

SUPREME COURT NO. 93685-4
COURT OF APPEALS NOs. 33073-7-III, 33074-5-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, PETITIONER,

v.

RALPH E. WHITLOCK, Respondent.

AND

THE STATE OF WASHINGTON, PETITIONER,

v.

DAVID R. JOHNSON, Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

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I. INTRODUCTION

Ralph É. Whitlock and David R. Johnson were tried jointly for crimes relating to the home invasion robbery of a residence belonging to Tanya Routt. At trial and during cross examination, counsel for Mr. Johnson, attempted to ask one of the State's witnesses whether or not they had ever been a confidential informant for the local narcotics task force. The State objected and requested a sidebar to discuss its concerns with this course of abusive questioning and the relevance thereof. The trial court, anticipating that more in depth discussion would be necessary, adjourned to chambers with all counsel to discuss the State's evidentiary objection. In a published opinion, the Court of Appeals determined that this procedure implicated the public trial rights of the defendants and constituted a closure of the proceedings. The Court of Appeals then reversed the convictions of both defendants. This Court has granted review. The State would request that this Court hold that the evidentiary sidebar conducted in this case was within the coverage of this Court's decision in State v. Smith, 181 Wn.2d 508, 334 P.3d 1049 (2014), and reinstate the convictions.

II. ASSIGNMENT OF ERROR

The Court of Appeals erred in determining that the trial court's decision to hold a sidebar conference in chambers, to address an

evidentiary objection concerning inappropriate and abusive cross examination by defense counsel, constituted a closure of the courtroom and triggered the requirement that the trial court review and consider the factors set forth in State v. Bone-Club, 128 Wn.2d 254, 256, 906 P.2d 325 (1995). The Court of Appeals further erred in concluding that the sidebar procedure utilized here can be legally distinguished from this Court's decision in Smith, *supra*.

III. STATEMENT OF THE CASE

In the very early hours of June 10, 2014, Ralph E. Whitlock, and his accomplice, David R. Johnson, went to Tanya Routt's home in Clarkston, Washington for the purposes of robbing Routt. Report of Proceedings (RP) at 248. Mr. Johnson knew that Routt had been involved with selling drugs. RP 180, 192.

On the night of this incident, Ms. Routt left the residence at around midnight, and was gone until morning. RP 185-190. Mr. Whitlock and Mr. Johnson arrived at approximately 1:00 a.m., entered the residence without permission, and through the use of threats and force against several of those present in the residence, took property belonging to Ms. Routt. RP 185-190, 247, 248, 249, 252, 254-7, 309, 310. 570-1. Present in the residence were Lisa Jones, Damien Hester, Crista Ansel, Ms. Routt's two daughters, Ms. Jones' daughter, and three unidentified friends of Mr. Hester. RP185.

Crista Ansel, who had been downstairs when Mr. Whitlock and Mr. Johnson entered the house, went upstairs and saw the two perpetrators. RP 307-09. Ansel saw Mr. Johnson in the kitchen with a silver handgun. RP 310-13. Ansel testified that Mr. Johnson had the pistol out, pointing it at her and the others and said, "Don't do anything stupid." RP 311.

Mr. Whitlock and Mr. Johnson removed a security camera system with a monitor from Routt's bedroom, along with a dial entry safe. RP 193. The safe contained methamphetamine, pills, and three thousand dollars (\$3,000.00) cash, as well as other personal records, which Whitlock and Johnson took when they the residence. RP 194, 385.

Mr. Whitlock was charged by information with Burglary in the First Degree, Robbery in The First Degree, both with deadly weapon and firearm enhancements, and two counts of Bribing a Witness. Clerk's Papers, Whitlock (CPW) 60-63. The State charged Mr. Johnson with Burglary in the First Degree and Robbery in The First Degree, both with deadly weapon and firearm enhancements. Clerk's Papers, Johnson (CPJ) 83-84.

