

COURT OF APPEALS, 3RD DIVISION
STATE OF WASHINGTON
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NO. 67357-2-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

RAMOS NOEL ORTIZ-LOPEZ,
Appellant.

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

The Honorable John M. Meyer, Judge

RESPONDENT’S SUPPLEMENTAL BRIEF

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Art. 1, § 10 3
Art. 1, § 22 3

I. SUMMARY OF ARGUMENT

Ramos Noel Ortiz-Lopez filed a supplemental assignment of error regarding a side-bar conference where his counsel and the prosecutor exercised peremptory challenges. He contends that even though he was present in court, the side-bar conference was required to be held in public and he was also required to be present. Since the public trial was occurring and a side-bar conference is not a hearing where a defendant's presence is required, these supplemental claims fail.

II. ISSUES

1. Is a side-bar conference regarding the exercise of peremptory challenges required to be conducted openly on the record?
2. Is a side-bar conference a proceeding at which a defendant's presence is required?

III. STATEMENT REGARDING SUPPLEMENTAL ASSIGNMENT OF ERROR

On April 25, 2011, the case proceeded to trial.¹ 4/25/11 RP 3. The jury completed a questionnaire. 4/25/11 RP 3. Toward the close of the jury selection process certain jurors were interviewed separately from the other

¹ For the purpose of this supplemental brief, 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:

4/25/11 RP Jury Selection and Pretrial Motions (Appellant cites as 1RP)
4/25/11 RP Supp Jury Selection excerpt (Requested by the State)

jurors. CP 136. Rather than engage in a Bone-Club analysis for closing the courtroom to interview the jurors, the jurors were interviewed in a separate open courtroom. 4/25/11 RP Supp 3, CP 136. The trial court held because the proceedings were conducted in an open courtroom, there was no need for a Bone-Club analysis. 4/25/11 RP Supp 3. Given the time was after 4:30 p.m., the defense counsel expressed concern that the courthouse doors were still open. 4/25/11 RP Supp 2-3. The trial court noted that “I don’t believe there’s been a member in the courthouse all day long in the main courtroom all day long.” 4/25/11 RP Supp 3. The trial court went on to note “the record should reflect the courthouse doors are open.” 4/25/11 RP Supp 3.

The court and counsel examined the jurors. 4/25/11 RP Supp 4-15. Prior to exercising peremptory challenges, the trial court suggested that the parties could return to the other courtroom so they could “take a look at them.” 4/25/11 RP Supp 15-6. Defense counsel agreed that would be helpful. 4/25/11 RP Supp 15-6. The court then returned to the courtroom. There was a side-bar conference after which the final jury members were announced. 4/25/11 RP Supp 16-7. There was no objection to the procedure of exercising peremptory challenges at the sidebar.

The clerk’s minutes indicated that the court advised the courtroom of the jurors selected.

Court recesses @ 5:25

Court reconvenes @ 5:28

**Counsel and defendant are present. Defendant is in custody
Jury panel is present.**

Counsel exercise their peremptory challenges.
Court seats selected jurors.

CP 137.

Ortiz-Lopez filed a supplemental assignment of error claiming the courtroom sidebar conference where the peremptory challenges were exercised was a hearing which should have been open to the public and for which his presence was required.

IV. ARGUMENT

1. The sidebar conference regarding the exercise of peremptory challenges was part of a public trial and not in violation of the defendant's right to an open courtroom.

Ortiz-Lopez contends that the exercise of peremptory challenges was required to be held before the jury in the public courtroom. However, there was no contested exercise of peremptory challenges and the public had the ability to be present throughout the entire trial and the announcement of the jury. There was no violation of the right to open administration of justice.

A criminal defendant has the right to a "speedy and public trial." Art. 1, § 22. The constitution also requires that justice be administered openly. Art. 1, § 10.

