001); RCW 9A.46.020(1). The State must show the person threatened was placed in reasonable fear of the actual threat made. State v. C.G., 150 Wn.2d 604, 610, 80 P.3d 594 (2003) ("the State must prove that the victim is placed in reasonable fear that the threat made is the one that will be carried out."). Thus, because felony harassment requires proof that the threat made was a threat to kill, the State must also show the

person threatened was placed in reasonable fear the threat to kill would be carried out. Id. at 609-10, 612. In other words, the State must show the threat caused the victim actually to fear the defendant would kill her. Id. It is not enough for the State to show the threat caused the victim to fear some lesser harm, such as the threat of injury. Id.

The State's burden to prove the threat to kill actually caused the victim to fear for her life arises from the Legislature's primary purpose in criminalizing threats -- to address the harm caused to the victim. C.G., 150 Wn.2d at 606-07, 610 (finding a generalized "concern" that a defendant might cause harm insufficient evidence to prove felony harassment). A person placed in fear of being killed is, in general, harmed more than a person threatened with bodily injury. Id. This greater harm accords with the Legislature's elevation of a threat to kill to a felony. Id. Thus, in order to prove the felony, the State must show the threat actually caused the victim to fear being killed. Id. at 612.

b. The State did not prove all the elements of felony harassment, as the State did not prove Ms. Barragan feared being killed by Mr. Rodriguez. As discussed, to prove the charge of felony harassment, the State was required to prove beyond a reasonable doubt that the threats caused Ms. Barragan reasonably to fear for her life. C.G., 150 Wn.2d at 612; State v. Kiehl, 128 Wn. App. 88, 94, 113 P.3d 528 (2005).

In reviewing the sufficiency of the evidence to uphold the conviction, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Here, even when viewed in the light most favorable to the State, the evidence was insufficient to prove felony harassment. When Ms. Barragan testified at trial, her statements fell far short of showing fear that Mr. Rodriguez would kill her. Ms. Barragan testified only that Mr. Rodriguez's comments about burning her apartment were "weird" and that they "got me thinking." 5/14/13 RP 25. She did not state that she feared for her life.

The Court of Appeals held that it was appropriate to consider the nature of an alleged threat in context, and to consider all of the facts and circumstances. Slip Opinion at 3. In so doing, the Court found that in the context of the relationship, there was sufficient evidence presented that Mr. Rodriguez's alleged words to Ms. Barragan caused her to reasonably believe that her life was in danger. Id. The Court thus distinguished the instant case from C.G., 150 Wn.2d at 604. Slip Op. at 3-4 ("That case bears no similarities to the present case.").

However, the instant case is not as different from C.G. as the Court of Appeals suggests. Although the scenario in C.G. did involve an "isolated threat" against a school authority figure by a student, as the Court of Appeals describes, Slip Op. at 4, the facts of C.G. state that the school principal believed the student "might try to harm him or someone else in the future." 150 Wn.2d at 607. This finding was based upon the student's history, apparently known to the vice-principal, from his prior experience with the student. Id. (testimony "based on what he knew about C.G.").

Thus, the threats in C.G. were no more isolated than those purportedly made in the instant case, and should be evaluated similarly. 150 Wn.2d at 607. Likewise, Ms. Barragan evaluated Mr. Rodriguez's comments in the context of everything she knew, including Mr. Rodriguez's history of mental illness, with which she had acquainted herself at his urging. 5/14/13 RP 43-44, 48-49.

In light of all of the facts and circumstances, even the most apparently threatening remarks, about stabbing Ms. Barragan in the neck, did not provoke a response from her, beyond saying she was "freaked ... out." Id. at 30-31. She pointedly did not state that she believed Mr. Rodriguez would kill her, and she did not, in fact, leave him. Id.

c. Because the State failed to prove an essential element of felony harassment, review is required. As this Court held in C.G., without a

reasonable fear that a threat to kill will be carried out, the State only proved fear of bodily injury, a misdemeanor. 150 Wn.2d at 611. Because the State failed to prove this essential element, review is required.

Accordingly, the Court of Appeals decision upholding the conviction is in conflict with a decision of this Court, and review should be granted. RAP 13.4(b)(1).

d. The trial court violated Mr. Rodriguez's right to a public trial by conducting peremptory challenges in a private bench conference. The federal and state constitutions provide parties the right to a public trial and also guarantee the public access to court proceedings. Public trials are a hallmark of the Anglo-American justice system. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-73, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). In the criminal context, the Sixth Amendment to the federal constitution and article I, section 22 of the Washington Constitution guarantee an accused the right to a public trial. Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L.Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 629 (1995).[3]

[3] See also Article I, section 10; Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); Federated Publications Inc. v. Kurtz, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980).

