

No. 42881-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Christopher Clark,

Appellant.

Lewis County Superior Court Cause No. 11-1-00449-4

The Honorable Judge Nelson Hunt

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Clark's First, Sixth, and Fourteenth Amendment right to an open and public trial.
2. The trial court violated Mr. Clark's right to an open and public trial under Wash. Const. Article I, Sections 10 and 22.
3. The trial court violated the constitutional requirement of an open and public trial by conducting proceedings behind closed doors.
4. Mr. Clark's conviction was entered in violation of his right to have the jury consider applicable lesser offenses.
5. The trial judge erred by refusing to instruct the jury on the inferior offense of third-degree assault of a child.
6. The trial judge violated Mr. Clark's Fourteenth Amendment right to due process and his state constitutional right to a jury trial by refusing to instruct on the inferior offense of third-degree assault of a child.
7. Mr. Clark was denied his state constitutional right to a unanimous verdict.
8. The trial court erred by instructing jurors on the "pattern or practice" means of committing second-degree assault of a child.
9. The trial court erred by entering a judgment of conviction based on a general verdict where the evidence was insufficient to support one alternative means of committing the charged crime.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The state and federal constitutions require that criminal trials be administered openly and publicly. Here, the trial judge conducted proceedings *in camera* without analyzing the need for closing the courtroom. Did the trial judge violate the constitutional requirement that criminal trials be open and public?

2. An accused person is entitled to have the jury instructed on applicable inferior-degree offenses. Here, the trial judge refused to instruct on the inferior-degree offense of third-degree assault of a child. Did the trial judge's refusal to instruct on third-degree assault of a child violate Mr. Clark's unqualified statutory right to have the jury consider an inferior-degree offense, as well as his Fourteenth Amendment right to due process and his state constitutional right to a jury trial?

3. An accused person has a constitutional right to a unanimous verdict, including unanimity as to the means by which the crime was committed. Here, the evidence was insufficient to establish one alternative means submitted to the jury. Did Mr. Clark's conviction violate his right to a unanimous verdict under Wash. Const. Article I, Section 21?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Christopher Clark married Crystle Strong, who had two children. RP (10/25/11) 60, 71-72. They had a child together. The couple and their children resided in Napavine, along with a roommate. RP (10/25/11) 59, 63, 71-72.

On July 4, 2011, Ms. Strong's four-year-old son Q. got into trouble for jumping on the bed. RP (10/25/11) 49. Q. had a large bruise on his face. RP (10/25/11) 28. He said that he fell off the bed onto a dog bone. RP (10/25/11) 28, 64.

The family went to the hospital. Once there, Q. told the social worker that Mr. Clark had hit him in the face. RP (10/25/11) 46-48. Mr. Clark said Q. fell on a dog bone. RP (10/25/11) 28.

The state charged Mr. Clark with Assault of a Child in the Second Degree. CP 1-3. The Information read, in pertinent part:

[Christopher Clark] did intentionally assault a child...and thereby did recklessly inflict substantial bodily harm, and /or knowingly inflicted bodily harm which by design caused such pain or agony as to be equivalent of that produced by torture, and/or intentionally assaulted [Q.] by strangulation, an/or caused bodily harm that was greater than transient physical pain or minor temporary marks, the defendant having previously engaged in a pattern or practice of either assaulting the child which resulted in bodily harm that was greater than transient pain or minor temporary, or causing the child physical pain or agony that was equivalent to that produced by torture...
CP 1-2.

At the start of Mr. Clark's jury trial, the trial judge came into the courtroom and announced that he had met with the attorneys for an in-chambers conference. He did not state the subject or result of the meeting. RP (10/25/11) 7.

