NO. 43871-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SHANE AUSTIN STACY,

Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

State Cases

Constitutional Provisions

Statutes and Court Rules

Other Authorities

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court's use of Instruction No. 18 and the trial court's refusal to give the defendant's proposed instruction defining involuntary intoxication denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

2. The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it invited the jury to base its decision upon a question of fact on which the court had precluded the defense from presenting evidence.

3. The trial court violated the constitutional mandate for public trials under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when it considered and responded to a factual question by the jury off the record and outside the presence of either the defendant or the public without entering findings of fact to support this action.

4. The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it precluded him from presenting specific instances of peacefulness under ER 405(b) to support his claim of a trait of peacefulness.

Issues Pertaining to Assignment of Error

1. Does a trial court's use of an instruction that fails to accurately define involuntary intoxication and the trial court's refusal to give a defendant's proposed instruction correctly defining involuntary intoxication deny that defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment?

2. Does a trial court deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it invites the jury to base its decision upon a question of fact on which the court had precluded the defense from presenting evidence?

3. Does a trial court violate the constitutional mandate for public trials under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, if it considers and responds to a factual question by the jury off the record and outside the presence of either the defendant or the public without entering findings to support that action?

4. Does a trial court deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it precludes that defendant from presenting specific instances of peacefulness under ER 405(b) when the existence of that trait is an essential element of the defense?

STATEMENT OF THE CASE

Factual History

At around 7:00 pm on February 24, 2012, the defendant Shane Austin Stacy went with his wife Mary Beth to a dinner and party at the Monticello Hotel in Longview hosted by the local chapter of the International Longshore and Warehouse Union (ILWU). RP 794.[1] Although the defendant is not an ILWU member, his wife Mary Beth is. RP 792-793. Well over 200 union members, family and friends attended. RP 246-247. The Hotel had set up a bar in the ballroom for the guests at the party and allowed them to run bar tabs. *Id.* The defendant's bar tab showed that during the evening he purchased five beers and a number of mixed drinks. RP 795-796. According to the defendant and a number of party guests, the defendant drank the five beers over the evening and provided the mixed drinks for his wife and friends. RP 212-218, 589-593, 599-603, 607-611, 795-796. A toxicologist later opined that given the defendant's weight, these beers would have put the defendant's blood-alcohol level at somewhere between .03% to .05% by around 11:00 pm, well below the legal limit for driving. RP 682-685.

At about 11:00 pm that evening, a member of the Longshore Women's Auxiliary by the name of Andrea Holde arrived at the hotel to help

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[1]The record on appeal includes seven volumes of continuously numbered verbatim reports referred to herein as "RP [page #]."

clean up after the party, which was then beginning to break up. RP 157-161. When she arrived, she spoke with a friend by the name of Karen Mitchell, who told her that during the evening some people had seen a Union member by the name of Mike Robinson kissing the defendant's wife Mary Beth. *Id.* Mr. Robinson's wife Heather is a friend of Ms Holde. RP 160. This information upset Ms Holde to the point that she decided to find the defendant's wife Mary Beth and speak to her about the situation. RP 160-161. Ms Holde walked into the ballroom, found the defendant's wife Mary Beth, confronted her with what she had heard, and then asked Mary Beth if she "liked being a home wrecking whore." *Id.* Ms Holde's friend Karen Mitchell was present during this confrontation. RP 212-218. The defendant's wife denied the allegations. RP 162-163, 214-216.

At this point, Andrea Holde walked out of the ballroom into an area in front of the bathrooms leading to the front lobby, where she found the defendant. RP 162-163, 216-218. She then told him what she had heard about Mike Robinson and his wife kissing and asked the defendant if he and his wife Mary Beth "were swingers." *Id.* According to Andrea Holde, the defendant looked dumbfounded and said "what," to which Ms Holde responded "Is it OK for your wife to be making out with Mike Robinson?" *Id.* In response, the defendant walked over to his wife and spoke with her for about 30 seconds. *Id.* At this point the defendant turned, ran back over to Ms

Holde, grabbed her with one hand by the throat, and started strangling her while yelling "Why are you lying, why are you lying?" RP 164-170, 218-223. Ms Holde first thought he was joking as did others in the immediate vicinity. RP 167-170. However, when she felt the defendant squeezing she realized that he was not joking. *Id.*

At this point, two union members by the names of Jimmy Meadows and Scott Mitchell grabbed the defendant and Ms Holde and tried to pull them apart with Mr. Meadows pulling the defendant from behind and Mr. Mitchell grabbing the defendant's hands. RP 192, 200-203, 232, 234-239. When Mr. Meadows was unable to pull the defendant away from Ms Holde, he put the defendant in a "sleeper" hold by putting his arm around the defendant's neck from behind and squeezing, thereby rendering the defendant unconscious. RP 204, 207, 210-211, 238-239. Mr. Mitchell was initially unable to get the defendant's hands off Ms Holde's throat, but was successful after striking the defendant in the side a couple of times. RP 202-207. Others also grabbed at the defendant and Ms Holde, and the lot of them tumbled down into a heap on the floor with Ms Holde on the bottom. RP 169-170, 201-221. Mr. Mitchell then pulled Ms Holde out from the bottom of the pile and everyone got up except the defendant, who was unconscious, and two persons who were holding the defendant. RP 203-204, 210-211, 238-239.

After a short span of time the defendant started coming back to consciousness. RP 204-207, 424-427, 546-549. As he did, the first of many police officers arrived and tried to take the defendant into custody with the aide of the two holding him to the ground. RP 271-273. At the time, the defendant was flailing around, yelling obscenities and resisting to the point that the officer decided to grab the defendant by his legs while the other two persons continued to hold him. RP 274-278. When the officer took these actions, the defendant kicked the officer in the head. *Id.* Within a few minutes a second officer arrived and they were able to place the defendant in handcuffs. RP 279-284. The defendant struggled and yelled obscenities while they were doing so. *Id.* Within a short time a number of other officers arrived and assisted taking the defendant to the front porch of the hotel so aide workers could examine him. RP 279-284, 316-319.

A number of the officers at the scene noted that the defendant had the odor of intoxicants about his person, that his eyes were bloodshot and watery, and that his speech was slurred, all signs they believed indicative of alcohol intoxication. RP 285-287, 315-316, 342-344, 422-425. However, a number of party attendees who had direct contact with the defendant during the evening and right before the event stated that the defendant did not have slurred speech, did not have bloodshot and watery eyes, and did not exhibit any indicators of alcohol intoxication. RP 589-593, 599-603, 607-611, 795-

796 In fact, one such person was Shelly Porter. RP 770-788. She stated that around 10:45 or 11:00 pm she ran into the defendant and his wife Mary Beth and talked with them about the fact that Mike Robinson had kissed Mary Beth earlier in the evening. RP 775-778. She asked them if they were "OK" with what had happened and both said they were. *Id.* According to Ms Porter, the defendant's speech was not slurred, his eyes were not bloodshot and watery, he was not upset and he did not exhibit any indicators of alcohol intoxication. *Id.*

