

No. 43290-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Ronald McNeal,

Appellant.

Lewis County Superior Court Cause No. 11-1-00816-3

The Honorable Judge James Lawler

Appellant's Reply Brief

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ARGUMENT

I. MR. MCNEAL’S CONVICTIONS VIOLATED THE CONSTITUTIONAL REQUIREMENT THAT CRIMINAL TRIALS BE OPEN AND PUBLIC.

A. Courts apply the “experience and logic” test to determine whether a proceeding must be open and public.

Criminal cases must be tried openly and publicly. *State v. Bone-Club*, 128 Wash.2d 254, 259, 906 P.2d 325 (1995); *Presley v. Georgia*, 558 U.S. 209, ___, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (per curiam). Proceedings to which the public trial right attaches may be closed only if the trial court enters appropriate findings following a five-step balancing process. *Bone-Club*, at 258-259.

The public trial right attaches to a particular proceeding when “experience and logic” show that the core values protected by the right are implicated. *State v. Sublett*, ___ Wash.2d ___, ___, ___ P.3d ___ (2012). A reviewing court first asks “whether the place and process have historically been open to the press and general public,” and second, “whether public access plays a significant positive role in the functioning of the particular process in question.” *Id.*, at ___ (quoting *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7-8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)). If the place and process have historically been open

and if public access plays a significant positive role, the public trial right attaches and closure is improper unless justified under Bone-Club.

The Supreme Court has yet to allocate the burden of proof when it comes to showing what occurred during a closed in camera proceeding. However, the court has provided some guidance: where the record shows the likelihood of a closure (in the form of “the plain language of the trial court’s ruling impos[ing] a closure”), the burden shifts to the state “to overcome the strong presumption” that a closure actually occurred. *State v. Brightman*, 155 Wash.2d 506, 516, 122 P.3d 150 (2005).

Similarly, the state should bear the burden of establishing that a closed proceeding does not implicate the core values of the open trial right. The prosecutor has an incentive to ensure that guilty verdicts are upheld, and is therefore the natural candidate to bear responsibility for putting on the record anything that transpired during a closed proceeding.¹

B. Under the experience prong of the “experience and logic” test, jury questions may only be answered in open court.

Traditionally, all communication between judge and jury takes place in open court:

[T]he rights of parties... [and] the common law... demand that everything given to a jury in relation to a case before them should

¹ Similarly, if a closed proceeding does implicate the core values of the public trial right, the prosecution should ensure that the court considers the five Bone-Club factors.

be given in open court, in the presence of all interested or authorized, for criticism, for suggestion, to guard against injustice and error, and to afford the means of remedying or correcting them... [T]he jury should receive the law of the case before them, solely, and openly, from the court.

State v. Smith, 6 R.I. 33, 36 (1859) (Smith I) (emphasis added).

Numerous courts have set aside verdicts—both civil and criminal—after jury questions were answered behind closed doors. See, e.g., Sargent v. Roberts, 18 Mass. 337, 349 (1823) (“[N]o communication whatever ought to take place between the judge and the jury, after the cause has been committed to them by the charge of the judge, unless in open court...[T]he only sure way to prevent all jealousies and suspicions is to consider the judge as having no control whatever over the case, except in open court...”) (emphasis added); Plunkett v. Appleton, 51 How. Pr. 469 (N.Y. 1876) (“[I]t is as essential to the important and effective administration of justice, that the opinions and instructions of the court should be openly and publicly imparted, so far as litigants are concerned, as that the deliberations of the jury should be conducted with secrecy and in seclusion...”) (emphasis added); Deming v. State, 235 Ind. 282, 286, 133 N.E.2d 51 (1956) (“[A]ll communications from the judge to the jury pertaining to the substantive rights of the defendant and not merely with the physical requirements of the jury, must be made in open court...”) (emphasis added); Kirk v. State, 14 Ohio 511 (1846) (“It is the right of the

accused to know and have the public know, that the court communicate no new principle of law which had not been before publicly declared...”) (emphasis added).

This long history suggests that jury questions should be answered in open court. The Sublett court reached the opposite conclusion; however, the “experience and logic” test was not raised in the briefing or at oral argument. The court thus reached its decision without input from any of the parties addressing the experience and logic test.² A motion for reconsideration is pending.

C. Under the experience prong of the “experience and logic” test, instructions conferences must be open and public if they are adversarial in any way.