The prosecution called Officer Ellwood, who had met the family at the hospital, to testify. Ellwood said that Q.'s injuries did not match the explanation initially provided, which was that Q. was jumping on the bed and fell on a dog bone. RP (10/25/11) 28. He further stated that he was told that Q. was hit in the face. RP (10/25/11) 29. Ellwood told the jury that Q. told him that Mr. Clark had choked him around the neck and punched him in the face, and that he'd fallen on a dog bone while jumping on the bed. RP (10/25/11) 30-31, 42. Further, Q. had alleged that Mr. Clark had previously hit and pinched him when his mother was not around. RP (10/25/11) 31-32. Defense counsel did not object to any of this testimony. RP (10/25/11) 28-31.

A social worker also met the family at the hospital; she too relayed statements Q. made. RP (10/25/11) 43-47. She claimed that Q. told her that Mr. Clark had punched and choked him, and she demonstrated what Q. showed her. RP (10/25/11) 46-48. She also repeated Q.'s alleged claim that Mr. Clark had hit and pinched him when his mother was not around. RP (10/25/11) 49. She opined that Q.'s bruises were from

multiple impacts, and the “linear lines” were consistent with a hand impact. RP (10/25/11) 54-55. Again, defense counsel did not object. RP (10/25/11) 43-55.

Crystle Strong twice told the jury that Q. had said Mr. Clark struck him. RP (10/25/11) 77, 79-80. She repeated Q.’s statements that Mr. Clark had hit him, choked him and slapped him. RP (10/25/11) 84. She also said that Q. had previously alleged that Mr. Clark had once squeezed his leg while putting him in the shower, and another time had smacked him hard on the buttocks. RP (10/25/11) 87.

Dr. Sunderland, who saw Q. in the emergency room later that day, testified that Q. had bruising around his eye and near his ear and neck. He said the explanation offered for the injury did not make sense. RP (10/25/11) 113. He testified that a nurse had told him an anonymous caller had “stated they’re concerned about the injury based on what they heard at the home.” RP (10/25/11) 110, 114. Again, there were no defense objections raised to this testimony. RP (10/25/11) 108-117.

Dr. Hall reviewed photos of Q., as well as the medical and social worker records. She opined that the dog bone explanation was not consistent with Q.’s injuries, and that the injuries did match Q.’s other statements. RP (10/25/11) 126-127.

After several attempts, it was determined that Q. was unable to testify. RP (10/25/11) 138-143; RP (10/26/11) 6-8.

Mr. Clark denied any assault. He said that Q. was in trouble for jumping on the bed, but despite this he continued to jump. He said that Q. fell onto a large dog bone that was on the floor. RP (10/26/11) 26-37.

Mr. Clark requested an instruction on the lesser charge of Assault of a Child in the Third Degree. After a closed *in camera* instructions conference, the request was denied. RP (10/26/11) 38-40. The court did use an elements instruction that included several alternative means of committing second-degree child assault, including that Mr. Clark “intentionally assaulted [Q.] ... and the defendant had previously engaged in a pattern or practice of assaulting [Q.] which had resulted in bodily harm that was greater than transient physical pain or minor temporary marks;...” Instruction No. 4, Court’s Instructions to the Jury, Supp. CP.

Mr. Clark was convicted as charged. After sentencing, he timely appealed. CP 4-11, 12-20.

ARGUMENT

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

A. Standard of Review.

Alleged constitutional violations are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011).

Whether a trial court procedure violates the right to a public trial is a question of law reviewed *de novo*. *State v. Njonge*, 161 Wash.App. 568, 573, 255 P.3d 753 (2011). Courtroom closure issues may be argued for the first time on review. *Id.*, at 574-575.

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

The state and federal constitutions require that criminal cases be tried openly and publicly. U.S. Const. Amend. I, VI, XIV; Wash. Const. Article I, Sections 10 and 22; *State v. Bone-Club*, 128 Wash.2d 254, 259, 906 P.2d 325 (1995); *Presley v. Georgia*, ___ U.S. ___, ___, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (*per curiam*). Proceedings may be closed only if the trial court enters appropriate findings following a five-step balancing process. *Bone-Club*, at 258-259. Failure to conduct the proper analysis requires automatic reversal, regardless of whether or not the accused person made a contemporaneous objection. *Bone-Club*, at 261-

262, 257.¹ In addition, the court must consider all reasonable alternatives to closure, whether or not the parties suggest such alternatives. *Presley*, 130 S.Ct., at 724-725.

