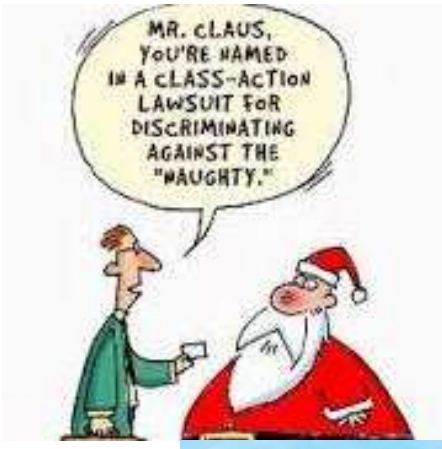
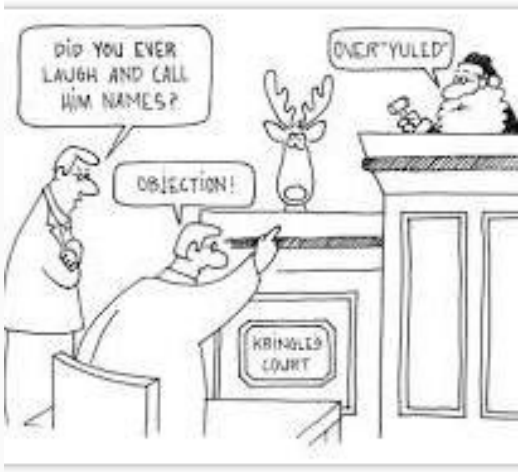
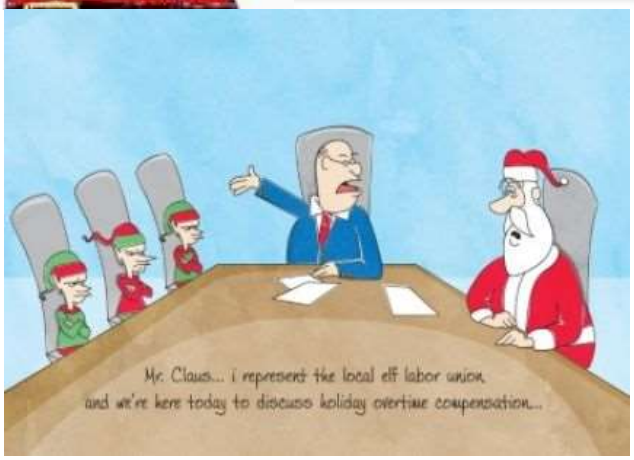
Happy Friday everyone.

I am back again with things I wish I had known during practice, things that have changed, interesting tidbits, and random tips for practice. Welcome back to:

SHERI'S SIDEBAR







Tis the season to be...legally represented!

1. **Are you aware that you can assure a jury that you can seal and keep confidential that jury questionnaire where you just asked all those personal questions about an individual's own and friends and families sexual history?**

   Held: trial court's sealing of juror questionnaires was not closure in alleged violation of defendant's right to public trial, and remand was not warranted for trial court to justify order sealing jury questionnaires, absent showing of good

cause for public access to juror's private information. *State v. Beskurt*, 176 Wn. 2d 441, 293 P.3d 1159 (2013).

Justice shall be administered openly, "[b]ut 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." *State v. Sublett,* 176 Wn.2d 58, 71, 292 P.3d 715 (2012). While open public trial rights are fixed stars in our constitutional firmament, they do not shine alone. The trial judge has both the inherent authority and statutory "power to preserve and enforce order in the courtroom and to provide for the orderly conduct of its proceedings." *State v. Lormor,* 172 Wn.2d 85, 93–94, 257 P.3d 624 (2011) (citing RCW 2.28.010). This includes the authority, when appropriate, to seal the courtroom or take matters into chambers for discussion with counsel. *E.g., Sublett,* 176 Wn.2d at 75–76, 292 P.3d 715 (recognizing that the trial judge has the authority to discuss jury instructions and jury questionnaires in chambers without *604 formally closing the proceedings on the record first). The defendant's right to a fair and speedy trial, the potential jurors' right to privacy, the judge's obligation to provide a safe and orderly courtroom, and many other considerations may justify a courtroom closure. Not all arguable courtroom closures require satisfaction of the five-factor test established in *State v. Bone–Club,* 128 Wn.2d 254, 906 P.2d 325 (1995).

State v. Slert, 181 Wn.2d 598, 603–04, 334 P.3d 1088, 1091 (2014).

Again, neither party has called a case on point to our attention, but it appears public access would have little role, positive or negative, on review of questionnaires to screen out those with prior prejudicial knowledge of the case. Questioning the jurors about their disqualifying knowledge in open court in front of the other jurors could have been potentially devastating to Slert's right to a fair trial. At a minimum, it is a waste of time to question potential jurors individually while everyone else waits if the parties and the court agree the potential juror is disqualified because of prejudicial knowledge of the case. Logic does not suggest conducting this review in public would play a significant positive role. *Accord Wilson,* 174 Wn. App. at 346, 298 P.3d 148 (finding public access to bailiff's decision to dismiss jurors for illness-related reasons pre-voir-dire would not serve a positive role).

