No. 84856-4

Stephens J. (concurring)—While I concur in the result reached by the lead opinion, and believe considerations of logic and experience appropriately guide the determination of when the public trial right attaches, we must carefully focus our analysis. I write separately because I disagree with the lead opinion that "the approach used by the Court of Appeals somewhat parallels the approach we use." Lead opinion at 11. Application of the public trial right does not turn on whether a proceeding involves fact finding or only legal issues. This distinction, relied on by the court below, sells short the public trial right and should be rejected. I also write separately to address Justice Wiggins's argument that the failure to lodge a contemporaneous objection to a court closure precludes appellate review of a public trial claim under RAP 2.5(a)(3).

The Court of Appeals Distinction between Fact-Finding and Legal Proceedings Erodes the Public Trial Right

The Court of Appeals decision mainly follows the reasoning of *State v. Sadler*, 147 Wn. App. 97, 193 P.3d 1108 (2008) (petition for review deferred

pending *State v. Wise*, No. 84319-8 (Wash. Nov. 21, 2012)). In particular, the opinion holds that under *Sadler*, a defendant has no right to a public hearing 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) (quoting *Sadler*, 147 Wn. App. at 114).[1] As the lead opinion notes, the view expressed in *Sadler* is gaining acceptance in the Court of Appeals, with several opinions adopting the view that the public trial right does not attach to proceedings that involve only legal issues. *See* lead opinion at 11-12 (collecting cases); *see also State v. Castro*, 159 Wn. App. 340, 344, 246 P.3d 228 (2011) (holding closed pretrial hearing did not implicate public trial right because "the matters addressed did not involve any fact finding required to be open to the public").

The view that proceedings on legal issues need not be open misapprehends our public trial precedent, and we need to take this opportunity to clarify the law. As articulated in *Sadler*, the legal/factual distinction derives from a conflation of two separate concepts, one involving the defendant's right to be present and the other involving the right to a public trial. With respect to the right to be present, it is

[1] Additionally, the Court of Appeals stated that "questions from the jury to the trial court regarding the trial court's instructions are part of jury deliberations and, as such, are not historically a public part of the trial. *Sublett*, 156 Wn. App. at 182. There is no authority for this proposition; the cited cases address the secrecy of jury deliberations and not the questions submitted by the jury during deliberations. Just as jury instructions are part of the public trial, so too are any answers to jury questions or further instructions given after deliberations have begun. Indeed, CrR 6.15(f)(1) itself recognizes that "[w]ritten questions from the jury, the court's response and any objections thereto shall be made a part of the record" and that "[t]he court shall respond to all questions from a deliberating jury in open court or in writing."

well settled that a defendant has no due process right to be present at chambers conferences on legal issues where such presence bears no reasonably substantial relationship to the opportunity to defend in person. *See In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994); *United States v. Gagnon*, 470 U.S. 522, 105 S. Ct. 2350, 84 L. Ed. 2d 486 (1985). *Sadler* acknowledges this authority and then reasons that "[t]he right to a public trial is linked to the defendant's constitutional right to be present during critical phases of trial." 147 Wn. App. at 114. Such linkage is not itself the problem, but *Sadler* uses it to equate the distinction between trial matters and ministerial matters that is relevant to the public trial inquiry with the distinction between legal and factual issues that sometimes helps determine whether the defendant's presence at a chambers or bench conference is required. *Id.* These are separate concepts.

Proof of the blurring of these separate concepts can be found in *Sadler*'s serial citations to *State v. Rivera*, 108 Wn. App. 645, 32 P.3d 292 (2001) and *State v. Bremer*, 98 Wn. App. 832, 991 P.2d 118 (2000) as supporting its point. In part, *Rivera* is the source of the confusion. That case considered whether a public trial violation occurred when the trial judge closed the courtroom to address a juror's concern about another juror's poor hygiene. *Rivera* properly held that such administrative or ministerial matters arising at trial need not be addressed in open court. 108 Wn. App. at 653. During the course of its discussion, however, the court cited to *Bremer*, a case involving the defendant's right to be present, for the

proposition that a defendant generally has no right to be present at a chambers or bench conference on legal issues. *Id.* The court then stated, without any citation, that where the defendant does not have a right to be present, there can be no right to have the public present. *Id.*

Sadler took this reasoning one step further and announced the "rule" that "[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." 147 Wn. App. at 114. The opinion below in this case illustrates the common holding of cases that follow *Sadler*: the faulty conclusion that the public trial right does not attach to hearings on matters that are legal in nature and do not require the resolution of disputed facts. *Sublett*, 156 Wn. App. at 182.

