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No. 38034-0-II

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,
Respondent,

v.

MICHAEL L. SUBLETT,
Appellant.

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STATE OF WASHINGTON
BY DEPUTY
COURT OF APPEALS
DIVISION II

REPLY BRIEF

Jeffrey E. Ellis, #17139
Law Offices of Ellis,
Holmes & Witchley, PLLC
Seattle, WA 98104
(206) 262-0300
(206) 262-0335

Attorney for Mr. Sublett

pm 11-13-09

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I. INTRODUCTION

A jury question, the discussion about what response, if any, should be given, and the court's response to the question, if any, are all part of trial. Thus, the right to an open and public trial applies, unless the court conducts a *Bone Club* hearing and determines closure is warranted. A hearing held in a judge's chambers is a closed hearing. Because the error is "structural" and there is no *de minimis* exception, reversal is mandated.

Where a jury question clearly indicates two possible constructions of an instruction, one of which would permit jurors to convict the defendant on far less proof than is statutorily or constitutionally permitted, the court has an obligation to direct the jury to consider only the correct interpretation of the law. Because the trial court did not do so, Sublett's jury was permitted to unconstitutionally convict him.

A conviction can be obtained only if the state proves the elements of a crime and negates any claimed defense. An out-of-state conviction can only be counted as a comparable "most serious offense" if, based only on facts admitted or found beyond a

reasonable doubt at the time of the conviction, it appears that those facts would support a conviction in Washington. Where, as here, defenses are available in Washington, but not in the foreign state, a court deciding comparability cannot conclude that the facts support a conviction. Here, the State does not dispute the differences in the defenses available in California versus Washington, only the legal significance of those differences. However, because those differences preclude a legal comparability determination, reversal of Sublett's persistent offender finding is required.

II. ARGUMENT

1. The Trial Court Violated Mr. Sublett's Right to Open and Public Trial Proceedings When it Held a Hearing in Response to a Jury Question in Chambers.
2. The Accomplice Liability Instruction was Susceptible of Two Constructions. One of Those Constructions Misstated the Law and Significantly Lowered the State's Burden of Proof.

Introduction

As noted previously, because these claims of error all arise from one factual predicate, Mr. Sublett groups them together.

Violation of the Open and Public Trial Guarantees

This Court reviews *de novo* whether a trial court procedure violates the right to a public trial. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

The State raises several issues in response.

First, the State argues that the consideration of a jury question and the Court's answer is not part of trial—or at least is not a part of trial to which the rights of an open and public trial apply.

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a ... public trial.” Article I, section 22 of the Washington Constitution similarly guarantees that “[i]n criminal prosecutions the accused shall have the right ... to have a ... public trial.” The Washington Constitution also provides in article I, section 10 that “[j]ustice in all cases shall be administered openly.” The Washington Supreme Court has concluded that this latter provision in our state constitution affords “the public and the press the right to open and accessible court proceedings.” *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006) (citing *Seattle Times Co. v.*

Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982)).

The State argues that *State v. Rivera*, 108 Wn. App. 645, 652, 32 P.3d 292 (2001), supports the conclusion that a Court's answer to a jury question is not a part of the trial to which the rights to an open and public trial apply. To the contrary, *Rivera* and the cases upon which it relies, support Sublett's position.

The central aim of the public trial guarantee is to ensure that a defendant is treated fairly by allowing the public to observe the defendant's treatment first-hand. *Rivera*, 108 Wn. App. at 652. The public trial right applies to the evidentiary phases of the trial, and to other "adversary proceedings." *Ayala v. Speckard*, 131 F.3d 62, 69 (2d Cir.1997). In *Rivera*, the Court of Appeals concluded that a question regarding the order in which jurors were seated (due to a hygiene issue) "was a ministerial matter, not an adversarial proceeding. It did not involve any consideration of evidence, or any issue related to the trial." *Id.* at 653. Sublett agrees with the "ministerial vs. adversarial" distinction. However, answering a jury question can hardly be characterized as a "ministerial matter." To the contrary, it is certainly an adversarial proceeding (both in theory

and often in practice).

