IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MICHAEL LYNN SUBLETT, Petitioner.	)	No. 84856-4 En Banc
STATE OF WASHINGTON, Respondent, v. CHRISTOPHER LEE OLSEN, Petitioner.	)	 Filed November 21, 2012

C. JOHNSON, J.—In this consolidated case, petitioners raise several issues, some common to both cases and others specific to each. Petitioner Michael Sublett challenges his convictions for premeditated first degree murder and felony murder, arguing the trial court wrongfully denied severance. He also challenges the comparability of out of state convictions used to support his sentence as a persistent

offender. Petitioner Christopher Olsen challenges his conviction for felony murder, raising claims regarding lesser included offense jury instructions and ineffective assistance of counsel. Both petitioners challenge the content of the accomplice liability jury instruction, and both claim a violation of their article I, section 22 trial rights occurred when the trial judge considered, in chambers and with counsel present, a question from the jury during its deliberations. The Court of Appeals rejected the issues raised. We affirm.

Facts and Procedural History

Petitioners Sublett and Olsen, along with a third person, April S. Frazier, were convicted of robbing and murdering victim Jerry Totten. Frazier had met Totten at an Alcoholics Anonymous meeting. Frazier needed housing and Totten offered her the use of a trailer on his property. He also allowed her to use the laundry facilities within his own home. Frazier's boyfriend, Sublett, was generally welcome as well. Totten was generous in assisting Frazier, giving her gifts of money as well as a place to live, and treated her, in her words, as a granddaughter. Despite this, Frazier and Sublett began stealing from Totten in November 2006. In January 2007, the two took Totten's wallet, cell phone, and checkbook. In total, Frazier and

Sublett stole over $51,000 from Totten.

Olsen was a friend of Frazier's. On January 29, 2007, Frazier and Sublett bailed Olsen out of jail, using $1,000 of Totten's money, after Olsen agreed to perform a "job" for them. The three went to a hotel and used methamphetamine. At this point in the story, the accounts differ.[1] According to Frazier, all three went to Totten's together. She knocked on the front door, and Totten let her in. She then went to the laundry room to finish her laundry, the alleged reason for the visit, and let Sublett and Olsen in through the adjacent backdoor. The two men proceeded to beat Totten with a baseball bat they took from the laundry room. Frazier heard Totten's moans but did not witness the violence herself. A forensic pathologist testified Totten died of manual strangulation.

According to Olsen, Frazier and Sublett left the hotel for a few hours. When they returned to pick up Olsen, they were agitated and angry. The three went to Totten's home. Totten was completely covered by blankets on a recliner when Olsen arrived, and Olsen was not sure whether the victim was alive or dead. He did not check. The three proceeded to loot Totten's home for valuables. At this point,

[1] Frazier agreed to testify against Sublett and Olsen in exchange for a plea deal. Sublett did not testify but generally denied the crimes. Olsen's testimony, to the extent that it differed from Frazier's, was uncorroborated, although consistent with his prior statements to investigators.

the two stories merge back together.

Olsen was upset, and he and Sublett went for a drive to calm down. Olsen claims Sublett threatened him with a gun, saying Olsen worked for Sublett now. Frazier also testified that Sublett threatened Olsen with a gun both at Totten's home and when they were back at the hotel. The following day, the three returned to Totten's home and moved his body. They put the body in the back of one of Totten's trucks, that had a canopy, and covered it with various boxes and stuffed animals. Olsen and Sublett then drove out to the Old Olympic Highway and abandoned the truck on an embankment.

Frazier confessed a version of this story to Elsie Pray-Hicks a few days later. Pray-Hicks reported the crime to police a week after that. Frazier and Sublett were arrested in Las Vegas, and Olsen was arrested in Olympia. Sublett and Olsen were charged with premeditated first degree murder and, alternatively, felony murder. The two, over Sublett's objection, were joined for trial.

During trial, Olsen submitted an irregular second degree manslaughter instruction that was refused by the court. He did not submit any other lesser included offense instructions, nor did he object to any of the instructions given.

During its deliberations, the jury submitted a question regarding the accomplice liability instruction. Counsel met in chambers to consider the question and agreed to the court's answer telling the jury to reread the instructions. No objection was made to this procedure or the answer itself. The written question and answer were put in the record, but there was no colloquy regarding the discussion in the verbatim report of the proceedings.

Sublett was convicted of both premeditated first degree murder and felony murder. He was sentenced to life without the possibility of release under the Persistent Offender Accountability Act (POAA), RCW 9.94A.570, based on prior out-of-state convictions found comparable to Washington strike offenses. Olsen was convicted of felony murder, but not premeditated murder. He was sentenced to 500 months of confinement based on his offender score of 9. The Court of Appeals affirmed. In rejecting that a closure occurred, the Court of Appeals held that the right to a public trial does not extend to hearings on purely ministerial or legal issues that do not require the resolution of disputed facts. Because the jury's question involved a purely legal issue, consideration of the inquiry was not subject to the right for a public trial, so the defendants' rights were not violated. This appeal

followed.

