No. 84585-9

WIGGINS, J. (dissenting)—It is not given to us to have perfect trials. *See Brown v. United States*, 411 U.S. 223, 231-32, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973) ("[T]here are no perfect trials."). Nevertheless, the fruitless search for a perfect trial is reflected in the majority opinions in this case, *State v. Wise*, No. 82802-4 (Wash. Nov. 21, 2012) and *In re Personal Restraint of Morris*, No. 84929-3 (Wash. Nov. 21, 2012) (plurality opinion). The approach advocated for in these cases belies a platonic conception of a trial as something that has the potential to be wholly without flaws. But a trial is a uniquely human affair and can only be as flawless as the judges and lawyers who conduct it. We strive for perfection but rarely attain it. Humans are imperfect.

That is why, on review, our task is not to determine whether the defendant received a trial completely free of defects, but to determine whether the defendant received a *fair* trial—a trial that does credit to our justice system and to the concept of due process. *See Lutwak v. United States*, 344 U.S. 604, 619, 73 S. Ct. 481, 97 L. Ed. 593 (1953) ("A defendant is entitled to a fair trial but not a perfect one."). This means, in all instances, that before reversing a conviction we must inquire whether a claimed error actually made the trial less fair, which ordinarily means asking whether it caused prejudice or was harmless.[1]

In Rene Paumier's case, the claimed public trial error is entirely theoretical; that is, it is premised solely on notions of policy and judicial administration that have nothing to do with the fairness of the underlying trial or whether Paumier committed the crime of which he is accused.

The majority reverses Paumier's conviction for an error to which Paumier never objected at trial, an error from which neither Paumier nor the majority can identify any prejudice whatsoever. Indeed, the limited in-chambers voir dire probably helped Paumier's case by encouraging potential jurors to be more forthcoming in responding to voir dire. Lacking any indication of real prejudice, the majority extends to this case a presumption of prejudice that neither we nor the United States Supreme Court has ever applied to limited unobjected-to in-chambers voir dire, the presumption of "structural error."

The structural error doctrine should be limited to extraordinary circumstances that render a criminal trial fundamentally unfair. We should instead apply the well-developed and more precise rules we have incorporated into RAP 2.5, which we adopted for cases exactly like this. RAP 2.5 inexorably points to the conclusion that Rene Paumier's conviction must be affirmed. This conclusion is consistent with our prior cases, including *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995); *In re*

[1] In the case of structural error, it means inquiring whether the error necessarily rendered the trial "'fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" *State v. Momah*, 167 Wn.2d 140, 149, 217 P.3d 321 (2009) (internal quotation marks omitted) (quoting *Washington v. Recuenco*, 548 U.S. 212, 218-19, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)).

Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004); *State v. Brightman*, 155 Wn.2d 506, 122 P.3d 150 (2005); and *State v. Easterling*, 157 Wn.2d 167, 137 P.3d 825 (2006) because the error here is different than in those cases. I respectfully dissent.

I. The Public Trial Violation in This Case Is Not a Structural Error

The term "structural error"' has an established meaning, and we have already grappled with how to apply it in the context of the public trial right. By labeling the error in this case a structural error, the majority opinion defies that established meaning and sends this court down a hazardous detour we would do better to avoid.

A. Structural Error

A structural error is an error that "'"necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence."'" *State v. Momah*, 167 Wn.2d 140, 149, 217 P.3d 321 (2009) (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))), *cert. denied*, 131 S. Ct. 160 (2010). Structural errors "'infect the entire trial process'" and deprive the defendant of "'basic protections,'" without which "'no criminal punishment may be regarded as fundamentally fair.'" *Neder*, 527 U.S. at 8-9 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 630, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) and *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986)).

The remedy for structural error is automatic reversal and remand for a new trial. *Id.* This remedy is truly automatic because, unlike most constitutional errors, structural errors are not subject to harmless error review. *Id.*

Structural errors are rare and encompass only the most egregious constitutional violations. There is a "'strong presumption'" that errors are not structural, *id.* at 8 (quoting *Rose*, 478 U.S. at 579), and structural errors comprise a "'very limited class of cases.'" *Id.* (quoting *Johnson v. United States*, 520 U.S. 461, 468, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997)). Examples include complete denial of counsel, a biased trial judge, racial discrimination in the selection of a grand jury, denial of right to self-representation, and a defective reasonable-doubt instruction. *Id.*; *see also State v. Vreen*, 143 Wn.2d 923, 930, 26 P.3d 236 (2001) (denial of peremptory challenge is structural error). In Washington, we have been hesitant to classify errors as structural. *See, e.g., In re Pers. Restraint of Benn*, 134 Wn.2d 868, 921, 952 P.2d 116 (1998) (rejecting argument that violation of the right to be present is a structural error).