“The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions” *In re Oliver*, 333 U.S. 257, 270, n. 25, 68 S.Ct. 499, 506, n. 25, 92 L.Ed. 682 (1948), quoting T. Cooley, *Constitutional Limitations* 647 (8th ed. 1927)). Accord, *Estes v. Texas*, 381 U.S. 532, 588, 85 S.Ct. 1628, 1662, 14 L.Ed.2d 543 (1965) (Harlan, J., concurring) (“Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings”).

At least six societal interests are advanced by open court proceedings, namely: promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system; promotion of the public perception of fairness which can be achieved only by permitting full

public view of the proceedings; providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; serving as a check on corrupt practices by exposing the judicial process to public scrutiny; enhancement of the performance of all involved; and discouragement of perjury. Only the last of these six interests is not at issue in this case. The Supreme Court has taken care to point out that "the First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, 'trial' or otherwise." *Press-Enterprise II v. Superior Court of Cal.*, 478 U.S. 1, 7, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986). *See also Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (Stevens, J., concurring) ("the distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues."). Thus, simply calling this hearing a "chambers conference" does not isolate it from the reach of the constitutional rights to open and public trials.

A judge's answer to a jury question, as well as the positions taken by the respective parties, obviously implicates issues of trial

fairness. While some questions may be routine, others may implicate significant fairness issues, either by the court or by the jury. Thus, this part of trial cannot be excluded from other portions of trial as far as the right to an open and public trial is concerned.

The State next argues that a hearing in the judge's chambers is not a closed hearing, citing the Court of Appeals' decision in *Momah*. While the Supreme Court's opinion affirmed the courtroom closure in *Momah*, it concluded that the proceedings in chambers were closed. *State v. Momah*, __ Wn.2d __, 217 P.3d 321 (2009) ("We hold the closure in this case was not a structural error. The closure occurred to protect Momah's rights and did not actually prejudice him."). Thus, it now follows as a matter of both logic and law that a hearing held in a judge's private chambers is closed to the public, unless there is an express invitation otherwise.

Finally, the State argues that the closure was a partial and temporary closure only and therefore, not harmful. It was not. A partial closure is one where only certain members of the public are excluded. Here, all members of the public (including Mr. Sublett, himself) were excluded. Thus, the closure was "full."

The length of the closure makes no difference either. The Supreme Court recently reiterated in *State v. Strode*, __ Wn.2d ___, 217 P.3d 310, 316 (2009):

Some courts in other jurisdictions have held that there may be circumstances where the closure of a trial is too trivial to implicate one's constitutional right. *United States v. Ivester*, 316 F.3d 955 (9th Cir.2003). Trivial closures have been defined to be those that are brief and inadvertent. *United States v. Al-Smadi*, 15 F.3d 153, 154-55 (10th Cir.1994); *Snyder v. Coiner*, 510 F.2d 224, 230 (4th Cir.1975). This court, however, "has never found a public trial right violation to be [trivial or] de minimis." *Easterling*, 157 Wash.2d at 180, 137 P.3d 825.

Strode did not change that result.

Instead, *Strode* reaffirmed that this error was structural—mandating reversal without a particularized showing of prejudice. *Strode, supra*. ("By conducting a portion of the trial (jury voir dire) in chambers without first weighing the factors that must be considered prior to closure, prejudice to Strode is presumed. This error cannot be considered harmless and, therefore, Strode's convictions are reversed, and the case is remanded for a new trial.").

Thus, Sublett is entitled to a new trial.

