

NO. 64158-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
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STATE OF WASHINGTON,

Respondent,

v.

BENITO RODRIGUEZ,

Appellant.

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

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated the Sixth Amendment to the United States Constitution and article I, sections 10 and 22 of the Washington Constitution when it questioned a juror in chambers.

2. The State failed to prove that Mr. Rodriguez committed malicious mischief in the second degree, as charged in Count I.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A trial court violates a defendant's constitutional right to a public trial if it holds a portion of voir dire in chambers without satisfying the factors set forth in State v. Bone-Club, including identifying a compelling interest in closure, balancing that interest against the public trial right, and entering formal findings and conclusions in a closure order. Where the trial court conducted a portion of voir dire in chambers without identifying a compelling interest in closure, without balancing that unnamed interest against the public trial right, and without entering any findings and conclusions, did the trial court violate Mr. Rodriguez's right to a public trial?

2. The State is required to prove every element of the crime charged beyond a reasonable doubt. In this case, the State charged Mr. Rodriguez with malicious mischief in the second

degree for a window that was broken in the complainant's truck. Where an eyewitness testified she saw Mr. Rodriguez crawl into the truck through the back window, but did not see or hear a window break, did the State fail to prove that Mr. Rodriguez committed malicious mischief in the second degree?

C. STATEMENT OF THE CASE

On the evening of May 16, 2009, Cassandra Curry was sitting in her car in a parking lot on Railroad Avenue and Holly Street in Bellingham when she saw a man climb into the back window of a truck. 2 RP 3-4.<sup>1</sup> The man "climbed up there and he slid across like the canopy and went into the back window." 2 RP 4. "He opened his window just with his hands." 2 RP 6. Ms. Curry did not "hear anything or see any type of damage being caused to the vehicle." 2 RP 16. The person entering the truck did not have a rock, hammer, or any other type of tool, and Ms. Curry did not see or hear a window break. 2 RP 19-20. She assumed the person entering the truck was the owner. 2 RP 20.

The man rummaged through the middle compartment of the truck for a couple of minutes, and then exited the vehicle through

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<sup>1</sup> There are two volumes of verbatim reports of proceedings in this case. 1 RP is the voir dire from August 24, 2009, and 2 RP includes the trial on August 24 and 25 as well as sentencing on September 15, 2009.

the same window. 2 RP 6. At that point, Ms. Curry thought the person might not be the owner, so she flagged down a police officer. 2 RP 10. The officer apprehended appellant Benito Rodriguez, and Ms. Curry identified him as the person who had been in the truck. 2 RP 13, 24-26. Mr. Rodriguez was in possession of two items belonging to the owner of the vehicle: a gate card and a hat. 2 RP 27, 38.

When the truck's owner returned to the parking lot, the officer told him someone had broken into his truck. 2 RP 69. The owner noticed that a window "was bashed out," and that it had not been broken when he had parked the car about four hours earlier. 2 RP 68, 70, 81.

The State charged Mr. Rodriguez with malicious mischief in the second degree, vehicle prowling in the second degree, and theft in the third degree. CP 61. Trial began on August 24, 2009.

During voir dire, the court stated:

Sometimes in this process a question may be asked that you may need to give an answer and for any reason you're hesitant or unwilling to give an answer in front of this large group of people. Please just raise your hand and say you would rather answer the question in a more private setting and at a later time we may be able to go back in my office if we need to and let you answer the question in a more private setting. It would just be myself and the attorneys and

the court reporter and the defendant present. So please avail yourself of that if you feel the need to do that.

1 RP 8. After the court asked whether a two-day trial would create a scheduling problem for anyone, Juror Number 12 said, "I have a situation at home if I could speak to somebody in private." 1 RP 12. The Court said, "Sure."

The lawyers then questioned the jurors, after which the court stated:

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.

1 RP 31. The prosecutor stated, "Is the court finding this is the least restrictive way to accomplish this?" The court responded, "It is." Mr. Rodriguez's attorney then confirmed that he did not object. 1 RP 31.

A jury was selected and trial commenced the same day. The eyewitness, the truck owner, and the officers testified as described above.

After the State rested its case, Mr. Rodriguez moved to dismiss the malicious mischief charge for insufficient evidence. 2

RP 92. He argued that no one saw or heard him break the window, and the State should not be allowed to bootstrap the vehicle prowling and theft charges into a conviction for malicious mischief. 2 RP 92-95. The court denied the motion, and the jury convicted Mr. Rodriguez on all three counts. 2 RP 95; CP 27.