As the Supreme Court noted, “[t]he resolution of legal issues is quite often accomplished during an adversarial proceeding...” Sublett, at _____. Traditionally, adversarial proceedings have been open to the public. See, e.g., *Press-Enterprise* at 13 (addressing preliminary hearing in California); *United States v. Simone*, 14 F.3d 833 (3d Cir. 1994) (granting public access to post-trial examination of juror for misconduct); *United States v. Smith*, 787 F.2d 111, 114 (3d Cir. 1986) (*Smith II*) (granting

² This explains the court’s failure to reference any of the authorities outlined here. See Sublett, at ____ (“The petitioners have not identified any case that holds that these proceedings are a closure or violate the defendants’ constitutional rights, and we cannot find one either.”)

public access to transcripts of sidebar and in camera rulings); *United States v. Criden*, 675 F.2d 550, 552 (3d Cir. 1982) (granting public access to transcript of pretrial hearing held in camera).

By contrast, the public trial right is less likely to attach to *ex parte* or nonadversarial matters. See, e.g., *In re Search of Fair Finance*, 692 F.3d 424, 430 (6th Cir. 2012) (refusing public access to search warrant documents); *United States v. Gonzales*, 150 F.3d 1246, 1257 (10th Cir. 1998) (refusing public access to indigent defendants' *ex parte* requests for public funds).

In keeping with this history, the experience prong suggests that an instructions conference should be open and public if it is adversarial in any way. This is especially true in light of the public's longstanding interest in the court's instructions on the law. See, e.g., *Deming*, *supra*; *Plunkett*, *supra*; *Sargent*, *supra*; *Kirk*, *supra*. Furthermore, where the record fails to establish what happened during a closed-door instructions conference, the hearing should be presumed to be adversarial. See *Brightman*, *supra* (allocating the burden on the issue of closure).

D. The "experience and logic" test suggests that both in camera hearings in this case should have been open and public.

Open court proceedings are essential to proper functioning of the judicial system; this is especially true for hearings that have an adversarial

tone, or for those that offer a possibility of prejudice to either party. Opening the courtroom doors to the public promotes public understanding of the judicial system, encourages fairness, provides an outlet for community sentiment, ensures public confidence that government (including the judiciary) is free from corruption, enhances the performance of participants, and discourages perjury. See *Criden*, at 556 (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980)). Each of these benefits accrues when the public, the press, and any interested parties have a full opportunity to observe every aspect of a proceeding.

Here, the court reviewed and responded to a jury question behind closed doors. The public was unable to observe any arguments made by the attorneys, any concerns expressed by the judge, the demeanor of the participants, and the means by which the ultimate decision was reached. Mr. McNeal, any family members, the press, and other interested spectators were likely unaware that proceedings were even taking place, and had no opportunity to play the important role secured to them when proceedings are open.

The judge and counsel also met in camera to discuss the instructions that would guide the jury's consideration of the evidence. RP (3/14/12) 101. The transcript does not indicate what occurred in

chambers: none of the arguments made by either party are preserved, nor are any rulings made by the trial judge. Accordingly, the state failed to establish that the proceeding did not implicate the core values of the public trial right. Cf Sublett, at ___ (“There was no showing here that the chambers discussion was adversarial in that it seems all sides agreed with the judge's response.”)

Ultimately, neither party took exception to the court’s instructions; however, there is no indication as to how consensus was reached. Given the lack of evidence, it is fair to presume that the in camera proceedings had an adversarial tone. Under these circumstances, the “experience” prong of the Sublett test suggests that the closed hearings here should have been open to the public.

The in camera hearings here implicated the core values of the public trial right. Accordingly, the trial court’s decision to close the courtroom violated both Mr. McNeal’s constitutional rights and those of the public. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. Article I, Sections 10 and 22; Bone-Club, supra. Accordingly, his convictions must be reversed and the case remanded for a new trial. Id.

II. MR. McNEAL’S CONVICTIONS VIOLATED DUE PROCESS BECAUSE THEY WERE BASED ON PROPENSITY EVIDENCE.

A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 203 P.3d 1044 (2009)). In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); see *State v. Russell*, 171 Wash.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

Contrary to Respondent’s argument, Mr. McNeal’s due process claim is a manifest error affecting a constitutional right. In the alternative, the court should exercise discretion and review the issue on its merits.

A. The error here is constitutional because it infringed Mr. McNeal’s Fourteenth Amendment right to due process.

A conviction based on propensity evidence violates due process.³ See *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), reversed on other grounds at 538 U.S. 202, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003); see also *McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993); see also *Old Chief v. United States*, 519 U.S. 172, 182, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) (“There is, accordingly, no question that propensity would be an

³ The U.S. Supreme Court has expressly reserved ruling on a very similar issue. *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

‘improper basis’ for conviction...”) (citation omitted). Respondent fails to address the authorities cited by Mr. McNeal, and relies, instead, on *State v. Powell*, 166 Wash.2d 73, 206 P.3d 321 (2009). Brief of Respondent, p. 13.