Analogously, it is not an open public courts violation to discuss jury instructions and questions from a deliberating jury in chambers. *Sublett,* 176 Wash.2d at 71–72, 292 P.3d 715 (jury questions), 75, 292 P.3d 715 (jury instructions). Historically, these discussions have been held in chambers. *Id.* at 75, 292 P.3d 715. Initial discussions of jury instructions have often been held informally, and as we noted in *Sublett,* we have found no evidence that has been held to raise open courts concerns. *Id.* at 75–76, 292 P.3d 715. Like here, these informal proceedings are often a prelude to a formal process, on the record and without the jury present, to allow any party to object and to create a record for review. *Id.* (citing *Schmidt v. Cornerstone Invs., Inc.,* 115 Wn.2d 148, 162–63, 795 P.2d 1143 (1990)).

State v. Slert, 181 Wn.2d 598, 607–08, 334 P.3d 1088, 1092–93 (2014)

Let's talk community.

2. **Are you aware of whether a client's work community is sufficient to use for character reputation evidence?**
    a. Yes! See e.g. *State v. Callahan*, 87 Wn. App. 925, 943 P.2d 676 (1997)

3. **Do you know whether Washington Courts allow character reputation evidence to be admitted for "good sexual morality?"**
    a. I am glad you asked….what did we learn in law school….it depends! But most likely it is admissible.
        i. Div. 1 in a 1986 case argues that because crimes such as indecent liberties and incest concern sexual activity which is private and unknown to the community, one's reputation for such conduct, or lack thereof, would not be known to the community. *State v. Jackson*, 46 Wash. App. 360, 365, 730 P.2d 1361 (1986).
            1. To that argument you have two counter arguments.
        ii. First, with the easy, unlimited access to the internet, that analysis, hypothesis, or argument has zero merit in this day. People put the most ridiculous intimate trash online for the entire world to know.
        iii. Secondly, and unlike the Div. 1 argument, a legal argument rather than speculation: the majority position of the Nation, as well as the case law authority in Washington, "**holds that reputation evidence of good sexual morality is pertinent to a sex crime charge, so long as the defendant can lay the proper foundation**." *State v. Cox*, 17 Wn. App. 2d 178, 194–95, 484 P.3d 529, 537, *review denied*, 198 Wn.2d 1020, 497 P.3d 382 (Div. 3 2021)(citing *State v. Griswold*, 98 Wn. App. 817, 991 P.2d 657 (2000),

abrogated on other grounds by State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003).

4. **Are you prepared for the common State arguments for the Court to deny admissibility of the reputation "good sexual moral" evidence?**
    a. "THIS TYPE OF EVIDENCE" is specifically excluded in sex crimes.
        i. General character evidence cannot be offered, but a pertinent character trait relevant to the charged crime, such as sexual morality, is admissible with proper foundation.
            1. For foundation, give an offer of proof by calling witnesses to make a record.
            2. The witnesses must be from the "community" to testify about the reputation of the character evidence
            3. In the above case, the defendant called 4 co-workers who testified they had many friends in common within the community (work), had known the defendant for a long time, and each had never heard anything negative about the defendant's sexual morality.
                a. The trial court excluded because 1) Inadmissible generally; 2) the term sexual morality is too vague; 3) counsel failed to establish proper foundation.
                b. Upon appeal the State added 4) defense failed in establishing the adequate foundation because a) each witness only offered conclusory statements and b) that by using a negative inference.

    b. Judge Siddoway stated, "**Contrary to the trial court's position, "this type" of evidence is explicitly admissible under ER 404(a)(1)."** He further noted the Griswold case did not hold there was a categorical exclusion of sexual morality, regardless of whether the term was well defined. *State v. Cox*, 17 Wn. App. 2d 178, 194–95, 484 P.3d 529, 537, *review denied*, 198 Wn.2d 1020, 497 P.3d 382 (2021).
    c. Regarding foundation, defense noted a 1904 Supreme Court case with well established, unblemished law finding one method of proving positive reputation is by negative inference – the absence of bad information. Judge Siddoway noted that the State neither made any attempt to distinguish that case holding, nor cited any authority supporting its own argument for the court.
        i. **** Ok Sheri's Sidebar peeps – what's the quote I told you I love to use here in motions to prevent the Court from considering the State's BS????**
        ii. **"Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none;" further stating the arguments without supporting authority are to be disregarded without consideration.** *Linth v. Gay*, 190 Wn. App. 331, Fn. 5, 360 P.3d 844

(2015)(emphasis added)(quoting *DeHeer v. Seattle Post–Intelligencer,* 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

d. Finally, the Court expressly found that the rules require the witnesses to provide only conclusory testimony about the reputation when providing character evidence. It is only after that is introduced that the opposing counsel, the State, is free to cross-examine the defense witnesses on specific instances of misconduct, the depth of their knowledge, and the factual basis for their knowledge under ER 405(a) in an attempt to reduce the persuasive value of the reputation evidence. Even then however, that goes only to weight, not to admissibility.
e. Judge Siddoway, joined by Judge Fearing in concurrence, held the Walla Walla Superior Court Judge abused its discretion by refusing to allow defense counsel to admit reputation evidence of good moral sexual character.
    i. WAY TO GO ON THAT 2021 APPEAL LENELL NUSSBAUM, allegedly in well-deserved retirement now 😉 This case was super helpful to some attorneys in the past two weeks so I wanted to give it and the contents which are helpful reminders a shout out!