At the sentencing hearing on September 15, 2009, Mr. Rodriguez moved for a judgment of acquittal notwithstanding the verdict on the malicious mischief charge. 2 RP 127-28. The court denied the motion, stating, “The evidence is not the strongest but I think there’s sufficient circumstantial evidence.” 2 RP 128.

Mr. Rodriguez appeals. CP 4-15.

#### D. ARGUMENT

##### 1. THE TRIAL COURT VIOLATED MR. RODRIGUEZ’S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL.

a. A trial court may not conduct any portion of proceedings outside the public courtroom unless it satisfies the *Bone-Club* procedures, including identifying a compelling interest in closure, showing a serious and imminent threat to that interest, and entering formal findings. The Sixth Amendment to the United States Constitution provides, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” U.S. Const.

amend. VI. The Washington Constitution similarly states, “In criminal prosecutions the accused shall have the right ... to have a speedy public trial.” Const. art. I, § 22. Our constitution further mandates, “Justice in all cases shall be administered openly.” Const. art. I, § 10.

Proceedings may occur outside the public courtroom “in only the most unusual circumstances.” State v. Strode, 167 Wn.2d 222, 226, 217 P.3d 310 (2009). Before holding proceedings outside the public courtroom, the trial court must:

1. identify a compelling interest that the closure is essential to protect and show a “serious and imminent threat” to that compelling interest;
2. provide anyone present with the opportunity to object;
3. ensure that the method for curtailing open access is the least restrictive means available for protecting the threatened interests;
4. weigh the competing interests of the proponent of the closure and the public; and
5. ensure that the closure is no broader in its application or duration than necessary to serve its purpose.

State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995); see also In re the Personal Restraint of Orange, 152 Wn.2d 795, 809, 100 P.3d 291 (2005). The trial court must enter formal

findings of fact and conclusions of law on these factors, which “should be as specific as possible rather than conclusory.” Orange, 152 Wn.2d at 807; accord Strobe, 167 Wn.2d at 228.

The right to a public trial extends to jury selection. Presley v. Georgia, \_\_\_ S.Ct. \_\_\_, 2010 WL 154813 at 3 (filed 1/19/2010); Strobe, 167 Wn.2d at 226. The violation of the right to a public trial is an issue that may be raised for the first time on appeal. Strobe, 167 Wn.2d at 229. This Court reviews de novo the question of whether the trial court violated the constitutional right to a public trial. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

b. The closure in this case was unconstitutional because no compelling interest was identified, no balancing analysis was performed, and no formal findings were entered. Here, the trial court failed to comply with Bone-Club. Accordingly, as in Orange and Strobe, the closure was improper and a new trial should be granted.

The trial court in this case never identified a compelling interest in holding a portion of the proceedings outside the courtroom. A fortiori, it did not identify a serious and imminent

threat to that interest. But “determination of a compelling interest is the affirmative duty of the trial court.” Orange, 152 Wn.2d at 810.

In Strode, which was a child rape case with more sensitive issues at stake, the conviction was reversed where jurors were questioned in chambers even though the trial court alluded to the fact that the interest in private questioning was to ensure confidentiality and to prevent the inquiry from being “broadcast” in front of the whole jury panel. Strode, 167 Wn.2d at 224. This was not good enough because the record was “devoid of any showing that the trial court engaged in the detailed review that is required in order to protect the public trial right.” Id. at 228.

Here, the trial court did not even do as much as the trial court in Strode had done to identify the interest at stake – there is no mention of a compelling interest justifying closure at all. Indeed, the court offered to close the courtroom for “any reason” so long as a juror requested it (“for any reason you’re hesitant or unwilling to give an answer in front of this large group of people”). 1 RP 8. The court then questioned Juror 12 in chambers simply because she “prefers to talk in chambers.” 1 RP 31. But a preference is not a compelling interest. If the trial court’s analysis in Strode was insufficient on this factor, it was certainly insufficient here.

As in Strode, the trial court's failure to identify the interest at stake prevented it from satisfying the other Bone-Club factors. The court did not weigh the competing interests and did not show a serious and imminent threat to the unnamed interest. Finally, the court simply made a conclusory statement that it was employing the least restrictive means of protecting the threatened interest, but did not explain how it was doing so and could not have explained it, given the failure to identify the interest in closure. Finally, the court failed to enter the "required formal findings of fact and conclusions of law relevant to the Bone-Club criteria." Strode, 167 Wn. 2d at 228.