Issues[2]

1. Whether the trial court erred by denying severance.
2. Whether the trial court violated the right to a public trial by considering a jury question in camera.[3]
3. Whether the accomplice liability instruction correctly stated the law.
4. Whether the trial court erred by refusing to specifically answer the jury's question.
5. Whether the trial court should have instructed the jury on lesser included offenses as to Olsen.
6. Whether Olsen received effective assistance of counsel given his counsel's failure to submit lesser included offense instructions.
7. Whether second degree robbery in California is comparable to Washington's

[2] Olsen's petition for review raises more issues, but rather than argue these in the petition, he attempts to incorporate his arguments below by reference. We do not address issues based solely on incorporated arguments. *State v. Brett*, 126 Wn.2d 136, 205, 892 P.2d 29 (1995) (citing RAP 10.3(a)(5) requirement that brief must include argument as well as citation to legal authority) and (citing *State v. Lord*, 117 Wn.2d 829, 916, 822 P.2d 177 (1991)).

[3] Both Sublett and Olsen argued their right to be present was violated by this procedure at the Court of Appeals, but abandoned this issue in their petitions for review here. The Court of Appeals held the conference itself was not a critical stage of the proceedings because it involved purely legal issues and no disputed facts, so the right to be present did not apply and therefore was not violated.

second degree robbery for persistent offender purposes.

Analysis

1. Whether the trial court erred by denying severance

A defendant seeking severance must demonstrate that a joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy. Whether to grant a motion to sever trials is left to the discretion of the trial court and is reversed on appeal only when a manifest abuse of discretion is shown. *State v. Hoffman*, 116 Wn.2d 51, 74, 804 P.2d 577 (1991) (citing *State v. Grisby*, 97 Wn.2d 493, 507, 647 P.2d 6 (1982)). On appeal, the defendant must be able to point to specific prejudice. Mutually antagonistic defenses may be sufficient to support a motion to sever, but this is a factual question which must be proved and is not sufficient grounds in itself as a matter of law. *Grisby*, 97 Wn.2d at 508.[4] The conflict must be so prejudicial that the two defenses are irreconcilable, such that the jury will unjustifiably infer that the conflict alone demonstrates that both defendants are guilty. *Hoffman,* 116 Wn.2d at 74 (citing *Grisby*, 97 Wn.2d at 508).

Sublett's defense was a general denial of involvement in the murder. Sublett

[4] Separate trials are required when an out-of-court statement by a codefendant incriminates his fellow defendant, because that situation raises confrontation clause issues. *Grisby*, 97 Wn.2d at 507 (citing *State v. Ferguson*, 3 Wn. App. 898, 906, 479 P.2d 114 (1970)). Because Olsen testified and was subject to cross-examination, this is not at issue here.

did not testify during trial. Olsen's defense was that he was not present for the murder, and he only helped move the body after the fact because Sublett threatened him. Sublett moved for severance so that he would not have to defend himself from both the State and Olsen. The Court of Appeals found that the trial court did not err by denying severance because the two defenses were not so prejudicially in conflict that the jury would infer guilt simply from the conflict, nor were the defenses so mutually exclusive that the jury would be forced to believe one if it disbelieved the other.

We have set a high bar for granting severance, and Sublett has not met it. While the two defenses are irreconcilable, they do not reach the level where the jury would unjustifiably infer *from the conflict* that both are guilty. *See Hoffman*, 116 Wn.2d at 74 (citing *Grisby*, 97 Wn.2d at 508). The jury could have believed either or neither defendant, though it could not believe both. That is, it could have believed that Sublett did not participate at all and inferred that Olsen was lying. Or it could have believed Olsen and inferred that Sublett was lying. Given the jury's verdict, it did not believe either of them, and Sublett has not shown that this was due to the conflicting defenses rather than the evidence presented during trial.[5] Nor did Sublett

[5] Such a result is supported by federal case law as well. In a similar case, *Zafiro v. United States*,

cite to any evidence admissible only as to Olsen, which prejudiced his defense. The trial court, therefore, did not err in denying severance.

2. *Whether the trial court violated the right to a public trial by considering a jury question in camera*

Both Sublett and Olsen contend that the trial court violated their public trial right when the court responded to a jury question in chambers, with only counsel present, and that this violation requires automatic reversal. Whether the right to a public trial has been violated is a question of law reviewed de novo. *State v. Momah*, 167 Wn.2d 140, 147-48, 217 P.3d 321 (2009) (citing *State v. Bone-Club*, 128 Wn.2d 254, 256, 906 P.2d 325 (1995)). There is a strong presumption that courts are to be open at all stages of the trial. A criminal defendant's right to a public trial is found in article I, section 22 of the Washington State Constitution and the Sixth Amendment to the United States Constitution, both of which provide a

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506 U.S. 534, 538-39, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993), the defendants sought a bright line rule requiring severance whenever defendants presented antagonistic defenses. The Court denied the request but instead offered situations where joint trials would seriously compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence. The examples given focused on evidence that would be admissible as to one defendant but inadmissible against another. Otherwise, limiting instructions are assumed to cure most risks of prejudice. Here, Instruction 6 told the jury to "separately decide the count charged against each defendant" and that a "verdict on one count as to one defendant should not control your verdict on the other count or as to the other defendant." Olsen Clerk's Papers (OCP) at 54. This is the proper procedure to follow in these circumstances.

criminal defendant with a "public trial by an impartial jury."[6] 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).