Mr. Whitlock and Mr. Johnson waived jury and were tried to the bench. RP 679. During trial and upon cross examination of a State's witness, counsel for Mr. Johnson attempted to examine the witness concerning the witness's prior cooperation with law enforcement. RP

338, 424. The State anticipated that the Defense would ask whether the witness had previously been a “confidential informant” for the local narcotics task force, and objected to the question. RP 339. The State believed that the questioning was a calculated effort to expose the witness as a cooperative informant for the purposes of intimidating the witness and exposing the witness to further threats and retaliation. RP 424. The State requested a sidebar to discuss its concerns without exposing the witness. RP 339. At that time, the court called for a break and took the sidebar into chambers. RP 339. After the sidebar, trial recommenced and Mr. Johnson’s counsel proceeded on a different line of questioning. RP 339. Neither Mr. Whitlock nor Mr. Johnson objected to the sidebar or that it was held in chambers. RP 339.

At the conclusion of the morning’s testimony, a record was made regarding the discussion that occurred during the sidebar. RP 424-427. The State reiterated that it had concerns regarding Mr. Johnson’s attempt to elicit testimony concerning the witness’s alleged prior cooperation as a confidential informant. RP 424. The State argued that such inquiry was not relevant to the credibility of the witness or any of the facts at issue in the case. RP 424. Instead, the State argued, the purpose of such questioning was solely to embarrass or intimidate the witness and place the witness in jeopardy of possible retaliation, potentially including physical harm. RP 424.

The State's position was that any arguable relevance that such testimony might have was substantially outweighed by the risk of unfair prejudice and harassment of the witness. RP 424. At sidebar, the trial court agreed with the State and said it would allow limited inquiry to whether the witness had previously provided statements to police, but that the defense would not be allowed to force the witness to reveal whether or not the witness was or had officially been a confidential informant. RP 425. The court's ruling further allowed counsel to develop whether or not Mr. Johnson or Mr. Whitlock suspected that the witness might have been an informant for the police. RP 425-6. Mr. Johnson's counsel agreed this approach would adequately address the defense's interest. RP 425-6. Neither defense counsel had any substantive disagreement with the State's characterization of the discussions that occurred during the evidentiary conference, nor did either object to the summary of the discussions and Court's ruling, nor did either defendant lodge any objection regarding the sidebar being conducted in chambers without simultaneous recording. RP 425-6. The court then recessed for lunch. The courtroom remained open during this discussion and during the sidebar in chambers. RP 339, 424-427.

The trial court found both Mr. Whitlock and Mr. Johnson guilty of Burglary in the First Degree and Robbery in the First Degree. CPW 71-77, CPJ 98-103. The Court further found that Mr. Johnson

was Mr. Whitlock's accomplice and that Mr. Johnson was armed with a firearm during the commission of these crimes. CPW 71 -77, CPJ 98-103.

Both Mr. Johnson and Mr. Whitlock filed timely notices of appeal and their cases were consolidated for review purposes. While not raised by either defendant, the court of appeals, *sua sponte*, raised the issue of whether the evidentiary conference constituted a closure of the courtroom. Supplemental briefing was requested, and without oral argument, the court issued the opinion, concluding that the evidentiary sidebar was a closure, resulting in a structural error necessitating reversal of the convictions. State v. Whitlock, 195 Wn. App. 745, 755, 381 P.3d 1250 (Div. III, 2016). This Court granted the State's petition for review.