But these steps are not optional. "[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." Orange, 152 Wn.2d at 806 (emphasis in original) (citing Waller v. Georgia, 467 U.S. 39, 48, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)). In failing to satisfy these requirements, the trial court violated Mr. Rodriguez's right to a public trial.

Furthermore, although Mr. Rodriguez's trial attorney stated that he did not object to the closure, "the failure to object, alone, does not constitute waiver of the right to a public trial." Strode, 167 Wn.2d at 234 (Fairhurst, J., concurring). Only where a defendant affirmatively seeks private juror questioning, in order to protect the defendant's own right to a fair trial, does he waive the right to a public trial. Id. (citing State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009)). Otherwise, the issue may be raised for the first time on appeal. Strode, 167 Wn.2d at 229.

In sum, the trial court violated the Sixth Amendment and article I, sections 10 and 22 by conducting a portion of voir dire in private without satisfying the Bone-Club factors.

c. The remedy is reversal and remand for a new trial. The violation of the right to a public trial is not subject to harmless error analysis. State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006). The convictions must be vacated, and the case remanded for a new trial. Strode, 167 Wn.2d at 231; Orange, 152 Wn.2d at 814.

2. THE STATE FAILED TO PROVE THAT MR. RODRIGUEZ COMMITTED MALICIOUS MISCHIEF.

a. Due Process requires the State to prove each element of the offense charged beyond a reasonable doubt. The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 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). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Id.; U.S. Const. amend. XIV; Const. art. I, § 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, 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, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

b. The State failed to prove Mr. Rodriguez broke the window of the truck. As charged in this case, "[a] person is guilty of malicious mischief in the second degree if he or she knowingly and

maliciously [c]auses physical damage to the property of another in an amount exceeding two hundred fifty dollars.” RCW 9A.48.080(1)(a) (effective until July 26, 2009).<sup>2</sup> Here, although the State presented evidence that Mr. Rodriguez entered the truck and took a couple of items, it failed to prove that Mr. Rodriguez “caused physical damage to the property.”

No witness testified to seeing or hearing Mr. Rodriguez break the window. To the contrary, the eyewitness who saw the whole incident from a nearby vantage point testified that Mr. Rodriguez simply opened the window with his hand and crawled in. Indeed, it is for that reason that she initially thought Mr. Rodriguez had simply locked himself out of his own car. The eyewitness did not see Mr. Rodriguez use a rock or hammer or any other tool to break into the car. Instead, “[h]e opened his window just with his hands.” 2 RP 6.

Although the owner testified that the window was not broken when he parked the car, the car had been in the parking lot for nearly four hours by the time he returned to find the window damaged. 2 RP 68, 70, 81. Anyone could have broken the window

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<sup>2</sup> Two months after the incident at issue in this case, an amended statute went into effect setting the amount at \$750, rather than \$250. Laws of 2009, ch. 431, § 5. The officer testified that a replacement window for the truck cost \$634.40. 2 RP 53.

during that period, before Mr. Rodriguez took advantage of the opportunity to climb into the car and take the hat and gate pass. And although a jury may infer the existence or nonexistence of facts based on circumstantial evidence alone, “an inference should not arise where there are other reasonable conclusions that would follow from the circumstances.” State v. Bencivenga, 137 Wn.2d 703, 708, 974 P.2d 832 (1999). The other reasonable conclusion in this case is that another person broke the window before Mr. Rodriguez entered the car. Accordingly, the State failed to prove that Mr. Rodriguez committed the crime of malicious mischief.

c. The remedy is reversal of the conviction on Count I and dismissal of the charge In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt that Mr. Rodriguez committed the offense for which he was convicted, the judgment may not stand. State v. Spruell, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits a second prosecution for the same offense after a reversal for lack of sufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)). The appropriate

remedy for the error in this case is dismissal of the conviction on Count I based upon the State's failure to prove Mr. Rodriguez broke the window of the truck.

E. CONCLUSION

For the reasons set forth above, Mr. Rodriguez respectfully requests that this Court reverse his conviction on Count I and dismiss the charge with prejudice. In the alternative, all three convictions should be reversed and the case remanded for a new trial.

DATED this 11<sup>th</sup> day of February, 2010.

Respectfully submitted,

  
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Attorneys for Appellant

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DIVISION ONE**

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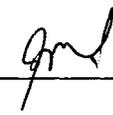
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11<sup>TH</sup> DAY OF FEBRUARY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 11<sup>TH</sup> DAY OF FEBRUARY, 2010.

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