IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 65009-2-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	UNPUBLISHED OPINION
ANDREW MARVIN STEAN,	)	
	)	
Appellant.	)	FILED: September 12, 2011
	)	

Leach, A.C.J. — Andrew Marvin Stean appeals his convictions for two counts of felony harassment and two counts of bail jumping. He contends the trial court violated his constitutional right to a public trial by holding an in-chambers conference on jury instructions without first conducting a Bone-Club[1] analysis. Stean also claims his trial counsel was ineffective for failing to object to hearsay testimony. Because the in-chambers conference concerned a purely legal matter, it did not implicate the right to open and public proceedings. And because Stean failed to demonstrate prejudice resulting from trial counsel's failure to object, we reject his ineffective assistance claim and affirm the trial court.

[1] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

FACTS

The State charged Stean with three counts of felony harassment. After Stean failed to appear at a status conference, the State amended the information to add one count of bail jumping. When Stean failed to appear at trial, the State amended the information to add a second count of bail jumping. The following substantive facts are taken from trial court testimony.

Matthew West, Travis Hansen, and Kris Elling resided at 712 East Maple Street in Bellingham. Sometime during the evening of July 31, 2007, Stean arrived at the house and asked to speak with West. Elling testified that Stean displayed a handgun and threatened to "shoot everyone in the house" if West did not produce $200 by midnight. Elling took the threat seriously, believing that it included him as well as West. Elling also testified that Stean scared West and that West also took the threat seriously. Elling later reported the incident to the police.

Because Hansen was not home at the time, West called him to tell him what had happened. The court allowed Hansen to testify about the phone call over defense counsel's hearsay objection. The court, however, gave a limiting instruction, informing the jury that it could not consider the testimony to prove the truth of what was said "over the phone" but only for purpose of assessing Hansen's reaction to it. Hansen proceeded to testify that West told him Stean had come to the house and threatened him by saying that he wanted the money by midnight or he was going to kill or "pistol whip him." Hansen also testified,

without defense counsel's objection, that when he arrived at the house, West retold what had happened. According to Hansen, West took the threat seriously.

Whitney Bartlett was with Hansen when he received West's phone call. She testified that Hansen appeared a little scared or nervous as a result of what West told him on the phone. She also testified that after arriving at the house, Elling, West, and Hansen appeared to be afraid.

> Q [Prosecutor]: Did the three of them appear to you to be afraid?
>
> A [Bartlett]: Yes.
>
> Q: From what you could tell and what they were doing, did it appear they were taking the threat seriously?
>
> A: Yes.
>
> Q: Were you comfortable based on the threat staying at that house that night?
>
> . . . .
>
> A: No.

Later that night, a friend of Stean's showed up at the house and spoke with Hansen. According to Hansen, the friend handed him a phone with Stean on the other end. Stean told Hansen he wanted his money by midnight and that if they did not produce it, he was going to go to the house and "collect his money one way or the other."

Approximately 20 minutes later, Stean arrived at the Maple Street house. He left the premises, however, when occupants of the house informed him that the police had been notified and were on their way.

Officer Jeremy Harper, who responded to the 911 call, testified that although he could not recall the demeanor of each victim individually, he remembered that West, Hansen, and Elling were "frantic and wanted to get out the information . . . as quickly as possible in hopes [that the police] would catch [Stean]." Harper indicated they "called 911 in fear for their lives" and that "one individual stated they were going to be staying up all night to ensure their safety."

Stean testified on his own behalf. He admitted the bail jumping charges, going to the East Maple Street house to ask West for money, returning to the house later that night, and having left the house when he heard someone say that the police were on their way. He denied, however, having a weapon or making any threat to Elling, West, or Hansen.

At the close of trial, the court informed the jury that it "need[ed] to talk to counsel about some instructions, so [it was] going to give [them] about a 20 to 25 minute break." Before the jury returned, the court stated on the record that "[c]ounsel met with the court in chambers and we discussed the instructions and made a couple changes." The court then asked the parties if either one had any exceptions or requests for additional instructions. Both parties answered in the negative.

The jury convicted Stean of two counts of felony harassment and both counts of bail jumping. The jury acquitted him of the third court of felony harassment. Stean appeals.