IV. ARGUMENT

The Court of Appeals decision herein directly conflicts with this Court's decision in State v. Smith, 181 Wn.2d 508, 334 P.3d 1049 (2014). There, this Court held that "a sidebar conference, even if held outside the courtroom, does not implicate Washington's public trial right." *Id.* at 519. Ignoring this clear holding, which this Court characterized as "commons sense," the court of appeals held that the sidebar in the present case did implicate the public trial right. The decision of the court of appeals fails to recognize that the subject

matter discussed during the sidebar herein was exactly the sort of evidentiary discussions historically considered at sidebar in accordance with Smith. Despite this Court's conclusion that sidebars may be conducted outside the courtroom, the court of appeals' decision erroneously distinguishes between "evidentiary objection in chambers" and sidebars conducted "even in hushed sidebar voices." Whitlock, at 754. The court of appeals' decision creates uncertainty where this Court has given clarity. This Court should reverse court of appeals' decision and reinstate the convictions.

A. PURSUANT TO THIS COURT'S RULING IN STATE V. SMITH, THE EVIDENTIARY SIDEBAR CONFERENCE CONDUCTED IN THIS MATTER DID NOT IMPLICATE THE PUBLIC TRIAL RIGHT.

The decision of the Court of Appeals is in direct conflict with this Court's decision in Smith. As recognized by a member of the Supreme Court in summarizing the Smith decision:

In Smith, this court applied the experience and logic test to hold that sidebar conferences involving evidentiary rulings on contemporaneous objections do not implicate the public trial right.

In re Pers. Restraint of Speight, 182 Wn.2d 103, 110, 340 P.3d 207 (2014) (Madsen C.J. concurring). In reaching this decision, the Supreme Court utilized the three step analysis to assess claims of courtroom closure. See Smith, at 513 (*citing* State v. Sublett, 176 Wn.2d 58, 70-71, 292 P.3d 715 (2012)). The first step is to determine

whether the public trial right is implicated. *Id.* Next, the Court looks to whether a closure occurred. *Id.* at 520. Finally, the Court reviews whether the closure was justified. *Id.* If the public trial right is not implicated, then it is unnecessary to determine whether a closure occurred, let alone decide whether it was justified. *Id.* at 519-21.

In determining whether the public trial right is implicated by a particular procedure or proceeding, the Court in Smith applied the “experience and logic” test. *See id.* at 514-515. As noted by the Court in Sublett, “not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public.” 176 Wn.2d at 71. Under the experience prong, the Court looks at “whether the place and process have historically been open to the press and general public.” Smith, 181 Wn.2d at 514 (*citing* Press-Enter. Co. v. Superior Court, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). “The logic prong asks ‘whether public access plays a significant positive role in the functioning of the particular process in question.’” *See id.*

Under Smith, this Court determined that sidebar conferences on evidentiary rulings have traditionally been conducted outside public view. *Id.* at 515. The Court noted that these conferences involved evidentiary rulings on highly technical and “mundane” issues of little public interest. *See id.* 515-516.

As to the logic prong, this Court found no logical reason why “allowing the public to intrude on the huddle” would otherwise further the policies compelling public trials. *Id.* at 519. The Court further noted that many attorneys “fail to fully appreciate the complexities” of evidence rules. *Id.* The Court observed, “Nothing is added to the functioning of the trial by insisting that the defendant and the public be present during sidebar *or in-chambers* conferences.” *Id.* (*emphasis added*). Ultimately, this Court held:

Sidebars have traditionally been held outside the hearing of both the jury and the public. Because allowing the public to “intrude upon the huddle” would add nothing positive to sidebars in our courts, we hold that a sidebar conference, ***even if held outside the courtroom***, does not implicate Washington’s public trial right.

Id. (*emphasis added*).

Here, the public would not have been privy to the conversation which occurred in the “huddle.” This is true whether the sidebar discussions occurred in the courtroom or in chambers. While the announcement of evidentiary rulings do routinely occur in open court, as recognized by Smith and ignored by the Court of Appeals, the arguments for and against the ruling often occur beyond earshot of spectators. That is precisely what occurred here. The objection was lodged on the record in open court. The arguments were had at sidebar in chambers, and the ruling was subsequently announced in

the courtroom, along with a summary of the concerns of the State and both defendants.

