

No. 41843-6-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Tammy Whitlock,**

Appellant.

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Grays Harbor County Superior Court Cause No. 10-1-00275-1

The Honorable Judge Gordon Godfrey

**Appellant's Opening Brief**

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### **ASSIGNMENTS OF ERROR**

1. The trial court violated Ms. Whitlock's First, Sixth, and Fourteenth Amendment right to an open and public trial.
2. The trial court violated Ms. Whitlock's right to an open and public trial under Wash. Const. Article I, Sections 10 and 22.
3. The trial court violated Ms. Whitlock's right to an open and public trial by conducting a closed hearing in chambers to select the appropriate jury instructions.
4. Ms. Whitlock's conviction violated her Fifth, Sixth, and Fourteenth Amendment right to notice of the charge against her.
5. Ms. Whitlock's robbery conviction violated her state constitutional right to notice of the charge against her, under Wash. Const. Article I, Sections 3 and 22.
6. The Information was deficient because it failed to properly allege that Ms. Whitlock caused substantial bodily harm with respect to two of the three alternative means charged.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The state and federal constitutions require that criminal trials be administered openly and publicly. Here, the trial judge consulted with counsel in chambers to select the jury instructions that guided the jury's deliberations. Did the trial judge violate the constitutional requirement that criminal trials be open and public by holding a hearing in chambers without first conducting any portion of a *Bone-Club* analysis?
2. A criminal Information must set forth all essential elements of an offense. The Information charged Ms. Whitlock with three alternative means of committing Vehicular Assault, but failed to allege that she caused substantial bodily harm under the first two alternate means. Did the Information omit an essential element of the offense in violation of Ms. Whitlock's right to

adequate notice under the Sixth and Fourteenth Amendments  
and Wash. Const. Article I, Section 22?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Tammy Whitlock and Sarah Aiken were in a car accident at a blind corner that turned quite sharply. RP<sup>1</sup> 18, 24. Both were taken immediately to the hospital after being removed from their vehicles. RP 18-21. Ms. Whitlock was unconscious at the scene, and remained so for some time at the hospital. RP 19-20, 76. Police obtained a blood sample after observing that Ms. Whitlock smelled of alcohol. RP 76-80, 95. Both Ms. Whitlock and Aiken were injured by the impact. RP 27-29, 45-49, 75-77.

The state charged Ms. Whitlock with Vehicular Assault. CP 1.

The Information alleged that Ms. Whitlock

did (1) operate or drive a vehicle in a reckless manner and/or (2) operate or drive a vehicle (a) and have, within two hours after driving, an alcohol concentration of 0.08 or higher, and/or (b) while under the influence or affected by intoxicating liquor or any drug; and/or while under the combined influence of or affected by intoxicating liquor and any drug and/or (3) operate or drive a vehicle with disregard for the safety of others, and thereby did cause substantial bodily harm to another...

CP 1.

The matter was tried to a jury. Both parties filed proposed jury instructions with the court. Plaintiff's Proposed Instructions, Defendant's

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<sup>1</sup> This brief cites only to the trial transcript, which is sequentially numbered.

Proposed Instructions, Supp. CP. On the second day of trial, the judge stated: “Now, the record reflect that I met with counsel this morning and presented them with copies of proposed jury instructions.” RP 188.

The jury convicted Ms. Whitlock as charged. CP 3-12. After sentencing, Ms. Whitlock timely appealed. CP 13.

### **ARGUMENT**

**I. THE TRIAL COURT VIOLATED BOTH MS. WHITLOCK’S AND THE PUBLIC’S RIGHT TO AN OPEN AND PUBLIC TRIAL BY CONDUCTING PROCEEDINGS BEHIND CLOSED DOORS.**

A. Standard of Review.

Alleged constitutional violations are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010). Whether a trial court procedure violates the right to a public trial is a question of law reviewed *de novo*. *State v. Njonge*, 161 Wash.App. 568, \_\_\_, 255 P.3d 753 (2011). Courtroom closure issues may be argued for the first time on review. *Njonge*, at \_\_\_.

B. Both the public and the accused person have a constitutional right to open and public criminal trials.

The state and federal constitutions require that criminal cases be tried openly and publicly. U.S. Const. Amend. I, VI, XIV; Wash. Const. Article I, Sections 10 and 22; *State v. Bone-Club*, 128 Wash.2d 254, 259,

906 P.2d 325 (1995); *Presley v. Georgia*, \_\_\_ U.S. \_\_\_, \_\_\_, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (*per curiam*). Proceedings may be closed only if the trial court enters appropriate findings following a five-step balancing process. *Bone-Club*, at 258-259. Failure to conduct the proper analysis requires automatic reversal, regardless of whether or not the accused person made a contemporaneous objection. *Bone-Club*, at 261-262, 257.<sup>2</sup> In addition, the court must consider all reasonable alternatives to closure, whether or not the parties suggest such alternatives. *Presley*, 130 S.Ct., at 724-725.

