No. 82802-4

J.M. JOHNSON, J. (dissenting)—I respectfully dissent. Even if a closure occurred in this case, Eric D. Wise failed to preserve any objection for appeal. RAP 2.5(a) provides that a claim of error generally will not be reviewed if it was not raised in the trial court, unless it falls under a specified exception. No exception applies here.

Under RAP 2.5(a)(3), a party may raise a manifest error affecting a constitutional right for the first time on appeal. Determining whether this exception applies requires a two-part test: First, the court must determine whether the error is truly constitutional. Then, the court should determine whether the error is "manifest." *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007), *overruled on other grounds by State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012). To be considered "manifest," there must be some evidence the error had "practical and identifiable consequences in the case."

State v. Schaler, 169 Wn.2d 274, 282-83, 236 P.3d 848 (2010). In other words, there must be "'a showing of actual prejudice.'" *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (quoting *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). In this case, there is no indication the individual questioning of potential jurors prejudiced Wise. If anything, Wise benefited from the information obtained from the potential jurors' candid responses. Thus, the alleged error was not "manifest" and Wise cannot raise it for the first time on appeal.

The invited error doctrine dictates a similar result. "The basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial." *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). In *Momah*, the defendant actively participated in the individual juror questioning that took place in chambers. He benefited from this procedure and exercised a number of challenges for cause based on the information learned. *Id.* at 155. The court found this conduct comparable to invited error and held Momah could not challenge the jury selection process. *Id.* at 154 ("While *Momah* does not present a classic case of invited error, the doctrine [is] helpful for the

purposes of determining the appropriate remedy in this case."). Similarly, Wise's counsel actively engaged in the questioning of jurors in chambers. He was able to strike jurors for cause based on information learned in chambers: information that may not have been candidly revealed under the watch of the public eye. Contrary to our reasoning in *Momah*, the majority allows Wise to exploit this procedure to his benefit, and then invoke it as a basis for a new trial. I would hold that invited error doctrine is instructive here, and Wise should not receive the windfall of a new trial.

Finding the public trial right was violated, the majority leaps to the conclusion that such an error is "structural" and demands automatic reversal. Majority at 2. Our precedent does not command this result. *See Momah*, 167 Wn.2d at 150 ("not all courtroom closure errors are fundamentally unfair and thus not all are structural errors"). A structural error is an error that " "'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" " *Id.* at 149 (alteration in original) (quoting *Washington v. Recuenco*, 548 U.S. 212, 218-19, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (quoting *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999))). A violation of the public trial

right is presumed to be structural error if the closure occurs *over an objection. See Waller v. Georgia*, 467 U.S. 39, 47, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). A closure defect that transpired *without objection*, however, should be subject to harmless error review unless a showing of prejudice is made.

The majority cites several United States Supreme Court cases, including *United States v. Marcus*, __ U.S. __, 130 S. Ct. 2159, 2164-65, 176 L. Ed. 2d 1012 (2010) and *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-49, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006), for the proposition, "[w]rongful deprivation of the right to a public trial has been repeatedly characterized as structural error by the United States Supreme Court." Majority at 11. This is a misleading characterization of that Supreme Court precedent. These cases merely reference *Waller* to demonstrate that the violation of the public trial right *can* be a type of structural error. Yet *Waller* is distinguishable from the case at bar because the courtroom was closed over Waller's objection. *See Waller*, 467 U.S. at 42. No objection was made here.

The Supreme Court has not decided whether individual questioning of

specific jurors in chambers, in contrast to questioning the entire panel in closed court, amounts to structural error. Given the Supreme Court's reluctance to classify errors as structural, it is unlikely to make such a determination. *See Recuenco*, 548 U.S. at 218 ("'[M]ost constitutional errors can be harmless.' . . . Only in rare cases has this Court held that an error is structural, and thus requires automatic reversal." (internal quotation marks omitted) (quoting *Neder*, 527 U.S. at 8)). This is especially true in light of the Court's decision in *Press-Enterprise Co. v. Superior Court*, holding the in camera examination of prospective jurors is not a violation of the public trial right so long as counsel is present and a record is made. 464 U.S. 501, 512, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).

This case is similar to *Momah*, where we found no structural error. 167 Wn.2d at 156. Wise actively benefited from the jury selection process, and he has shown no prejudice to his right to a fair trial. Because Wise failed to object to the individual questioning at trial and there is no evidence of prejudice, the alleged closure cannot be classified as "structural." Therefore, the majority's automatic reversal of his conviction is unwarranted.

Conclusion

Wise made no objection to the jury selection process and he makes no showing of prejudice now. Therefore, any claimed error was not preserved for review on appeal. For this reason, I would uphold Wise's conviction.

AUTHOR:

Justice James M. Johnson

WE CONCUR:

Justice Charles W. Johnson

Justice Charles K. Wiggins