Under the logic prong, there is no significant reason to believe that the public's presence and input would have aided the trial court. To this end, the function of the hearing should be paramount. Under Smith, the location is irrelevant. *Id.* at 519. Here, the function was to field a midtrial objection to contemporaneous questioning, a trial practice which falls squarely and traditionally within the scope of a sidebar. The fact that the sidebar occurred during a bench trial and not a jury trial is, under the facts of the current case, of no moment. Ordinarily, the concern at trial and the justification for a sidebar is to avoid the jury hearing information or argument and being potentially influenced thereby. In the present case there is obviously no concern that the fact finder would be improperly influenced. The State did not object to the defense examination to avoid the trier of fact, in this case the trial judge, from hearing the question or the answer. Rather, pursuant to ER 403, the State sought to avoid unfairly and dangerously prejudicing the witness. Trial counsel was attempting to intimidate the witness on an issue of tangential relevance, for the purposes of chilling the witness's testimony or otherwise harassing the witness, thereby placing the witness at great risk of retaliation after trial.

As in Smith, no testimony was taken during the in-chambers sidebar. The State had objected to the question posed by defense counsel on the basis of relevance. RP 339. A sidebar was requested and the trial court decided to conduct the sidebar in chambers. RP 339. The State explained the potential prejudice to the State and the witness, as well as a lack of substantial relevance of the question and anticipated answer. RP 424. The defense was given opportunity to explain the perceived relevance. RP 425-6. This is clearly the traditional grist of the sidebar mill.

To effectively articulate the prejudice underlying its objection, the State had to effectively expose the witness, causing the very harm that the objection sought to avoid. Thus, the issue was not that the trier of fact would hear this information, but that the *defendants* and *spectators* would have official confirmation about whether or not the witness had previously acted as a confidential informant.¹ The defendants were given fair opportunity through counsel to explain the relevance of the line of inquiry before the trial court decided whether to allow the question to be posed to the witness. This was a simple legal issue of relevance and prejudice under ER 403, wrapped in very

¹Any claim that the Defendants' rights to be present at evidentiary sidebar was adequately addressed in *In Re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994). (Holding that a criminal defendant does not have the right to be present during in-chambers conferences or sidebar conferences on legal matters that do not involve the resolution of disputed facts.)

complicated fact pattern that would not be obvious to the trial court without explanation. An open hearing to explain the need for a closure would have defeated the purpose and caused the very harm the State sought to avoid.

The identity of a confidential informant is protected and the State has a substantial interest in protecting the identities of informants. See RCW 5.60.060(5). Even a defendant, who is charged with crimes that the informant, in that capacity, assisted law enforcement with the investigation, may not compel disclosure, absent a compelling showing of necessity to overcome the State's interest. See Roviaro v. United States, 353 U.S. 53, 60-61, 1 L. Ed. 2d 639, 77 S. Ct. 623 (1957). Even if a defendant makes such showing, the trial court would necessarily conduct an *in camera* hearing to review the informant's testimony. State v. Harris, 91 Wn.2d 145, 150, 588 P.2d 720 (1978); State v. Allen, 27 Wn. App. 41, 48, 615 P.2d 526 (1980). It would be a logical disconnect that the defendants herein could compel public disclosure of the witnesses identity as a previous informant in this setting, where the witness was not acting in the capacity of an informant, but an *in camera* (in chambers or otherwise closed) hearing would occur if the witness had been acting as an informant. If defense can simply "out" informants by inquiring on cross and forcing a public discussion of the witness's

prior history as an informant, then the privilege is in substantial peril. As Judge Korsmo recognized in his dissent, the concerns raised could not adequately be addressed, even in the bench trial setting, in the manner suggested by the lead opinion of the Court of Appeals. Whitlock, 195 Wn. App. at 758. The evidentiary sidebar is the appropriate mechanism for addressing abusive cross examination and was appropriately utilized herein to thwart trial counsel's attempt to intimidate the witness.