The public trial right ensures that an accused person “is fairly dealt with and not unjustly condemned.” *State v. Momah*, 167 Wash.2d 140, 148, 217 P.3d 321 (2009). Furthermore, “the presence of interested spectators may keep [the accused person’s] triers keenly alive to a sense of the responsibility and to the importance of their functions.” *Id.* The public trial right serves institutional functions: encouraging witnesses to come forward, discouraging perjury, fostering public understanding and trust in the judicial system, and exposing judges to public scrutiny. *State*

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<sup>2</sup> See also *State v. Strobe*, 167 Wash.2d 222, 229, 235-236, 217 P.3d 310 (2009) (six justices concurring); *State v. Brightman*, 155 Wash.2d 506, 517-518, 122 P.3d 150 (2005).

*v. Strode*, 167 Wash.2d 222, 226, 217 P.3d 310 (2009); *State v. Duckett*, 141 Wash.App. 797, 803, 173 P.3d 948 (2007).

The public trial right “applies to all judicial proceedings.” *Momah*, at 148. The Supreme Court has never recognized any exceptions to the rule, either for violations that are allegedly *de minimis*, for hearings that address only legal matters, or for proceedings are merely “ministerial.” *See, e.g., Strode*, at 230.<sup>3</sup>

C. The trial court violated the public trial requirement by holding a hearing in chambers.

In this case, the trial judge conducted an *in camera* hearing to select the appropriate jury instructions. RP 188. This *in camera* proceeding, conducted outside the public’s eye without the required analysis and findings, violated Ms. Whitlock’s constitutional right to an open and public trial. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. Article I, Sections 10 and 22; *Bone-Club, supra*. It also violated public’s right to an open trial. *Id.* Accordingly, Ms. Whitlock’s conviction should be reversed and the case remanded for a new trial. *Id.*

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<sup>3</sup> (“This court, however, ‘has never found a public trial right violation to be [trivial or] *de minimis*’”) (quoting *State v. Easterling*, 157 Wash.2d 167, 180, 137 P.3d 825 (2006)).

D. The Court should reject exceptions to the public trial right that have not been recognized by the Supreme Court.

The Court of Appeals has held that the right to a public trial only extends to hearings that require the resolution of disputed facts, and does not encompass hearings to resolve issues that are purely legal or ministerial. *See, e.g., State v. Sublett*, 156 Wash.App. 160, 181, 231 P.3d 231, *review granted*, 170 Wash.2d 1016, 245 P.3d 775 (2010). This view of the public trial right is incorrect, and should be reconsidered.

The evils addressed by the requirement of open and public trials do not arise solely in the context of adversary proceedings to resolve disputed facts. Instead, any player in the judicial system can be guilty of impropriety at any stage. Without public scrutiny, such impropriety remains hidden.

The problem is primarily one of appearance. For example, a murder victim's family, already upset that the murder weapon was suppressed prior to trial, might feel that the judge is colluding with the defense upon learning—after an acquittal is entered—that a jury question about the missing gun was met only with an instruction to continue deliberating. While such a response may well be appropriate, the fact that it was arrived at in secret could lead the victim's family to speculation about judicial impropriety.

The difficulty with closed hearings extends beyond mere appearance issues. In another era, racism and sexism reared their heads in the justice system, especially in closed proceedings.<sup>4</sup> Blatant sexism and racial prejudice may be less common now than they were in years past; however, closed hearings allow such prejudices to be voiced with impunity, regardless of whether or not the hearing involves adversarial positions or disputed facts.

Even without actual malfeasance of the sort described, secret hearings degrade the public's perception of the judicial system. Only by opening all hearings—no matter how trivial—to the light of public scrutiny, can the judiciary be assured that it will be accorded the respect it deserves.

In *Sublett*, the Court of Appeals also implied that the need for an open and public hearing was obviated by the production of a written answer to the jury's question. *Sublett*, at 182. Under this reasoning, no proceeding need ever be open to the public, since courts excel at producing written records of their proceedings. The production of written jury instructions in this case does not eliminate the constitutional

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<sup>4</sup> Similarly, in chambers, a judge may improperly silence a contract public defender's objections in a particular case by threatening to withhold assignment to future indigent cases. Such pressure could be applied during argument over purely legal issues, and would place counsel's ethical duties in conflict with her or his livelihood.

requirement that proceedings be open and public.

In this case, the *in camera* hearings violated Ms. Whitlock's public trial right under the state and federal constitutions. They also violated the public's right to monitor proceedings. For these reasons, Ms. Whitlock's conviction must be reversed, and the case remanded for a new trial. *Bone-Club, supra*.

**II. MS. WHITLOCK'S CONVICTION VIOLATED HER RIGHT TO ADEQUATE NOTICE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ARTICLE I, SECTION 22.**

**A. Standard of Review**

Constitutional questions are reviewed *de novo*. *Schaler, at 282*. A challenge to the constitutional sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wash.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Id, at 105*. The test is whether the necessary facts appear or can be found by fair construction in the charging document. *Id, at 105-106*. If the Information is deficient, prejudice is presumed and reversal is required. *State v. Courneya*, 132 Wash.App. 347, 351 n. 2, 131 P.3d 343 (2006); *State v. McCarty*, 140 Wash.2d 420, 425, 998 P.2d 296 (2000).

