No. 84856-4

WIGGINS, J. (concurring in result)—I concur in the result the lead opinion reaches. I write separately because I believe the experience and logic test the lead opinion adopts conflicts with our constitution. Article I, section 10 of our constitution says that justice must be done in the open, and I believe the experience and logic test confounds this mandate. But I would also hold that a defendant who raises a public trial issue for the first time on appeal must satisfy the requirement of RAP 2.5(a)(3) of showing "manifest error affecting a constitutional right."

I. Article I, section 10 is a uniquely strong mandate for openness at every stage of a judicial proceeding

Washington's article I, section 10 is unique among American constitutions. It commands, "Justice in all cases shall be administered openly, and without unnecessary delay." Const. art. I, § 10. This language strongly commits Washington to the open administration of justice.

Anyone doubting the strength of this commitment need look only to the origins of the clause. Article I, section 10 is derived through a series of metamorphoses of the Magna Carta. At the time of our Constitutional Convention in 1889, many other states had adopted the so-called "open courts" clauses in their constitutions, most of which can be traced to the Magna Carta. *See* Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 Or. L. Rev. 1279, 1284-86 (1995). These clauses were designed to ward off corruption and

manipulation in the administration of justice. *Id.* at 1294-95. The rationale behind them is that public scrutiny can serve as a check on abuse of judicial power and enhance public trust in the judicial system. *E.g.*, *Dreiling v. Jain*, 151 Wn.2d 900, 915, 93 P.3d 861 (2004) (stating that the policy for granting public access to courts "'relate[s] to the public's right to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system'" (quoting *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 848 P.2d 1258 (1993))).

Our article I, section 10 draws from these clauses and hence ultimately from the Magna Carta, but with a unique emphasis on open proceedings. Our clause is loosely based on Oregon's open courts clause, which says, "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation." Or. Const. art. I, § 10. Oregon's clause also derives from the Magna Carta, *see Hoffman*, *supra*, at 1284-86, but Oregon appears to be the only state that uses the exact phrase "justice shall be administered openly" other than Washington, which modeled its open courts clauses after Oregon's, and Arizona, which followed Washington. *See* John H. Bauman, *Remedies Provisions in State Constitutions and the Proper Role of the State Courts*, 26 Wake Forest L. Rev. 237, 284-88 (1991) (collecting open courts provisions).

The first draft of our constitution, known as the "Hill draft," included this clause in its entirety. *See generally* Janice Sue Wang, *State Constitutional Remedy Provisions*

and Article I, Section 10 of the Washington State Constitution: The Possibility of Greater Judicial Protection of Established Tort Causes of Action and Remedies, 64 Wash. L. Rev. 203 (1989) (citing Journal of the Washington State Constitution Convention, 1889, at 51, 499 n.18 (B. Rosenow ed. 1962)). However, our framers did not adopt the whole clause, choosing only to adopt the open administration of justice language, which was unique at the time. *Id.* Thus, our constitution contains a stand-alone open administration of justice clause that was entirely unique to our constitution when it was adopted.[1] This suggests our framers were especially preoccupied with the open administration of justice.

Under article I, section 10, *every part* of the administration of justice is presumptively open. Section 10 says that justice in *all cases* must be administered openly, the purpose being to ward off corruption and enhance public trust in our judiciary. Const. art. I, § 10; *Dreiling*, 151 Wn.2d at 915. These concerns are at play during each and every stage of a judicial proceeding, whether it be cross-examination, a clarifying question from the jury to the judge, or any other proceeding. At any stage, absence of public scrutiny could "breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 595, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) (Brennan, J., concurring). Thus, every stage of judicial proceedings must be presumptively open under our constitution. The only exception to this principle is that a judge may close a courtroom after

[1] Arizona has since enacted an identical provision in its constitution. *See* Ariz. Const. art. II, § 11 ("Justice in all cases shall be administered openly, and without unnecessary delay.").

conducting a *Bone-Club* hearing. *See State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

Article I, section 10's broad mandate for openness must inform our interpretation of the right to a public trial under article I, section 22. Indeed, as we have said, "The section 10 guaranty of public access to proceedings and the section 22 public trial right serve complementary and interdependent functions in assuring the fairness of our judicial system." *Bone-Club*, 128 Wn.2d at 259. These two clauses must be read in tandem. This does not mean a defendant can assert different rights under the two clauses, it means only that section 10 necessarily illuminates the meaning of section 22.