According to Ms Porter, a short while after having this conversation with the defendant and his wife Mary Beth she went out to the front porch with a friend to smoke a cigarette. RP 778-781. While doing so the defendant came out to speak to her. *Id.* Although it had only been 10 or 15 minutes since she had spoken with the defendant and his wife, the defendant's mood was completely changed and he was acting in a very odd manner. *Id.* First, he did not appear to recognize her. *Id.* Second, he called her by the name of "Michelle." *Id.* Third, he started making nonsensical allegations about her "talking" about his wife. *Id.* Fourth, according to Ms Porter, he simply looked "crazy." *Id.* The incident with Ms Holde occurred just before the defendant returned inside the hotel and spoke with Ms Holde. *Id.*

Once the police got the defendant outside, the ambulance personnel

examined him and recommended that the officers take the defendant to the Emergency Room to get him medically cleared before taking him to jail given the fact that he had been unconscious. RP 316-319. One of the officers then put the defendant into a patrol vehicle and took him to the local hospital. RP 405-408. Once at the hospital, a security guard came out to help the officer place the defendant into a wheelchair, which was standard procedure with arrestees who are at the hospital to be medically cleared for booking into jail. RP 411-414, 449-451. When the defendant did not respond to the officer's order to get out of the vehicle, both the police officer and the security guard reached in and pulled the defendant out. *Id.* While pushing the defendant into the building, he purposely put his feet on the ground to try to stop the wheelchair. *Id.*

Once inside the hospital, the officer and security guard lifted the defendant up onto an examining table in a "secure" ER room. RP 451-453. When a nurse came in to try to take his vital signs the defendant became very agitated and started yelling "Are you Christians" and "You are going to go to hell," along with other odd religious references. RP 413-415, 454-458. At one point the hospital security guard tried to help restrain the defendant as a nurse tried to take his blood pressure. *Id.* The defendant responded by kicking the security guard in the face and trying to kick at the officer and others in the room. RP 454-458. The officer and security guards along with

a second officer who had arrived then put the defendant in four point restraints. RP 343, 456, 473. Eventually a doctor came in, examined the defendant for a couple of minutes, and released him for booking into jail. RP 457, 464. At no point did either a police officer or hospital worker ask the defendant for a breath or fluid sample in order to test for either his alcohol level or the presence of any drugs. RP 285, 463-464, 483-487.

Once the defendant was medically cleared the officer and security guards placed him back in a wheelchair and put him back into a patrol vehicle. RP 347-348. By this time the defendant appeared cooperative. RP 320-322. According to the officers at the hospital and one of the security guards the defendant's speech was slurred, his eyes were watery and bloodshot, his movement was slow, and he appeared intoxicated. RP 320-322, 420-421, 454-458, 474-475. Once at the jail, the defendant again became combative and confrontational to the point that he threatened one of the jail officers. RP 330-333, 424-426. After booking they put him in a restraint chair and placed him in a holding cell. RP 797-798. The jail officers later let him out of the restraint chair. *Id.* At some point after being let out of the restraint chair one of the police officers who had earlier been at the hotel returned to the jail on an unrelated matter. RP 400-402. As he walked by the defendant's holding cell, the defendant walked up to the door and asked the officer what had happened and why he was in the jail. *Id.* He also stated that

he had no memory of what had happened to put him in the jail. *Id.* At the trial that later occurred in this case, the court refused to allow the defense to elicit the defendant's statement to the officer that he had no memory of what had happened. *Id.*

Procedural History

By information filed February 28, 2012, the Cowlitz County Prosecutor charged the defendant Shane Austin Stacy with one count of second degree assault against Andrea Holde, one count of third degree assault against Office Tim Deisher, and one count of fourth degree assault against hospital security officer Kyle Rousch. CP 1-2. Following arraignment the defendant endorsed defenses of both voluntary intoxication as well as involuntary intoxication. RP 1, 13[2]. At trial, the state called 17 witnesses, including Andrea Holde, Scott Mitchell, Karen Mitchell, Jimmy Meadows, the officer the defendant kicked while at the hotel and the security officer the defendant kicked at the hospital. RP 157-575. The defense then called 12 witnesses, including Shelly Porter, a forensics scientist, a pharmacist, the defendant, and a number of witnesses to testify concerning the defendant's reputation for peacefulness in the community and his physical state at the

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[2]The record on appeal includes seven volumes of continuously numbered verbatim reports of a number of pretrial hearing, the jury trial and sentencing. They are referred to herein as "RP [page #]."

hotel. RP 589-828.

At the beginning of trial the state moved to exclude all of the defendant's witnesses whom the defense intended to call to give evidence of the defendant's reputation for peacefulness in the community as well as evidence of specific instances of that character trait. RP 115-122, 134-135. The defense responded by arguing that this evidence was relevant and admissible under ER 405(b) given the defendant's endorsed defense of involuntary intoxication. *Id.* The court granted the state's motion in part, ruling that while the defendant could bring in reputation evidence of the defendant's reputation in the community for peacefulness, the defense was precluded from introducing any specific instances of conduct tending to support that character trait. *Id.*

Both the state and the defendant's witnesses testified to the facts set out in the preceding factual history. *See* Factual History. In addition, the defendant testified that (1) he was not intoxicated that evening, having drank five beers over a four hour period, (2) that he did not use any non-prescribed drugs at all let alone that evening, (3) that he had no memory of what happened for the period of time from just before his assault on Andrea Holde to when he woke up in the jail strapped to a restraint chair, and (4) that he believes someone slipped him some type of drug that caused him to assault Ms Holde, the police officer and the hospital security guard. RP 795-814.

His belief that someone had surreptitiously given him some type of drug was supported by both the forensic scientist and the pharmacist he called as witnesses. RP 656-719, 720-769. Both opined that under all of the facts of the case, including the descriptions of all of the state and defendant's witnesses, along with the statements of the defendant, his assaultive conduct, his high blood pressure at the hospital, were best explained as having been caused by the defendant's ingestion of some type of central nervous system stimulant such as methamphetamine, amphetamine, MDMA, cocaine or PCP. RP 665-669, 671-681, 723-727.

Following the close of the defendant's case, the court instructed the jury with the defense objecting to the trial court's decision to give Instruction No. 18 setting out the defense of involuntary intoxication and the failure to give the defendant's proposed definition of this term. RP 835-836. Instruction No. 18 stated as follows:

Instruction No. 18

> Involuntary Intoxication is a defense to a charge of Assault if:
>
> (a) The defendant was given alcohol or drugs by force or fraud; and
>
> (b) The alcohol or drugs prevented the defendant from forming the intent to assault.
>
> The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the

> defendant has established this defense, it will be your duty to return a verdict of not guilty as to a specific charge. Because a separate crime is charged in each count, you must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 117.

The defendant's proposed instruction defining involuntary intoxication stated as follows:

Instruction No. _____

> Involuntary intoxication is a defense to the crime charged. "Involuntary intoxication" means intoxication brought about by force, or fraud, or some other means not within the control of the defendant. Involuntary intoxication absolves the defendant of any criminal responsibility.

CP 72.

Specifically, the defense argued that the term "fraud" as used the in the court's instruction was a term of art and not a word generally understood in the public and that the court should instruct the jury that it included any administration of a drug to the defendant without his knowledge. RP 835-836.

Following instruction and closing arguments, the jury retired for deliberation. RP 842-856, 856-918, Specifically, the jury retired for deliberation at 11:39 am on July 13th, the fourth day of trial. RP 920. At 1:10 pm that same day the jury sent out a question on a form provided by the court. CP 180. Five minutes later at 1:15 pm the court sent back a reply. *Id.*

The following sets out the substance of that question and answer as is reflected from the original which is included in Clerk's Papers at page 180.