Before determining whether there was a violation, we first consider whether the proceeding at issue implicates the public trial right, thereby constituting a closure at all. We recently held that a closure "occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). But 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.

To facilitate this determination, the Court of Appeals, relying on its earlier

[6] Additionally, article I, section 10 of Washington's Constitution provides that "[j]ustice in all cases shall be administered openly," granting both the defendant and the public an interest in open, accessible proceedings. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). This right is mirrored federally by the First Amendment. *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (*Press* I). We have historically analyzed allegations of a court closure under either article I, section 10 or article I, section 22 analogously, although each is subject to different relief depending upon who asserts the violation. *See Press* I, 464 U.S. at 512 (transcript will remedy violation of public trial right asserted by member of public); *Ishikawa*, 97 Wn.2d at 45-46 (remanding for reconsideration of motion to unseal transcripts when violation asserted by member of public); *Waller v. Georgia*, 467 U.S. 39, 50, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (remanding for new suppression hearing when right asserted by defendant*); State v. Easterling*, 157 Wn.2d 167, 182, 137 P.2d 825 (2006) (remanding for new trial when right asserted by defendant excluded from proceeding).

decision in *State v. Sadler*, 147 Wn. App. 97, 193 P.3d 1108 (2008) held that the right to a public trial does not extend to hearings on purely ministerial or legal issues that do not require the resolution of disputed facts. *State v. Sublett*, 156 Wn. App. 160, 181, 231 P.3d 231 (2010). The appellate court recognized that the public trial right extends to the evidentiary phases of trial and other adversary proceedings such as suppression hearings and jury selection (voir dire). There was no showing here that the chambers discussion was adversarial in that it seems all sides agreed with the judge's response. Rather, because the jury's question involved a purely legal issue, consideration of the inquiry was not subject to the public trial right under this distinction, so the Court of Appeals found that defendants' rights were not violated. This analytical construct has gained acceptance in Court of Appeals cases. *See, e.g.*, *In re Det. of Morgan*, 161 Wn. App. 66, 253 P.3d 394 (2011); *In re Det. of Ticeson*, 159 Wn. App. 374, 386, 246 P.3d 550 (2011); *State v. Koss*, 158 Wn. App. 8, 17-18, 241 P.3d 415 (2010); *State v. Rivera*, 108 Wn. App. 645, 652-53, 32 P.3d 292 (2001). While we agree with the appellate court's result in this case, and note the approach used by the Court of Appeals somewhat parallels the approach we use, we reject the Court of Appeals' formulation of the relevant inquiry. We

decline to draw the line with legal and ministerial issues on one side, and the resolution of disputed facts and other adversarial proceedings on the other. The resolution of legal issues is quite often accomplished during an adversarial proceeding, and disputed facts are sometimes resolved by stipulation following informal conferencing between counsel. The distinction made by the Court of Appeals will not adequately serve to protect defendants' and the public's right to an open trial.

We have recognized that the right to a public trial serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (citing *Peterson v. Williams*, 85 F.3d 39, 43 (2d Cir. 1996)). The appellate court concluded no public trial right violation occurred. We reach the same conclusion using the experience and logic test because we hold that resolution of the jury's question did not implicate the core values the public trial right serves.

Recognizing that resolution of whether the public trial right attaches to a particular proceeding cannot be resolved based on the label given to the proceeding,

in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (*Press* II), the United States Supreme Court formulated and explained the experience and logic test to determine whether the core values of the public trial right are implicated.[7] The first part of the test, the experience prong, asks "whether the place and process have historically been open to the press and general public." *Press* II, 478 U.S. at 8. The logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* If the answer to both is yes, the public trial right attaches and the *Waller* or *Bone-Club* factors must be considered before the proceeding may be closed to the public.[8] *Press* II, 478 U.S. at 7-8. We agree with this approach and adopt it in these

[7] The Court had already discussed the importance of access to criminal trials under the First Amendment in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604-06, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982), as recognized by both experience and logic. Because criminal trials were historically open, and the right of access "plays a particularly significant role in the functioning of the judicial process and the government as a whole," the *Globe* Court required the State to identify a compelling government interest prior to closure and to narrowly tailor the denial of access to serve the interest. *Globe*, 457 U.S. at 606. *Globe* preceded *Press* I and *Waller* by two years.

[8] Before closing a proceeding to the public, the trial court is required to consider the following factors and enter specific findings on the record to justify any ensuing closure: (1) The proponent of closure must show a compelling interest, and if based on anything other than defendant's right to a fair trial, must show serious and imminent threat to that right; (2) anyone present when the motion is made must be given opportunity to object; (3) the least restrictive means must be used; (4) the court must weigh the competing interests of the proponent of the closure and the public; and (5) the order must be no broader in application or duration than necessary. *Bone-Club*, 128 Wn.2d at 258-59. These are consistent with the factors required by *Waller*, 467 U.S. at 47, although a recent decision, *Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010), clarifies that the trial court must, sua sponte, consider reasonable alternatives to closure.

circumstances.