II. The experience and logic test fails to account for article I, section 10

The experience and logic test is a creature of the federal courts that has no place within our state's constitutional scheme. We have recognized in the past that article I, section 10 requires us to interpret open courts differently than the federal courts. *See Rufer v. Abbott Labs.*, 154 Wn.2d 530, 549, 114 P.3d 1182 (2005) ("There is good reason to diverge from federal open courts jurisprudence where appropriate. While our state constitution has an explicit open courts provision, there is no such counterpart in the federal constitution . . . ."). Because the United States Constitution has no open administration of justice clause, the Sixth Amendment right to a public trial has been construed in a constitutional context that is far different from our own. *Id.* In short, the United States Supreme Court is much freer to limit courtroom

openness than we are.[2]

With this in mind, I would reject the experience and logic test because it is contrary to the plain language of article I, section 10. We cannot say, on the one hand, that justice must always be administered openly, but that on the other hand certain stages of a proceeding can be closed to the public because experience and logic tell us they can be closed. This is a contradiction. Either our courts are open, or they are not.

Further, our case law does not support use of the experience and logic test. The test is similar to a so-called "triviality" or "de minimis" approach, which is used in the federal courts but that we have declined to adopt.[3] Under this approach, certain trivial closures do not implicate the public trial right. *See State v. Easterling*, 157 Wn.2d 167,

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[2] We have never performed a *Gunwall* analysis to determine if our article I, section 10 provides greater protection than its federal analogue, the first amendment right of public access to judicial proceedings. *See State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). However, it is not necessary to do a *Gunwall* analysis where we apply "established principles of state constitutional jurisprudence." *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998) ("Once we agree that our prior cases direct the analysis to be employed in resolving the legal issue, a *Gunwall* analysis is no longer helpful or necessary."). That is the case here, so no *Gunwall* analysis is required. *E.g.*, *Rufer*, 154 Wn.2d at 549 (concluding that article I, section 10 gives us "good reason to diverge from federal open courts jurisprudence").

[3] The experience and logic test and the triviality approach appear to be identical in most important respects. Both limit the public trial right by declaring that some proceedings can be closed—either because they are de minimis or because experience and logic so dictate. The purpose and effect of each is the same. Indeed, the methodology of each is similar as well: the experience and logic test turns on whether the closure would offend the essential purpose of the public trial right, but so does the triviality approach. *Easterling*, 157 Wn.2d at 183-84 (Madsen, J., concurring) ("[W]hether a particular closure implicates the constitutional right to a public trial is determined by inquiring whether closure has infringed the 'values that the Supreme Court has said are advanced by the public trial guarantee . . . .'" (quoting *Carson v. Fischer*, 421 F.3d 83, 92 (2d Cir. 2005))). The only distinction between the two approaches appears to be the "experience" prong.

183, 137 P.3d 825 (2006) (Madsen, J., concurring) (collecting federal cases on the de minimis standard). In *Easterling*, we said a triviality approach would conflict with section 10's mandate that justice be open: "Application of this 'triviality' standard may be appropriate where a federal court room is fully closed because the United States Constitution, unlike our state constitution, does not contain the open administration of justice in all cases requirement that is contained in article I, section 10 of our state's constitution."[4] *Id.* at 180 n.12. Justice Chambers went even further in concurring in *Easterling* stating, "I cannot agree that there could ever be a proper exception to the principle that a courtroom may be closed without a proper hearing and order." *Id.* at 186 (Chambers, J., concurring). We should reject the experience and logic test for the same reasons we have declined to adopt a triviality approach.