> **JURY QUESTION:** *What date was the defense hired for the defendant?*
>
> *Dwayne Waterman 7-13-2012*
> Presiding Juror / Date
>
> Date and time received by the Bailiff: *7/13/12 1:10*
>
> ---
>
> **COURT'S RESPONSE:** (After affording all counsel/parties opportunity to be heard.)
>
> *You must rely on the evidence presented to you in the course of the trial.*
>
> *S.Warning*
> Judge
>
> Date and time returned to the jury: *7/13/12 1:15*

CP 180. (Italics added; bold in original)

A copy of that jury question is also attached to the appendix of this brief. *See* Appendix. That portion of the document shown above in italics was handwritten on the form by either the presiding juror (question, signature and date on signature line) or the judge (date and time received, answer, signature of judge, and date and time returned to the jury). CP 180.

The reception of this question, any discussion that might have occurred about it, and the decision of the court to answer the way it did is not part of the trial record and therefore is not part of the record on appeal. *See*

RP 920-922. The verbatim report of proceedings simply notes the time the jury retired and the time the jury returned with nothing happening between these two times except the court's instructions to the alternates. *Id.* The Trial Minute Sheets also fail to mention any question by the jury, any discussion about that question if any happened, and how the answer was formulated. CP 205-220.

Although the record is silent on how the court's reply to the jury was formulated, the document itself does state that the bailiff gave the jury the answer for its consideration at 1:15 pm. CP 180. After receiving this answer by the court the jury deliberated for over two additional hours before returning verdicts of "guilty to each count. RP 920-922; CP 181-183. The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 185-197, 202; RP 928-937.

ARGUMENT

I. THE TRIAL COURT'S USE OF INSTRUCTION NO. 18 AND REFUSAL TO GIVE THE DEFENDANT'S PROPOSED INSTRUCTION ON INVOLUNTARY INTOXICATION DENIED THE DEFENDANT A FAIR TRIAL.

While due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, does not guarantee every person a perfect trial, both our state and federal constitutions do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). This guarantee to a fair trial includes the right to raise any defense supported by the law and facts. *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984). It also includes the right to have the court correctly define the law and correctly instruct the jury on that defense. *State v. Cantabrana*, 83 Wn.App. 204, 921 P.2d 572 (1996).

In the case at bar the defendant objected to the trial court's use of Instruction No. 18 and took exception to the trial court's refusal to give its proposed instruction defining involuntary intoxication. Instruction No. 18 stated as follows:

Instruction No. 18

Involuntary Intoxication is a defense to a charge of Assault if:

(a) The defendant was given alcohol or drugs by force or fraud; and

(b) The alcohol or drugs prevented the defendant from forming the intent to assault.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to a specific charge. Because a separate crime is charged in each count, you must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 177.

The state proposed this instruction and composed it in reliance upon *State v. Hutsell*, 120 Wn.2d 913, 845 P.2d 1325 (1993), *State v. Carter*, 31 Wn.App. 572, 643 P.2d 916 (1982) and *State v. Corwin*, 32 Wn.App. 493, 649 P.2d 119 (1982). *See* CP 97. In these cases the court sought to present a definition for the term "involuntary intoxication" and explain how it constituted a defense. In *Hutsell*, *surpa*, the court examined the law on voluntary and involuntary intoxication by first reviewing RCW 9A.16.090. This statute states:

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his or her intoxication may be taken into consideration in determining such mental state.

RCW 9A.16.090.

In *Hutsell* the court noted that since the legislature limited the application of this statute to voluntary intoxication, it did not apply to cases in which the defense was claiming involuntary intoxication. *See Hutsell*, 120 Wn.2d at 920 (Involuntary intoxication may absolve the defendant of any criminal responsibility).

The defendant's proposed instruction defining involuntary intoxication stated as follows:

> Involuntary intoxication is a defense to the crime charged. "Involuntary intoxication" means intoxication brought about by force, or fraud, or some other means not within the control of the defendant. Involuntary intoxication absolves the defendant of any criminal responsibility.

CP 72.

The defendant's objections to the court's use of Instruction No. 18 and the refusal to give its proposed instruction defining involuntary intoxication was twofold. First, the defense argued that the court's use of the term "fraud" was erroneous because it was a term of legal art not understood by the jury and it was too limiting on how the drug could be administered. Second, the defense argued that the instruction failed to explain that involuntary intoxication, if proven by a preponderance, would constitute a complete defense to the crimes charged.

Perhaps one of the best explanations setting out the defense of

involuntary intoxication in relation to voluntary intoxication is found in Washington Practice, which states as follows on these related issues:

> Involuntary intoxication, like voluntary intoxication, may negate the mental state necessary to constitute a specific crime. When the defense is used for this purpose, there is no practical difference between voluntary and involuntary intoxication. Unlike voluntary intoxication, however, involuntary intoxication can be used as a defense to crimes that do not require any mental state. A complete substantive defense will exist if the involuntary intoxication rises to the level of temporary insanity. In other words, it must be established that involuntary intoxication prevented the defendant from perceiving the nature and quality of the act, or from distinguishing right and wrong with reference to the act. The defendant bears the burden of proving this by a preponderance of the evidence.

13b Washington Practice, § 3204, ¶ 1, *Involuntary Intoxication* (footnotes omitted).

This explanation for involuntary intoxication is supported by the Washington Supreme Court's decision in *State v. Mriglot*, 88 Wn.2d 573, 564 P.2d 784 (1977). The court states as follows in that case:

> The Court of Appeals also correctly states that involuntary intoxication is a complete defense, albeit a disfavored one for reason of its potential for abuse. Since involuntary intoxication acts to excuse the criminality of an act, it must rise to the level of insanity, which in this jurisdiction is determined by the M'Naghten test. See RCW 9A.12.010. As stated by W. LaFave & A. Scott, Handbook on Criminal Law s 45, 347-348 (1972):
>
> > Involuntary intoxication, on the other hand, does constitute a defense if it puts the defendant in such a state of mind . . . that he does not know the nature and quality of his act or know that his act is wrong, in a jurisdiction which has adopted the M'Naghten test for insanity.

See generally, R. Perkins, Criminal Law 894 Et seq. (2d ed. 1969).

State v. Mriglot, 88 Wn.2d at 575.

A review of these authorities demonstrates the deficiency found in Instruction No. 18. What that instruction did was use the term "involuntary intoxication" but actually limited the defendant to a defense of voluntary intoxication. By doing so it denied the defendant the opportunity to effectively argue his defense of involuntary intoxication and have the jury effectively consider it. This failure to correctly instruct the jury was particularly egregious in this case because the crux of the defense presented was that the involuntary intoxication rendered the defendant incapable of committing the crime at all because it prevented him from understanding the nature and quality of his actions and rendered him incapable of conforming his conduct to the dictates of society (*i.e.* akin to insanity). Thus, by instructing the jury that the defendant had the burden of proving that "the alcohol or drugs prevented the defendant from forming the intent to assault" the court denied the defendant his right under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, to present his defense and have the jury correctly instructed on it.

