IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 64823-3-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
GABRIEL NIGHTINGALE,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: November 14, 2011

Lau, J. — Gabriel Nightingale appeals his conviction for felony harassment and intimidating a public servant, arguing insufficient evidence supports the jury's findings that Agent Patrick Fuller feared that he would carry out his threat and that he attempted to influence Officer Michael Munden's official action. He also contends that the trial court violated his right to a public trial by considering the State's motion to amend the information and his own questions regarding his speedy trial rights while in chambers. Because sufficient evidence supports the convictions and because the issues decided in chambers were purely ministerial matters, we affirm. We also reject the claims Nightingale raises in his statement of additional grounds for review.

FACTS

Late on March 24, 2009, Marla Mobley approached United States Border Patrol Agent Adan Gonzales and told him that she was afraid of a man who had been living

with her because he was off his medication and would not leave when she asked. Agent Gonzales called the Blaine Police Department for assistance. Officer Munden responded and spoke to Mobley, who was distraught, shaking, and having trouble speaking. Mobley reported that Gabriel Nightingale had been living with her and he threatened to kill her if she didn't give him $500 for drugs. Mobley also explained that she had known Nightingale for years, that he had threatened her in the past, and that he had a fantasy about being killed by police officers. Mobley asked Officer Munden to go to her apartment and talk Nightingale into going to a hospital for his medication.

Officer Munden asked Officer Tom Erickson, Agent Gonzales, and Agent Fuller to assist him at Mobley's apartment. When they arrived, Officer Munden knocked and announced they were police. When there was no response the second time, Officer Munden tried the door and found it unlocked. He opened the door and yelled loudly that they were police officers as they walked inside. The room was dark except for a dim light from a bedroom. Officer Munden opened the bedroom door and saw Nightingale sitting on a mattress on the floor and pointing a flashlight at the officers. When Officer Munden started to explain why he was there, Nightingale told him, "[S]hut the fuck up." Verbatim Report of Proceedings (Dec. 9, 2009) (VRP) at 64. As Officer Munden tried to explain Mobley's concerns and ask for his side of the story, Nightingale continued to interrupt with the same phrase.

Nightingale continued to eat from a bowl and appeared to ignore the officers until he began a long rant about Mobley that Officer Munden found difficult to understand. Nightingale appeared to become more and more angry, until he said,

"Fuck you, man, get the fuck out of my house or shoot me in the head. If you don't, I'm going [to] kill you. I'll kill all of you." VRP at 67. Then Nightingale stood up, turned to face the officers as if he was ready to fight, and said, "Either arrest me or get the fuck out." [VRP 12/9/09 72] Officer Munden observed that Nightingale appeared to be six feet seven or eight inches tall and well over 200 pounds. Officer Munden directed Nightingale to turn around and put his hands behind his back, but Nightingale did not comply until Officer Munden drew his taser, activated the laser light, and aimed it at Nightingale. After Officer Erickson handcuffed Nightingale, the officers took him outside to the police car, where Nightingale said to them, "I will kill you and I will eat your hearts." [VRP 12/9/09 76]

The State charged Nightingale with four counts of felony harassment and one count of intimidating a public servant. The jury convicted Nightingale as charged, and the trial court imposed a standard range sentence.

Nightingale appeals.

DISCUSSION

Nightingale first contends that the State failed to present sufficient evidence to support the felony harassment charge as to Agent Fuller and the single count of intimidating a public servant.

In reviewing sufficiency of the evidence in a criminal case, we view the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Hagler, 74 Wn. App. 232, 234–35, 872 P.2d 85 (1994). We interpret all

reasonable inferences from the evidence in favor of the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, 119 Wn.2d at 201. Circumstantial evidence is as probative as direct evidence. State v. Moles, 130 Wn. App. 461, 465, 123 P.3d 132 (2005). We defer to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107 (2000).