The experience and logic test can be helpful in that it allows the determining court to consider the actual proceeding at issue for what it is, without having to force every situation into predefined factors. For example, in *Press* II, the underlying case concerned preliminary hearings in California, which are held before trial to determine whether probable cause exists to try the defendant. Such hearings, being similar in nature to probable cause hearings, have traditionally been open, therefore satisfying the first prong of the test, experience. Next, the Court considered the values served by open courts, that is, whether the logic prong dictated openness during such proceedings. Having previously found that public access to criminal trials is essential to the proper functioning of the criminal justice system, the Court compared the hearing at issue to the trial itself. It found that many of the same rights attached (the right to appear, to cross-examine hostile witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence); it commented on the importance of the hearing because it is often the final and most important step of the criminal proceeding; and it remarked that because there was no jury present to act as a safeguard, public access was even more significant.

Therefore, the logic prong counseled toward a finding of openness. Because both prongs of the analysis were answered affirmatively, the Court held that the right of public access attached. For any closure to ensue, then, it would need to be justified by findings that it was essential to preserve higher values and narrowly tailored to serve that interest. *Press* II, 478 U.S. at 10-13.[9] But not every case will fit cleanly within a comparison between the proceeding at issue and trial in general, so the trial or reviewing court must consider whether openness will "enhance[] both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (*Press* I). We recognize the failure of any test to identify a closure with accuracy. However, the federal approach is a useful

[9] At issue in *Press* II was whether a newspaper could obtain transcripts of the proceeding, which the defendant had successfully moved the court to close to the public under a state statute. The release of transcripts was initially denied because it could result in prejudicial pretrial publicity, but after the defendant waived his right to a jury trial, the transcripts were released. Review of the matter was not moot because the controversy was capable of repetition, yet evading review. The remedy in *Press* II was not a new trial or release of the transcripts, but simply a reversal of the reasoning of the California Supreme Court because it had failed to consider the First Amendment right of access to criminal proceedings. *Press* II, 478 U.S. at 15. Though *Press* II involved the First Amendment, we see no reason not to apply the experience and logic test to determine the scope of protected rights under article 1, section 22 of the Washington State Constitution. The Court has recognized in the context of juror selection proceedings, "there is no legitimate reason . . . to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has. 'Our cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant.'" *Presley*, 130 S. Ct. at 724 (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979)).

tool for determining whether the public trial right attaches to a particular process; we therefore apply it in this case.

In applying the experience and logic test to the facts before us, we find the petitioners have failed to establish that their right to a public trial was violated. 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.[1] Because the jury asked a question concerning the instructions, we view this as similar in nature to proceedings regarding jury instructions in general. Historically, such proceedings have not necessarily been conducted in an open courtroom. Jury instructions are covered by CrR 6.15. Proposed instructions are submitted in writing at least three days before the start of trial. CrR 6.15(a). We are aware that, quite often, counsel discuss the instructions with the court during an informal proceeding. But before instructing the jury, counsel is to be given the opportunity to object in the absence of the jury. CrR 6.15(c). Any objections to the

[1] Sublett cites one case where a Massachusetts appellate court held that "it was a violation of the defendant's right to a public trial for the judge to give her supplemental instructions to the jury in the privacy of the jury room," *Commonwealth v. Patry*, 48 Mass. App. Ct. 470, 475, 722 N.E.2d 979, 983 (2000), and argues this case supports his contention that the discussion regarding the question should also, therefore, be held in open court. But the judge and counsel in *Patry*, similar to the facts before us, discussed the jury question and the appropriate answer in private, and that discussion was held not to be in violation of the defendant's public trial right, so this case does not support Sublett's argument.

instructions, as well as the grounds for the objections, must be put in the record to preserve review. *Schmidt v. Cornerstone Inv., Inc.*, 115 Wn.2d 148, 162-63, 795 P.2d 1143 (1990); *Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn. App. 609, 615-17, 1 P.3d 579 (2000) (counsel has duty to lodge formal objections even if instructions discussed during informal hearing). Both CrR 6.15(a) and CrR 6.15(c) have been in effect, in almost identical form, since 1973. We have found no challenges to either of these sections of the rule or, prior to the rule's enactment, any case requiring the discussion of jury instructions to be held in open court.

The same is true regarding a proceeding to discuss a question from the jury about its instructions. Such questions from the jury are covered by CrR 6.15(f). This rule requires:

> (1) The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. *The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing.* In its discretion, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence. *Any additional instruction upon any point of law shall be given in writing.*

CrR 6.15(f)(1) (emphasis added).[11] While the rule requires that the question itself, any objections, and the court's response be "made a part of the record," it does not state how this must be done. Given that the question is submitted in writing, the rule contemplates that the answer, and any objections will also become part of the record in document form. It is, of course, within the court's discretion to read the question, ask for objections, and give an answer in open court with a court reporter present, but this is not required by CrR 6.15(f)(1). The rule itself advances and protects those interests underlying the constitutional requirements of open courts with its directive to put the question, answer and objections in the record. This rule is the only authority we can find governing this process, so, historically, we conclude that a proceeding in open court to discuss the question itself and any appropriate answer has not been required.