One last inappropriate prosecutor argument since it is the end of the year – you are going to lose your mind over this one, and the "explanation" for it!

5. **Did you know that it is *inappropriate* during plea negotiations where the African American defendant is present, for the prosecutor to say to him, "your jury will not necessarily be a jury of *your peers* (while pointing at him); it'll be a jury of OUR peers (pointing to themselves and the other white attorney in the room), be a lot of white folks."?**
    a. I SWEAR IT HAPPENED -- THERE IS A TRANSCRIPT – AND THE TRIAL COURT JUDGES (prosecutors in robes) ALLOWED IT ONCE RAISED – Stated yeah, prosecutor misconduct but so what, doesn't impact the voluntariness of the plea…
        i. What did that survey show? Defense counsel is tired of being disrespected and treated poorly by the bench who listens to the State as

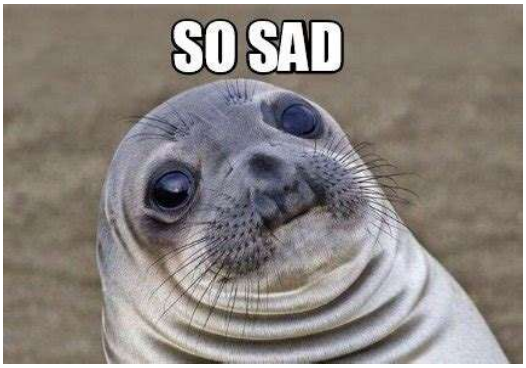
if they are Gods, regardless of what the law says, and what the Judicial duty is to the bench, to defense counsel, to the public, and to the defendant as well! Hmmmm….I can't believe Div. 3 wasn't naming names in this appellate case!

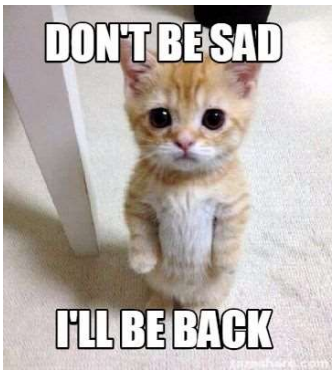
b. See Dec. 12, 2023 State v. Lance Ray Horntvedt 38928-6 Div. 3: https://www.courts.wa.gov/opinions/?fa=opinions.disp&filename=389286MAJ

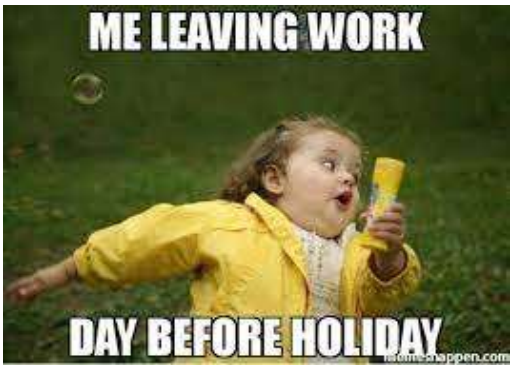
6. ***But wait, there is more*****…..Were you also aware that AFTER having said THAT, it apparently is also inappropriate to double down and tell the African American defendant who is charged with Human Sex Trafficking (among other things) that …**

> [T]his meeting is ***not to threaten you, intimidate you, scare you***, [or] anything like that . . . . [J]ust to tell you kind of what you're looking at, . . . what the potential could be if the case goes to trial. As the group continued to discuss the potential for resolution, the subject of the assigned judge and jury composition came up. The prosecutor explained that because of conflicts, only five judges remained in the pool to be assigned to Mr. Horntvedt's case. The prosecutor explained that of the five judges, *"two of those judges are women, which might be difficult for you in a case like this where there are six women victims . . . but those are things for you to consider as well."*

Hey all, just a note that WDA is out of the office between Christmas and New Year's Day. Accordingly, this is the last Sheri's Sidebar of the Year 2023.

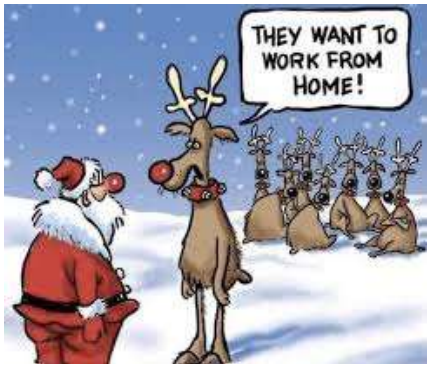






I look good in yellow too, don't I?!

Have a happy holiday in whatever manner you do or do not celebrate it. I hope you get some down time as many courts do not allow trials around the holiday season.



Sheri

Sheri's Sidebar archived editions are found here: https://defensenet.org/resource-category/sheris-sidebar/