

FILED
COURT OF APPEALS
DIVISION II

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No. 43853-4-II

STATE OF WASHINGTON

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

BY cm
DEPUTY

STATE OF WASHINGTON,
Respondent,

v.

ANTHONY SUMAIT,
Appellant.

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

THE HONORABLE MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

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STATEMENT OF CASE

On February 2, 2011, Charles Burnett and Jennifer Minkler were cohabitating at 1941 Broadway Ave. in Hoquiam, Washington. RP 54. That evening, the two were away from the residence working on Ms. Minkler's vehicle. They returned late in the evening. *Id.* Shortly after they returned, Mr. Burnett was confronted outside by two men. *Id.* The two men were inquiring about a vehicle that was for sale. During this conversation, for no apparent reason, the two men began to strike Mr. Burnett, and both men had clubs. RP 56. In self-defense, Mr. Burnett shot one of them. This man was later identified as Daniel Holcomb. RP 8. The other man ran off, he was later identified as the appellant.

Sergeant Brian Dayton was the first law enforcement officer to arrive on scene. RP 6. He observed Daniel Holcomb lying on the sidewalk, and he also located Charles Burnett, who is still armed. RP 7. Sgt. Dayton ordered Charles Burnett to drop his weapon and Mr. Burnett complied. *Id.* Sgt. Dayton returned to Daniel Holcomb, where he located a wooden stick with a metal cap. RP 10. DNA testing of the stick produced a profile that match that of Charles Burnett. RP 48.

Sergeant Shane Krohn observed the injuries to Mr. Burnett. RP 84. He described a mark that was consistent with an injury caused by the wooden stick or handle that was recovered. *Id.* He also observed an injury described as a gash which required stitches. RP 85.

Officer Kristi Lougheed of Aberdeen Police Department observed the appellant walking down the road from the area where this incident occurred. RP 39. She noticed him to be continually looking back towards the scene of the crime. *Id.* She also notice that he was sweating heavily, even though it was a cold night. *Id.* He was wearing clothing matching the description of the man that left the scene of the crime. RP 40.

Officer David Blundred interviewed the appellant at the Hoquiam police station. RP 27. The officer observed that the defendant had injuries to his hands. He observed that the blood had saturated over the dry dirt on the appellant's hands. RP 29. During an interview, the appellant admitted to being at the scene with Daniel Holcomb. RP 31.

The defendant was charged with the crime of assault the second degree, and the case ultimately went to trial. At the beginning of the trial, before the for first witness, the prosecuting attorney asked for a sidebar. RP 5. No record of the sidebar was made, and the defendant did not object to the fact that no record was made. *Id.*

ARGUMENT

1. The State presented adequate evidence that the appellant is guilty of Assault in the Second Degree.

Due process requires that the State bear the burden of proving each and every element of the crime beyond a reasonable doubt. *State v. McCollum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). The applicable standard of review is whether, after reviewing the evidence in the light

most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn.App. 478, 484, 761 P.2d 632 (1987) rev. den., 11 Wn.2d 1033 (1988). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted more strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In considering this evidence, "credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Carmillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In this case, Jennifer Minkler specifically stated that both men had clubs. RP 55. One club was found at the scene of the crime, and the second club apparently was carried off by the appellant. Any issue of credibility is resolved in favor of the state, therefore, this Court must assume the jury believed this witness. It must be assumed that the jury believed that both men were armed with clubs. This is sufficient evidence to convict the appellant of the crime of assault with a deadly weapon. Moreover, Ms. Minkler stated that both men were assaulting Mr. Burnett at the same time. Assuming that the jury believed this statement, which this Court must, the jury could find that the appellant was acting as an accomplice to Mr. Holcomb, who was clearly armed with a deadly weapon.

2. A sidebar conversation between the court and counsel does not violate the public trial right.

The appellant claims that it was error for the trial court to hold a sidebar outside the presence of the public. The determination as to whether the public trial right has been violated is a question of law to be reviewed de novo. *State v. Momah*, 167 Wash.2d 140, 147-48, 217 P.3d 321 (2009). The public trial right is not absolute, but may be overcome to serve an overriding interest based on findings that closure is essential and narrowly tailored to preserve higher values. *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

In deciding whether public trial right has been violated the court should first determine whether the proceeding at issue implicates the public trial right. *State v. Sublett*, 176 Wash.2d 58, 71, 292 P.3d 715, 721 (2012). The Supreme Court has dictated proper analysis for this issue. *Id* 73. The court describes this as the "experience and logic" test. *Id*. The experience prong of this test, asks "whether the place and process have historically been open to the press and general public." *Id*. The logic prong of this test, asks whether public access places significant positive role in the functioning of the particular process in question." *Id*. If the answer to both questions is yes, then the public right attaches. *Id*. The appellant has the burden of satisfying the experience and logic test. *In re Pers. Restraint of Yates*, 177 Wash.2d 1, 29, 296 P.3d 872, 886 (2013).

During jury deliberations in the case against *Sublett*, the jury submitted a question to the court. *Id* at 67. The question was considered in chambers with counsel and judge present. *Id*. There was no objection to this procedure at the time.

The court in *Sublett*, held that the public trial right was not implicated because discussions of jury questions had historically been something that was not done in open court presence of the public. *Id*. at 75. This is true in this case. Sidebar discussion have historically been done outside the presence of the public. Sidebar discussion are usually procedural. Often meant to uniform the court of the need to put something on the record outside the presence of the jury, or in this case the need of a recess. The fact that the appellant did not make a request to put the discussion on the record after the jury was dismissed indicates that nothing of significant was decided.

Moreover, public access to such a brief insignificant discussion would not have a positive role on the functioning of the process. For this reason, the logic prong of the test above is not satisfied.

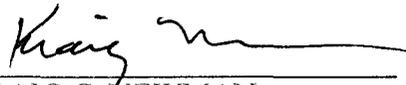
CONCLUSION

Because the State has presented sufficient evidence to convict the appellant of the crime of Assault the Second degree, and that a sidebar

does not violate the public trial right, the State asks this Court to deny the appellant's claims of error and to affirm the conviction.

DATED this _____ day of June 2013.

Respectfully Submitted,

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