The public trial right ensures that an accused person “is fairly dealt with and not unjustly condemned.” *State v. Momah*, 167 Wash.2d 140, 148, 217 P.3d 321 (2009). Furthermore, “the presence of interested spectators may keep [the accused person’s] triers keenly alive to a sense of the responsibility and to the importance of their functions.” *Id.* The public trial right serves institutional functions: encouraging witnesses to come forward, discouraging perjury, fostering public understanding and trust in the judicial system, and exposing judges to public scrutiny. *State v. Strode*, 167 Wash.2d 222, 226, 217 P.3d 310 (2009); *State v. Duckett*, 141 Wash.App. 797, 803, 173 P.3d 948 (2007). The Supreme Court has never recognized any exceptions to the rule, either for violations that are allegedly *de minimis*, for hearings that address only legal matters, or for proceedings are merely “ministerial.” *See, e.g., Strode*, at 230.²

¹ *See also State v. Strode*, 167 Wash.2d 222, 229, 235-236, 217 P.3d 310 (2009) (six justices concurring); *State v. Brightman*, 155 Wash.2d 506, 517-518, 122 P.3d 150 (2005).

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

- C. The trial court violated the public trial requirement by conferring with counsel behind closed doors.

Here, the trial court met with counsel in chambers for a pretrial conference. No details of the *in camera* proceeding were put on the record. RP (10/25/11) 7. The court also met with counsel in chambers at the close of the evidence, to discuss the appropriate instructions to guide the jury's consideration of the case. RP (10/26/11) 39. The judge noted that he had "assembled as a result of that conference a set of instructions..." RP (10/26/11) 39. Although defense counsel was permitted to put exceptions on the record, no indication was made of the arguments counsel presented in chambers. RP (10/26/11) 39. The court did not analyze the *Bone-Club* factors in relation to either *in camera* proceeding.

These closed door proceedings, conducted outside the public's eye without the required analysis and findings, violated Mr. Clark's constitutional right to an open and public trial. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. Article I, Sections 10 and 22; *Bone-Club, supra*. They also violated public's right to an open trial. *Id.* Accordingly, Mr. Clark's convictions must be reversed and the case remanded for a new trial. *Id.*

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

The public trial right “applies to all judicial proceedings.” *Momah*, at 148. The Supreme Court has never recognized any exceptions to the rule, either for violations that are allegedly *de minimis*, for hearings that address only legal matters, or for proceedings are merely “ministerial.” *See, e.g., Strobe*, at 230.³

The Court of Appeals has held that the public trial right only extends to evidentiary hearings. *See, e.g., State v. Sublett*, 156 Wash.App. 160, 181, 231 P.3d 231, *review granted*, 170 Wash.2d 1016, 245 P.3d 775 (2010).⁴ This view of the public trial right is incorrect, and should be reconsidered. *Momah*, at 148; *Strobe*, at 230.

II. MR. CLARK’S CONVICTION MUST BE REVERSED BECAUSE THE TRIAL JUDGE ERRONEOUSLY REFUSED TO INSTRUCT THE JURY ON THE INFERIOR-DEGREE OFFENSE OF THIRD-DEGREE ASSAULT OF A CHILD.

A. Standard of Review

A trial court’s refusal to instruct on an inferior-degree offense is reviewed *de novo*, if the refusal is based on an issue of law. *City of*

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

⁴ The Supreme Court heard oral argument in *Sublett* in June of 2011.

