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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 41843-6-II

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

STATE OF WASHINGTON,
Respondent,

v.

TAMMY PATRICE WHITLOCK,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON L. GODFREY

BRIEF OF RESPONDENT

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TABLE

Table of Contents

COUNTERSTATEMENT OF THE CASE 1

 Factual Background. 1

 Procedural Background. 3

RESPONSE TO ASSIGNMENTS OF ERROR 3

 1. The trial court did not violate the defendant’s right to an
 open public trial. 3

 2. The Information filed in this case was not deficient. 5

TABLE OF AUTHORITIES

Table of Cases

State v. Bone-Club, 128 Wn.2d 254, 259, 906
P.2d 325 (1995) 5

State v. Kjorsvik, 117 Wn.2d 93, 105-108,
812 P.2d 86 (1991) 6

State v. Momah, 167 Wn.2d 140, 217
P.3d 321 (2009) 5

State v. Nonog, 169 Wn.2d 220, 226-27,
237 P.3d 250 (2010) 6

State v. Powell, 167 Wn.2d 672, 683,
233 P.3d 493 (2009) 7

State v. Sadler, 147 Wn.App. 97, 114, 193
P.3d 1108 (2008) 5

State v. Shabel, 95 Wn.App. 469, 474,
976 P.2d 153 (1999) 6

State v. Sublett, 156 Wn.App. 160, 81, 231
P.3d 231 *rev. granted*, 170 Wn.2d 1016, 245
P.3d 775 (2010) 4

STATUTES

RCW 46.61.522 3
RCW 46.61.522(1)(b) 3

COUNTERSTATEMENT OF THE CASE

Factual Background.

On December 4, 2009, at around 5:00 p.m., Tammy Whitlock was driving a Ford Explorer northbound on Middle Satsop Road. (RP at 179). Sarah Aiken was driving a Honda southbound on Middle Satsop Road.(RP at 42, 179). The Honda entered a curve in the roadway to the left.(RP at 179). The Explorer crossed over the no passing portion of the yellow painted center lines as it entered the curve in the roadway to the right near Schafer Meadows Lane.(RP at 179). The collision occurred in the southbound lane of travel.(RP at 180).

In the vehicle driven by Sarah Aiken were also her two young daughters.(RP at 42). One was seated in the right rear seat in the lap and shoulder belt seatbelt, while the other was in the left rear seat in a lap and shoulder belt seatbelt.(RP at 42). Ms. Aiken stated that she remembers traveling southbound on Middle Satsop Road and she saw the Explorer approaching in her lane of travel.(RP at 43).

When deputies arrived on scene, they observed a green Ford Explorer in the center of the roadway.(RP at 92). The front end of the Explorer was facing toward the southbound lane of travel and the rear end of the Explorer was facing toward the northbound fog line.(RP 162; Exhibit 22). The Explorer had severe contact damage to the left front bumper and quarter panel. (RP at 107, 176; Exhibit 6). The driver was identified as Tammy Whitlock and was trapped in her vehicle.(RP at 19, 94). Officers observed a broken multicolored glass smoking device containing burnt marijuana residue on the ground next to the passenger

side of the Explorer.(RP at 106). Also in the vehicles officers found a quarter full bottle of vodka, empty 50 mL bottle of rum and an empty 50 mL bottle of Aftershock.(RP at 102-4). Officers next observed the black in color Honda Accord off the roadway on the southbound shoulder.(RP at 92). The front end of the Honda was facing south toward the roadway and the rear end of the Honda was facing toward the southbound shoulder.(RP at 92). The Honda had severe contact damage to the left front bumper and quarter panel.(RP at; Exhibits 9, 10).