We have already grappled with how to apply structural error principles in the context of the public trial right. We have found that it is a structural error for a judge to close a courtroom for a significant portion of a criminal trial without conducting a *Bone-Club* analysis. We made this determination in *Bone-Club*, *Orange*, *Brightman*, and *Easterling*. *See Momah*, 167 Wn.2d at 150-51. In each of those cases, we concluded that the closure error made the trial less fair, and prejudice resulting from

the error was so clear that a new trial was required. *See id.* For example, in *Easterling* we ordered a new trial because the court excluded the defendant from a portion of his own trial, during which his codefendant struck a deal with the State to testify against him. 157 Wn.2d at 172-73, 181. In *Orange*, we ordered a new trial because the trial judge excluded the defendant's family from most of voir dire even after defense counsel specifically requested the family be allowed to attend. The closure prevented the family from "'contribut[ing] their knowledge or insight to the jury selection'" and prevented venirepersons from seeing "'interested individuals.'" 152 Wn.2d at 812 (emphasis omitted) (quoting *Watters v. State*, 328 Md. 38, 48, 612 A.2d 1288 (1992)).

However, more recently, we held in *Momah* that not *every* public trial violation is a structural error. 167 Wn.2d at 150-51. In *Momah*, we listed several criteria for determining when a public trial error is structural and when it is not: (1) whether the trial court closed the courtroom based on interests other than the defendant's or to safeguard the defendant's constitutional rights (such as the right to a fair trial); (2) whether the closure impacted the fairness of the defendant's proceedings; (3) whether the defendant was consulted or given the opportunity to object, and whether the defendant assented to or actively participated in the closure; and finally (4) whether the record suggests that the court considered the defendant's right to a public trial when it closed the courtroom. *Id.* at 151-52.

Our holding in *Momah* is consistent with United States Supreme Court

precedent. Despite what the majority implies, our Supreme Court has never held that *any* public trial violation, no matter how small, is a structural error. *See Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); *Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010). Indeed, it would be preposterous to conclude that any time a category of errors has been deemed structural, every single error within that category must also be structural. The Second Circuit Court of Appeals explained this exact point in *Gibbons v. Savage*, 555 F.3d 112, 119-20 (2d Cir. 2009) (citations omitted):

> When a criminal trial is conducted in a manner that renders it fundamentally unfair by depriving the defendant of a fundamental structural right, reversal of the conviction is ordinarily automatic. *Recuenco*, 548 U.S. at 218, 126 S. Ct. 2546; *Neder*, 527 U.S. at 8, 119 S. Ct. 1827. . . . It does not necessarily follow, however, that every deprivation in a category considered to be "structural" constitutes a violation of the Constitution or requires reversal of the conviction, no matter how brief the deprivation or how trivial the proceedings that occurred during the period of deprivation.
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> Suppose, for example, that in a lengthy, multi-defendant trial, three months into trial, for a few minutes after a luncheon recess, trial proceeded without the judge being aware that the attorney for one of the defendants had not yet returned to the courtroom. Assume that the evidence received during those few minutes had nothing to do with the temporarily unrepresented defendant's complicity, and that upon counsel's tardy return a few minutes later, counsel reviewed the evidence received in his absence and advised the court that, while he objected to the trial having been conducted in his absence, he had no objection to any of the evidence. Trial then continued for another several months. We very much doubt, notwithstanding the brief "structural" deprivation for an inconsequential portion of trial, that the Supreme Court would require that the conviction be vacated.

Even if public trial violations constitute a category of errors susceptible to structural

error analysis, the Supreme Court has never said categorically that there can be no nonstructural public trial errors. And indeed, the Supreme Court is unlikely to do so given its hesitance to classify errors as structural, *Neder*, 527 U.S. at 8-9. The approach we adopted in *Momah*, 167 Wn.2d at 150-51, is fully consistent with United States Supreme Court precedent, and we should have no hesitation about applying it here.

B. This Is Not a Case of Structural Error

Turning to the specific question presented by this case, we have never held that partial in-chambers voir dire without a *Bone-Club* analysis is a structural error. We have considered this question in two cases: *Momah*, 167 Wn.2d 140, and *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009) (plurality opinion).