To convict a defendant of felony harassment based on a threat to kill, the State must prove beyond a reasonable doubt that the victim reasonably feared that the threat to kill will be carried out. State v. C.G., 150 Wn.2d 604, 608, 80 P.3d 594 (2003) (victim's testimony that he feared the accused might try to harm him or someone else in the future was not sufficient to prove he reasonably feared she would carry out threat to kill him). But "neither RCW 9A.46.020 nor the definition of 'threat' in RCW 9A.04.110 requires the State to prove a nonconditional present threat . . . ." State v. Cross, 156 Wn. App. 568, 582, 234 P.3d 288 (2010), review granted on other grounds, 172 Wn.2d 1009 (2011).

Here, Agent Fuller testified that (1) Nightingale threatened to kill all four of the officers and eat their hearts; (2) he did not fear Nightingale would take immediate action against them while he was handcuffed and escorted by four officers; (3) Nightingale "is a big man" and "could carry out or try to carry out his threats" if Agent Fuller were to meet him on the street; VRP at 26, and (4) he believed at the time of the threat that Nightingale could at some future date attempt to carry out his threat and

succeed and kill him. Taken in the light most favorable to the State, it is reasonable for a jury to have found from this evidence that Agent Fuller feared that Nightingale would carry out his threat to kill him.

Regarding the charge of intimidating a public servant, Nightingale argues that the State failed to produce sufficient evidence that he attempted to influence any official action. To convict a person of the crime of intimidating a public servant, the State must prove that "the defendant made a threat and that the threat was made with the purpose of influencing a public servant's official action." State v. Montano, 169 Wn.2d 872, 876, 239 P.3d 360 (2010); RCW 9A.76.180. "[T]here must be some evidence suggesting an attempt to influence, aside from the threats themselves or the defendant's generalized anger at the circumstances." Montano, 169 Wn.2d at 877. In Montano, the defendant struggled violently with police officers who were attempting to subdue him, grew increasingly enraged and violent, and then, after being physically subdued, he threatened and insulted the officers. Montano, 169 Wn.2d at 879. Although his behavior demonstrated anger at the situation and the officers, there was no evidence that he made his threats to influence the officers' actions. Montano, 169 Wn.2d at 879.

But here, Officer Munden testified that Nightingale repeatedly interrupted and shouted profanity at him while he tried to explain Mobley's complaint and ask him "if he could tell me his side of the story." VRP at 65. After becoming more and more agitated, Nightingale threatened to kill them if they did not get out, and he appeared ready to fight. Officer Munden testified that he believed Nightingale was trying to intimidate the officers into not making an arrest. Taken in the light most favorable to

the State, this evidence is sufficient to allow a reasonable jury to find that Nightingale made his threat with the purpose of influencing Officer Munden's decision as to whether to arrest him.

Nightingale next argues the trial court's conference with counsel in chambers regarding the State's motion to amend the information and Nightingale's pro se questions regarding time for trial calculations violated his right to a public trial. Specifically, Nightingale contends that the conference amounts to a courtroom closure and that reversal and remand for a new trial is necessary because the trial court closed the courtroom without first weighing the factors set forth in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). See State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009) and State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), cert. denied, 131 S. Ct. 160 (2010) (Bone-Club factors must be weighed before courtroom closure).

Article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution guarantee a criminal defendant the right to a public trial. Article I, section 10 of the Washington Constitution provides: "'Justice in all cases shall be administered openly, and without unnecessary delay.'" This provision guarantees the public and the press the right to open and accessible judicial proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). After the court weighs the Bone-Club factors, it must enter specific findings justifying its closure order. Easterling, 157 Wn.2d at 175.