Tacoma v. Belasco, 114 Wash.App. 211, 214, 56 P.3d 618 (2002).⁵ The evidence is viewed in a light most favorable to the instruction's proponent. *State v. Fernandez-Medina*, 141 Wash.2d 448, 456, 6 P.3d 1150 (2000).

B. The trial judge applied the wrong legal standard in rejecting Mr. Clark's request for instructions on an inferior degree offense.

An accused person has a statutory right to have the jury instructed on applicable inferior-degree offenses. RCW 10.61.003 provides:

Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

RCW 10.61.010 provides as follows:

Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they shall in their verdict specify the degree or attempt of which the accused is guilty.

These statutes guarantee the "unqualified right" to have the jury decide on the inferior-degree offense if there is "even the slightest evidence" that the accused person may have committed only that offense. *State v. Parker*, 102 Wash.2d 161, 163-164, 683 P.2d 189 (1984) (citing *State v. Young*, 22 Wash. 273, 276-277, 60 P. 650 (1900)). The

⁵ An abuse of discretion standard applies if the refusal was based on a factual dispute. *Id.* at 214.

instructions must be given whenever the evidence “raise[s] an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense.” *Fernandez-Medina*, at 455. The instruction should be given even if there is contradictory evidence, or if the accused presents other defenses. *Id.* The right to an appropriate inferior-degree offense instruction is “absolute;” failure to give such an instruction requires reversal. *Parker*, at 164.

Although the instructions conference was conducted behind closed doors (as noted above), the trial judge summarized his reason for rejecting the proposed instructions as follows:

For there to be a lesser included here, there would have to be an indication of an act done with criminal negligence. There’s nothing in the State’s evidence in my mind that would suggest that only that occurred. The clear evidence and all the inferences are that there was an intentional striking.
RP (10/26/11) 40.

But proof of an intentional act establishes criminal negligence: under RCW 9A.08.010(2) (“Substitutes for Criminal Negligence, Recklessness, and Knowledge”), “[w]hen a statute provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally, knowingly, or recklessly.” Thus proof that Mr. Clark intentionally assaulted Q. would suffice to

establish that he acted with criminal negligence. It should not have disqualified him from receiving instructions on the inferior degree offense.

In addition, the court made no mention of taking the evidence in a light most favorable to Mr. Clark as the proponent of the instruction. *Fernandez-Medina*, at 456. Nor did the judge mention the “slight[] evidence” test. *Parker*, at 163-164.

The court did not apply the correct legal standard to the facts in this case. Had the judge taken the evidence in the light most favorable to Mr. Clark and properly applied the correct legal test, he would have concluded that Mr. Clark was entitled to instructions on third-degree assault of a child. *Id.*; *Fernandez-Medina*, at 456.

C. The refusal to instruct on third-degree assault of a child denied Mr. Clark his unqualified statutory right to have the jury consider any applicable inferior-degree offense.

There was at least “slight[] evidence” that Mr. Clark was guilty only of third-degree assault of a child. Conviction of the inferior degree offense required proof that he committed “the crime of assault in the third degree as defined in RCW 9A.36.031(1)(d) or (f) against the child.” RCW 9A.36.140. A person is guilty of third-degree assault when s/he “[w]ith criminal negligence, causes bodily harm accompanied by substantial pain

that extends for a period sufficient to cause considerable suffering...”

RCW 9A.36.031(1)(f).⁶

Taking the evidence in a light most favorable to Mr. Clark, the jury could have decided that he was not guilty of second-degree assault of a child. Specifically, jurors might have believed that Mr. Clark struck Q. but found that the child’s injuries did not amount to “substantial bodily harm.” RCW 9A.36.021(1)(a); Instruction No. 5, Supp. CP. Likewise, given the complete lack of evidence on Mr. Clark’s specific intent, jurors could have found that he did not “by design [inflict] such pain or agony as to be the equivalent of that produced by torture.” RCW 9A.36.021(1)(d); Instruction No. 5, Supp. CP. Furthermore, jurors may have concluded from the lack of choke-marks or other indications of neck trauma that Mr. Clark did not strangle the child. RCW 9A.36.021(1)(g); Instruction No. 5, Supp. CP. Finally, jurors could decide that Mr. Clark had not “previously engaged in the pattern or practice of assaulting [Q.] which had resulted in bodily harm that was greater than transient physical pain or minor temporary marks.” RCW 9A.36.130(1)(b); Instruction No. 4, Supp. CP.