Tammy Whitlock was airlifted to Harborview Medical Center.(RP at 110). Trooper Daniel Duefrane of the Washington State Patrol read Whitlock her *Miranda* warnings and the Implied Consent Warning for Vehicular Assault.(RP at 76-8). Ms. Whitlock was unconscious at the time and unable to respond.(RP at 76). Steven Rogge (RN) conducted the blood draw of Whitlock using two gray top vials provided by the WSP Trooper.(RP at 87). The blood was sent to the Washington State Toxicology Lab where Naziha Nuwayhid conducted the test and initial screening to determine the blood ethanol.(RP at 140). Whitlock's blood was found to contain .12 g/100 mL of Blood Ethanol and there was also 6.1 ng/mL of THC (marijuana) present in her blood.(RP at 141). Nuwayhid testified regarding the synergistic effect of marijuana and alcohol on a person and how a person's ability to judge time and distance is affected along with a slower reaction time.(RP at 126-27).

Sarah Aiken sustained significant injuries to her left arm. She was taken to Grays Harbor Community Hospital where she was treated by Dr.

McCann in the emergency room.(RP at 27) She had a deep laceration (puncture wound) to her left arm and suffered the loss of the use of her left arm for at least a one month period.(RP at 28; 66). In addition, she suffered whiplash and abrasions. (RP at 47). She was immobile for two weeks, requiring her husband to bath her and carry her around.(RP at 46-7; 62). On the left arm, at the deep laceration point, she suffered substantial scarring and testified that she is still having problems and tingling in her finger tips.(RP at 56; 65). She has to wear gloves at all times because of the nerve damage she suffered as a result of this collision.(RP at 56; 65).

Procedural Background.

The defendant was charged by Information on July 6, 2010, with Vehicular Assault, RCW 46.61.522. The State alleged each of the three alternative means. (CP 1-2). The matter was tried to a jury commencing on January 12, 2011. The jury returned a verdict of guilty, along with a special verdict determining that each of the alternative means was proven beyond a reasonable doubt. The defendant sentenced for Vehicular Assault while under the influence, RCW 46.61.522(1)(b), on February 14, 2011. (CP 3-12).

RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court did not violate the defendant's right to an open public trial.

Grays Harbor County Local Rule 6.3 requires: “

(1) Proposed instructions shall be submitted at least two working days before the day of the trial by serving one copy

upon counsel for each party, by filing one copy with the clerk of the court, and by delivering the original and one copy to the trial judge...

(3) The trial judge should be provided with an electronic copy of the proposed instructions in WordPerfect format, containing an uncited set of the proposed instructions. These electronic copies may be sent by e-mail to the Court Administrator.

Once the court receives both sets of instructions, the judge puts them together and gives a copy to both parties sometime during the trial and then asks for objections and exceptions. (RP at 188).

There was no *in camera* or closed courtroom hearing during this trial. The judge's exact statement was "Now, the record reflect that I met with counsel this morning and presented them with copies of proposed jury instructions." (RP at 188). The judge did not say there was an *in camera* hearing. There was no hearing held at all. In fact, a clear reading of the judge's exact statement is that the mentioned "meeting" involved the judge handing each counsel a copy of the judge's proposed jury instructions in the courtroom and included no dialogue whatsoever. To state otherwise is to add alleged facts that are not in the record. In addition, there is no evidence in the record that anyone was excluded from this "meeting" where the jury instructions were handed to counsel.

What the defense misses in all of cases that it cites is that those cases involve a decision to close the courtroom for a **motion hearing, testimony or *voire dire***. *State v. Sublett*, 156 Wn.App. 160, 81, 231 P.3d 231 *rev. granted*, 170 Wn.2d 1016, 245 P.3d 775 (2010). The public's right to be present applies only to evidentiary phases of the trial and any

other “adversary proceedings.” *State v. Sadler*, 147 Wn.App. 97, 114, 193 P.3d 1108 (2008). What happened herein was not such a proceeding.

In *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) the public was excluded from a pretrial hearing in order to protect the identity of an undercover narcotics agent. There is no evidence in this case that there was any order excluding the public or that the “meeting” occurred anywhere other than in the open courtroom.