The accused's right to a public trial under both the federal and state constitutions applies to voir dire. Presley, 558 U.S. at 213-14; State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009); State v. Orange, 152 Wn.2d 795, 812, 100 P.3d 291 (2004). A request for courtroom closure must be stated with specificity, and the trial court must perform a test based upon the five criteria adopted in Bone-Club and Ishikawa. Bone-Club, 128 Wn.2d at 259-60. After any weighing test, the factors justifying any such limitation of public access must be articulated by a trial court with specificity. E.g., Presley, 558 U.S. at 213-14; State v. Lormor, 172 Wn.2d 85, 91-92, 257 P.3d 624 (2011).

Exercising peremptory challenges is a vital part of voir dire. See State v. Wilson, 174 Wn. App. 328, 343, 298 P.3d 148, 156 (2013) (observing that unlike hardship strikes made by clerk, "voir dire" involves trial court and counsel questioning prospective jurors to determine their ability to serve fairly and to enable counsel to exercise informed challenges for cause and peremptory challenges); State v. Vreen, 99 Wn. App. 662, 668, 994 P.2d 905 (2000) (recognizing "it is the interplay of challenges for cause and peremptory challenges that assures the fair and impartial jury"), aff'd, 143 Wn.2d 923 (2001).

Where the trial court effectively closed the courtroom by conducting peremptory challenges at the bench, in the absence of oral or written

findings or explaining the need for such a procedure, the court violated Mr. Rodriguez's right to a public trial. 2RP 133-34.

In affirming Mr. Rodriguez's convictions, the Court of Appeals opined that this Court's recent public courtroom decisions of September 2014 do not control here. Slip Op. at 4, n. 3. Interestingly, the panel expressed concern with the difficulty in making a claim of racially biased peremptory challenges,[4] when all peremptory challenges are unrecorded and unpreserved for review, as was argued by Mr. Rodriguez.

A related concern over "sparse" records was noted by several members of this Court in State v. Slert, No. 87844-7 (Stephens, dissenting), at *8. Justice Stephens and three other members of this Court write that the Slert majority "lament" that the Court could not reach the issue of the public trial right due to an "inadequate record." Id. at *8-9. However, the dissenting justices note that "the sparse record results from the very constitutional error at issue." Id. at *9.

Accordingly, because the Court of Appeals decision upholding this procedure is in conflict with decisions of this Court, and because it involves an issue of substantial public interest, review should be granted. E.g., Bone-Club, 128 Wn.2d at 259-60; Sublett, 176 Wn.2d at 71; RAP 13.4(b)(1), (4).

---

[4] See Batson v. Kentucky, 476 U.S. 79, 85-86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

e. The trial court violated Mr. Rodriguez's right to be present at a critical stage of trial by conducting peremptory challenges in a private bench conference. "A criminal defendant has a fundamental right to be present at all critical stages of a trial." State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011).

The right to be present includes the right to be present during voir dire and empanelling of the jury. Diaz v. United States, 223 U.S. 442, 455, 32 S. Ct. 250, 56 L. Ed. 500 (1912). This right derives from the Confrontation Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. Id

It is clear from the portions of the record that were reported that Mr. Rodriguez was not present at the bench conference where his jury was selected. Several times, the trial court instructed the potential jurors that "the attorneys are going to review their notes," and then "they're going to come up here, and we're going to go through the selection process." 5/13/13 RP 119-20. Immediately before the unreported bench conference, the court continued, "Counsel, come on up and take the time you need." Id. at 120. The record does not show that Mr. Rodriguez was asked to approach the bench to participate in the conference.

The fundamental purpose of a defendant's right to be present during jury selection, including the exercise of peremptory challenges, is to allow

him to give advice or suggestions to counsel or even to supersede counsel's decisions. Irby, 170 Wn.2d at 888; Gomez v. United States, 490 U.S. 858, 874, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989). Here, as in Irby, because Mr. Rodriguez was not present for this portion of jury selection, he was unable to exercise that right. Nonetheless, violation of the right to be present is subject to harmless error analysis. Irby, 170 Wn.2d at 885. The State bears the burden of proving beyond a reasonable doubt that the error is harmless. Id. at 886. Thus, the Irby Court considered whether the same jurors would have inevitably sat on the jury regardless of Irby's participation and concluded the answer was no. Accordingly, the State could not show the error was harmless. Id. As in Irby, the State did not show that the venire members excused during the proceedings at sidebar had no chance to sit on this jury; indeed, since the peremptory challenge process was not reported, there is no record of what transpired in the bench conference.