Having found that the evidence—when taken in a light most favorable to Mr. Clark—did not establish the greater charge, jurors could

⁶ Because there is no allegation that a weapon was involved, RCW 9A.36.031(1)(d) is inapplicable.

have concluded that Mr. Clark assaulted Q. and caused harm producing substantial pain that extended for a period sufficient to cause considerable suffering. RCW 9A.36.031(1)(f). Thus, taking the facts in a light most favorable to Mr. Clark, there was at least slight evidence that he committed third-degree assault of a child and did not commit second-degree assault of a child.

The trial judge should have granted Mr. Clark's request to have the jury pass on the inferior offense of third-degree assault of a child. The court's failure to instruct the jury on the inferior degree offense requires reversal. *Parker*, at 164; *Fernandez-Medina*, *supra*.

III. MR. CLARK WAS DENIED HIS STATE CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *E.S.*, at 702.

B. The state constitution guarantees an accused person the right to a unanimous verdict.

An accused person has a state constitutional right to a unanimous jury verdict.⁷ Wash. Const. Article I, Section 21; *State v. Elmore*, 155 Wash.2d 758, 771 n. 4, 123 P.3d 72 (2005). The right to a unanimous

⁷ The federal constitutional guarantee of a unanimous verdict does not apply in state court. *Apodaca v. Oregon*, 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

verdict also includes the right to jury unanimity on the *means* by which the defendant is found to have committed the crime. *State v. Lobe*, 140 Wash. App. 897, 903-905, 167 P.3d 627 (2007). A particularized expression of unanimity (in the form of a special verdict) is required unless there is sufficient evidence to support each alternative means submitted to the jury. *State v. Ortega-Martinez*, 124 Wash.2d 702, 707-708, 881 P.2d 231 (1994).

If one or more alternatives are not supported by sufficient evidence, the conviction must be reversed. *Lobe, supra*. Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009).

C. The evidence was insufficient to establish one alternative means of committing second-degree assault of a child.

Here, over Mr. Clark's objection, the court instructed jurors on an alternative means of committing second-degree assault of a child that required proof, *inter alia*, that he'd "previously engaged in a pattern or practice of assaulting [Q.] which had resulted in bodily harm that was greater than transient physical pain or minor temporary marks."

Instruction No. 4, Supp. CP; *see also* RCW 9A.36.130(1)(b). Even when

taken in a light most favorable to the prosecution, the evidence was insufficient to establish this element. Although Q. made statements about prior assaults, no evidence was introduced suggesting these prior assaults (spanking and pinching) caused more than transient pain or minor temporary marks. RP (10/25/11) 31, 50, 87.

Because the evidence was insufficient to establish one of the alternative means submitted to the jury, Mr. Clark was denied his constitutional right to a unanimous jury. *Lobe, supra*. His conviction must be reversed and the case remanded for a new trial.

CONCLUSION

For the foregoing reasons, Mr. Clark's conviction must be reversed and the case remanded for a new trial. He may not be retried on the theory set forth in section (1)(b) of the "to convict" instruction.

Respectfully submitted on April 30, 2012,

BACKLUND AND MISTRY



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A handwritten signature in black ink, appearing to read "Manek R. Mistry". The signature is fluid and cursive, with the first name "Manek" being the most prominent.

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Christopher Clark, DOC #353913
Coyote Ridge Corrections Center
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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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

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

Signed at Olympia, Washington on April 30, 2012.



Jodi R. Backlund, WSBA No. 22917
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