Under the facts of this case, then, we find no closure occurred because this proceeding did not implicate the public trial right, and therefore there was no

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[11] CrR 6.15(f)(1) has been in its present form since 2002. Before that, the rule contemplated that the court may wish to bring the jury into open court but did not require such a proceeding:

> After retirement for deliberation, if the jury desires to be informed on any point of law, the judge may require the officer having them in charge to conduct them into court. Upon the jury being brought into court, the information requested, if given, shall be given in the presence of, or after notice to the parties or their counsel. Any additional instruction upon any point of law shall be given in writing.

Former CrR 6.15(f)(1) (1974).

violation of either petitioners' public trial right. None of the values served by the public trial right is violated under the facts of this case. No witnesses are involved at this stage, no testimony is involved, and no risk of perjury exists. The appearance of fairness is satisfied by having the question, answer, and any objections placed on the record pursuant to CrR 6.15. Similarly, the requirement that the answer be in writing serves to remind the prosecutor and judge of their responsibility because the writing will become part of the public record and subject to public scrutiny and appellate review. This is not a proceeding so similar to the trial itself that the same rights attach, such as the right to appear, to cross-examine witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence. Neither Sublett nor Olsen claim or argue any of these rights, nor could they since such rights are inapplicable in the discussion of, or resolution of, questions from the jury. We hold the petitioners have not established that a closure or public trial right violation occurred.

3. Whether the accomplice liability instruction correctly stated the law

We review instructional errors de novo. *State v. Schaler*, 169 Wn.2d 274, 282, 236 P.3d 858 (2010) (citing *State v. Grande*, 164 Wn.2d 135, 140, 187 P.3d

248 (2008)). In doing so, we evaluate each instruction in the context of the instructions as a whole. *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995) (citing *State v. Benn*, 120 Wn.2d, 631, 654-55, 845 P.2d 289 (1993)). Olsen did not object to the instructions implicated by his argument, but he argues his due process rights were violated because the State was not required to prove every element of the offense, thus, according to his argument, reversal is warranted. *See In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"). Under RAP 2.5(a)(3), we will review an alleged manifest error affecting a constitutional right even if not raised in the trial court. But for relief to be granted, Olsen must show actual prejudice resulting from the error, and the error is nonetheless subject to harmless error review. *State v. O'Hara*, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2010).

Olsen argues that the jury instructions allowed for his conviction of felony murder even if, as according to his own testimony, Olsen arrived at the scene after the murder to participate in a second burglary. This theory relies on a novel

approach to burglary: that a first burglary ended when Sublett and Frazier allegedly left the victim's home and a second began when the three returned to steal more items.[12] Olsen argues the jury should have been instructed on this multiple-instance theory of burglary. Specifically, Olsen argues that the State arguably did not prove Olsen participated in *the* crime that felony murder was predicated upon because according to his testimony, he could have participated only in a separate, second burglary.[13] The Court of Appeals found that the instructions accurately stated the elements required for the jury to convict Olsen of felony murder.[14] We agree.

> A person is guilty of felony murder when
>
> [h]e or she commits . . . the crime of . . . robbery in the first or second degree,

[12] In support of this theory, Olsen cites *State v. Dennison*, 115 Wn.2d 609, 616, 801 P.2d 193 (1990), where we found that the burglary at issue still in progress while the defendant was fleeing the scene, consonant with the felony murder statute. RCW 9A.32.030(1)(c) ("in the course of or in furtherance of such crime or in immediate flight therefrom, he or she . . . causes the death of a person other than one of the participants"). We did not consider whether, if the defendant had returned after fleeing, a second, chargeable burglary would have occurred, and need not do so for purposes of this discussion.

[13] In making this argument, Olsen relies on *State v. Cronin*, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000) and *State v. Roberts*, 142 Wn.2d 471, 501-02, 14 P.3d 713 (2000), where we clarified that for accomplice liability to attach, the defendant must have knowledge of *the specific underlying crime* to be guilty as an accomplice, not simply knowledge of any crime, because we are not a strict accomplice liability state. The instructional problems addressed in *Roberts* and *Cronin* have been remedied by using "the crime" and "such crime" rather than "a crime" in jury instructions, and such was the case here. *See* Instruction 21, OCP at 71 (accomplice liability instruction).

[14] The Court of Appeals rejected Olsen's arguments first because he did not object to the instructions but mainly because it believed there was no evidence that Totten was killed during the course of a crime that had terminated prior to Olsen's involvement. *Sublett*, 156 Wn. App. at 190-91 (citing *State v. Hunter*, 152 Wn. App. 30, 44, 216 P.3d 421 (2009)). This ignores Olsen's testimony that he arrived after the violent acts occurred, which, though perhaps not credible, was before the jury as evidence.

> [or] . . . burglary in the first degree . . . and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants.

RCW 9A.32.030(1)(c). The corresponding instruction given, instruction 11, provided that

> [a] person also commits the crime of murder in the first degree when he or she attempts to commit burglary in the first degree or robbery in the first or second degree, and in the course of and in furtherance of such crime or in immediate flight from such crime he or another participant causes the death of a person other than one of the participants.