In *Momah*, we found that this error was *not* structural. 167 Wn.2d at 156. There, the trial court questioned several prospective jurors in chambers because there was a danger that the jury pool would be tainted by prior knowledge of pretrial publicity. On appeal, we held that there was no structural error, relying on certain key facts that distinguished *Momah* from other public trial cases, namely, that the defendant affirmatively assented to closure, the trial judge consulted with the defendant about the closure, and the trial judge's express purpose in closing the courtroom was to safeguard the defendant's right to a fair trial. *Id.* at 151-52.

In *Strode*, we also did not hold that the closure error was structural even though the facts that distinguished *Momah* from an ordinary public trial case were

absent. *Strode* was a split decision consisting of a four-vote plurality authored by Justice Alexander,[2] a two-vote concurrence authored by Justice Fairhurst,[3] and a dissent authored by Justice Charles Johnson.[4] The plurality opinion labeled in-chambers voir dire without a *Bone-Club* analysis as structural error. However, neither of the other two opinions mentioned structural error at all, nor did they discuss harmless error review. Thus, even in *Strode*, there were only four votes for structural error, and a majority of this court did not find that the error was structural.

To determine if the error in *this* case is structural, we must ask whether the error "'"necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence."'" *Momah*, 167 Wn.2d at 149 (alteration in original) (quoting *Recuenco*, 548 U.S. at 218-19 (quoting *Neder*, 527 U.S. at 19)).

The improper in-chambers voir dire that occurred here did not constitute structural error because it did not render the trial unfair, nor did it convert an otherwise sound trial into an unreliable vehicle for determining guilt or innocence. An error like this fails to meet the high standard for structural error and does not belong in the same class of errors as complete denial of counsel, a biased trial judge, or racial discrimination in the selection of a grand jury. Certainly, the closure here violates the public trial right. And in some instances, closures of this kind may warrant reversal.

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[2] 167 Wn.2d at 223.

[3] 167 Wn.2d at 231.

[4] 167 Wn.2d at 236.

But the closure here does not rise to the level of a structural error that warrants *automatic* reversal.

We must begin our structural error analysis with a straightforward inquiry into whether improper in-camera voir dire renders a criminal trial fundamentally unfair. This requires analyzing what impact, if any, in-camera voir dire may have had on the fairness of jury selection. I fail to see how interviewing jurors in chambers had any adverse impact on these proceedings. The defendant still had the opportunity to question jurors and challenge them for cause or peremptorily. This process occurred on the record and in the presence of counsel, the judge, and the defendant. Furthermore, voir dire is extensively governed by statute, *see* chapter 2.36 RCW, jurors take an oath to tell the truth, *State v. Tharp*, 42 Wn.2d 494, 499, 256 P.2d 482 (1953), and we presume jurors follow the judge's instructions, *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). These procedural safeguards are more than enough to ensure that jury selection is fair even if a small portion of it occurs in chambers.

If anything, in-chambers voir dire *protects* the defendant's right to a fair and unbiased trial. Empirical studies have shown that prospective jurors often do not reveal sensitive information if required to do so in open court. *See* Paula L. Hannaford, *Safeguarding Juror Privacy: A New Framework for Court Policies and Procedures*, 85 Judicature 18, 23 (2001). Interviewing certain jurors in-chambers encourages a fair trial by eliciting this information and allowing counsel to root out

potential bias and prejudice. This is true even where there has been no *Bone-Club* analysis prior to closure. Questioning jurors in chambers on sensitive topics simply does not render a trial fundamentally unfair in the same way as, for example, complete denial of counsel or a biased trial judge.

Further, the criteria set forth in *Momah,* 167 Wn.2d at 150-51, weigh against finding structural error. The criteria are (1) the interests on which closure was based, (2) whether the closure impacted the fairness of the proceedings, (3) whether the defendant objected or assented to the closure, and (4) whether the court considered the defendant's right to a public trial. *Id.* The first factor suggests the error is not structural. The closure here appears to have been based on the defendant's fair trial right: by encouraging jurors to be more forthcoming about sensitive topics in-chambers, counsel can better eliminate bias and prejudice and ensure a fair trial. Turning to the second factor, the closure here appeared to have no negative impact on the fairness of the proceedings. Unlike in *Easterling* or *Orange*, there is no readily detectable prejudice, nor indeed any hint of adverse impact at all. As to the third factor, Paumier did not object to the closure and appeared to go along with it, although there is no evidence of affirmative assent in this record as there was in *Momah*, 167 Wn.2d 140. This factor is inconclusive at best but, if anything, indicates the error is not structural. Last, the fourth factor counsels in favor of finding that the error is structural: there appears to be no evidence in the record that the judge considered Paumier's right to a public trial before closing the courtroom. Taken as a

whole, this is not a structural error under the criteria set forth in *Momah*. *Id*.