The Trial Court's Failure to Instruct on the Law

Constitutionally sufficient jury instructions must be readily

understood and not misleading to the ordinary mind. *State v. Dana*, 73 Wn.2d 533, 537, 439 P.2d 409 (1968); *State v. Alexander*, 7 Wn. App. 329, 336, 499 P.2d 263 (1972). A trial court must fully and accurately instruct a jury on the law of accomplice liability. *State v. Roberts*, 142 Wn.2d 471, 513, 14 P.3d 713 (2000); *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). Where a defective jury instruction lowers the State's burden of proof, it constitutes a structural error and reversal is required. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

In this case, the jury obviously and reasonably concluded that the instruction defining accomplice liability was ambiguous. Seizing on the lack of specificity in Instruction 21's use of the pronoun "he," Mr. Sublett's jury asked whether Sublett was legally accountable for the conduct of Olsen, if Olsen knew he was promoting a murder and aided another (not necessarily Sublett), in planning or committing the crime. Under this interpretation, Sublett could be found guilty even if he acted without the intent or knowledge that he was aiding a murder or even a crime. In short, Instruction 21 could reasonably be interpreted to permit Sublett's jury to convict him on much less

proof than is required under the statute. In response, the Court refused to clarify the ambiguity, but instead told jurors to re-read their instructions—which could not have resolved the ambiguity.

The State argues that the trial court did not abuse of discretion by instructing jurors to consider only the construction that constituted an accurate statement of the law.

The State relies on two cases: *State v. Ng*, 110 Wn.2d 32, 42, 750 P.2d 632 (1988); and *State v. Becklin*, 163 Wn.2d 519, 182 P.3d 944 (2008). Both cases are easily distinguished.

In *Ng*, the instructions were not ambiguous, but instead provided a clear answer to the question asked to the jury. Thus, telling jurors to reread the instructions where they would find the answer was not an error. *Ng*, 110 Wn.2d at 43. In *Becklin*, the Court gave an instruction to the jury in response to a question, thereby clarifying the law. The Supreme Court affirmed because the supplemental instruction “accurately reflected the law,” and the trial court's answer to the jury question adequately apprised the jury as to the definition of the crime.” 163 Wn.2d at 530. This is precisely what Sublett argues should have happened.

However, the issue of whether the trial court should have responded is secondary to the basic question posed by Sublett's assignment of error: was the instruction ambiguous and reasonably susceptible to a construction contrary to the law which permitted jurors to convict on legally insufficient proof. The State does not respond to that argument, likely because the answer clearly is "yes."

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), requires that a conviction must depend on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991), requires a reviewing court to first ask whether the jury instructions were ambiguous. The jury question here establishes that there is a "reasonable likelihood" that the jury misapplied the ambiguous jury instructions, thereby relieving the State of its burden of proof of an element of the crime.

The jury question was not the result of a misreading of the instructions. It was, instead, the result of an ambiguous instruction resulting in two reasonable constructions. One of those constructions was consistent with the law. The other construction

was entirely inconsistent with the requirements of accomplice liability.

Sublett's jurors reasonably concluded that the "he" referred to in the second sentence of Instruction 21 could either be the defendant whose culpability was under consideration or his putative accomplice. Both constructions were reasonable based on the wording of the instruction. Only the former construction accurately stated the law.

According to one reasonable construction of Instruction 21, Sublett was legally accountable for the actions of Olsen (and Frazier) if Olsen acted with knowledge that he was promoting or facilitating a crime. Indeed, Sublett was guilty as long as Olsen had the requisite belief that Sublett was assisting. Read in that manner, the instruction did not require a particular *mens rea* or act by Sublett.

This error would be harmless only if the State had submitted an interrogatory inquiring whether jurors found Sublett guilty as a principal and the jury had answered "yes." Alternatively, it could have been easily cured with a simple answer to the jury question. Because neither of the above actions was taken, reversal is required.

3. Mr. Sublett's California Robbery Convictions Are Not Comparable to a Most Serious Offense. Thus, Sublett is not a Persistent Offender.

Mr. Sublett was convicted on two separate occasions of robbery in California. The trial court erred when it found these convictions "comparable" to a strike because the elements of the crimes differ. In his opening brief, Sublett pointed to significant differences in both the elements of the crimes of comparison, as well as the available defenses.

In response, the State admits that the range of available defenses in the foreign state is narrower than in Washington, but argues that it makes no difference. The State argues that only the elements of a crime matter to a comparability determination, not the defenses available. *Response*, p. 34. Thus, Sublett limits his reply to that argument.