Consider the array of legal issues a trial judge may address during a criminal trial. In addition to jury instructions (or by extension how to answer a jury's question regarding the instructions), the judge may need to decide motions to amend the charges, to dismiss, to allow the defendant to proceed pro se, to disallow evidence, or to suppress. Often such motions will proceed on stipulated facts. Indeed, the *trial itself* may proceed on stipulated facts following CrR 3.5 or 3.6 motions. Never has this court held that such obviously critical parts of a criminal trial may occur in private because they do not involve the resolution of disputed facts. The legal/factual distinction is simply out of place in the context of the right to a public trial. We should take this opportunity to reject the distinction drawn by

the Court of Appeals and clarify that the only recognized exception to the public trial right grounded in the *type of issue involved* is the one actually applied in *Rivera*: administrative or ministerial matters arising during trial need not be addressed in open court.

At the same time, we must caution against equating the scope of the public trial right with the scope of the defendant's right to be present. The latter right is grounded in due process principles and is reviewed as trial error, subject to harmless error analysis. *See Gagnon*, 470 U.S. 522. The public trial right, in contrast, is not subject to harmless error analysis. *See, e.g., Waller v. Georgia*, 467 U.S. 39, 49-50 & n.9, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); *State v. Bone-Club*, 128 Wn.2d 254, 261, 906 P.2d 325 (1995); *State v. Easterling*, 157 Wn.2d 167, 181, 137 P.3d 825 (2006). Moreover, we have repeatedly recognized that "the right to a public trial applies to all judicial proceedings." *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009), *cert. denied*, 131 S. Ct. 160 (2010). We have never held that if the defendant can be excluded without offending his due process rights, then there is no public trial right. In fact, we rejected an analogous notion in *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 549, 114 P.3d 1182 (2005) (rejecting the rule that "if the jury does not see it, the public does not see it," and emphasizing the value of public proceedings to instill trust and confidence in the judicial system). The benefits of a public trial sweep more broadly than the defendant's due process interests. *See In re Oliver*, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L. Ed. 682

(1948) ("'The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions . . . .'" (quoting 1 Thomas M. Cooley, A Treatise on Constitutional Limitations 647 (8th ed. 1927))).

Recognizing that the rule announced in *Sadler* draws an improper line between legal and factual issues in determining when a public hearing is required, our task is to articulate where the proper line should be drawn. I believe the distinction between ministerial matters and adversarial proceedings is helpful in highlighting the obvious truth that some matters, such as issues of scheduling, juror hygiene, or trial management are properly handled in chambers. Similarly, courts often hold brief side-bars to allow counsel to raise concerns that may need to be taken up outside the jury's presence.

Conferences on proposed jury instructions are of particular interest here. It has been common practice in both criminal and civil trials to have counsel submit a set of proposed jury instructions for the trial judge to review. *See* CR 51. These proposed instructions are not necessarily put into the record but are discussed informally, often with counsel in chambers. Importantly, however, once the court determines which instructions it will give, the matter is taken up in open court so that counsel can lodge objections and enter proposed but rejected instructions into the record, and the court can explain its rulings if necessary. In criminal cases, the

defendant's presence is not required at such conferences or when the court's decision is put on the record.