ANALYSIS

We must decide whether the trial court violated Stean's constitutional right to a public trial when it held an in-chambers, off-the-record conference with counsel to discuss jury instructions.

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.[2] Article I, section 10 of the Washington Constitution provides that "[j]ustice 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.[3] Whether a trial court procedure violates a public trial provision is a question of law this court reviews de novo.[4]

A trial court should apply and weigh the five factors in Bone-Club before closing the courtroom.[5] The court should also enter specific findings justifying its

[2] Wash. Const. art I, § 22 states, "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial." U. S. Const. amend. VI reads, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."

[3] State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006).

[4] State v. Duckett, 141 Wn. App. 797, 802, 173 P.3d 948 (2007) (citing State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005)).

[5] These five factors include

> "1. The proponent of closure . . . must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.
>
> "2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
>
> "3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened

closure order.[6] These requirements comport with the United States Supreme Court's Sixth Amendment public trial analysis.[7]

Not all in-chambers conferences implicate the public's right to open judicial proceedings.[8] Public trial rights only apply in "'adversary proceedings,' including presentation of evidence, suppression hearings, and jury selection."[9] Where the court resolves "'purely ministerial or legal issues that do not require the resolution of disputed facts,'" the right to open proceedings does not attach.[10] Thus, the question is whether an in-chambers conference regarding proposed jury instructions is an "adversary proceeding" or merely one that

---

interests.

"4. The court must weigh the competing interests of the proponent of closure and the public.

"5. The order must be no broader in its application or duration than necessary to serve its purpose."

Bone-Club, 128 Wn.2d at 258-59 (second alteration in original) (quoting Allied Daily Newspapers of Wash. v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

[6] Easterling, 157 Wn.2d at 175 (citing Bone-Club, 128 Wn.2d at 258-59).

[7] See In re Pers. Restraint of Orange, 152 Wn.2d 795, 805-06, 100 P.3d 291 (2004) (quoting Waller v. Georgia, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)).

[8] See, e.g., In re Det. of Ticeson, 159 Wn. App. 374, 386, 246 P.3d 550 (2011) (rejecting argument that in-chambers conference on the admissibility of deposition testimony implicated the public's right to open proceedings); State v. Koss, 158 Wn. App. 8, 16-17, 241 P.3d 415 (2010) (in-chambers conference to discuss the removal of accomplice liability language from a proposed first-degree burglary instruction did not violate the public trial right); State v. Sublett, 156 Wn. App. 160, 182, 231 P.3d 231 (2010) (an in-chambers conference to address a jury question regarding one of the trial court's instruction did not implicate the public trial right).

[9] Ticeson, 159 Wn. App. at 384 (quoting Koss, 158 Wn. App. at 16); see also State v. Rivera, 108 Wn. App. 645, 652–53, 32 P.3d 292 (2001) (quoting Ayala v. Speckard, 131 F.3d 62, 69 (2d Cir.1997)).

[10] Ticeson, 159 Wn. App. at 384 (internal quotations marks omitted) (quoting Koss, 158 Wn. App. at 17).

involves the resolution of ministerial and legal matters.

In State v. Koss,[11] Division Three held that the public trial right did not attach to an in-chambers conference to discuss the removal of accomplice liability language from a proposed first-degree burglary instruction. According to the court, the conference involved "a ministerial legal matter" that did not include the resolution of disputed facts. Nor was the closure a critical stage of the proceeding requiring the defendant's presence.[12]

We apply the same analysis to Stean's public trial claim. The record shows that the conference concerned the composition and wording of the proposed instructions. This in-chambers conference was not an adversarial proceeding where evidence was taken, a jury was impaneled, or factual or credibility determinations were made. Because the in-chambers conference did not implicate Stean's public trial rights, no Bone-Club analysis was required.

Stean argues Koss is inapposite because it involved a dispute about specific wording of an instruction as opposed to what instructions to give the jury. But Stean cites no authority for parsing the preparation or revision of jury instructions in this manner. Jury instructions are appropriate when, as a whole, they accurately state the law and are supported by the evidence.[13] Whether instructions accurately state the law is a purely legal determination. And while

[11] 158 Wn. App. 8, 17, 241 P.3d 415 (2010).

