

FILED
May 13, 2016
Court of Appeals
Division I
State of Washington

NO. 73553-5-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

MAXIMO BERNAL-ROSAS,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable John M. Meyer, Judge

RESPONDENT’S BRIEF

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I. SUMMARY OF ARGUMENT

Maximo Bernal-Rosas appeals from his convictions for Attempting to Elude a Pursuing Police Vehicle and Driving while under the Influence contending there was an improper courtroom closure where a single side bar conference occurred following an objection during closing argument.

Since there is no error manifest in the record, Bernal-Rosas is precluded from raising the issue for the first time on appeal. And furthermore, sidebar conferences are not historically open to the public and thus, there was no violation of the right to public trial.

Thus, the convictions and sentence must be affirmed.

II. ISSUES

1. Where there was no record made of the contents of a sidebar conference following an objection during closing argument, is there an error manifest in the record?
2. Is a sidebar conference a part of the proceeding that is historically open to the public?
3. Does a single sidebar discussion in the courtroom where there has been an order excluding members of the public implicate a violation of the right to public trial?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On December 17, 2013, Maximo Bernal-Rosas was charged with Attempting to Elude a Pursuing Police Vehicle, Taking a Motor Vehicle without Permission in the Second Degree and Driving while under the Influence alleged to have occurred December 25, 2013. CP 77-8. It was alleged that Bernal-Rosas had been contacted at his residence about a possible assault. CP 3. Bernal-Rosas was reported by family as drinking a significant amount of Tequila, and acting irrationally. CP 3. Bernal-Rosas was detained un-handcuffed in the back of a sheriff's vehicle. CP 3. Bernal-Rosas opened the sliding partition window of the patrol vehicle and drove off. CP 3. Bernal-Rosas was pursued by a trooper, eventually crashing the sheriff's vehicle in a field destroying the front of the vehicle. CP 2-3. Bernal-Rosas admitted to officers that he was drunk. CP 3.

On January 12, 2015, the trial began. 1/12/15 RP 9-10.¹

¹ The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

1/2/14 RP	Arraignment in vol. with 2/12/14, 1/12/15
2/12/14 RP	3.5 Hearing in vol. with 1/2/14, 1/12/15
6/19/14 RP	Continuance in vol. with 1/8, 1/9, 1/16, 4/22 & 7/1/15
1/8/15 RP	Trial Confirmation in vol. with 6/19/14, 1/9, 1/16, 4/22 & 7/1/15
1/9/15 RP	Reconsideration in vol. with 6/19/14, 1/8, 1/16, 4/22 & 7/1/15
1/12/15 RP	Trial Day 1, in vol. with 1/2/14, 2/12/14
1/13/15 RP	Trial Day 2
1/14/15 RP	Trial Day 3
1/15/15 RP	Trial Day 4
1/16/16 RP	Trial Day 5, in volume with 5/22/15

Defense sought and obtained the defense of not guilty by reason of insanity on all the charges. CP 26, 29. The jury was also instructed that voluntary intoxication is not a defense, but may be considered in evaluating intent, knowledge or willfulness. CP 30.

On January 16, 2015, the jury found Bernal-Rosas guilty of Attempting to Elude a Pursuing Police Vehicle and Driving while under the Influence. 1/16/15 RP 80-1, CP 130, 132. Bernal-Rosas was found not guilty by reason of insanity of Taking a Motor Vehicle without Permission. CP 131.

On May 22, 2015, Bernal-Rosas was sentenced to three months of jail time on the charge of Attempting to Elude a Pursuing Police Vehicle and 364 days on the charge of Driving while under the Influence charge with 363 days suspended. CP 72-3.

On May 27, 2015, Bernal-Rosas timely filed a Notice of Appeal to the Court of Appeals. CP 113.

1/16/16 RP 2	Jury Question in vol. with 6/19/14, 1/8, 1/9, 1/16, 4/22, 7/1/15
4/22/15 RP	Motion in vol. with 6/19/14, 1/8, 1/9, 1/16, & 7/1/15
5/22/15 RP	Sentencing in vol. with 1/16/15.
7/1/15 RP	Restitution hearing in vol. with 6/19/14, 1/8, 1/9 & 1/16/15.