When the jury submits a question about the jury instructions, the court in some sense must conduct what amounts to a supplemental jury instruction conference. After all, the issue is whether the given instructions need to be clarified or the jury further instructed. The procedure described in CrR 6.15(f)(1) states that the jury's questions must be in writing and "[w]ritten questions from the jury, the court's response and any objections thereto shall be made part of the record." Further, "[t]he court shall respond to all questions from a deliberating jury in open court or in writing," and "[a]ny additional instruction upon any point of law shall be given in writing."[2] *Id.*

The central question in this case is whether the public trial right attaches to the chambers conference. As noted, this question is distinct from the question of whether the defendant has a constitutional right to be present, an issue not raised here. I believe the answer to this question should be the same for a hearing responding to a jury question about the instructions as for a hearing addressing jury instructions in the first instance. Thus, if the public trial right is not offended by holding an in-chambers conference to discuss jury instructions before returning to

[2] CrR 6.15(f)(1) also contemplates jury questions about the evidence. It recognizes the trial court's discretion to allow the jury to rehear or replay evidence. Notably, we have said that when a court accommodates the jury's request in this regard, the defendant should be present. *State v. Caliguri*, 99 Wn.2d 501, 508, 664 P.2d 466 (1983). I could find no case where evidence was replayed for the jury other than in open court.

the courtroom to put matters on the record, then it is not offended when the judge considers a question from a deliberating jury with counsel in chambers before entering the matter in the record. CrR 6.15(f)(1) seems to implement the constitutional requirement, though it is undoubtedly true that "the court rule operates within the confines of the state and federal constitutional protections guaranteeing an open and public trial." Sublett Pet. for Review at 8.

I believe the lead opinion is correct to reject any litmus test for deciding when a particular proceeding implicates the public trial right. Given the connection between a defendant's public trial right and the public's right of access under First Amendment principles, I agree that the logic and experience analysis is helpful. Conceptually, this analysis is similar to the historical analysis we have used in other contexts to determine when a constitutional right attaches. *See, e.g., Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 780 (1989). It stands to reason that in evaluating whether the public trial right attaches to a particular hearing, courts should look at the historical context in which such a hearing has occurred (i.e., whether in open court or in chambers), as well as the nature of the interests involved and "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986).

Considerations of logic and experience allow for a qualitative evaluation of the public trial right, focused on the societal interests advanced by open court

proceedings. The lead opinion numbers these interests at four, while Sublett suggests there are six, *see* Sublett Suppl. Br. at 13-14, but however the catalog is numbered, the core value of the public trial right is to ensure open justice, recognizing that "[a] trial is a public event" and that "[w]hat transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374, 67 S. Ct. 1249, 91 L. Ed. 1546 (1947).[3] Because I agree that the procedure followed by the trial court in this case was consistent with CrR 6.15(f)(1) and the public trial right, I concur in the result reached by the lead opinion.

RAP 2.5(a)(3) Does Not Preclude Review of an Alleged Public Trial Violation

The lead opinion wisely does not address the issue that forms the basis of Justice Wiggins's concurrence, namely whether a criminal defendant's failure to object to a closure at trial precludes review under RAP 2.5(a)(3). But, the lead opinion should not be read as endorsing this possibility. The State has not asserted RAP 2.5(a)(3) for good reason. We have repeatedly and conclusively rejected a contemporaneous objection rule in the context of the public trial right. *Bone-Club*, 128 Wn.2d at 261 (holding trial court must inform defendant of his right to a public

[3] I disagree with the lead opinion's conclusion that *none* of the values served by open court proceedings are implicated here. *See* lead opinion at 19. While this proceeding did not involve witnesses or fact-finding, openness promotes public understanding of the judicial system and the perception of fairness, reminds the court and counsel of their responsibilities, and serves as a check on bias or corruption. The record here is adequate to give us confidence that these values were secured by the procedure the trial court followed. Consistent with CrR 6.15(f)(1), the court made a public record of the jury's question, the court's response, and counsel's agreement with that response. I agree with the lead opinion that what happened here is consistent with historical practice and does not offend traditional notions of openness.

trial before he can object to a closure); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 806, 100 P.3d 291 (2004) (citing *Bone-Club* to reject waiver argument and holding that anyone present at the time of the closure motion must be given an opportunity to object); *Easterling*, 157 Wn.2d at 176 n.8 (noting defendant does not waive public trial right by failing to make a contemporaneous objection); *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (holding defendant's failure to object at trial to courtroom closure does not amount to waiver); *Momah*, 167 Wn.2d at 154-55 (agreeing that defendant's failure to object to closure did not constitute waiver of right to public trial)[4]; *State v. Strode*, 167 Wn.2d 222, 229, 217 P.3d 310 (2009) (plurality opinion) (same).