The Washington Supreme Court has held that where a courtroom is closed during significant portions of trial, these constitutional rights are

violated. In State v. Marsh, 126 Wn. 142, 145, 217 P. 705 (1923), the superior court tried an adult as if he were a juvenile, closing the entire proceeding and failing to provide counsel. In State v. Bone-Club, 128 Wn.2d 254, 256-57, 906 P.2d 325 (1995), the trial court summarily granted the State's request to clear the courtroom for the pretrial testimony of an undercover detective. In State v. Brightman, 155 Wn.2d 506, 511, 122 P.3d 150 (2005) the trial court ordered -- sua sponte -- that the courtroom be closed for the entire 2 ½ days of voir dire, excluding the defendant's family and friends. In In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), the trial court summarily ordered the defendant's family and friends excluded from *all* voir dire proceedings. And, in State v. Easterling, 157 Wn.2d 167, 172-73, 137 P.3d 825 (2006), the trial court ordered the defendant and his attorney excluded from pretrial motions regarding the co-defendant. Most recently, in State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009), the court held private questioning of a subset of jurors violated the right to a public trial where the court failed to balance the Bone-Club factors before holding voir dire in chambers. In State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), the court held that, even if there was error, Momah had invited the error by his conduct and thus was not entitled to a new trial.

In each of the cases above, however, a courtroom closure was either directly ordered or indirectly effectuated by the trial court's action. In this

case, the courtroom was never closed at all, nor was anyone excluded and all substantive matters were discussed in open court.

Moreover, the sidebar conference at issue here is a not a "proceedings" that implicate the public trial right. In the cases cited above, all or part of an important substantive proceeding was shielded from public view.² In this case, the exercise of peremptory challenges was done in the courtroom, but just communicated between counsel and the trial court. There was no challenge to any of the exercises of peremptory challenges and thus no need to make a further record.

In context of the defendant's right to presence, the Washington Supreme Court has recognized that sidebars are not truly trial proceedings to which the defendant or the public must be granted access. For example, in In re Personal Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994), the supreme court considered an argument that the defendant had a right to be present at numerous conferences between the lawyers and the judge. The court held that Lord had a right to be present at none of these purely legal discussions between the court and counsel.

The core of the constitutional right to be present is the right to be present when evidence is being presented. United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985) (per curiam). Beyond that, the defendant

² Bone-Club (pretrial testimony); Orange, (voir dire); Brightman (voir dire); Easterling (pretrial hearing); Strode (voir dire of selected jurors); Momah (voir dire of selected jurors).

has a “right to be present at a proceeding ‘whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge....’ ” Gagnon, 470 U.S. at 526 (*quoting Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575 (1934)). The defendant therefore does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters, United States v. Williams, 455 F.2d 361 (9th Cir.), *cert. denied*, 409 U.S. 857 (1972), at least where those matters do not require a resolution of disputed facts. People v. Dokes, 79 N.Y.2d 656, 584 N.Y.S.2d 761, 595 N.E.2d 836 (1992) (right to be present during hearing on admissibility of prior conviction).

Id. Similarly, in In re Personal Restraint of Pirtle, 136 Wn.2d 467, 484, 965 P.2d 593 (1998), the court held that the defendant need not be present for discussions about the wording of jury instructions, ministerial matters, and whether the jury should be sequestered.

Decisions from the Court of Appeals are similar. In State v. Rivera, 108 Wn. App. 645, 32 P.3d 292 (2001), the court held that the defendant had no right to be present at a chambers conference where jurors complained about the hygiene of another juror, because the matter was purely ministerial. In State v. Bremer, 98 Wn. App. 832, 835, 991 P.2d 118 (2000), the court held a defendant had no right to be present at a chambers conference regarding proposed jury instructions because the inquiry was legal and did not involve resolution of questions of fact.

Here, the defendant was present throughout the jury selection process, he had the ability to consult with his counsel who then was present

for the exercise of the peremptory challenges. “The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control.” State v. Salinas, 87 Wn.2d 112, 549 P.2d 712 (1976) *citing* State v. Thompson, 68 Ariz. 386, 206 P.2d 1037 (1949); Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892).

The clerk’s minutes show which jurors were excused, so there is a record of the challenges. CP 147-9. But which party excused each juror did not need to be made part of the public proceedings because the exercise of peremptory challenges is not controlled by the court unless there is a claim such as discriminatory exercise of peremptory challenges. Since there were no objections during the process, there were no contested issues.

Having the public and the jury available to see which party exercises the peremptory challenge against each juror defeats the purpose of the peremptory challenge which is to keep the jurors from drawing inferences from the exercises of such challenges. Georgia v. McCollum, 505 U.S. 42, 53, 112 S. Ct. 2348, 2356, 120 L. Ed. 2d 33 (1992) (footnote 8), People v. Willis, 27 Cal. 4th 811, 822, 43 P.3d 130, 137 (2002).

There was no violation of Ortiz-Lopez’s right to public trial by the exercise of peremptory challenges at a sidebar conference.