The Washington Supreme Court has explained:

To determine if a foreign crime is comparable to a Washington offense, the sentencing court must first look to the elements of the crime. More specifically, the elements of the out of state crime must be compared to the elements of a Washington criminal statute in effect when the foreign crime was committed. If the elements of the foreign conviction are comparable to the elements of a Washington strike offense on

their face, the foreign crime counts toward the offender score as if it were the comparable Washington offense.

In re Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005) (internal citations removed).

The comparison of elements includes a careful examination of each required mental state, *including* the available defenses permitted by the requisite *mens rea*. *Lavery, supra*; *State v. Thieffault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007) (Crimes not comparable where Montana attempted robbery statute is broader than its Washington counterpart because Montana law permits a conviction for assault with a lesser *mens rea* than required under Washington law). *Lavery* specifically details the defenses available under state law, not applicable in a federal prosecution:

Thus, a person could be convicted of federal bank robbery without having been guilty of second degree robbery in Washington. Among the defenses that have been recognized by Washington courts in robbery cases which may not be available to a general intent crime are (1) intoxication, (2) diminished capacity; (3) duress; (4) insanity; and (5) claim of right.

Id. at 255 (internal citations removed).

The comparability question is relatively simple (although it has been admittedly elusive to define in legal terms): are the facts

admitted or proven in the foreign jurisdiction sufficient to establish a conviction in Washington. While the elements are the cornerstone of that inquiry, the range of defenses applies, as *Lavery* obviously holds. Further any effort to divide the world of defenses into those which negate the requisite *mens rea* and those that don't is both elusive and ignores part of the comparability inquiry. In any event, Sublett has cited to defenses available in Washington, but unavailable in California which negate the requisite *mens rea*.

As the Washington Supreme Court stated in *State v. Stockwell*, 159 Wn.2d 394, 397, 150 P.3d 82 (2007): Legal comparability analysis is not an exact science, but when, for example, an out-of-state statute criminalizes more conduct than the Washington strike offense, *or when there would be a defense to the Washington strike offense that was not meaningfully available to the defendant in the other jurisdiction or at the time*, the elements may not be legally comparable.”

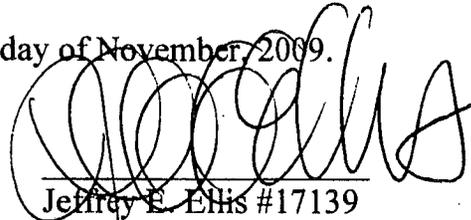
Thus, it is clear that the range of available defenses is an indispensable part of comparability analysis.

Thus, the trial court erred when it concluded that the crimes were comparable and that Mr. Sublett was a persistent offender. This Court should reverse Sublett's sentence and remand for resentencing within the standard range.

III. CONCLUSION

Based on the above, this Court should reverse Sublett's conviction and remand for a new trial. In the alternative, this Court should vacate Sublett's life sentence and remand for resentencing.

DATED this 13th day of November, 2009.



Jeffrey E. Ellis #17139

Attorney for Mr. Sublett

Law Offices of Ellis,
Holmes & Witchley, PLLC
705 Second Ave., Ste 401
Seattle, WA 98104
(206) 262-0300 (o)
(206) 262-0335 (f)

CERTIFICATE OF SERVICE

I, Vance G. Bartley, Paralegal for the Law Offices of Ellis, Holmes & Witchley, PLLC, certify that on November 13, 2009 I served the parties listed below with a copy of *Petitioner's Reply Brief* as follows:

Carol L. LaVerne
Thurston County Prosecuting Attorney
2000 Lakeridge Drive, SW Bldg 2
Olympia, WA 98502

Jodi Backlund
Manek Mistry
Backlund & Mistry
203 4th Ave E. Ste 404
Olympia, WA 98501

Michael Sublett
DOC #884297
WSP
1313 N. 13th Ave
Walla Walla, WA 99362

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