2. Statement of Facts

i. Summary of Trial Testimony

Earle Steele lived on Ershig Road in Burlington and had a Hispanic male arrive at his house on December 25, 2013. 1/13/15 RP 63-4. Steele identified Bernal-Rosas as the male and said he was making comments about being tied up with his wife and children, but that he escaped. 1/13/15 RP 64. Steele called 911. 1/13/15 RP 64. Skagit County Sheriff's deputies arrived in about 15 minutes and took him away. 1/13/15 RP 66.

Deputy Jason Moses arrived and contacted Steele and Bernal-Rosas. 1/13/15 RP 87, 89-90. Bernal-Rosas was acting paranoid and was fidgety. 1/13/15 RP 90. Moses smelled an odor of intoxicants on Bernal-Rosas. 1/13/15 RP 93-4. Bernal-Rosas's wife and uncle arrived at the house and spoke with officers. 1/13/15 RP 93-6, 213-4..

The uncle testified that Bernal-Rosas had been drinking about four or five in the afternoon the day before. 1/13/15 RP 127, 130. The uncle had been out drinking with Bernal-Rosas until after midnight. 1/13/15 RP 132-3. Shortly after his last drink Bernal-Rosas acted scared like he was seeing things and started damaging things. 1/13/15 RP 134-5. Bernal-Rosas kept trying to leave so the uncle and his wife tied him up. 1/13/15 RP 138, 197. He was able to untie himself and left about 5:00 a.m. 1/13/15 RP 139-40. 199.

Bernal-Rosas was placed in the back seat of Moses's patrol vehicle. 1/13/15 RP 95-6. Moses got information from the wife and uncle about what occurred earlier, consulted with his sergeant and decided to take Bernal-Rosas in for a mental health evaluation. 1/13/15 RP 54, 59, 96-8, 222. Bernal-Rosas said he wanted to go to jail. 1/13/15 RP 222.

Moses heard his patrol vehicle move into gear. 1/13/15 RP 98. Bernal-Rosas had gotten in the front seat and drove off. 1/13/15 RP 99-100.

Before being pursued, at one point, two citizens saw Bernal-Rosas stop the vehicle, get out for about five minutes and acting excited, before getting back in the vehicle and driving off. 1/13/15 RP 77-81, 1/14/15 RP 30, 34-5.

Trooper Anthony Pasternak responded to the call of the stolen deputies' vehicle at about 12:14 p.m. 1/12/15 RP 49, 51. Pasternak left from his office, to the area, found the vehicle and began pursuing the vehicle in his marked patrol vehicle. 1/12/15 RP 51, 57. The Sheriff's vehicle did not have lights or sirens. 1/12/15 RP 58. The vehicle accelerated to 95 miles per hour in a 35 mile per hour zone. 1/12/15 RP 59. When the vehicle tried to make a turn at an intersection, it left the roadway going at least 40 miles per hour, crashing through a fence and into a tree. 1/12/15 RP 59-61.

Pasternak took Bernal-Rosas into custody, passed him off to Sheriff's Deputies and went to put out the fire in the vehicle. 1/12/15 RP 62-6.

Deputies struggled with Bernal-Rosas after he attempted to slip his handcuffs. 1/13/15 RP 134-8, 218. Deputies decided to take Bernal-Rosas for a check at the hospital given his apparent convulsing and shivering. 1/13/15 RP 38-9. Once Bernal-Rosas was placed on the backboard, he appeared fine. 1/13/15 RP 40.

Pasternak later went to the hospital, evaluating Bernal-Rosas for DUI with a series of tests. 1/12/15 RP 77-81. Pasternak opined that Bernal-Rosas was impaired by consuming alcohol. 1/12/15 RP 82. Pasternak obtained a blood draw. 1/12/15 RP 82-3.

Testing of the blood sample obtained from Bernal-Rosas showed an alcohol level of 0.084 at the time of the blood draw. 1/14/15 RP 11, 19-20, 24-5.