B. THE COURT MADE A PROMPT MEMORIALIZATION OF THE COURT'S DISCUSSION WITH THE PARTIES AND THE SUBSTANCE OF ITS RULING ON THE RECORD AS REQUIRED.

In distinguishing the sidebar procedure utilized here from the evidentiary conference in Smith, the court of appeals relied upon the fact that the conference was not recorded. Whitlock, 195 Wn. App. at 756-7. Believing that recording was "an important factor in the Supreme Court's public trial jurisprudence," the Concurrence asserted that "[r]elying on human memory to accurately recount what happened during a court proceeding is inadequate." *Id.* at 757. However, as this Court noted in Smith, simultaneous recording is not required. Smith, at 516, fn. 10. Prompt memorialization is authorized where the proceeding is not recorded. See id.

Here, the contents and discussions of the sidebar were memorialized on the record. RP 424-426. All parties were given

ample opportunity to place on the record the concerns they expressed during sidebar, and the announcement of the trial court's ruling, allowing for all objections to be preserved for the record. RP 424-426. Thus any member of the public wishing to inquire can readily discover exactly what happened during the evidentiary sidebar. See Smith, at 518.

The court of appeals finds that the memorialization that did occur was not prompt. Whitlock, at 753. In a footnote, the Court of Appeals observes that the court reporter did not make notation of the actual time, but that the objection and retirement to chambers for sidebar occurred at page 339 of the Report of Proceedings and that memorialization occurred at page 424-27. *Id.* p. 8, fn. 3. By this measure, the Court determined that the memorialization was not "prompt" within the meaning of Smith. But this is not a remotely accurate measure of time, nor is it the appropriate standard from measuring promptness.² What actually occurred during the morning session is a better indicator of whether the memorialization was sufficiently prompt within the meaning of Smith. Looking only at page numbers and using the Court of Appeals' "watch," the second day of trial commenced on December 9, 2014 and the State resumed its

²The number of pages in the transcript is a poor measurement in light of the fact that it fails to consider any pauses in dialog or pace of the speakers. It only measures the number of words actually spoken.

case at RP 281. RP 63, 281, 339. Testimony was taken from three witnesses that morning. RP 281-423. The State's objection that resulted in the sidebar occurred during the first round cross examination of the second³ witness, which was conducted by Mr. Johnson. RP 339. The witness was then cross examined by Mr. Whitlock's counsel. RP 349 - 372. Redirect and recross followed. RP 372-377. Memorialization of the sidebar occurred before the Court recessed for the noon lunch break. RP 423-424. The memorialization thus occurred in a timely fashion and at an opportune moment in the trial. Anyone wishing to observe the morning proceedings would have been able to hear the summary of the discussions.⁴ The memorialization was not buried in the record after conclusion of the trial or at some other inconvenient or illogical time where no one would think to look. The appellate record was preserved for review and is available for public scrutiny. Under these circumstances memorialization was conducted promptly, within the meaning of Smith, and without any impairment to the defendants' public trial rights.

³This witness took the stand at RP 303.

⁴Even if the court conducted the sidebar in open court and it was recorded, anyone not in attendance who wished to review the record would have had to wait to review the record until the noon recess when the Clerk would have time to close the recording and make a copy.

The subject matter discussed in this case was that traditionally addressed outside the public view at sidebar. That this discussion occurred in chambers and not in the hushed whispers of a bench conference is of no moment. Further, neither Mr. Whitlock, nor Mr. Johnson objected to the sidebar being conducted in chambers. RP 426. The public trial right was not implicated by the sidebar herein. Application of the ruling announced by the court of appeals confuses the analysis of Smith, and substitutes new considerations of recording and location as primary considerations, rather than setting (midtrial) and function (to address finite evidentiary issues which invariably arise during trial).