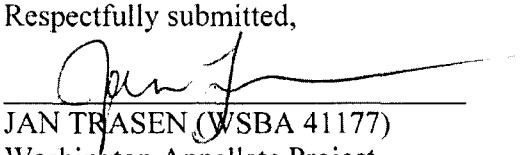
Accordingly, the Court of Appeals decision affirming Mr. Rodriguez's convictions was in conflict with decisions of this Court, and review should be granted. RAP 13.4(b)(1).

F. CONCLUSION

For the above reasons, the Court of Appeals decision requires review, as it is in conflict with decisions of this Court and involves an issue of substantial public interest. RAP 13.4(b)(1), (4).

DATED this 5th day of November, 2014.

Respectfully submitted,



JAN TRASEN (WSBA 41177)
Washington Appellate Project
Attorneys for Petitioner

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	NO. 70490-7-I
	)	DIVISION ONE
v.	)	
RAMIRO RODRIGUEZ, JR., Appellant.	)	UNPUBLISHED OPINION
	)	FILED: October 6, 2014

LAU, J. — Ramiro Rodriguez Jr. appeals his conviction for felony harassment and threats to bomb or injure property. He argues that (1) the State presented insufficient evidence to establish that the victim feared the threat to kill would be carried out—an essential element of felony harassment, (2) the trial court violated his right to a public trial by conducting peremptory challenges at a bench conference, and (3) this bench conference violated his right to be present at a critical stage of the proceedings. Because Rodriguez fails to show insufficient evidence, a public trial right violation, or a right to be present violation, we affirm Rodriguez's convictions.

FACTS

Ramiro Rodriguez moved in with Zulema Barragan and her three children after dating for close to a year. Barragan reported to police that Rodriguez had threatened her several times before she took her children to her cousin's home.

Rodriguez was arrested and charged with threats to bomb or injure property, felony harassment, and taking a motor vehicle without permission. A jury convicted Rodriguez of threats to bomb or injure property and felony harassment. It acquitted him of the taking a motor vehicle offense. Rodriguez appeals.

ANALYSIS

Felony Harassment

Rodriguez contends that the State presented no evidence of an essential element that, "the threats to kill actually caused Ms. Barragan to fear Mr. Rodriguez would kill her."[1] Appellant's Br. at 6. He cites selected portions of her testimony to argue the State fell short of its burden to prove this element beyond a reasonable doubt.

To prove felony harassment, the State must prove every element of the charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); U.S. CONST. amend. 14; WASHINGTON CONST. art. I, § 3. Felony harassment occurs where the threat to cause bodily injury is a threat to kill the person threatened or any other person. RCW 9A.46.020(2)(b). Among the elements necessary to prove felony harassment is the requirement that the person threatened be put in reasonable fear that the threat to kill will be carried out. RCW 9A.46.020. It is not enough for the State to show the threat caused the victim to suffer some lesser harm, such as the threat of an injury. State v. C.G., 150 Wn.2d 604, 610, 80 P.3d 594 (2003).

[1] To the extent Rodriguez claims that sufficient evidence requires Barragan to testify she feared Rodriguez would kill her, we reject that claim. We are unaware of any case authority, and Rodriguez cites none, that so holds.

Circumstantial as well as direct evidence may support a conviction. State v. Bright, 129 Wn.2d 257, 270, 916 P.2d 922 (1996). The nature of the threat depends on all the facts and circumstances, and it is not proper to limit the inquiry to a literal translation of the words spoken. C.G., 150 Wn.2d at 604. Furthermore, in deciding whether a threat occurred, the fact finder can consider the statements in context and not just the literal words. State v. Scherck, 9 Wn. App. 792, 514 P.2d 1393 (1973).

A claim of insufficiency admits the truth of the State's evidence and all inferences that can be drawn from that evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Read in context, there is ample direct and circumstantial evidence to establish Barragan reasonably believed that Rodriguez's multiple threats to kill would be carried out. For example, he threatened her that when people piss him off, "he's already planning their death." Report of Proceedings (May 14, 2013) (RP) at 20. He also told her that if she left him, he knew a guy on the street who would "do a good deed for him." RP at 21. She took that threat to mean he would harm her. Rodriguez also threatened to stab her in the neck if she left him. He threatened to set her apartment on fire. He also said he bruised his former girl friend's infant daughter and busted open his former girl friend's lip. Rodriguez also threatened to see her "lying in a pool of blood, and that he would still fuck [her] because it turns him on." RP at 38. This comment "[f]reaked [her] out." RP at 38. She finally moved her children to her cousin's house because she was afraid he would follow through on his threats. Barragan reported Rodriguez's threats to the police. Her mother described her demeanor as "very very pale," "whole body shaking," tearful and unable to speak. RP at 89.