2. The exercise of peremptory challenges at a sidebar

conference after the defendant was present for voire dire was not a violation of the defendant's right to be present.

Ortiz-Lopez also claims that the exercise of peremptory challenges violated his right to be present at the trial. However, Ortiz-Lopez was in the courtroom and had the ability to consult with his lawyer prior to and during the exercise of peremptory challenges. In fact, the record shows his counsel believed it would be useful for them to look at the jury before exercising the challenges. 4/25/11 RP Supp 15-6. Ortiz-Lopez was present as required.

In Snyder v. Massachusetts, a defendant claimed that his failure to be present at a view of the scene by jurors violated his right to be present at trial. In evaluating the extent of the right to presence, the Snyder court set forth the following test.

We assume in aid of the petitioner that in a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment **to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.**

Snyder v. Massachusetts, 291 U.S. at 105-6 (emphasis added). This test from Snyder is the test Washington courts apply.

In In Re Personal Restraint of Lord, 123 Wn.2d 296, 868 P.2d 835 (1994), the defendant claimed that he did not waive his presence at numerous unspecified in-chambers hearings and sidebar conferences. In Re Personal Restraint of Lord, 123 Wn.2d at 305-6. But the Lord court

indicated that prejudice cannot be presumed and that “Lord does not explain how his absence affected the outcome of any of the challenged proceedings or conferences, nor can we find any prejudice.” In Re Personal Restraint of Lord, 123 Wn.2d at 307 *citing*, Rushen v. Spain, 464 U.S. at 117-20.

In State v. Wilson, 141 Wn. App. 597, 171 P.3d 501 (2007), the defendant was not present for an in-chambers conference regarding a seated juror. The court presented the question as whether the defendant “has demonstrated that his presence at the in-chambers conference bore a reasonably substantial relation to the fullness of his opportunity to defend against the charge, or whether a fair and just hearing was thwarted by his absence.” State v. Wilson, 141 Wn. App. at 604. The court held the right to presence extends to jury voir dire, though the defendant's presence at this stage is only required because it is substantially related to the defense and allows the defendant ‘to give advice or suggestion. The court concluded: “However, Mr. Wilson must demonstrate how his presence was necessary to secure his due process rights; **prejudice will not be presumed.**” State v. Wilson, 141 Wn. App. at 604 (emphasis added), *citing* In Re Personal Restraint of Lord, 123 Wn.2d 296, 307, 868 P.2d 835 (1994).

“The exclusion of a defendant from a ... proceeding should be considered in light of the whole record.” United States v. Gagnon, 470 U.S. 522, 526-7, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985). The defendant need not

be present “ ‘when presence would be useless, or the benefit but a shadow.’ ”
State v. Rice, 110 Wn.2d 577, 616, 757 P.2d 889 (1988) (*quoting Snyder v. Massachusetts*, 291 U.S. 97, 106-07, 54 S.Ct. 330, 78 L.Ed. 674 (1934)).

The purpose of voir dire is to gain information, which enables parties to challenge jurors for cause or to use peremptory challenges. State v. Frederiksen, 40 Wn. App. 749, 752, 700 P.2d 369, *rev. denied*, 104 Wn.2d 1013 (1985).

Ortiz-Lopez’s counsel exercised the peremptory challenges for the defense. See U.S. v. Stratton, 649 F.2d 1066, 1080-81 (5th Cir.1981) (recognizing that defendant's attorney's presence is relevant to whether defendant was prejudiced by absence from proceeding).

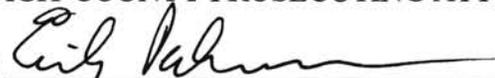
Ortiz Lopez’s counsel’s participation in the sidebar conference protected Ortiz-Lopez’s interests.

V. CONCLUSION

For the foregoing reasons, this Court must deny Ortiz-Lopez’s supplemental assignments of error.

DATED this 24th day of July, 2012.

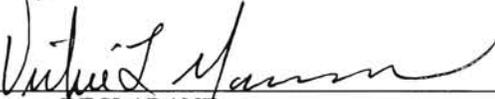
SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
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DECLARATION OF DELIVERY

I, Vickie Maurer, declare as follows:

I sent for delivery by; [X]United States Postal Service; []ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Jennifer M. Winkler , addressed as Nielsen Broman & Koch, PLLC, 1908 E. Madison Street, Seattle, WA 998122-2842 . 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 24th day of July, 2012.



DECLARANT