**B.** The Information was deficient because it failed to properly allege that Ms. Whitlock caused substantial bodily harm with respect to two of the three alternative means charged.

The Sixth Amendment to the Federal Constitution guarantees an accused person the right “to be informed of the nature and cause of the accusation.” U.S. Const. Amend. VI.<sup>5</sup> A similar right is secured by the Washington State Constitution. Wash. Const. Article I, Section 22. All essential elements—both statutory and nonstatutory—must be included in the charging document. *State v. Johnson*, 119 Wash.2d 143, 147, 829 P.2d 1078 (1992). An essential element is “one whose specification is necessary to establish the very illegality of the behavior.” *Id* (citing *United States v. Cina*, 699 F.2d 853, 859 (7th Cir.), *cert. denied*, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983)).

RCW 46.61.522 criminalizes Vehicular Assault. The statute provides (in relevant part) as follows:

(1) A person is guilty of vehicular assault if he or she operates or drives any vehicle: (a) In a reckless manner and causes substantial bodily harm to another; or (b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another; or (c) With disregard for the safety of others and causes substantial bodily harm to another.

RCW 46.61.522.

The Information in this case charged all three alternative means of committing the crime; however, it did not track the language of the statute.

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<sup>5</sup> This right is guaranteed to people accused in state court, through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948).

Instead, the prosecution saved a few lines of text by omitting the phrase “cause[d] substantial bodily harm to another” from each alternative except the last. The Information alleged that Ms. Whitlock

did (1) operate or drive a vehicle in a reckless manner and/or (2) operate or drive a vehicle (a) and have, within two hours after driving, an alcohol concentration of 0.08 or higher, and/or (b) while under the influence or affected by intoxicating liquor or any drug; and/or while under the combined influence of or affected by intoxicating liquor and any drug and/or (3) operate or drive a vehicle with disregard for the safety of others, and thereby did cause substantial bodily harm to another...

CP 1.

As can be seen, the first two alternatives do not allege that she caused substantial bodily harm to another person; only the third alternative alleged this. CP 1. Accordingly, the Information was deficient as to the first two alternative means. *McCarty*, at 425. Because the Information was deficient, Ms. Whitlock’s Vehicular Assault conviction by recklessness or intoxication must be vacated, and the case remanded for entry of conviction of Vehicular Assault by disregard for the safety for others. *Id.*

C. The general rule that an Information need only allege one alternative means should not apply where different penalties attach to each alternative means.

Ordinarily, “if a charging document charges under more than one statutory alternative, it is constitutionally sufficient if it includes all the

essential elements of the crime under one of the alternatives... [and] [t]he conviction will stand if substantial evidence supports a conviction under that given alternative.” *State v. Shabel* 95 Wash.App. 469, 474, 976 P.2d 153 (1999). In this case, however, application of the rule set forth in *Shabel* would violate *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

A criminal Information must include any sentencing enhancements that elevate the penalty for the charged crime. *See, e.g., State v. Recuenco*, 163 Wash.2d 428, 434-435, 180 P.3d 1276 (2008). Failure to properly charge a sentencing enhancement deprives the accused person of notice, in violation of the Sixth and Fourteenth Amendments and Wash. Const. Article I, Section 22. *Id.*

Although there are three alternative means of committing Vehicular Homicide, two of the alternatives provide for enhanced penalties. A conviction under either RCW 46.61.522(1)(a) (reckless driving) or (b) (intoxication) is a Level IV offense; a conviction under section (c) is a Level III offense. RCW 9.94A.515. Furthermore, a conviction under the first two alternative means is a “most serious offense” or strike; a conviction under section (c) is not. *See* RCW 9.94A.030(32).

Because of the difference in penalties, the rule set forth in *Shaler* is not adequate to protect an accused person's constitutional right to notice. The rule should not apply in cases where the charge is Vehicular Homicide, and the defendant is charged with committing the offense by all three alternative means.

Ms. Whitlock was not provided adequate notice of the three alternatives alleged. Her conviction and sentence for the two more serious alternatives cannot stand.

### **CONCLUSION**

For the foregoing reasons, the conviction must be reversed and the case either remanded for a new trial or dismissed with prejudice. In the alternative, the conviction under the "reckless" and "intoxication" alternative means must be vacated, and the case remanded for entry of conviction under the "disregard for the safety of others" alternative.

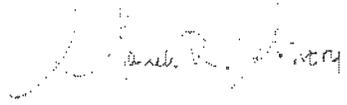
Respectfully submitted on October 10, 2011.

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CERTIFICATE OF SERVICE

I certify that on DATE:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 10, 2011.



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**October 10, 2011 - 11:03 AM**

## Transmittal Letter

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