Not all in-chambers conferences implicate the right to a public trial, however. Public trial rights apply only in "'adversary proceedings,' including presentation of

evidence, suppression hearings, and jury selection." In re Det. of Ticeson, 159 Wn. App. 374, 384, 246 P.3d 550 (2011) (quoting State v. Koss, 158 Wn. App. 8, 16, 241 P.3d 415 (2010)). Importantly, the right does not attach where the court resolves "'purely ministerial or legal issues that do not require the resolution of disputed facts'. . . . " Ticeson, 159 Wn. App. at 384 (quoting Koss, 158 Wn. App. at 17). Whether a trial court procedure violates the public trial right is a question of law we review de novo. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

Here, on the first day of trial in open court and before jury selection, defense counsel asked for time to interview witnesses and the State indicated that certain witnesses would be unavailable for trial on the following day. The trial court and the parties discussed scheduling and the upcoming expiration of the time for trial. The State then moved to amend the information by removing a count of felony harassment as to Mobley. Defense counsel did not object, and the trial court granted the motion. The trial court recessed to allow the defense to conduct interviews.

The court reconvened in the afternoon in chambers to address (1) the State's motion to add the count of felony harassment as to Mobley back into the information and (2) Nightingale's "question" regarding the calculation of the proper time for trial. VRP (Dec. 7, 2009) at 18. The trial court did not explain the reason for a chambers hearing on the record. Pro se, Nightingale asked a series of questions about the calculation of the time for trial and complained that he was not in court when certain continuances were granted, that he had objected to all the continuances, and that his trial date had been set six times. The trial court mentioned that the record appeared to

reflect several continuances and that there was no apparent speedy trial violation. Defense counsel did not make any motion to dismiss based on a speedy trial violation, and Nightingale did not claim that his time for trial had expired on any particular date.

The trial court denied the State's proposed amendment or withdrawal of its earlier amendment, ruling that in view of the fact that final witness interviews had been conducted after the State dropped the charge that morning, it would be unfairly prejudicial to require the defense to choose between proceeding on the additional charge without preparation or requesting a continuance.

Nightingale fails to identify any authority for his claim that the matters discussed in the conference in chambers were subject to the right to a public trial. He claims that the trial court resolved disputed facts, but he fails to identify any factual disputes. Nothing in the record indicates that the trial court considered or addressed the substantive facts underlying the charges, the existence or admissibility of any evidence, or any issue in the jury selection process. Instead, the trial court addressed the purely ministerial matters of the timing of the State's requested amendment and Nightingale's general pro se questions about the computation of the time for trial. Nightingale fails to establish error.

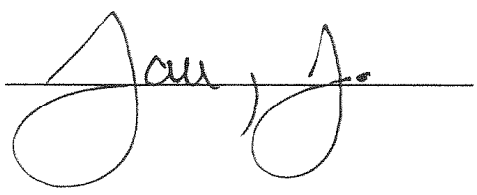
In his statement of additional grounds for review, Nightingale contends the trial court violated his speedy trial rights by continuing the trial several times over his objections and setting the trial outside the applicable time for trial three times over his objections. Because it appears that defense counsel requested several continuances and the record on appeal does not include any orders granting continuances or setting

trial dates, we cannot review this claim. RAP 10.10(c).

Nightingale also claims that Mobley's statements should have been suppressed because she did not testify and he was denied the right to "face my accuser." Statement of Additional Grounds (SAG), at 2. Although the confrontation clause limits out-of-court statements made by a nontestifying witness offered for their truth, it is clear from the record that Mobley's statements were not admitted for their truth, but rather to show a basis for the officers' reasonable fears and to provide the jury with a context to understand the officers' actions. Nightingale fails to identify grounds for relief.

Finally, Nightingale contends that after he was arrested and the officers were taking him to the car, Agent Gonzales asked him a direct question before informing him of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). In particular, after Nightingale said, "I'll kill you," Agent Gonzales asked, "Who me?" SAG at 2. Nightingale claims that his response, "All of you," must be suppressed as obtained during a custodial interrogation in violation of Miranda. Contrary to Nightingale's claim, Agent Gonzales's question does not amount to interrogation. Instead, during the commission of an ongoing crime of felony harassment in his presence, Agent Gonzales merely attempted to clarify whether he was in fact an intended victim. Nightingale fails to demonstrate error in the trial court's admission of his response.

Affirmed.



WE CONCUR:

Cox, J.

Becker, J.