The court's instruction was also erroneous in that it improperly limited the definition for the term "involuntary." Instruction No. 18 limits the

term "involuntary" to mean "given for force or fraud." However, as is explained in Washington Practice, the term is not so narrow. The second paragraph of the section on involuntary intoxication states as follows on this issue:

> When a defendant intends to use involuntary intoxication as a general defense, and not merely as an evidentiary challenge to a mental state, it will be necessary for the defendant to prove that the intoxication was in fact involuntary. Intoxication is involuntary if it arises from medical advice, the fault of another person, duress, accident, inadvertence, mistake, or physiological conditions beyond the defendant's control. Thus, involuntary intoxication includes the medicinal use of drugs, including intoxication resulting from a physician's prescription of an intoxicating dose. The intoxication is also involuntary if an overdose results from the defendant's own mistake or that of some other person. Intoxication is also involuntary if the defendant was forced to consume the intoxicant or deceived into taking it without knowing its nature. Intoxication may also be deemed involuntary if it results from a mistake as to the nature or character of the intoxicant or from taking something not known to be capable of producing intoxication.

13B Washington Practice, § 3204, ¶ 2, *Involuntary Intoxication* (footnotes omitted); *see e.g. Seattle v. Hill,* 72 Wn.2d 786, 794, 435 P.2d 692, 698 (1967) (the act of consuming alcohol when given by another claiming it to be a non-intoxicating substance does not constitute the *actus reus* of consuming alcohol); *see also,* LaFave & Scott, Substantive Criminal Law, § 4.10(f) (1986).

A review of these authorities illustrates the error the court made in Instruction No. 18 when it defined "involuntary" as "given . . . by force or

fraud" as opposed to the other methods one might unknowingly ingest a drug. The defense attempted to ameliorate this defect by presenting a definition that expanded the method of ingestion to include "some other means not within the control of the defendant." In rejecting this instruction and by using Instruction No. 18, the court erroneously instructed the jury and prevented the defendant from effectively presenting his defense. As a result, the court violated the defendant's right to present a valid defense and thereby denied him due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

The instructional error in this case was far from harmless by any standard. As was previously stated, the defendant presented a number of lay and professional witnesses who supported his claim that he ingested some drug by mistake or fraud, and that the drug then prevented him from understanding the nature and quality of his actions and prevented him from conforming his conduct to the dictates of society (*i.e.,* rendered him insane). Had the court instructed the jury correctly, it is more likely than not that the jury would have returned verdicts of acquittal. Thus, the trial court's error prejudiced the defendant, who is entitled to a new trial.

II. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL WHEN IT INVITED THE JURY TO BASE ITS DECISION UPON A QUESTION OF FACT ON WHICH THE COURT HAD PRECLUDED THE DEFENSE FROM PRESENTING EVIDENCE.

As was mentioned in Argument I, while due process does not guarantee every person a perfect trial, both our state and federal constitutions do guarantee all defendants a fair trial. *State v. Swenson*, *supra*; *Bruton v. United States*, *supra*. As part of this right to a fair trial, due process also guarantees that a defendant charged with a crime will be allowed to present relevant, exculpatory evidence in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

For example, in *State v. Ellis,* 136 Wn.2d 498, 963 P.2d 843 (1998), a defendant charged with aggravated first degree murder sought and obtained discretionary review of a trial court order granting a state's motion to exclude his three experts on diminished capacity. In granting the motion to exclude, the trial court noted that the defense had failed to meet all of the criteria for the admissibility of diminished capacity evidence set in the Court of Appeals decision in *State v. Edmon*, 28 Wn.App. 98, 621 P.2d 1310 (1981).

On review, the state argued that the trial court had not erred because the defense experts had failed to meet the *Edmon* criteria. In its decision on the issue, the Supreme Court initially agreed with the state's analysis.

However, the court nonetheless reversed the trial court, finding that regardless of the factors set out in *Edmon*, to maintain a diminished capacity defense, a defendant need only produce expert testimony demonstrating that the defendant suffers from a mental disorder, not amounting to insanity, and that the mental disorder impaired the defendant's ability to form the specific intent to commit the crime charged. The court then found that the state had failed to prove that the defendant's experts did not meet this standard. Thus, by granting the state's motion to exclude the defendant's experts on diminished capacity, the trial court had denied the defendant his due process right under Washington Constitution, Article 1, § 3, and United States Constitution, Sixth and Fourteenth Amendments, to present relevant evidence supporting his defense.

In the case at bar, the state charged the defendant with one count each of second degree assault, third degree assault and fourth degree assault. The defendant responded by endorsing a defense of involuntary intoxication. During the presentation of the state's case, the defense attempted to elicit on cross-examination of a police officer that at some point within a few hours of being booked in the county jail after the incident out of which he was charged, he claimed that he had no memory of the preceding few hours. This evidence was relevant because it supported the defendant's claim of involuntary intoxication because it (1) set a time boundary during which the

effects of the involuntary drug he was administered had dissipated to the point that he was again in possession of his mental and physical faculties, and (2) it rebutted the argument by the state that the defendant's claim of involuntary intoxication was fabricated well after the fact as the only potential defense with any possibility of success. However, the court refused to allow the defendant to present this evidence. This occurred during cross-examination of Officer Brian Price and went as follows:

> Q. Did you have contact with the Defendant later that night at the jail?
>
> A. Yes, I did.
>
> Q. And tell me about that contact.
>
> A. Well, we – my trainer – trainer, Officer Blanchard, and I were there for an unrelated case. And, Mr. Stacy was in one of the holding cells, and he had asked us what he was doing there, because he had no idea.
>
> Q. Okay.
>
> MS. HUNTER: Objection, Your Honor, to the last part as hearsay.
>
> JUDGE WARNING: Okay. I'll sustain as to the last comment about him not knowing why.
>
> MR. CRANDALL: Okay. Do –
>
> MS. HUNTER: And Your Honor, we'd ask for an instruction to disregard that.
>
> JUDGE WARNING: The jury should disregard that last part of the answer. Alright. Mr. Crandall, anything further?

RP 399.

In fact, the trial court was in error when it sustained the state's hearsay objection because the introduction of the defendant's statement made in the jail shortly after his arrest was offered in part to rebut the state's implied argument that the defendant's claim of involuntary intoxication was a relatively recent fabrication. Under ER 801(d)(1)(ii), such statements are not hearsay. This rule states:

> (d) Statements Which Are Not Hearsay. A statement is not hearsay if–
>
> > (1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person;

ER 801(d)(1).

In the case at bar the defendant did testify and did claim, consistent with his previously endorsed defense, that (1) someone had slipped him some type of drug that robbed him of his ability to form the intent to commit the offenses charged as well as any memory of the events, as well as robbing of the ability to understand what he was doing and conform his conduct to the dictates of the law, and (2) that within an hour or two after being booked into the jail, he again became aware of where he was, although not what had

happened over the intervening hours. Indeed, this was the substance of the defendant's claim of involuntary intoxication. Thus, his statement to the police officer in the jail that he had no idea why he was in the jail and no memory of what had happened was admissible to rebut the state's claim that the defendant had later made of these claims.