There has never been any disagreement about what occurred at sidebar. There is no concern that the memorialization on the record was inaccurate.⁵

Further, contrary to the concerns of the Concurrence regarding the frailty of the human memory, Washington law already allows for a similar procedure where the entire trial record is lost. There, reconstruction of the entire record is allowed for appellate review. See State v. Tilton, 149 Wn.2d 775, 785, 72 P.3d 735 (2003) (“[A] reconstructed record will provide the defendant a record of sufficient

⁵Both attorneys for the defendants and the deputy prosecutor, three members of the Bar in good standing, made a record of the discussions and had opportunity for input were there any substantive disagreements. Further, the Superior Court Judge, also in good standing, affirmed these representations.

completeness for effective appellate review.”). If an entire trial record can be effectively constructed from the memory of the trial judge and counsel months later, then so too can a few minutes of argument on a single legal issue be accurately recalled and related before the end of the morning session. The Concurrence also expressed concerns that the decision of the trial court resulted in a limitation on the scope of cross-examination. Whitlock, at 756. However, neither Mr. Whitlock nor Mr. Johnson raised this issue or otherwise complained that the scope of cross examination was improperly limited or argued that the witness’s status should have been deemed admissible at trial. As such, the State’s objection was properly granted and the questioning was clearly improper.

Addressing such an objection at sidebar was the most expedient and effective method to address this type of issue without necessarily causing the very harm which the court and the State sought to avoid. There were no issues of credibility or disputed facts to resolve. Rather, the question was simply the legal conclusion of whether the witness’s prior alleged cooperation was relevant to credibility or otherwise. In the bench trial setting, the trial judge did not have to speculate what weight a jury might give this evidence. The trial judge was no doubt aware what, if any, impact this information would have on his determination of the witness’s

credibility. This was a proper use of the sidebar procedure, and did not implicate the public trial right.

Finally, it should be recognized that the court of appeals' decision creates a hardship for smaller counties, like Asotin County, that lack the ability to record at sidebar or outside the courtroom,⁶ and would be unable to utilize the sidebar mechanism as limited by the court of appeals. As recognized in Smith, sidebars have a long standing place in trial practice, certainly predating electronic recording. That recording may now more available than in previous times does not equate to the creation of a constitutional right to recording of all sidebars. The evidentiary sidebar is not a proceeding which implicates the public trial right. Smith, at 519.

VI. CONCLUSION

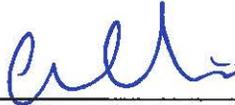
The sidebar conducted here concerned an evidentiary ruling on a finite objection to a single question. Resolution of such objection is clearly within the proper scope of a sidebar. That the sidebar was not recorded is of no moment, as the sidebar was properly memorialized at a reasonable and prompt time and within the trial record, nor is it significant that the sidebar occurred outside the courtroom. Under State v. Smith, this Court concluded that a sidebar, at any other

⁶At current and without substantial cost to the County, the Asotin County Superior Courtroom only records through the amplified sound system. As such, conducting a recorded sidebar would defeat the purpose as all person in the courtroom would be able to hear the conversation.

location, is still a sidebar, and the defendants' public trial rights were not implicated by the sidebar. For the forgoing reasons, this Court should reverse the decision of the court of appeals and reinstate the defendants' convictions. The State respectfully requests this Court enter such a decision.

Dated this 31st day of January, 2017.

Respectfully submitted,



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IN THE SUPREME COURT OF THE STATE OF
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The State of Washington,

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Supreme Court No: 93685-4

DECLARATION OF SERVICE

DECLARATION

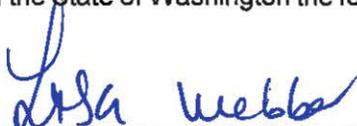
On February 1, 2017 I electronically mailed, with prior approval from Mr. Kato and Ms. Gasch, a copy of the SUPPLEMENTAL BRIEF OF PETITIONER in this matter to:

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I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on February 1, 2017.



LISA M. WEBBER
Office Manager