The State's expert on alcohol testified that a reading of 0.084 likely meant a person of the defendant's weight and height would have likely had to consume 25 standard drinks over the preceding 22 hours to reach that alcohol level. 1/13/15 RP 186.

Defense expert Dr. Anthony Eusanio, a psychologist, reviewed Bernal-Rosas's medical records from the hospital and saw that he had sepsis.

1/14/15 RP 78, 1/15/15 RP 11. Eusanio opined that Bernal-Rosas suffered from delirium caused by the Sepsis infection. 1/14/15 RP 104. Eusanio also opined that due to the delirium, exacerbated by alcohol, Bernal-Rosas could not understand right from wrong. 1/14/15 RP 107, 113-4, 141.

Bernal-Rosas testified he had consumed some alcohol, but did not feel drunk and believed he had consumed more alcohol on other occasions. 1/15/15 RP 40-43. Bernal-Rosas claimed to have no memory of the events from early in the morning of December 25, 2013, until sometime the next day. 1/15/15 RP 38. But Bernal-Rosas described a series of events occurring starting around 1:00 a.m. 1/15/15 RP 44-56. And he described his recollection of his interactions with officers, taking the patrol vehicle and fleeing the scene. 1/15/15 RP 58-65. On cross examination, Bernal-Rosas said he remembered almost everything, but did not remember specific words. 1/15/15 RP 120.

ii. Facts about Closing Argument Objections and Sidebar Conference

On January 16, 2015, closing arguments were made. 1/16/15 RP 5. The State pointed out that the State had the burden of proving the crimes, but the defense had the burden of proving insanity. CP 5. The prosecutor stated:

MR. WEYRICH: ...And the state believes that they have shown it through their evidence, that those criminal acts - -
MS. RIQUELME: And I would object to any comments -

THE COURT: What the state believes is probably inappropriate to mention.

MR. WEYRICH: The evidence shows that the defendant drove while he was drunk, intentionally tried to get away from Trooper Pasternak, and intentionally stole the car of Deputy Moses.

1/16/15 RP 5.

The second objection made was about arguing facts not in evidence.

MR. WEYRICH: ... Now, albeit, the fact that McLean is in the opposite direction.

MS. RIQUELME: Objection. Facts not in evidence.

THE COURT: That's true. Please disregard.

1/16/15 RP16.

The third defense objection made during closing was overruled.

MR. WEYRICH: ...In fact, we never heard anything else about that after he mentioned to Deputy Moses, for the whole rest of that day and into the next morning.

MS. RIQUELME: Your Honor, I would object at this point to - - .

THE COURT: Go ahead tell me the reason for your objection.

MS. RIQUELME: Well, the right to remain silent, and this - - touching upon that. Placing a burden on Mr. Rosas to make comments.

THE COURT: I don't think so. Overruled.

1/16/15 RP 20-1.

The fourth defense objection in closing was to personal opinion of the prosecutor.

MR. WEYRICH: When you talk about credibility, you saw the ties that were used, he said he untied his hands, but

he didn't untie his feet. You can use that as you see fit. And I think where had got confused - -

MS. RIQUELME: Objection to what Mr. Weyrich thinks.

THE COURT: Restate.

1/16/15 RP 24.

The fifth objection was overruled.

MR. WEYRICH: ... But it does seem odd, and I think -
- and I think - -

MS. RIQUELME: Objection.

THE COURT: Overruled. Go ahead

1/16/15 RP 25.

The sixth and seventh objections came in short succession resulting in the conference at sidebar which the defense contends was error meriting reversal.

MR. WEYRICH: ...

That's when it comes to the preponderance of evidence. Did they convince you that it's more likely true than not that the alcohol -- or the sepsis was the cause of these deliriums? Or was it the alcohol, which was reaching its highest level, and compute -- and you can compute it back to what it would have been, about that time, using those figures that we gave you. It was that's what was causing this defendant to go off the rails.

That's their burden, to show you that that happened.

MS. RIQUELME: Objection.