As it turned out, the issue of the timing of the defendant's claim of involuntary intoxication was important enough to the jury that it sent the court a question during deliberation asking when the defendant had first made the claim. This jury question, along with the court's response, stated as follows:

> **JURY QUESTION:** *What date was the defense hired for the defendant?*
>
> *Dwayne Waterman 7-13-2012*
> Presiding Juror / Date
>
> Date and time received by the Bailiff: *7/13/12 1:10*
>
> ---
>
> **COURT'S RESPONSE:** (After affording all counsel/parties opportunity to be heard.)
>
> *You must rely on the evidence presented to you in the course of the trial.*
>
> *S. Warning*
> Judge
>
> Date and time returned to the jury: *7/13/12 1:15*

CP 180. (Italics added; bold in original)

The trial court's response, while a correct statement of the law, illustrates the court's error in preventing the defense from eliciting the only evidence apart from the defendant's own testimony at trial that he was claiming involuntary intoxication from the time he was in jail well in advance of speaking with an attorney or attempting to find a defense that took into account all of the evidence the state had against him. The jury's question and the court's response also illustrates the unfair prejudice that arose when the court invited the jury to "rely upon the evidence presented in the course of the trial" in order to answer its factual question when the court well knew that it had prevented the defense from presenting its best evidence on this question that was obviously so important to the jury.

This error was not harmless by either the standard of review. An unbiased review of all of the evidence presented at trial strongly supports the defendant's claim that someone had surreptitiously given him some type of powerful stimulant drug shortly before he attacked Ms Holde. Not only did a number of witnesses who had contact with the defendant state that he was not intoxicated with alcohol, and that he suffered a dramatic change in personality and action, but the defense also called two expert witnesses who corroborated these claims. Under this evidence, along with the jury's concern with timing, it is more likely than not that but for the court's erroneous exclusion of the evidence of the defendant's immediate claims in the jail that

the jury would have returned verdicts of acquittal. Thus, the trial court violated the defendant's due process right under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, to present relevant, exculpatory evidence. As a result, this court should reverse the defendant's conviction and remand for a new trial.

III. THE TRIAL COURT VIOLATED THE CONSTITUTIONAL MANDATE FOR PUBLIC TRIALS WHEN IT CONSIDERED AND RESPONDED TO A FACTUAL QUESTION BY THE JURY OFF THE RECORD AND OUTSIDE THE PRESENCE OF EITHER THE DEFENDANT OR THE PUBLIC WITHOUT ENTERING FINDINGS OF FACT TO SUPPORT THIS ACTION.

Under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, every person charged with a crime is guaranteed the right to a public trial. *State v. Easterling*, 157 Wn.2d 167, 137 P.3d 825 (2006). In addition, Washington Constitution, Article 1, § 10, also guarantees the public the right to open accessible proceedings. *Id.* This latter constitutional provision states: "Justice in all cases shall be administered openly." *State v. Easterling*, 157 Wn.2d at 174. The right to a public trial under these constitutional provisions ensures the defendant a fair trial, reminds officers of the court of the importance of their functions, encourages witnesses to come forward, and discourages perjury." *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

Although a defendant's right to a public trial is not absolute, the

"protection of this basic constitutional right clearly calls for a trial court to resist a closure motion except under the most unusual circumstances." *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). Thus, under the decision in *Bone-Club*, a court must weigh the following five factors to determine whether it may properly close a portion of a trial:

> 1. The proponent of closure or sealing 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 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.

State v. Bone-Club, 128 Wn.2d at 258-59.

When ordering a hearing closed, the court must also enter specific findings of fact justifying the decision to close the courtroom. *State v. Easterling*, 157 Wn.2d at 175. These rules also apply when the plain language or the effect of the trial court's ruling imposes a closure, and the burden is on the State to overcome the strong presumption that the courtroom was closed. *State v. Brightman*, 155 Wn.2d at 516; *see e.g.*, *State v. Duckett*,

141 Wn.App. 797, 807 n. 2, 173 P.3d 948 (2007) (On appeal, the burden is on the state to show that the closing did not occur where the "trial judge stated he/she intended to interview the selected jurors in a jury room.").

For example, in *State v. Heath*,150 Wn.App.151, 206 P.3d 712 (2009), the state charged the defendant with two counts of unlawful possession of a firearm. When the case came on for trial before a jury, the court held portions of pretrial motions and portions of voir dire in chambers without performing any analysis under *Bone-Club*. The judge, the prosecutor, the defense attorney, and the defendant, were the only persons present in chambers during these hearings (except for the various prospective jurors who were examined). At one point, the defense attorney stated that he had no objection to this procedure. Following conviction, the defendant appealed, arguing that the trial court had violated her right to a public trial under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when it held portions of the pretrial motions and portions of voir dire in chambers to the exclusion of those sitting in the courtroom.

The state responded to these claims by arguing that no *Bone-Club* analysis was necessary because (1) the trial court did not explicitly close the hearings, and (2) neither party had moved to close the hearings. The State also argued that even if there was a closure, the defendant either invited the

error or waived her right to public hearings. In addressing these arguments, this division of the Court of Appeals first addressed the standard of review that applied, and the claim of waiver. This court held:

> Whether a trial court procedure violates the right to a public trial is a question of law we review de novo. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). The remedy for such violation is reversal and remand for new trial. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). A defendant who fails to object at the time of the closure does not waive the right.

State v. Heath, 206 P.3d at 714.

The court then went on to address the applicability of *Bone-Club* by first noting that in *State v. Erickson*, 146 Wn.App. 200, 11, 189 P.3d 245 (2008), the court specifically held that conducting *voir dire* out of the courtroom constitutes a "closure" that mandates a *Bone-Club* analysis even when the trial court has not explicitly closed the proceedings. The court also noted the Division III was in accord but that Division I was contrary. *See State v. Frawley*, 140 Wn.App. 713, 720, 167 P.3d 593 (2007) (Division III holding the same); *but see State v. Momah*, 141 Wn.App. 705, 714, 171 P.3d 1064 (2007), *affirmed*, (filed October 8, 2009) (Court properly balance need for fair trial with need for public trial in closing part of *voir dire*). In accordance with its prior ruling in *Erickson*, the court held that *Bone-Club* applied. As a result, it reversed the defendant's convictions and remanded for a new trial. The court also held the following on the state's claim that (1) the

trial court's *sua sponte* decision to close a portion of the trial did not invoke *Bone-Club*, and (2) that the defense attorney's statement that he did not object to the procedure constituted a waiver by the defendant. The court stated:

> The State argues that the trial court was not required to engage in a *Bone-Club* analysis because neither party moved to close the hearings, thereby triggering the need for such an analysis. This argument fails because a trial court's sua sponte decision to close public hearings triggers the need for a *Bone-Club* analysis.
>
> The State also argues that Heath waived her right to public hearings on the disputed issues. But a defendant, by failing to object, does not waive her constitutional rights to a public trial. Heath did not waive the right by failing to object.
>
> We conclude that the trial court violated Heath's right to a public trial by hearing pretrial motions and interviewing juror eight in chambers without first engaging in a *Bone-Club* analysis. Because we presume prejudice, we reverse and remand for a new trial.

State v. Heath, 206 P.3d at 716 (citations and footnote omitted).

The Washington Supreme Court has reaffirmed the application of these principles in *State v. Strode*, No. 80849-0 (filed October 8, 2009). In this case, the state charged the defendant with first degree rape of a child, first degree attempted rape of a child, and first degree child molestation. During *voir dire*, the court gave the prospective jurors a confidential juror questionnaire, which included a question as to whether or not they or someone close to them, had ever been the victim of sexual abuse. At least 11 prospective jurors answered in the affirmative and were taken one at a time into chambers to determine whether or not their past experiences would

preclude them from impartiality. The judge, the prosecutor, the defense attorney, and the defendant were the only people allowed into chambers along with the prospective juror. The trial judge held no *Bone-Club* hearing prior to holding this portion of *voir dire* in chambers. Following convictions on all counts, the defendant appealed, arguing that the trial court had denied him the right to a public trial.