OCP at 59. The instruction closely tracks the statute. A burglary is deemed to be "in progress" while the burglar is on the premises and continues during his flight. *State v. Dennison*, 115 Wn.2d 609, 616, 801 P.2d 193 (1990). According to Olsen, the effect of these instructions allowed the jury to convict him of felony murder even if the jury believed his version of events that there were actually two separate burglaries, the second occurring after Totten was murdered. Olsen's arguments fail because the instructions are subject to only one interpretation: that Olsen participated in *the* burglary upon which the felony murder was predicated. *See* Instruction 15, OCP at 64 (to convict instruction).[15] Moreover, the accomplice

[15] The "to convict" instruction required finding, as felony murder, alternative B: (1)That on or about January 29, 2007, Jerry Totten was killed; (2) That the defendant or an accomplice was committing or attempting to commit *the crime* of burglary in the first degree or

liability instruction makes clear that "more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice." Instruction 21, OCP at 71.[16] Importantly, these instructions allowed for acquittal if the jury believed Olsen's testimony, which they did not.

Additionally, Olsen's arguments fail because we evaluate each instruction in the context of the instructions as a whole. *Brett*, 126 Wn.2d at 171 (citing *Benn*, 120 Wn.2d at 655). There is a defense available to a felony murder charge, and the jury was given that corresponding instruction:

It is a defense to a charge of murder in the first degree based upon committing

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robbery in the first or second degree; (3) That the defendant, or another participant, caused the death of Jerry Totten in the course of or in furtherance of *such* crime or in immediate flight from such crime; (4) That Jerry Totten was not a participant in the crime; and (5) That the acts occurred in the State of Washington.

Instruction 15, OCP at 64 (emphasis added).

[16] In full, the accomplice liability instruction provided:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

Instruction 21, OCP at 71.

> Burglary or Robbery that the defendant:
> (1) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and
> (2) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and
> (3) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and
> (4) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.
>
> This defense must be established by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

Instruction 25, OCP at 75. This instruction almost verbatim tracks the language of RCW 9A.32.030(1)(c). If the jury had believed Olsen's version of events, this instruction allowed for his acquittal. The State was not, therefore, relieved of its burden of proof because it had to prove Olsen participated in the burglary, which resulted in Totten's death, and, given the available defense, in some way either committed or aided in the homicidal act. We affirm the Court of Appeals in finding no instructional error.

4. *Whether the trial court erred by refusing to specifically answer the jury's question*

As discussed above, the jury submitted a question during its deliberations concerning the accomplice liability instruction. *See* Instruction 21, note 10, OCP at 75. The jury sent the following question to the trial court:

> Clarification of Instruction 21. The structure of the 2nd sentence in the 1st paragraph is unclear. Which of the following is correct for intent? A person (X) is legally accountable for the conduct of another person (Y) when he or she (X) is an accomplice of such other person (Y) in the commission of the crime. – OR— A person (X) is legally accountable for the conduct of another person (Y) when he or she (Y) is an accomplice of such other person (X) in the commission of the crime.

The judge and counsel discussed this question in chambers, and the judge responded to the jury that "I cannot answer your question please re-read your instructions." SCP at 129.

It is within the trial court's discretion whether to give further instruction to a deliberating jury. *State v. Becklin*, 163 Wn.2d 519, 529, 182 P.3d 944 (2008) (citing *State v. Brown*, 132 Wn.2d 529, 612, 940 P.2d 546 (1997)). Because there was no objection, however, we do not review for abuse of discretion. Rather, Olsen must show actual prejudice caused by a constitutional error. *O'Hara*, 167 Wn.2d at 98-99. He does not do so. The Court of Appeals found that the accomplice liability instruction was not ambiguous and could support only one reading and that reading

was a correct statement of the law, thus there was no error. We agree.

Olsen argues that the second interpretation allowed the jury to convict him even if he lacked the mental state necessary for accomplice liability, therefore relieving the State of its burden to prove every element of the crime. But this section of the instruction does not touch upon the requisite mental state. The following paragraph requires knowledge: "A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he . . . aids or agrees to aid another person in planning or committing the crime." Instruction 21, OCP at 71. Despite any potential confusion regarding who is aiding whom from the first part of the instruction, the jury still had to find Olsen *knew* his aid would facilitate the robbery or burglary. Therefore, there was no prejudice or error caused by not further instructing the jury.

5. *Whether the trial court should have instructed the jury on lesser included offenses as to Olsen*

We apply the *Workman* test to determine whether a defendant is entitled to an instruction on a lesser included offense. *State v. Nguyen*, 165 Wn.2d 428, 434-35, 197 P.3d 673 (2008) (citing *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382

(1978)). Under that test, two conditions must be met: first, each element of the lesser offense must be a necessary element of the offense charged. Second, the evidence must support an inference that the lesser crime was committed. We view the evidence in the light most favorable to the requesting party. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). First and second degree manslaughter may be lesser included offenses to premeditated murder, but neither first nor second degree manslaughter is a lesser included offense to first degree felony murder. *State v. Warden*, 133 Wn.2d 559, 562-63, 947 P.2d 708 (1997); *Dennison*, 115 Wn.2d at 609, 626-27 (explaining mental elements required for manslaughter not required for felony murder).[17] Thus, the only avenue open to Olsen is an argument that he was entitled to a manslaughter instruction based on the premeditated murder charge.