THE COURT: Approach.

(BENCH CONFERENCE OFF THE RECORD.)

MR. WEYRICH: Just to be clear, the state is not saying that -- that the defense has the burden of proof on anything, other than when they claim insanity, they have the burden of proof preponderance of the evidence. And if I -- if their testimony is that it was caused by sepsis, then they have to

prove that. We think what the -- the evidence shows that it is the alcohol. That's all.

So in closing, we have to prove beyond a reasonable doubt that this car was stolen, and I went through the elements, and I think we've done that. We have to prove that this car was driven while he was -- the defendant was under the influence, and I believe we've shown, the state -- we believe the evidence shows that he was. And finally, I believe -- or we believe.

MS. RIQUELME: Objection.

MR. WEYRICH: The evidence shows.

MS. RIQUELME: Objection to state's belief.

THE COURT: Right. Evidence shows.

MR. WEYRICH: The evidence shows that the defendant attempted to elude Trooper Pasternak when he squealed out of that driveway and drove down that road at 95 miles an hour in a rash and heedless manner and crashed into that fence.

The evidence shows that the defendant has not met the burden of insanity by a preponderance of the evidence. The evidence shows that -- or does not show that the sepsis was the cause of these actions of the defendant. The evidence shows that the actions of the defendant were caused by the copious amounts of alcohol that the defendant consumed, that he now denies consuming.

1/16/15 RP 29-31. No record was made of the substance of the conference at the bench.

Defense argued that the defendant suffered from a sepsis-associated delirium as diagnosed by a doctor after the incident. 1/16/15 RP 32. Defense noted that the plan by deputies was to take the defendant in for a mental health evaluation before he took the sheriff's vehicle. 1/16/15 RP 35-6, 63. The defense closing also focused on the family member's description of Bernal-Rosas's unusual behavior that night. 1/16/15 RP 40-3.

IV. ARGUMENT

1. Where defense did not preserve any ruling on the objection, there is no error manifest in the record.

The general rule in Washington is that appellate courts will not hear challenges that were not presented to the trial court. RAP 2.5(a). An exception is made for issues of “manifest error affecting a constitutional right.” RAP 2.5(a)(3). Such issues may be raised if the record is sufficient to adjudicate them. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

It is a long-standing rule that we do “not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent.” *Barker v. Weeks*, 182 Wash. 384, 391, 47 P.2d 1 (1935) (quoting 4 C.J. *Appeal and Error* § 2666 (1916)).

State v. Love, 183 Wn.2d 598, 608, 354 P.3d 841, 846 (2015).

During the closing argument, the defense only stated there was an objection without a basis. Assuming from context that the defense objection was to the State shifting the burden to the defense, the State’s argument immediately preceding the objection was not objectionable given the defense’s burden to prove the insanity defense. 1/16/15 RP 29-30. Furthermore, defense counsel did not press the trial court for a ruling. And finally, immediately after the sidebar conference, the prosecutor reaffirmed that the sole burden on the defense was to prove insanity. 1/16/15 RP 30.

MR. WEYRICH: ...

That's when it comes to the preponderance of evidence. Did they convince you that it's more likely true than not that the alcohol -- or the sepsis was the cause of these deliriums? Or was it the alcohol, which was reaching its highest level, and compute -- and you can compute it back to what it would have been, about that time, using those figures that we gave you. It was that's what was causing this defendant to go off the rails.

That's their burden, to show you that that happened.

MS. RIQUELME: Objection.

THE COURT: Approach.

(BENCH CONFERENCE OFF THE RECORD.)

MR. WEYRICH: Just to be clear, the state is not saying that -- that the defense has the burden of proof on anything, other than when they claim insanity, they have the burden of proof preponderance of the evidence.

1/16/15 RP 29-30. This supports the conclusion that the trial court addressed the legal issue of the burden of proof at sidebar and therefore was dealing with a brief legal issue. Given the prosecutor's argument before the sidebar did not shift the burden of proof and further clarification immediately after the sidebar conference, there was no need for defense counsel to object to make a record of the content of the sidebar conference.