On appeal, the state argued that (1) the trial was not closed because it did not begin until after *voir dire*, (2) the court on appeal could itself perform the *Bone-Club* analysis in the place of the trial court, (3) the defendant invited or waived his right to challenge the closure when he failed to object and when he participated in the procedure the court used, and (4) that the error was harmless beyond a reasonable doubt. The court rejected the state's first argument, noting that *voir dire* is part of a jury trial and is subject to the public trial requirements of the state and federal constitutions. The court also rejected the state's second argument, noting that when the trial court did not address any of the *Bone-Club* factors, an appellate court has no basis upon which to perform the analysis itself.

The court then rejected the state's third argument, noting as follows concerning the waiver argument:

> [T]he public trial right is considered an issue of such constitutional magnitude that it may be raised for the first time on appeal. We have held that a "defendant's failure to lodge a contemporaneous objection

> at trial [does] not effect a waiver." Strode's failure to object to the closure or his counsel's participation in closed questioning of prospective jurors did not, as the dissent suggests, constitute a waiver of his right to a public trial.The right to a public trial is set forth in the same provision as the right to a trial by jury, and it is difficult to discern any reason for affording it less protection than we afford the right to a jury trial. It seems reasonable, therefore, that the right to a public trial can be waived only in a knowing, voluntary, and intelligent manner.
>
> Additionally, Strode cannot waive the public's right to open proceedings. As we observed in Bone-Club, the public also has a right to object to the closure of a courtroom, and the trial court has the independent obligation to perform a Bone-Club analysis. The record reveals that the public was not afforded the opportunity to object to the closure, nor was the public's right to an open courtroom given proper consideration.

State v. Strode, at page 7-8.

Finally, the court rejected the state's fourth argument, finding that the error in closing a trial without a proper *Bone-Club* analysis was a structural error that was conclusively presumed to be prejudicial. Thus, the court reversed the defendant's convictions and remanded for a new trial.

The right to a public trial under Washington Constitution, Article 1, § 22, also includes each defendant's right to "to appear and defend in person" as well as the public's right to open court proceedings. This constitutional guarantee is embodied in the rule that a defendant has the right to be present at "every critical stage of a criminal proceeding." *In re the Personal Restraint of Lord*, 123 Wn.2d 296, 868 P.2d 835 (1994). In *State v. Chappel*, 145 Wn.2d 210, 36 P.3d 1025 (2001), the Washington Supreme Court stated

this rule as follows:

> A criminal defendant has a constitutional right to be present in the courtroom at all critical stages of the trial arising from the confrontation clause of the Sixth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment. The Washington State Constitution also provides a criminal defendant with "the right to appear and defend in person." Wash. Const. Art. I, § 22. Additionally, Washington's criminal rules state that "[t]he defendant shall be present ... at every stage of the trial ... except ... for good cause shown." CrR 3.4(a).

State v. Chapple, 145 Wn.2d at 318.

At a minimum, "critical stages" in a criminal trial include any hearing at which "evidence is being presented or whenever the defendant's presence has a relation, reasonably substantial, to the opportunity to defend against the charge." *State v. Bremer*, 98 Wn.App 832, 991 P.2d 118 (2000). Normally, conferences about the admissibility of jury instructions are not deemed a "critical stage" in the proceedings that require the defendant's presence because they only involve the resolution of legal issues. Such discussions many times occur off the record and in chambers outside of the defendant's presence. For example, in *State v. Bremer, supra*, a defendant convicted of attempted residential burglary appealed, arguing that the court's decision to hold a discussion about jury instructions in chambers outside his presence denied him the right to be present in all critical stages of the proceedings. However, noting that the discussion in chambers dealt solely with the legal issues surrounding the use of certain jury instructions, the court found no

constitutional violation. The court states as follows on this issue:

> The crux of a defendant's constitutional right to be present at all critical stages of the proceedings is the right to be present when evidence is being presented or whenever the defendant's presence has "a relation, reasonably substantial," to the opportunity to defend against the charge. A defendant does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters, at least when those matters do not require the resolution of disputed facts.
>
> Mr. Bremer contends that he was not allowed to be present when the court, the State and his attorney discussed proposed jury instructions. This was not a hearing at which evidence was being presented. Jury instructions involve resolution of legal issues, not factual issues. In the absence of some extraordinary circumstance in which Mr. Bremer's presence would have made a difference, a discussion involving proposed jury instructions is not a critical stage of the proceedings. Because Mr. Bremer was fully represented by counsel at the hearing, he would not have had an opportunity to speak. As such, Mr. Bremer's presence had no relation to the opportunity to defend against the charge of attempted residential burglary. Pursuant to the holding in Lord, Mr. Bremer's absence from the jury instruction hearing was not a violation of his constitutional rights.

State v. Bremer, 98 Wn.App. at 834-35.

In the case at bar appellant claims that the trial court violated both the public right to an open court as well as the defendant's right to be present during every critical stage in the trial when it apparently reviewed and decided how to respond to the jury's question of fact in chambers and apparently without the presence of the defendant. The state may respond to this argument by claiming that under the decision in *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (2012), a trial court's decision on how to instruct the

jury in answering the jury's inquiry is a question of law historically held outside the presence of the public and the defendant. However, as the following explains, the decision in *Sublett* actually supports the defendant's arguments under the facts of this case.

In *State v. Sublett*, *supra*, the Thurston County Prosecutor charged two co-defendants with robbery and murder of an older gentleman that one co-defendant's girlfriend had met in an AA meeting. During deliberation after the presentation of evidence, the jury submitted a question asking for further explanation concerning the accomplice liability instruction that the court had used. The prosecutor and the defense attorney then met in chambers and agreed to answer the question by telling the jury to reread the instructions. The defendants were later convicted and appealed, arguing in part that the trial court had violated their right to a public trial when it reviewed and decided how to respond to a jury question *in camara*.

Ultimately the Court of Appeals affirmed. In reliance upon its earlier decision in *State v. Sadler*, 147 Wn.App. 97, 193 P.3d 1108 (2008), the court held that the right to a public trial does not extend to hearings on purely ministerial or legal issues that do not require the resolution of factual issues. Thus, since the conference in chambers involved purely legal issues and no disputed facts, the defendants' constitutional right to be present and have the proceeding open to the public was not violated. The defendants then sought

and obtained review by the state supreme court.

On further review, the Washington Supreme Court rejected the Court of Appeals categorization approach whereby the court drew a bright line between ministerial/legal questions which did not impact the right to public trial on the one hand and factual questions which did impact the right to public trial on the other hand. Rather, the court adopted the "experience and logic test" propounded by the United States Supreme Court. The court held:

> Recognizing that resolution of whether the public trial right attaches to a particular proceeding cannot be resolved based on the label given to the proceeding, in *Press–Enterprise Co. v. Superior Court*, 478 U.S. 1, 8–10, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (*Press II*), the United States Supreme Court formulated and explained the experience and logic test to determine whether the core values of the public trial right are implicated. The first part of the test, the experience prong, asks "whether the place and process have historically been open to the press and general public." *Press II*, 478 U.S. at 8, 106 S.Ct. 2735. The logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* If the answer to both is yes, the public trial right attaches and the *Waller* or *Bone–Club* factors must be considered before the proceeding may be closed to the public. *Press II*, 478 U.S. at 7–8, 106 S.Ct. 2735. We agree with this approach and adopt it in these circumstances.