[12] Koss, 158 Wn. App. at 17 (citing In re Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994)).

[13] State v. Berube, 150 Wn.2d 498, 510, 79 P.3d 1144 (2003).

evidentiary considerations factor into the decision to give an instruction, the trial court does not generally resolve factual disputes to determine how to instruct a jury. Instead, the trial court makes a legal determination whether the evidence presented warrants the requested instruction.

We conclude that the closure here did not implicate Stean's right to a public trial. As a result, the trial court did not err by failing to apply and weigh the five Bone-Club factors before closing the hearing.

We next address Stean's argument that his attorney provided ineffective assistance of counsel by failing to object to prejudicial hearsay statements from Bartlett,[14] Harper,[15] and Hansen.[16] Stean asserts that because he denied having a gun or having threatened anyone at the house, counsel could not have had a legitimate strategic or tactical reason for not objecting to the testimony. He further contends the testimony was prejudicial because it bolstered Elling's version of events.

---

[14] Specifically, Stean claims counsel was ineffective for failing to object to Bartlett's testimony that she heard through Hansen that West told him Stean had come to the house when she had no personal knowledge of that event. Stean also contends counsel was ineffective for failing to object to the prosecutor's injection of the word "threat" when questioning Bartlett about the events of that evening.

[15] Stean contends it was error not to object to Harper's testimony that Hansen, West, and Elling said they were "in fear for their lives" and that one of them said "they were going to be staying up all night to ensure their safety."

[16] Stean claims Hansen's testimony that West retold the story when he arrived at the house circumvented the trial court's limiting instruction by permitting the jury to consider the story for the truth of the matter asserted—that Stean threatened West and the others. Thus, Stean argues counsel was ineffective for failing to object a second time.

This court reviews ineffective assistance of counsel claims de novo.[17] To prevail, a defendant must show both deficient performance and resulting prejudice.[18] Counsel's performance is deficient if it falls below an objective standard of reasonableness.[19] Scrutiny of defense counsel's performance is highly deferential, and this court employs a strong presumption of reasonableness.[20] "To rebut this presumption, the defendant bears the burden of establishing the absence of any 'conceivable legitimate tactic explaining counsel's performance.'"[21] To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial would have been different absent counsel's deficient performance.[22] Failure on either prong is fatal to an ineffective assistance of counsel claim.[23]

Stean relies primarily on State v. Hendrickson,[24] where the court agreed that counsel's assistance was ineffective by failing to object to hearsay testimony that "was crucial to the State's case because it was the only evidence linking" the defendant to the crime. The court reasoned, "[W]ithout th[e] evidence[,] Hendrickson would have been acquitted on th[e] charge."[25]

---

[17] In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

[18] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[19] State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997).

[20] Strickland, 466 U.S. at 689; State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995).

[21] State v. Grier, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

[22] State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

[23] Strickland, 466 U.S. at 697.

[24] 138 Wn. App. 827, 833, 158 P.3d 1257 (2007).

But the circumstances here are entirely different. The testimony challenged on appeal was not crucial to the State's case; rather, it was duplicative of other admissible testimony.

To convict Stean of felony harassment, the State had to prove that Stean unlawfully and knowingly threatened to kill a person and that by words or conduct placed the person threatened in reasonable fear that the threat would be carried out.[26] Elling testified that he saw the gun and heard Stean say, "[I]f you don't have $200 by midnight that night . . . that he was coming back to the house and shoot everyone in the house." Elling and Hansen both testified that they, along with West, took the threat seriously. Further, Stean admitted to going to the house to ask for money, returning to the house later that evening, and leaving the house when he was informed that someone had called the police. Given this unchallenged testimony, there is no reasonable probability that Stean would have been acquitted without the challenged testimony from Bartlett, Harper, and Hansen. Therefore, no prejudice resulted, and absent prejudice, Stean's ineffective assistance of counsel claim fails.

[25] Hendrickson, 138 Wn. App. at 833.
[26] RCW 9A.46.020.

CONCLUSION

Finding no error, we affirm the trial court.

Leach, A.C.J.

WE CONCUR:

Spearman, J.

Cox, J.