Rodriguez asserts the present case is like C.G. where the court reversed the felony harassment conviction on the ground of insufficient evidence. C.G., 150 Wn.2d 604. That case bears no similarities to the present case. There, C.G. threatened to kill the school principal, "'I'll kill you Mr. Haney, I'll kill you.'" C.G. 150 Wn.2d at 607. Haney said the threat caused him concern and fear that CG might harm him or someone in the future. Unlike the present case, C.G. involves an isolated threat leveled at a school authority figure by a student. Here, the record shows a domestic relationship marked by verbal abuse and threats to kill that intensified over time. We conclude that there is sufficient evidence to support the essential element—Rodriguez's threats to kill actually caused Barragan to fear Rodriguez would kill her.[2]

Right to a Public Trial[3]

Even though all parts of jury questioning took place in open court, Rodriguez contends that his right and the public's right to a public trial were violated when the attorneys exercised their peremptory challenges during a private bench conference. He asserts this process "occurred privately, outside the public's scrutinizing eyes and ears . . . ." Appellant's Br. at 18. He also claims, "The bench conference was not recorded,

---

[2] We are unpersuaded by Rodriguez's reliance on State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004). The case is not controlling.

[3] We note that our Supreme Court recently decided several public trial cases—State v. Slert, No. 87844-7 (Wash. Sept. 25, 2014); State v. Frawley, No. 80727-2 (Wash. Sept. 25, 2014); State v. Koss, No. 85306-1 (Wash. Sept. 25, 2014); and State v. Njonge, No. 86072-6 (Wash. Sept. 25, 2014). However, none of these cases control here.

could not be heard by the public, and no record memorializes which peremptory strike was made, in which order."[4] Appellant's Br. at 19.

Whether the right to a public trial has been violated is a question of law this court reviews de novo. State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012). The Sixth Amendment and article I, section 22 of the Washington Constitution guarantee a criminal defendant's right to a public trial. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 325 (1995). Article I, section 10 provides the additional guarantee that "[j]ustice in all cases shall be administered openly, and without unnecessary delay."

There is a strong presumption that courts are open at all stages of trial. Sublett, 176 Wn.2d at 70. But the public trial right is not absolute. Sublett, 176 Wn.2d at 70. It may be overcome "to serve an overriding interest based on findings that closure is essential and narrowly tailored to preserve higher values." Sublett, 176 Wn.2d at 71.

To determine whether a public trial right applies, Washington courts use the "experience and logic test." Sublett, 176 Wn.2d at 73. The experience prong of the test asks whether the practice, place, or procedure in question has historically been open to the public. Sublett, 176 Wn.2d at 73. The logic prong asks whether public access plays a significant positive role in the functioning of the particular process in question. Sublett, 176 Wn.2d at 73. If both prongs are satisfied, then the court must apply a five-factor test to evaluate whether a proposed closure is constitutional. Bone-Club, 128 Wn.2d at 258-59.

[4] After the parties filed their briefs, we granted the State's request to supplement the record consisting of the in-court clerk's notes and record of peremptory, for cause, and joint challenges. The record shows which prospective jurors the court excused.

The right to a public trial applies to voir dire of prospective jurors. Presley v. Georgia, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); State v. Wise, 176 Wn.2d 1, 11, 288 P.3d 1113 (2012). In cases where Washington courts found an improper closure during jury selection, the trial court had questioned or dismissed potential jurors in a closed courtroom, chambers, or other private setting outside the public eye. See, e.g., Wise, 176 Wn.2d at 6-7 (partial voir dire in chambers); State v. Brightman, 155 Wn.2d 506, 509, 122 P.3d 150 (2005) (courtroom closed to public during voir dire); State v. Tinh Trinh Lam, 161 Wn. App. 299, 301, 254 P.3d 891 (2011) (interview of juror in chambers) review granted, 176 Wn.2d 1031, 299 P.3d 20 (2013).

However, not every interaction between the court, counsel, and a defendant will implicate the public trial right or constitute a closure if closed to the public. Sublett, 176 Wn.2d at 71. Thus, before we determine whether a public trial violation occurred, we must consider whether the contested procedure constituted a closure at all. Sublett, 176 Wn.2d at 71. A closure occurs when the courtroom is "completely and purposefully closed to spectators so that no one may enter and no one may leave." State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011).