Olsen argues that he was entitled to a second degree manslaughter instruction based on his failure to summon aid when he had a legal duty to do so. *See State v.*

[17] RCW 9A.32.060, manslaughter in the first degree, requires proof of recklessness, and RCW 9A.32.070, manslaughter in the second degree, requires proof of criminal negligence. Neither of these are present in the felony murder statute, which requires no proof of a criminal mental state other than that necessary for the predicate crime. *State v. Frazier*, 99 Wn.2d 180, 191-92, 661 P.2d 126 (1983) (citing *State v. Dudrey*, 30 Wn. App. 447, 450, 635 P.2d 750 (1981)).

Morgan, 86 Wn. App. 74, 80, 936 P.2d 20 (1997).[18] Under RCW 9A.32.070, "A person is guilty of manslaughter in the second degree when, with criminal negligence, he causes the death of another person." Olsen relies on RCW 9.69.100, which creates a duty to report a violent offense, and criminalizes the failure to do so as a gross misdemeanor.[19] According to Olsen, Totten was kidnapped.[2] Because kidnapping is a violent offense, Olsen argues his failure to report Totten's kidnapping demonstrates his criminal negligence. *See* RCW 9.94A.030(44)(a)(vi) (defining first degree kidnapping as a serious violent offense), (53)(a)(vi) (defining

[18] In *Morgan*, the Court of Appeals held that a statute criminalizing the willful refusal to provide medical assistance to one's spouse could support the recklessness element necessary for a manslaughter charge. Violation of that statute, similar to RCW 9.69.100 (failure to report), is a gross misdemeanor.

[19] RCW 9.69.100, in full, requires:

(1) A person who witnesses the actual commission of:

(a) A violent offense as defined in RCW 9.94A.030 or preparations for the commission of such an offense;

(b) A sexual offense against a child or an attempt to commit such a sexual offense; or

(c) An assault of a child that appears reasonably likely to cause substantial bodily harm to the child, shall as soon as reasonably possible notify the prosecuting attorney, law enforcement, medical assistance, or other public officials.

(2) This section shall not be construed to affect privileged relationships as provided by law.

(3) The duty to notify a person or agency under this section is met if a person notifies or attempts to provide such notice by telephone or any other means as soon as reasonably possible.

(4) Failure to report as required by subsection (1) of this section is a gross misdemeanor. However, a person is not required to report under this section where that person has a reasonable belief that making such a report would place that person or another family or household member in danger of immediate physical harm.

[2] We are unaware of any defendants being charged with kidnapping in this case.

second degree kidnapping as violent offense). The failure to report, in turn, caused the death of Totten, so Olsen, under his theory, was therefore guilty of manslaughter. Olsen offered a nonstandard second degree manslaughter instruction based on this theory that the trial court refused.

We can find no support for Olsen's reading of the statutes. The legislature already decided that the failure to report under RCW 9.69.100 would be categorized and punished as a gross misdemeanor. We see no reason to elevate this crime to a felony. We therefore reject Olsen's argument that the failure to report a violent offense can support a manslaughter charge.

Additionally, we agree with the reasoning of the Court of Appeals. It found, under the second prong of the *Workman* test, that Olsen was not entitled to a second degree manslaughter instruction because his defense was not that the victim was still alive when he began participation in the robbery, as it would need to be to support the proposed instruction, but rather his defense amounted to a denial that he participated in the murder at all. Even if we accept Olsen's legal theory, the evidence did not support any causal relationship between Olsen and the death due to Olsen's alleged negligence in failing to summon aid. There is no evidence that

Totten was still alive when Olsen arrived at the scene if, as according to Olsen, Olsen arrived after the violent acts occurred. Totten died within three to five minutes by manual strangulation, which Olsen claims he did not witness, so the reporting statute was not triggered. Olsen's testimony does not, therefore, support the inference that only the lesser included offense was committed, as is required for the instruction to be applicable.

Next, Olsen makes an extended argument, including a *Gunwall*[21] analysis, that the right to a jury trial includes the right to be instructed on applicable lesser included offenses. His arguments, however, provide no relief because there was no applicable lesser included offense instruction available to him.[22]

6. *Whether Olsen received effective assistance of counsel given his counsel's failure to submit lesser included offense instructions*

Because Olsen was not entitled to lesser included offense instructions, his claim that his counsel was ineffective for offering none necessarily fails.

[21] In *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), we explained six nonexclusive factors that are examined to determine if the state constitution provides greater protection than the federal one.

[22] Olsen additionally argues the refusal to give lesser included offense instructions violated his Fourteenth Amendment due process rights. The only authoritative case Olsen cites is a capital case, where the evidence supported the lesser offense. *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). Such is not the case here.