Finally, on a practical level, the majority opinion creates a disturbing win-win for the defendant. The majority would allow defense counsel to lie in the weeds, silently consent to private questioning (and reap the benefits of increased candor), while secretly nursing a public trial issue that would virtually guarantee success on appeal.[5] This would allow any defense counsel who notices a public trial error like this one to remain quiet and gamble on a jury verdict knowing that the public trial issue will allow a do-over once it is raised on appeal.

I fail to see how the partial chambers voir dire in this case rendered Paumier's trial fundamentally unfair or made it an unreliable vehicle for determining guilt or innocence. Accordingly, I would hold that there is no structural error here.

II. When Error Is Not Structural and the Defendant Does Not Object, RAP 2.5 Is a Procedural Bar to Appeal

A proper determination that the error here is not structural requires abandoning the majority's conclusion that RAP 2.5 does not bar this appeal.

Paumier asserts his public trial claim for the first time on appeal. He did not object to in-chambers voir dire at the time of the closure or at any time during the trial.

It is a fundamental principle of appellate litigation that a party may not assert on appeal a claim that was not first raised at trial. *Yakus v. United States*, 321 U.S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834 (1944); *State v. Davis*, 41 Wn.2d 535, 250 P.2d

[5] We need not even assume that defense will resort to manipulation on this issue. The defense gains the same benefit even if defense counsel is unaware that a *Bone-Club* analysis is necessary.

548 (1953). This rule is grounded in notions of fundamental fairness and judicial economy. *See* 2A Karl B. Tegland, Washington Practice: Rules Practice RAP 2.5(1), at 192 (6th ed. 2004); *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). A trial court should be given the opportunity to respond to and correct mistakes at the time they are made to avoid unnecessary retrials and appeals.

In Washington, this principle is enshrined in RAP 2.5, which states that an appellate court need not review errors raised for the first time on appeal. There is an exception for any "manifest error affecting a constitutional right." RAP 2.5(a)(3). If an error is constitutional in nature, it can be reviewed for the first time on appeal only if it is "manifest," meaning it "had practical and identifiable consequences in the trial of the case" and can survive harmless error review. *State v. O'Hara*, 167 Wn.2d 91, 98-100, 217 P.3d 756 (2009). In other words, a defendant who does not object must show actual prejudice resulting from the error. *Id.* Ordinarily, constitutional errors are presumed prejudicial and the burden is on the State to show the error is harmless beyond a reasonable doubt. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). But where the defendant fails to preserve a constitutional issue by objecting, the burden shifts under the clear parameters of RAP 2.5 and the defendant must affirmatively show prejudice. *O'Hara*, 167 Wn.2d at 98-100.

It is wholly appropriate to apply RAP 2.5 to public trial errors. In *Waller*, the Supreme Court noted that state procedural bars apply in full force where the right to a public trial has been violated. *Waller*, 467 U.S. at 42 n.2. In that case, one of the

defendants, Cole, did not object to closure at trial. The Supreme Court remanded his case so that the state court could determine "whether Cole is procedurally barred from seeking relief as a matter of state law." *Id.* Moreover, the Supreme Court has held that the federal plain error rule, Fed. R. Crim. P. 52(b) (which is similar to our RAP 2.5), applies to structural errors. *Johnson v. United States*, 520 U.S. 461, 466, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997). There is no basis in federal law, nor in RAP 2.5 itself, nor in our case law,[6] for not applying RAP 2.5 to public trial violations.

In the past, RAP 2.5 has not been a major feature of our public trial cases because where error is structural, our RAP 2.5 analysis is straightforward. *See Easterling*, 157 Wn.2d at 173 n.2. In our previous cases, we have nearly always held that the closure error was structural and have also presumed prejudice even where there was no contemporaneous objection. We did so in *Bone-Club, Orange*, *Brightman*, and *Easterling*. If an error is labeled structural and presumed prejudicial, like in these cases, it will always be a "manifest error affecting a constitutional right"; in other words, RAP 2.5 will apply, but it will always be satisfied because prejudice has

[6] We have never justified our past failure to apply RAP 2.5 in public trial cases. I explain this in detail in my concurring opinion in *State v. Sublett*, No. 84856-4, slip op. at 8-10 (Wash. Nov. 21, 2012) (Wiggins, J., concurring). As I explain, we have never articulated a reasoned justification for ignoring RAP 2.5, simply relying on a 1923 case, *State v. Marsh*, 126 Wash. 142, 217 P. 705 (1923), for the proposition that no objection is required to preserve a public trial error. *See Sublett*, No. 84856-4, slip op. at 8-10 (Wiggins, J., concurring). But *Marsh* predates RAP 2.5 and has a far more egregious set of facts than most public trial violations. Standing alone, *Marsh* simply does not justify ignoring the unambiguous parameters of our appellate rules. Subsequent cases have relied on *Marsh* with no principled explanation of why the right to a public trial must be treated differently than every other constitutional error in this regard.