But the appellant in *Powell* did not raise a due process claim. See *Powell*, at 84 (noting that “An evidentiary error, such as erroneous admission of ER 404(b) evidence, is not of constitutional magnitude,” without mentioning the Fourteenth Amendment or the right to due process.) Accordingly, *Powell* is inapposite.

B. The error here is manifest because it prejudiced Mr. McNeal.

An error is manifest if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008). Mr. McNeal has met this standard.

At trial, jurors were provided two competing versions of events: Ms. Chipman testified that she sold drugs to Morgan (the informant); Morgan testified that he purchased methamphetamine from Mr. McNeal. RP (3/13/12) 90; RP (3/14/12) 58, 72. In light of this conflicting evidence, it is likely that jurors used the improperly admitted evidence as proof that Mr. McNeal had a propensity to commit crimes. This is especially true given the lack of limiting instruction and the court’s directive that jurors were to “consider all of the evidence” in assessing guilt.

Respondent's claim that the evidence was "overwhelming" ignores Ms. Chipman's testimony, Morgan's credibility issues, and the officers' inability to observe what transpired inside the residence. See Brief of Respondent, p. 15-17. Respondent's approach—ignoring all the weaknesses in the state's evidence, and all the evidence that favors the defense—is inconsistent with the "plausible showing" standard required under *Nguyen*. Had the propensity evidence been excluded (or, alternatively, if the evidence had been redacted and/or introduced for a limited purpose, accompanied by a proper limiting instruction), the jury would likely have accepted Ms. Chipman's version of events and acquitted Mr. McNeal.

Accordingly, the error had practical and identifiable consequences at trial. The issue can be reviewed under RAP 2.5(a)(3); *Nguyen*, at 433. The erroneous admission of propensity evidence, the lack of a limiting instruction, and the court's opening instruction (which encouraged jurors to consider the propensity evidence in determining Mr. McNeal's guilt) combined to violate Mr. McNeal's Fourteenth Amendment right to due process. *Garceau*, *supra*. Accordingly, his convictions must be reversed and the case remanded for a new trial. *Id.*

III. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.

Mr. McNeal rests on the argument set forth in Appellant’s Opening Brief.

IV. THE ACCOMPLICE LIABILITY STATUTE CRIMINALIZES PROTECTED SPEECH.

The First Amendment protects speech advocating criminal activity: “[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.” U.S. Const. Amend. I; *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). Because of this, speech advocating criminal activity may only be punished if it “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L.Ed.2d 430, 89 S.Ct. 1827 (1969).

The accomplice liability statute (RCW 9A.08.020) violates this standard. As interpreted, the statute reaches pure speech—in the form of “words” and “encouragement”—if made with knowledge that it will promote or facilitate the commission of the crime.⁴ RCW 9A.08.020; WPIC 10.51; CP 31-54. The statute and the pattern jury instruction

⁴ Respondent erroneously suggests there is an additional requirement—that the “encouragement must aid in planning [or] committing the crime.” Brief of Respondent, p. 27. This is incorrect: the pattern instruction used in this case defines aid to include encouragement. See WPIC 10.51.

substitute mere knowledge for the intent requirement imposed under *Brandenburg* (“directed to inciting or producing imminent lawless action”). The statute and instruction also eliminate *Brandenburg*’s second requirement: that the speech be “likely to incite or produce” imminent lawless action. *Brandenburg*, at 447. Respondent’s argument—that the “knowledge” requirement eliminates any free speech problem—is incorrect: *Brandenburg* did not adopt a standard allowing the government to outlaw speech made with knowledge that it would promote or facilitate crime. See Brief of Respondent, pp. 27-28.

Respondent also relies on Division I’s *Coleman* decision, but *Coleman* is analytically unsound. Brief of Respondent, pp. 28-29 (citing *State v. Coleman*, 155 Wash.App. 951, 231 P.3d 212 (2010), review denied, 170 Wash.2d 1016, 245 P.3d 772 (2011) and *State v. Ferguson*, 164 Wash.App. 370, 264 P.3d 575 (2011)). In *Coleman*, Division I concluded that the statute’s mens rea requirement removed from its reach “protected speech activities that are not performed in aid of a crime and that only consequentially further the crime.” *Coleman*, at 960-961 (citations omitted).⁵

The *Coleman* court’s logic is flawed for two reasons.

⁵ In *Ferguson*, Division II court adopted the reasoning set forth in *Coleman*.

First, the constitution protects much more crime-related speech than the “speech activities” described by the Coleman court (speech that only consequentially furthers a crime). Coleman, at 960-961. Contrary to Division I’s reasoning, speech encouraging criminal activity is protected even if it is performed in aid of a crime and even if it directly furthers the crime, unless it is also “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” Brandenburg at, 447; cf. Coleman, at 960-961.