The record here fails to support Rodriguez's assertion that a closure occurred during jury selection. Jury questioning, for-cause challenges, and select individual questioning of prospective jurors on sensitive topics, occurred in open court. Immediately before the parties exercised their peremptory challenges, the court announced the beginning of jury selection:

> COURT: Ladies and gentlemen, the attorneys are going to review their notes and probably for five to ten minutes, and then they're going to come up here, and we're going to go through the selection process.

> So, during this time I will allow you to stand, if you want, in the area that you're seated in. And a lot of their notes and memories are based on where you're located in the courtroom. You can talk quietly among yourselves also, but don't get up and start wandering around, or you will really give them fits. And with that, you can talk quietly, if you wish, but you cannot talk about the case of course, and you can stay seated, stand as you wish also. Counsel, when you're ready, come on up and take the time you need.

RP (May 13, 2013) at 119-20.

At a bench conference, counsel disclosed their peremptory challenges to the court. Members of the public saw the dismissed jurors and observed which jurors remained. The court did not announce which counsel had challenged which juror. But the in-court clerk recorded how the parties exercised peremptory and for cause challenges on a document entitled "Judge's List." This list identified the entire jury panel by name and number, the party who made the challenge, and the order in which the challenges occurred. The clerk also recorded which juror, by name and number, the court excused. The clerk's notes show that counsel exercised peremptory challenges between 1:49 p.m. and 2:05 p.m. at the bench conference. The list was filed the same day as part of the public record, and there was no significant delay in the public's access to it. Rodriguez does not dispute it was accessible as a public record.

We conclude the trial court's procedure and timely access to the list discussed above protected both the "core values of the public trial right" and the open administration of justice. Sublett, 176 Wn.2d at 73.

But even assuming a closure, Rodriguez's public trial right claim fails.[5] The exercise of peremptory challenges is not the type of procedure that historically has been conducted in open court. See State v. Love, 176 Wn. App. 911, 918-19, 309 P.3d 1209 (2013) (concluding that the experience and logic test did not support the notion that voir dire challenges are traditionally completed in open court within earshot of the public); State v. Dunn, 180 Wn. App. 570, 575, 321 P.3d 1283 (2014) (concluding that experience and logic do not suggest that the practice of exercising peremptory challenges at clerk's station implicated the defendant's right to a public trial).

Rodriguez fails to show a public trial right violation.

Critical Stage

Rodriguez contends that the bench conference violated his right to be present at a critical stage of the proceedings. Rodriguez argues that because he was not present at the bench conference where the challenges were exercised, he was not able to provide advice to counsel.

A criminal defendant has a fundamental right to be present at all critical stages of a trial. State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). This includes the right to be present during voir dire and the empanelling of the jury. Diaz v. United States, 223 U.S. 442, 455, 32 S. Ct. 250, 56 L. Ed. 500 (1912). The right to be present derives from the confrontation clause of the Sixth Amendment and the due process clauses of the Fifth and Fourteenth Amendments. Diaz, 223 U.S. at 455. A defendant's presence at jury selection bears, or may fairly be assumed to bear, a relation, reasonably

[5] In State v. Smith, No. 85809-8 (Wash. Sept. 25, 2014), our Supreme Court recently held that an evidentiary sidebar conference does not implicate the public trial right under the experience and logic test.

substantial, to his opportunity to defend because it will be in his power to give advice or suggestion or even to supersede his lawyers altogether. Irby, 170 Wn.2d at 883. The right attaches at the time the jury is empanelled. Irby, 170 Wn.2d at 883.

Rodriguez claims Irby controls. That case is distinguishable. There, the trial court e-mailed the State and defense counsel to discuss reasons for excusing prospective jurors. But the defendant was in custody and could not provide input to counsel. Irby, 170 Wn.2d at 878-79. The court held that this violated the defendant's right under the due process clause of the Fourteenth Amendment to be present at a critical stage of trial and article I, section 22 of the state constitution to "'appear and defend in person.'" Irby, 170 Wn.2d at 884-85.

Unlike in Irby, here, Rodriguez was present in court and able to consult with counsel about selecting the jury before the bench conference. We find no violation of Rodriguez's right to be present for jury selection.

For the reasons discussed above, we affirm Rodriguez's convictions.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 70490-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Edwin Norton, DPA
Skagit County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: November 5, 2014