been presumed and structural errors defy harmless error analysis. *See Easterling*, 157 Wn.2d at 173 n.2. Moreover, it makes sense to presume prejudice despite the lack of objection when an error is structural because by the time we have decided an error is structural, we have already determined that it is of such an egregious nature that it has rendered the underlying trial unfair and deprived the defendant of "'basic protections'" without which "no criminal punishment may be regarded as fundamentally fair." *Neder*, 527 U.S. at 8-9.

However, in my view, this case is different from our previous cases because the closure error here is not structural. Where a public trial error is not structural, we must conduct a more thorough analysis under RAP 2.5.

It also does not make sense to presume prejudice in a case like this where the error is not structural and the defendant did not contemporaneously object. This is so for four reasons. First, it does not make sense to presume prejudice where, had the trial judge simply performed a *Bone-Club* analysis, there is every reason to believe the closure would have occurred in exactly the same manner. It is hard to imagine how not doing a *Bone-Club* analysis prejudiced the defendant. This is particularly pertinent in light of the fact that the trial court likely would have performed a *Bone-Club* analysis had the defendant simply objected in a timely manner. Second, prejudice is unlikely to result from in-chambers voir dire because the statutory schemes that govern voir dire and juries, such as chapter 2.36 RCW, provide ample protection to prevent prejudice. There are extensive procedures in place that give the

parties opportunity to examine jurors and evaluate whether they are objective and can follow the law. *See, e.g.*, *Tharp*, 42 Wn.2d 494 (holding that prospective jurors must take an oath before voir dire begins). Further, we presume jurors will follow the instructions given to them by the court. *Johnson*, 124 Wn.2d at 77. To presume prejudice in a case like this is tantamount to presuming that at least one of the jurors questioned in chambers concealed facts relevant to that juror's ability to follow the law and be fair, which conflicts with our presumption that jurors follow the court's instructions. Third, if there is any prejudice resulting from the in-chambers voir dire, it is prejudice to the public's right to observe proceedings in open court, not prejudice to Paumier. It is not at all clear that a defendant can assert the public's right to open courts, let alone rely on prejudice to the public's right in order to satisfy RAP 2.5. *See Strode*, 167 Wn.2d at 236 (Fairhurst, J., concurring). Finally, we do not need to presume prejudice given that in-chambers voir dire was done on the record and, having reviewed the transcript, we fail to detect any hint of prejudice. Given all of this, it simply does not make sense to presume prejudice from partial in-camera voir dire where the defendant did not object at trial.

Where a closure error like this one is not structural and the defendant did not object at trial, RAP 2.5 is a procedural bar to appeal. I would hold that before we will hear a claim of nonstructural public trial error not objected to below, a criminal defendant must satisfy RAP 2.5 by showing that the closure error had practical and identifiable consequences in the trial of their case.

III. Paumier Should Not Be Awarded a New Trial

Applying these principles to this case, I would hold that Paumier is not entitled to a new trial.[7] Since the public trial error here was not structural and Paumier did not object, we must conduct a thorough RAP 2.5 analysis. This means we will review the issue only if it is "manifest," meaning it had "practical and identifiable consequences in the trial of the case" and can survive harmless error review. *O'Hara*, 167 Wn.2d at 98-100. Paumier has not made this showing, nor does the record suggest that any such showing can be made. Paumier gives us no reason to believe that the in-chambers questioning of several jurors on sensitive topics had any practical and identifiable consequences in the trial of his case. He is not entitled to relief, so I respectfully dissent.

IV. Conclusion

Everyone accused of a crime deserves a fair trial, but no one is entitled to a perfect trial. The trial in this case was by all indications a fair and just vehicle for determining Paumier's guilt or innocence. And while it is true that the trial had a constitutional defect (failure to conduct a *Bone-Club* hearing), there has been no showing whatsoever that this defect impacted the fairness of the trial in any way. I would affirm Paumier's conviction.

[7] This result is contrary to the result in *Strode*, 167 Wn.2d 222. We do not need to overrule *Strode* because it is a plurality opinion; plurality opinions have limited precedential value and are not binding on the courts. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004).

AUTHOR:
Justice Charles K. Wiggins

WE CONCUR:
Justice James M. Johnson

Justice Charles W. Johnson