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

STATE OF WASHINGTON,	)	No. 30741-7-III
Respondent,	)	
	)	
v.	)	
	)	UNPUBLISHED OPINION
TAMMY PATRICE WHITLOCK,	)	
	)	
Appellant.	)	
	)	

Korsmo, C.J. — Tammy Whitlock challenges her conviction for vehicular assault, arguing that the trial court violated her right to a public trial and that the information charging her with vehicular assault was deficient. We disagree and affirm.

FACTS

On December 4, 2009, Ms. Whitlock's car crossed over the center line and struck Sarah Aiken's car, causing significant injuries to Ms. Aiken. Testing established that Ms. Whitlock's blood contained .12 g/100 ml of blood ethanol as well as 6.1 ng/ml of THC (marijuana).

The State charged Ms. Whitlock with vehicular assault on July 6, 2010. The information alleged that Ms. Whitlock:

> [D]id (1) operate or drive a vehicle in a reckless manner and/or (2) operate or drive a vehicle (a) and have, within two hours after driving, an alcohol concentration of 0.08 or higher, and/or (b) while under the influence of or affected by intoxicating liquor or any drug; and/or while under the combined influence of or affected by intoxicating liquor and any drug and/or (3) operate or drive a vehicle with disregard for the safety of others, and thereby did cause substantial bodily harm to another, to wit: Sarah Aiken.

The matter was tried to a jury. Both parties proposed jury instructions to the court. On the second day of trial, the judge stated in open court: "Now, let the record reflect that I met with counsel this morning and presented them with copies of proposed jury instructions." Report of Proceedings (RP) at 188. The trial court then heard objections to the proposed jury instructions in open court.

The jury returned a verdict of guilty, as well as a special interrogatory determining that each of the alternative means was proven beyond a reasonable doubt. Ms. Whitlock was sentenced to 90 days in jail. She then timely appealed.

ANALYSIS

Ms. Whitlock alleges that the trial court violated her right to an open and public trial, and also attacks the sufficiency of the charging document. We address each argument in turn.

Public Trial Right. Ms. Whitlock

argues that the trial court violated her constitutional right to an open and public trial by conducting a hearing to select the appropriate jury instructions. We decline her invitation to depart from this court's prior rulings that the public trial right does not encompass hearings that involve issues that are purely legal or ministerial, and also note that the record does not clearly indicate that a hearing even occurred.

A defendant's right to a public trial is protected by both the state and federal constitutions. U.S. Const. amend. VI; Const. art. I, § 22. The Washington Constitution also guarantees the public the right to open court proceedings. Const. art. I, § 22. The public trial right is not absolute, but it assures that proceedings only occur outside the public courtroom in the "most unusual circumstances." *State v. Easterling*, 157 Wn.2d 167, 174-75, 137 P.3d 825 (2006) (emphasis omitted). This court reviews de novo whether a trial court has violated a defendant's public trial right. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

The public trial right applies to evidentiary phases of the trial as well as other "adversary proceedings," including suppression hearings, voir dire, and the jury selection process. *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008). However, a defendant does not have a right to a public hearing on "purely ministerial or legal issues that do not require the resolution of disputed facts." *Id.*

(citing *State v. Rivera*, 108 Wn. App. 645, 653, 32 P.3d 292 (2001)).

Ms. Whitlock contends that the trial court held a hearing that violated her public trial right. We disagree. The record shows only that trial counsel and Judge Godfrey met in the judge's chambers so that he could give counsel his proposed jury instructions.[1] The parties had previously submitted their proposed instructions, and based on the record it does not appear that the parties discussed the proposed instructions in chambers. Instead, the parties had the chance to discuss the instructions in open court.

This factual situation is similar to that of *State v. Koss*, 158 Wn. App. 8, 17, 241 P.3d 415 (2010). There, trial counsel and the judge met off the record in chambers for the purpose of making a change to a jury instruction. The court and counsel then went on the record in open court to address any objections to the instructions. *Id.* at 17. This court held that there was no public trial violation because the conference was a ministerial legal matter, it did not involve disputed facts, and therefore it did not implicate the defendant's right to a public trial. *Id.*

Like *Koss*, this case involved a meeting of counsel and the judge in chambers regarding jury instructions. It was a ministerial legal matter involving no factual dispute.

[1] On the second day of trial, the judge stated: "Now, let the record reflect that I met with counsel this morning and presented them with copies of proposed jury instructions." RP at 188.

Additionally, the record here does not establish that a hearing or conference even occurred. Judge Godfrey's statement simply indicates that he provided his proposed jury instructions to both parties in chambers; it does not indicate that the instructions were discussed or that he heard any arguments regarding the instructions. Instead, the record shows that the parties presented their challenges to the proposed instructions in open court. The trial court's meeting with counsel in chambers to distribute proposed jury instructions was not improper, and it did not violate Ms. Whitlock's public trial right.[2]

Sufficiency of the Charging Document. Ms. Whitlock next argues that the information charging her with vehicular assault was deficient because the first two of the three alternatives charged do not allege that she caused substantial bodily harm to another person, which is an element of the crime. We agree that the information was ambiguous as to the bodily harm element, but conclude that the necessary elements can be found within the terms of that document and that Ms. Whitlock failed to establish that she was prejudiced by the inartful pleading.