In *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009) the trial court specifically ordered closure of the courtroom to conduct *voire dire* of potential jurors. Once again, in the case at hand, there is no evidence in the record that the courtroom was closed or that any proceedings took place outside the courtroom. We certainly have not arrived at the point in the law where the court cannot speak to the attorneys off the record long enough to provide them with proposed jury instructions.

The alleged violation in this case was not a motion hearing. The jury had already been appropriately selected in public. The trial was held in open court. There was no proceeding other than handing over jury instructions. (RP at 188). Exceptions to the instructions were taken in open court. (RP 188).

This assignment of error must be denied.

2. The Information filed in this case was not deficient.

In the first instance, there is no serious claim that the Information fails to set out all the essential elements of the charged offense. Indeed,

the Information plainly sets forth the crime of Vehicular Assault, alleging all three alternative means.

No challenge to the sufficiency of the Information was made prior to the time the State of Washington rested. This court must adopt a liberal construction when considering any alleged challenge to the Information raised for the first time on appeal. *State v. Kjorsvik*, 117 Wn.2d 93, 105-108, 812 P.2d 86 (1991). The only issue is whether the statutory elements of the crime “appear in any form, or by fair construction can they be found, in the charging document.” *State v. Nonog*, 169 Wn.2d 220, 226-27, 237 P.3d 250 (2010).

In the case at hand the Information specifically alleges all the necessary elements in the exact language of the statute. There is no confusion. The best that the defendant can say is that the State was supposed to allege each alternative means separately followed by the words “and thereby did cause substantial bodily harm.” A fair reading of the charging language informs the defendant that it is alleged that she operated a motor vehicle in three separate manners and that the consequence of her operation of a motor vehicle was substantial bodily harm to the victim. The phrase “and thereby did cause substantial bodily harm” applies to each of the alleged alternative means. There is no confusion.

The State is entitled to allege each of the alternative means. *State v. Shabel*, 95 Wn.App. 469, 474, 976 P.2d 153 (1999). The defendant

would now have this court hold that in addition to charging each of the essential elements of the crime, the State must set forth the punishment for each alternative. This simply is not the law.

The sentencing range for each of the alternatives means is set forth in the Sentencing Reform Act. The fact that one alternative means may carry a different punishment than the other does not mean that one of the alternative means, such as driving while under the influence, carries a sentence enhancement that must be set forth in the Information.

Admittedly, an aggravating circumstance or sentence enhancement that is not an element of the offense must be alleged and proven beyond a reasonable doubt. They are not, however, elements of the crime that must be set forth in the information. *State v. Powell*, 167 Wn.2d 672, 683, 233 P.3d 493 (2009).

Importantly, "essential elements " include only those facts that must be proved beyond a reasonable doubt to convict a defendant of the charged crime. *See, e.g., State v. McCarty*, 140 Wash.2d 420, 425, 998 P.2d 296 (2000). An aggravating circumstance, on the other hand, is not a fact that must be proved to convict a defendant of the charged crime. Here, for example, Powell's conviction for first degree murder does not depend on whether or not the jury finds that the aggravating circumstances alleged by the State exist beyond a reasonable doubt.

The State did not allege an aggravating circumstance or sentence enhancement that was not an element of the charged crime. The information need not set out the punishment for each alternative means.

What is the State to do? List the seriousness level of the offense charged, calculate the offender score and then include a sentence range in the information?

Furthermore, the State is unaware of any case law that requires that the State allege in the Information that the particular alternative means is a “most serious offense.”

For the reasons set forth, this assignment of error must be denied.

Respectfully Submitted,

By: 
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

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STATE OF WASHINGTON,

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No.: 41843-6-II

v.

DECLARATION OF MAILING

TAMMY PATRICE WHITLOCK,

Appellant.

DECLARATION

I, Randi M. Toyra hereby declare as follows:

On the 18th day of November, 2011, I mailed a copy of the Brief of

Respondent to:

Jodi R. Backlund
Manek R. Mistry
Backlund & Mistry
P. O. Box 6490
Olympia, WA 98507-6490

by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 18th day of November, 2011 at Montesano, Washington:

Randi M. Toyra