State v. Sublett, 176 Wn.2d at 72-73 (footnotes omitted).

In applying the experience and logic test, the court began by examining the court rule, CrR 6.15(a) , under which jury instructions are submitted, argued and given. The court then expanded that analysis by reviewing CrR 6.15(f) under which the court considers and answers questions

submitted by the jury. The court then held as follows:

> Under the facts of this case, then, we find no closure occurred because this proceeding did not implicate the public trial right, and therefore there was no violation of either petitioners' public trial right. None of the values served by the public trial right is violated under the facts of this case. ***No witnesses are involved at this stage, no testimony is involved,*** and no risk of perjury exists. The appearance of fairness is satisfied by having the question, answer, and any objections placed on the record pursuant to CrR 6.15. Similarly, the requirement that the answer be in writing serves to remind the prosecutor and judge of their responsibility because the writing will become part of the public record and subject to public scrutiny and appellate review. This is not a proceeding so similar to the trial itself that the same rights attach, such as the right to appear, to cross-examine witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence. Neither Sublett nor Olsen claim or argue any of these rights, nor could they since such rights are inapplicable in the discussion of, or resolution of, questions from the jury. We hold the petitioners have not established that a closure or public trial right violation occurred.

State v. Sublett, 176 Wn.2d 177-178 (emphasis added).

In analyzing the court's decision in *Sublett* it is important to first note what the court did do and what the court did not do. What the court did do was take the facts before it (the trial court's in chambers review and answer to a question of law propounded by the jury) and then examine it under the experience and logic test. In doing so, the court found no violation of the right to a public trial. What the court did not do was conclude that there were no possible circumstances in which an in chambers review of a jury's question would violate the right to public trial. In fact, the substance of the court's decision was to reject that type of categorical approach. When

viewed in this light, the distinction between the facts in *Sublett* and the facts in the case at bar are critical. This distinction is that in *Sublett* the trial court performed an in chambers review of a legal question submitted by the jury. No factual issues were involved. Thus, the court found no violation of the right to public trial.

By contrast, in the case at bar, the trial court performed an in chambers review of a purely factual question presented by the jury. This question was as follows:

What date was the defense hired for the defendant?

CP 180.

As was explained in the preceding argument, this question was one that did involve witnesses, that did involve testimony and that did involve evidence the court has specifically instructed the jury to disregard (see Argument II). Under these circumstances, there was a significant public purpose in making sure that the discussion on this factual issue took place in open court with the defendant and the public present. As a result, the trial court in this case violated the right to public trial when it decided how to answer this uniquely factual question in chambers instead of in open court with the defendant and public present. Consequently, this court should reverse the defendant's conviction and remand for a new trial.

IV. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL WHEN IT PRECLUDED HIM FROM PRESENTING SPECIFIC INSTANCES OF PEACEFULNESS UNDER ER 405(b) TO SUPPORT HIS CLAIM OF A TRAIT OF PEACEFULNESS.

Under ER 405(b) there are a certain number of limited circumstances in which a defendant is entitled to present specific prior acts into evidence to support a claim that he or she possessed a specific character trait. Evidence Rule 405 states:

> (a) Reputation. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross examination, inquiry is allowable into relevant specific instances of conduct.
>
> (b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

ER 405.

Although a number of cases explain what does not constitute "an essential element of a charge, claim, or defense" for the purposes of ER 405(b), few if any cases explain what does. Washington Practice gives the following comment on this issue:

> Under Rule 405(b), character may be proved by evidence of specific instances of conduct, but only in the relatively unusual case in which "character or a trait of character of a person is an essential element of a charge, claim, or defense."
>
> In a criminal case, the rule does not permit the State to introduce evidence of the other misconduct on the part of the defendant merely because the defendant has offered evidence of his or her reputation

> for good character under Rule 404(a)(1). The defendant's character is rarely an essential element in a criminal case, and thus the State is seldom allowed to introduce specific instances of misconduct to demonstrate the defendant's character or general propensities. Rule 404(b) makes it clear that specific instances of misconduct are admissible only when they are relevant to some issue other than character or general propensities.
>
> As an exception to the foregoing, some courts have suggested that the defendant's character is at issue when a defense of entrapment is asserted, thus opening the way to proof by specific instances of conduct.
>
> ***In a criminal case in which the defendant pleads insanity, acts of conduct are admissible to demonstrate sanity or insanity, but the situation is not usually thought of as involving evidence of character.***
>
> Some criminal charges such as harassment require the State to prove that the victim had reason to fear the defendant. In such a case, the defendant's prior misconduct may be admissible to show why the victim had reason to fear the defendant, assuming the victim knew of that misconduct. In this situation, admissibility is not subject to the restrictions on character evidence because the evidence is not offered to prove character, nor is it offered to show that the defendant acted in conformity with prior misconduct. The defendant's prior misconduct, assuming it was known to the victim, is admissible because it is relevant to show the victim's state of mind.

5A Washington Practice, § 405.4 Part 1, *Specific Instances of Conduct – Criminal Cases* (emphasis added; footnotes omitted).

In the case at bar the trial court ruled that the defense evidence of the defendant's character trait for peacefulness and truthfulness was relevant and admissible. Specifically, the court found that (1) the defendant's claim of involuntary intoxication as a defense to his assault charges made his character

trait for peacefulness relevant and admissible, and (2) that since the defendant intended to and did testify at trial contrary to claims made by state's witnesses, his character trait for truthfulness was also relevant and admissible. The state responded by moving *in limine* to preclude the defense from presenting any evidence of specific instances illustrating either one of those character traits. The state argued that under the decision in *State v. Mercer-Drummer*, 128 Wn.App. 625, 116 P.3d 454 (2005), neither of these traits was an essential element of the charges, claims or defenses in this case and was thus not admissible under ER 405(b). Following argument by counsel and review of the *Mercer-Drummer* decision, the court granted the state's motion. As the following examination of *Mercer-Drummer* explains, the trial court's ruling was in error.

In *Mercer-Drummer*, *supra*, the state charged the defendant with third degree assault against a police officer, obstructing an officer and resisting arrest after she allegedly turned and hit a police officer in the head with a closed fist. At the time of this event the officer had put her hand on the defendant's shoulder to keep her from walking away during the officer's investigation of an incident in which a bus driver claimed the defendant had refused to get off of a public bus. At trial the defendant testified that she had turned away from the officer and did not intentionally strike her as the officer turned the defendant around.

Prior to the presentation of the defendant's case-in-chief, the State moved *in limine* to prevent the defendant from testifying that she had no criminal history. The defendant responded by arguing that this evidence was relevant and admissible to establish (1) her character, and (2) her claim that she did not intend to strike the officer. The trial court ruled that the defendant's lack of a criminal history (1) did not tend to show her character or reputation for peacefulness within the meaning of ER 404, and (2) did not meet the criteria for admissible character evidence under ER 405. Following conviction the defendant appealed, arguing that the trial court had erred when it granted the state's motion *in limine*.