7. Whether second degree robbery in California is comparable to Washington's second degree robbery for persistent offender purposes

At sentencing, the trial court found Sublett's prior California convictions for second degree robbery comparable to Washington convictions for second degree robbery and sentenced Sublett to life without parole as a third strike offender under the POAA. RCW 9.94A.570 (mandating life sentence for persistent offenders); RCW 9.94A.030(36) (defining persistent offender). The Court of Appeals affirmed, finding the elements of both crimes substantially similar, with each crime requiring a specific intent to steal.

Comparability of a prior out of state conviction is reviewed de novo. To determine whether a foreign offense is comparable to a Washington offense, we first consider if the elements of the foreign offense are substantially similar to the Washington counterpart. If so, the inquiry ends. If not, we determine whether the offenses are factually comparable, that is, whether the conduct underlying the foreign offense would have violated the comparable Washington statute. *State v. Thiefault*, 160 Wn.2d 409, 414-15, 158 P.3d 580 (2007) (citing *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). In this case, however, there is no factual

record of the foreign convictions so comparability is determined based only on the legal elements of the crime.

Robbery is defined by California Penal Code (CPC) § 211 as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Second degree robbery is all those instances which are not included as first degree. CPC § 212.5.[23] We compare this statute with our own law defining robbery.

In Washington, under RCW 9A.56.190,

> [a] person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking

[23] In full, the CPC § 212.5 provides:

> (a) Every robbery of any person who is performing his or her duties as an operator of any bus, taxicab, cable car, streetcar, trackless trolley, or other vehicle, including a vehicle operated on stationary rails or on a track or rail suspended in the air, and used for the transportation of persons for hire, every robbery of any passenger which is perpetrated on any of these vehicles, and every robbery which is perpetrated in an inhabited dwelling house, a vessel as defined in Section 21 of the Harbors and Navigation Code which is inhabited and designed for habitation, an inhabited floating home as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, a trailer coach as defined in the Vehicle Code which is inhabited, or the inhabited portion of any other building is robbery of the first degree.
>
> (b) Every robbery of any person while using an automated teller machine or immediately after the person has used an automated teller machine and is in the vicinity of the automated teller machine is robbery of the first degree.
>
> (c) All kinds of robbery other than those listed in subdivisions (a) and (b) are of the second degree.

> constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

And, "[a] person is guilty of robbery in the second degree if he commits robbery." RCW 9A.56.210. Under our law, the crime of robbery includes a specific intent to steal as an essential, nonstatutory element. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). This is also true under California law: "'Robbery is the taking of personal property in the possession of another against the will and from the person or immediate presence of that person accomplished by means of force or fear and with the specific intent permanently to deprive such person of such property.'" *People v. Davis*, 46 Cal. 4th 539, 608, 208 P.3d 78, (2009) (internal quotation marks omitted) (quoting *People v. Lewis*, 43 Cal. 4th 415, 464, 181 P.3d 947 (2008)). Thus, in either state, robbery requires (1) taking (2) personal property (3) from another person or from another's immediate presence (4) against his or her will (5) by force or threatened force (6) with the specific intent to steal. The two crimes are substantially similar.

Sublett argues that, because Washington law recognizes defenses to robbery that California does not, the two are not substantially similar.[24] In support, he relies

[24] Washington recognizes a diminished capacity defense to robbery, whereas California does not.

on *Lavery*, where we compared federal bank robbery, a general intent crime, to second degree robbery under Washington law, a specific intent crime. In *Lavery*, however, the distinction regarding the element of intent alone was enough to conclude the two crimes were not legally comparable. *Lavery*, 154 Wn.2d at 256 ("Because the elements of federal bank robbery and robbery under Washington's criminal statutes are not substantially similar, we conclude that federal bank robbery and second degree robbery in Washington are not legally comparable."). Here, however, both crimes require the specific intent to steal, so *Lavery* in fact supports a finding of comparability. While available defenses were mentioned in *Lavery*, they were not discussed as having any impact on the legal comparability analysis. The focus of the comparability inquiry remains on the elements of the crimes, and not the defenses. Without further support, Sublett's argument regarding defenses distinguishing the two crimes fails. Therefore, the trial court correctly found comparability.

Conclusion

We affirm the Court of Appeals and find no error by the trial court in the

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See State v. Thamert, 45 Wn. App. 143, 146, 723 P.2d 1204 (1986) (whenever intent is element of crime, diminished capacity available as defense); CPC § 25 (abolishing defense of diminished capacity).

denial of severance, in not answering an inquiry from the jury, in the accomplice liability instruction, and in not giving or offering lesser included offense instructions. We find second degree robbery in California comparable to second degree robbery in Washington, affirming the Court of Appeals. Finally, we affirm the Court of Appeals' holding that petitioners' public trial rights were not violated, but on different grounds. We find that neither experience nor logic supports the conclusion that the discussion regarding the appropriate response to a jury question, where no objection or dispute to the response is shown, need occur in open court, so long as the jury's question and response are placed in the record.

AUTHOR:
Justice Charles W. Johnson

WE CONCUR:

Justice James M. Johnson

Justice Tom Chambers

Justice Susan Owens