[2] Ms. Whitlock also contends that this court should reject, as a matter of policy, the recognized rule that the right to a public trial only extends to hearings that require the resolution of disputed facts, alleging that judicial impropriety may arise in non-adversarial hearings and that secret hearings degrade the public's perception of the judicial system. However, these generalized policy arguments are unconvincing in light of the facts here, when the "secret" meeting was simply the judge providing trial counsel with proposed jury instructions. We decline to depart from our prior rulings.

A charging document must state the elements of the alleged crime in order to give the accused an understanding of the crime charged. "All essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him." *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). When challenged for the first time after a verdict has been returned, courts will liberally construe the document to see if the necessary facts can be found. If not, the charge will be dismissed without prejudice. Even if a charge is stated, dismissal is appropriate if a defendant shows prejudice from an "inartful" pleading. *Id.* at 105-06.

The State may charge a defendant with one or all of the alternative means outlined in the statute, as long as the alternatives are not repugnant to one another. *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). If a charging document charges under more than one statutory alternative, it is constitutionally sufficient if it includes all the essential elements of the crime under one of the alternatives. *State v. Shabel*, 95 Wn. App. 469, 474, 976 P.2d 153 (1999).

Ms. Whitlock did not challenge the charging document until this appeal, thus requiring application of the liberal construction standard here. *Id.* This court begins its analysis by determining whether there is at least some language in the information that

gives notice of each element. *State v. Tunney*, 129 Wn.2d 336, 340, 917 P.2d 95 (1996). The information need not contain the exact words of the statute so long as the elements appear in some form, and the elements may be implied if the language supports that result. *State v. Moavenzadeh*, 135 Wn.2d 359, 362, 956 P.2d 1097 (1998).

RCW 46.61.522 provides:

> (1) A person is guilty of vehicular assault if he or she operates or drives any vehicle:
>
> (a) In a reckless manner and causes substantial bodily harm to another; or
>
> (b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another; or
>
> (c) With disregard for the safety of others and causes substantial bodily harm to another.

The information charged that Ms. Whitlock:

> [D]id (1) operate or drive a vehicle in a reckless manner and/or (2) operate or drive a vehicle (a) and have, within two hours after driving, an alcohol concentration of 0.08 or higher, and/or (b) while under the influence of or affected by intoxicating liquor or any drug; and/or while under the combined influence of or affected by intoxicating liquor and any drug and/or (3) operate or drive a vehicle with disregard for the safety of others, and thereby did cause substantial bodily harm to another.

Clerk's Papers at 1.

The charging document is ambiguous concerning whether the element of causing substantial bodily harm applies to all three alternative means charged—as directed in the

statute—or only to the third alternative means of operating or driving a vehicle with disregard for the safety of others. Under the rule of liberal construction, if the necessary facts appear in any form or can be found by a fair construction within the terms of the charging document, then it will be upheld unless Ms. Whitlock establishes that she was prejudiced by the "inartful pleading." *Kjorsvik*, 117 Wn.2d at 104. Here, the element of "caused substantial bodily harm to another" may be fairly implied to all three alternative means, not only the third. Liberally construed, the necessary element was present.

Ms. Whitlock also argues that the information was deficient, but does not establish that she suffered any prejudice as a result of the ambiguity in the charging document. Therefore, the ambiguity does not require reversal of her conviction.

Additionally, Ms. Whitlock contends that an information must include any sentencing enhancements that elevate the penalty for the charged crime under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). We disagree with this novel argument because the State is not required to set forth the punishment for each alternative means charged.

The purpose behind the charging document is to give the accused notice of the nature of the allegations so that a defense can be properly prepared. *Kjorsvik*, 117 Wn.2d at 97-102. The State is required, by statute as well as by court rule, to include all

essential elements of the alleged crime in the information. RCW 10.37.050(6); CrR 2.1(a)(1). However, the State is not required to include the punishment for each alternative means charged, even when the punishment differs for each alternative means.

Ms. Whitlock's argument that the State was required to include the sentencing range for each alternative means in the charging document under *Blakely* is without authority or precedent. She incorrectly claims that a conviction under RCW 46.61.522(1)(a) or (b) involves a "sentencing enhancement" because it is a Level IV offense, whereas a conviction under RCW 46.61.522(1)(c) is only a Level III offense. In either circumstance, the standard sentence range is a function of the jury's verdict, not an extra factual finding beyond the elements of the crime.

Furthermore, her argument that an aggravating factor or sentencing enhancement must be included in the charging document fails in light of the recent Washington Supreme Court decision, *State v. Siers*, 174 Wn.2d 269, 274 P.3d 358 (2012). In *Siers*, the defendant was convicted of two counts of assault in the second degree, but one count was reversed on appeal because the aggravating factor that the victim was acting as a good Samaritan was not included in the charging document. *Id.* at 272-73. The Supreme Court reversed, holding that an aggravating factor is not the functional equivalent of an essential element and it does not need to be charged in the information, overturning *State*

v. Powell, 167 Wn.2d 672, 223 P.3d 493 (2009). *Id.* at 282. Ms. Whitlock's contention that the State was required to include the sentencing range for each alternative means of vehicular assault in the information is even further removed than alleging the factual basis for an aggravating factor. *Blakely* does not apply to charging documents.

Liberally construed, the information was not deficient.

Affirm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

_____
Korsmo, C.J.

WE CONCUR:

_____
Kulik, J.

_____
Siddoway, J.