For example, the state cannot criminalize speech that is “nothing more than advocacy of illegal action at some indefinite future time.” Hess v. Indiana, 414 U.S. 105, 108, 94 S. Ct. 326, 38 L. Ed. 2d 303 (1973). Merely examining the mens rea required for conviction is insufficient to save the statute, because a person can engage in criminal advocacy with the intent to further a particular crime and still be protected by the constitution.

Speech that “encourage[s] unlawful acts” is protected, unless it falls within the narrow category outlined by Brandenburg. Ashcroft, at 253. The state cannot ban all speech made with intent to promote or facilitate the commission of a crime; such speech can only be criminalized if it also meets the Brandenburg test. A conviction can only be sustained if the jury is instructed that it must find that the speech was (1) “directed

to inciting or producing imminent lawless action..." and (2) "likely to incite or produce such action." *Brandenburg* at 447. The jury was not so instructed in this case. Thus, assuming (as the *Coleman* court claims) that the accomplice liability statute avoids the "protected speech activities" described, such avoidance is not enough to render the statute constitutional, if it also reaches other protected speech.

Second, the *Coleman* court applied the wrong legal standard in evaluating the statute. The U.S. Supreme Court has drawn "vital distinctions between words and deeds, between ideas and conduct." *Ashcroft*, at 253. The accomplice liability statute reaches pure speech: "words" and "encouragement" are sufficient for conviction, if accompanied by the proper mens rea. See WPIC 10.51; CP 31-54. Because the statute reaches pure speech, it cannot be analyzed under the more lenient First Amendment tests for statutes regulating conduct.

But the *Coleman* court ignored this distinction. Specifically, the *Coleman* court relied on cases dealing with laws regulating behavior. The court began its analysis by noting that "[a] statute which regulates behavior, and not pure speech, will not be overturned as overbroad unless the challenging party shows the overbreadth is both real and substantial in relation to the statute's plainly legitimate sweep." *Coleman*, at 960 (citing *Virginia v. Hicks*, 539 U.S. 113, 122, 156 L.Ed.2d 148, 123 S.Ct. 2191

(2003); and *City of Seattle v. Webster*, 115 Wash.2d 635, 641, 802 P.2d 1333 (1990), cert. denied, 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991)). The court then imported the Supreme Court’s rationale from *Webster* and applied it to the accomplice liability statute:

We find Coleman's case similar to *Webster*. *Webster* was charged under a Seattle ordinance banning intentional obstruction of vehicle or pedestrian traffic. The Washington Supreme Court explained the ordinance was not overbroad because the requirement of criminal intent prevented it from criminalizing protected speech activity that only consequentially obstructed vehicle or pedestrian traffic... In the same way, the accomplice liability statute Coleman challenges here requires the criminal mens rea to aid or agree to aid the commission of a specific crime with knowledge the aid will further the crime.

Coleman, at 960-61 (citation omitted). But (as noted) *Webster* involved the regulation of conduct—obstruction of vehicle or pedestrian traffic—and therefore, the statute could be upheld based on the distinction between “innocent intentional acts which merely consequentially block traffic...” and acts performed with the requisite mens rea. *Webster*, at 641-642.

No such distinction is available here, because the accomplice liability statute reaches pure speech, unaccompanied by any conduct—i.e. “words” or “encouragement” made with knowledge that it will promote or facilitate criminal activity, but that is not directed at and not likely to incite imminent lawless action. See WPIC 10.51; CP 31-54. The First Amendment does not only protect “innocent” speech; it protects free

speech, including criminal advocacy directly aimed at encouraging criminal activity, so long as the speech does not fall within the rule set forth in Brandenburg.

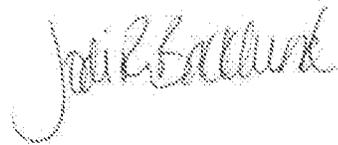
The Coleman court applied the wrong legal standard in upholding the accomplice liability statute. It should have analyzed the statute under Brandenburg instead of the test for conduct set forth in Webster. Accordingly, Coleman and Ferguson should be reconsidered.

CONCLUSION

Mr. McNeal's convictions must be reversed and the case remanded to the trial court for a new trial.

Respectfully submitted on January 15, 2013,

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CERTIFICATE OF SERVICE

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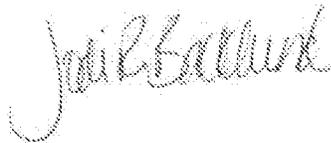
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply 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 January 15, 2013.



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