Notably, in analyzing whether a contemporaneous objection is necessary to preserve a public trial right claim, we have already considered and rejected using RAP 2.5(a) as a procedural bar to review. *See Easterling*, 157 Wn.2d at 173 n.2 ("A criminal accused's rights to a public trial and to be present at his criminal trial are issues of constitutional magnitude that may be raised for the first time on appeal." (citing RAP 2.5(a), *Orange*, and *Bone-Club*)). In the face of our clear precedent, Justice Wiggins's reliance on RAP 2.5(a)(3) is alarming. Concurrence (Wiggins, J.) at 7.

[4] The court in *Momah* did not preclude the defendant from asserting his public trial right on appeal notwithstanding that "Momah affirmatively accepted the closure, argued for the expansion of it, actively participated in it, and sought benefit from it." 167 Wn.2d at 156; *see also id.* at 155 (noting "Momah is correct in terms of the ability to raise the issue)." Certainly, then, the mere failure to object to a closure cannot preclude appellate review.

The way to secure a valid waiver of the public trial right is set forth in the *Bone-Club* analysis. 128 Wn.2d at 261 (holding court may secure waiver after advising defendant of his public trial right); *Easterling*, 157 Wn.2d at 176 n.8 ("[U]nder the *Bone-Club* criteria, the burden is placed upon the trial court to seek the defendant's objection to the courtroom closure."). Indeed, this was a key point of agreement between the lead and concurring opinions in *Strode*, which joined in holding that the defendant did not knowingly waive his public trial right. 167 Wn.2d at 229 (lead opinion); *id.* at 235 (Fairhurst, J., concurring).

Unlike Justice Wiggins, I do not believe we have "ignored RAP 2.5 in the context of open trial violations." Concurrence (Wiggins, J.) at 8. Rather, we have looked at the waiver question and RAP 2.5 in conjunction with each other, consistently reviewing claims of closure raised for the first time on appeal. *See Easterling*, 157 Wn.2d at 173 n.2 (finding issue of constitutional magnitude under RAP 2.5(a)), 176 n.8 (noting failure to object is not waiver and trial court has affirmative obligation to provide opportunity to object before ordering closure); *Momah*, 167 Wn.2d at 155 (noting "Momah is correct in terms of the ability to raise the issue," though "being able to raise an issue on appeal does not automatically mean reversal is required"). While there is a technical distinction between waiver and forfeiture, so that it is possible to forfeit a right one has not waived, the terminology is often used interchangeably. *See Kontrick v. Ryan*, 540 U.S. 443, 458 n.13, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004). The important point is not the

nomenclature but the fact that neither this court nor the United States Supreme Court has ever invoked a plain error procedural rule to avoid addressing the merits of a public trial claim. This stands to reason because such procedural rules fundamentally involve considerations of harmless error, to which public trial error has never been subject. *See Waller*, 467 U.S. at 49 n.9 ("'The harmless error rule is no way to gauge the great, though intangible, societal loss that flows' from closing courthouse doors." (quoting *People v. Jones*, 47 N.Y.2d 409, 416, 418 N.Y.S.2d 359, 391 N.E.2d 1335 (1979))); *accord Bone-Club*, 128 Wn.2d at 261-62 ("Prejudice is presumed where a violation of the public trial right occurs."). I believe it is important to emphasize that we have been over this ground, and we have consistently rejected the argument Justice Wiggins would embrace.

I concur in the result to affirm the Court of Appeals.

AUTHOR:
Justice Debra L. Stephens

WE CONCUR:

Justice Mary E. Fairhurst

Gerry L. Alexander, Justice Pro Tem.