On appeal the court characterized the defendant's arguments as follows:

> Mercer–Drummer disputes the trial court's ruling that her proffered character evidence was not in the form of reputation testimony and, therefore, not admissible under ER 405. She also urges us to adopt the dissent's reasoning in *State v. O'Neill*, which, she contends, would allow her lack of criminal arrests into evidence here. In short, she asks us to hold that (1) under ER 405(b), being a "law abiding citizen" is an essential element of a defense in any criminal trial; and (2) reputation testimony is one way, but not the exclusive way, to prove character under ER 405(a),

State v. Mercer-Drummer, 128 Wn.App. at 630-631 (footnotes omitted).

The court then reviewed the decision in *State v. O'Neill*, noting that the court there had rejected a similar argument in an appeal from a drunken driving conviction, holding that the defendant's character trait of being a

law-abiding citizen was not an essential element of a DWI charge. Thus, the court in *O'Neill* ruled that the evidence was not admissible under ER 405(b). By a two to one decision, the court in *Mercer-Drummer* then rejected the defendant's claims on appeal as the result mandated by the decision in *O'Neill*. The court held:

> Because character does not determine a party's rights and liabilities incident to an assault, obstruction of a law enforcement officer, or resisting arrest, character therefore is not an essential element of any charge, claim, or defense to the crimes with which Mercer–Drummer was charged. Thus, the trial court correctly excluded Mercer–Drummer's evidence of being a "law abiding citizen" under ER 405(b).

State v. Mercer-Drummer, 128 Wn.App. at 632.

The dissent disagreed with this holding, suggesting that a person's good character and lack of criminal conviction was always relevant for a person charged with a crime. The dissent stated:

> I respectfully dissent. The majority follows the opinion in *State v. O'Neill*, 58 Wn.App. 367, 793 P.2d 977 (1990), in upholding the trial court's decision to exclude the testimony by the defendant as to her good character. I would follow the well-reasoned dissent in O'Neill because I agree that "the character of being law abiding is pertinent to rebut any criminal charge." *O'Neill*, 58 Wn.App. at 372, 793 P.2d 977. I agree that a "criminal defendant has a constitutional right to testify in his own defense as to his character for law abidingness as incident to his Sixth Amendment rights under the United States Constitution and article 1, section 22 of our constitution." *O'Neill*, 58 Wn.App. at 374, 793 P.2d 977 (footnote omitted). I would reverse and remand for a new trial.

State v. Mercer-Drummer, 128 Wn.App. at 633.

In the case at bar there is a fundamental difference between the facts from *Mercer-Drummer* and the facts in the case at bar. In *Mercer-Drummer*, the defendant was attempting to introduce specific conduct (lack of criminal convictions) to prove a trait of lawfulness. This offered evidence did not address an essential element on any of the charges or on the defense. Thus, the evidence was ostensibly not admissible under ER 405(b). By contrast, in the case at bar, evidence of specific acts tending to prove peacefulness were an essential part of the defense of involuntary intoxication.

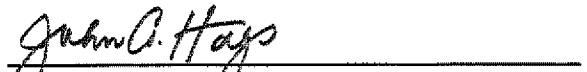
As was explained in Argument No. 1, the defense of involuntary intoxication as argued by the defendant is akin to a claim of insanity. 13b Washington Practice, 13b, § 3204 ("A complete substantive defense will exist if the involuntary intoxication rises to the level of temporary insanity."). *See also, State v. Mriglot, supra.* In such cases, "acts of conduct are admissible to demonstrate sanity or insanity" even though "the situation is not usually thought of as involving evidence of character." 5A Washington Practice, 405.4 §1, supra. Thus, in the case at bar, the trial court erred when it refused to allow the defendant to present evidence of specific incidents of peacefulness in support of his claim of involuntary intoxication. As a result, this court should vacate the defendant's conviction and remand for a new trial.

CONCLUSION

The trial court denied the defendant a fair trial and an open court when it failed to correctly instruct the jury on involuntary intoxication, when it decided in chambers how to answer a question of fact propounded by the jury, and when it precluded the defense from presenting relevant, exculpatory evidence. As a result, this court should reverse the defendant's conviction and remand for a new trial.

DATED this 8th day of April, 2013.

Respectfully submitted,



John A. Hays, N.C. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

WASHINGTON CONSTITUTION
ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

WASHINGTON CONSTITUTION
ARTICLE 1, § 10

Justice in all cases shall be administered openly, and without unnecessary delay.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

ER 405 METHODS OF PROVING CHARACTER

(a) Reputation. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

ER 801

The following definitions apply under this article:

(a) Statement. A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A 'declarant' is a person who makes a statement.

(c) Hearsay. 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements Which Are Not Hearsay. A statement is not hearsay if–

(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person; or

(2) Admission by Party-Opponent. The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Instruction No. 18

Involuntary Intoxication is a defense to a charge of Assault if:

(a) The defendant was given alcohol or drugs by force or fraud; and

(b) The alcohol or drugs prevented the defendant from forming the intent to assault.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to a specific charge. Because a separate crime is charged in each count, you must decide each count separately. Your verdict on one count should not control your verdict on any other count.

Defendant's Proposed Instruction
Defining
Involuntary Intoxication

Involuntary intoxication is a defense to the crime charged. "Involuntary intoxication" means intoxication brought about by force, or fraud, or some other means not within the control of the defendant. Involuntary intoxication absolves the defendant of any criminal responsibility.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON, **Respondent,**	**COWLITZ CO. NO: 12-1-00205-1** **COA NO. 43871-2-II**
vs.	**AFFIRMATION OF SERVICE**
STACY, Shane Austin, **Appellant.**	

STATE OF WASHINGTON)
) **: ss.**
County of Cowlitz)

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On **APRIL 8th, 2013** , I personally placed in the mail and/or e-filed the following documents:

1. BRIEF OF APPELLANT

to the following:

SUSAN I. BAUR
COWLITZ COUNTY PROS ATTY
312 S.W. 1ST STREET
KELSO, WA 98626

SHANE A STACY
208 RAGLAND RD.
LONGVIEW, WA 98632

Dated this 8TH day of APRIL, 2013 at LONGVIEW, Washington.

/s/

Cathy Russell
Legal Assistant to John A. Hays

DO NOT DESTROY / RETURN TO BAILIFF

FILED
SUPERIOR COURT

2012 JUL 13 P 4:15

COWLITZ COUNTY
BEVERLY R. LITTLE, CLERK

BY

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON,

Plaintiff(s),

vs.

Shawn Stacy,

Defendant(s).

No. 12-1-00205-1

QUESTION FROM THE DELIBERATING JURY AND COURT'S RESPONSE

Do NOT indicate how the jury has voted.

JURY QUESTION: Exhibit date was the Defense [illegible] for the Defendant?

Presiding Juror / Date 7-13-2012

Date and time received by the Bailiff: 7/13/12 1:10

COURT'S RESPONSE: (After affording all counsel/parties opportunity to be heard.)

You must rely on the evidence presented to you in the course of the trial.

Judge

Date and time returned to the jury: 7/13/12 1:15

Scanned

HAYS LAW OFFICE

April 08, 2013 - 4:29 PM

Transmittal Letter

Document Uploaded: 438712-Appellant's Brief~2.pdf

Case Name: State vs. Stacy

Court of Appeals Case Number: 43871-2

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

2nd Filing - Page missing in earlier (last page)

Sender Name: Cathy E Russell - Email: **jahayslaw@comcast.net**

A copy of this document has been emailed to the following addresses:
sasserm@co.cowlitz.wa.us