There is no error manifest in the record which merits review.

2. Sidebar conferences are not historically part of public trial.

The sidebar conference occurred in the courtroom with the jury and any members of the public who chose to be there present. There was no exclusion of the public from the proceedings.

Sidebars have historically *not* been open to the public. They serve the important purpose of ensuring a fair trial by insulating potentially prejudicial discussions from the jury's ears. *See, e.g. Sublett*, 176 Wn.2d at 67-68 (public trial right “does not extend to hearings on purely ministerial or legal issues that do not require the resolution of disputed facts”); *State v. Swenson*, 62 Wn.2d 259, 272, 382 P.2d 614 (1963), *overruled on other grounds by State v. Land*, 121 Wn.2d 494, 851 P.2d 678 (1993) (defendant's public trial right not implicated when holding a sidebar conference to address concerns about a witness's comfort while testifying); *Popoff v. Mott*, 14 Wn.2d 1, 9, 126 P.2d 597 (1942) (defendant's public trial right not implicated when holding a sidebar during voir dire on whether to excuse a juror for cause). *See also Love*, 176 Wn. App. at 920 (defendant's public trial right not violated by hearing for cause challenges at sidebar during jury selection); *State v. Castro*, 159 Wn. App. 340, 341, 246 P.3d 228 (2011) (defendant's public trial right not implicated when, after holding a sidebar to decide motions in limine, the trial court placed its decisions on the record in open court and counsel had an opportunity to object); *State v. Rivera*, 108 Wn. App. 645, 653, 32 P.3d 292 (2001) (defendant's public trial right not violated by closing the courtroom for a brief hearing on a juror's complaint about another juror's hygiene).

In *State v. Smith*, 181 Wn.2d 508, 334 P.3d 1049 (2014), we alluded to the fact that evidentiary motions may not implicate the public trial right, but because sidebars, and not evidentiary conferences, were at issue in that case we did not decide definitively one way or the other

In re Pers. Restraint of Speight, 182 Wn.2d 103, 106, 340 P.3d 207 (2014)

(bold emphasis added).

In *State v. Love*, the Supreme Court noted that convictions have been reversed in courtroom closure cases either where there was an exclusion of people from the courtroom or where a portion of the trial occurs in another

place inaccessible to spectators. *State v. Love*, 183 Wn.2d 598, 606, 354 P.3d 841 (2015).

The defendant in *Love* sought to equate the peremptory challenges in that case handled at sidebar conference with actions behind closed chamber doors. The Supreme Court rejected the comparison and found no closure occurred where the peremptory challenges were made at a sidebar conference. *State v. Love*, 183 Wn.2d at 606-7, 354 P.3d 841 (2015), see also *State v. Marks*, 185 Wn.2d 143, 339 P.3d 196 (2016) (no closure of courtroom for sidebar exercise of peremptory challenges exercised and list of challenged jurors made part of the record).

Finally, in *State v. Smith*, 181 Wn.2d 508, 334 P.3d 1049 (2014), the supreme court specifically held that sidebar conferences do not implicate the public trial right.

Sidebars have traditionally been held outside the hearing of both the jury and the public. Because allowing the public to “intrude upon the huddle” would add nothing positive to sidebars in our courts, we hold that a sidebar conference, even if held outside the courtroom, does not implicate Washington's public trial right.

State v. Smith, 181 Wn.2d 508, 519, 334 P.3d 1049 (2014), citing, *State v. Sublett*, 176 Wn.2d 58, 97-8, 292 P.3d 715 (2012).

V. CONCLUSION

For the foregoing reasons, challenge raising a claim of a courtroom closure for a sidebar conference following an objection made during closing argument must be denied. Bernal-Rosas's convictions and sentence for Attempting to Elude a Pursuing Police Vehicle and Driving while under the Influence must be affirmed.

DATED this 13th day of May, 2016.

SKAGIT COUNTY PROSECUTING ATTORNEY

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DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Gregory C. Link, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 13th day of May, 2016.


KAREN R. WALLACE, DECLARANT