In addition, there are practical problems with identifying what constitutes "experience" under the test. It is not immediately clear how lawyers and judges will effectively research how courts functioned—what was open and what was not—when our constitution was adopted. There is likely to be precious little guidance available. Nor is it immediately clear how our "experience" *since* 1889 has any constitutional significance. It is simpler and more true to our constitution merely to say that all phases of judicial proceedings are presumptively open.

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[4] *Easterling* says in the next sentence: "Thus, arguably, there is room for concluding that a public trial right violation is de minimis or trivial where only a violation of the Sixth Amendment is asserted." 157 Wn.2d at 180 n.12. But this cannot be true of section 22. Our section 10 and section 22 jurisprudences are intertwined. *Bone-Club*, 128 Wn.2d at 259. The two rights are not the same and should not be conflated, but we must read section 22 in light of the requirement that justice be administered openly in all cases.

Finally, limiting the scope of our open courts clause undermines the efficacy of section 10. We must keep in mind that any limitations we place on openness in this case may also be applied to requests for access to the administration of justice in future cases. In the next case, a newspaper may be asking for access to a particular phase of trial. If we begin to close off the courtroom to one proceeding after another, we will diminish open access to courts and court records.

Corruption and manipulation can slip into any phase of the trial, even a phase that the lead opinion would consider outside the open administration of justice. We should preserve our commitment to open courts by rejecting the experience and logic test.

III. Resolving this case

Despite my disagreement with the lead opinion's approach, I agree with the lead opinion's result. I would require the defendant to object or satisfy RAP 2.5(a)(3) before he is entitled to a new trial for a public trial violation.[5]

This approach recognizes that all phases of a trial are presumptively open but draws an important distinction between the right to open courts and entitlement to a certain form of relief (namely, a new trial). I would hold that any courtroom closure

[5] No objection is required, however, to appeal a courtroom closure of such an egregious nature that it ""necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence."" *State v. Momah*, 167 Wn.2d 140, 149-50, 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))). This occurs, for example, when a full phase of trial is closed such as in *Bone-Club*, 128 Wn.2d 254, or *Easterling*, 157 Wn.2d 167.

without a *Bone-Club* hearing violates the public trial right, but that a defendant is not entitled to a new trial unless the defendant either objected to closure at trial or can satisfy RAP 2.5(a)(3) by showing "'practical and identifiable consequences in the trial of the case.'" *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)).

Sublett did not object to closure and has not satisfied RAP 2.5(a)(3). Accordingly, I agree with the lead opinion that his conviction should be affirmed.

By its terms, RAP 2.5(a) applies to all errors not objected to at trial: "The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: . . . (3) manifest error affecting a constitutional right." We have regularly required RAP 2.5(a)(3) analysis any time a party raises a constitutional error to which they did not object at trial. *See, e.g.*, *Kirkman*, 159 Wn.2d at 918, 926-27 (RAP 2.5(a)(3) analysis required where error affecting right to trial by impartial jury was raised for the first time on appeal); *State v. Clark*, 139 Wn.2d 152, 155-56, 985 P.2d 377 (1999) (RAP 2.5(a)(3) analysis required where error affecting confrontation clause rights was raised for the first time on appeal). This requires a showing that the error "had practical and identifiable consequences in the trial of the case"; in other words, the defendant must show *actual prejudice* before an appeals court will review the issue. *O'Hara*, 167 Wn.2d at 98-100. RAP 2.5(a)(3) also requires a harmless error analysis. *Id.*

Justice Stephens's concurring opinion finds "alarming" my reliance on RAP 2.5 "in the face of our clear precedent . . . ." But what is "alarming" is that the court has ignored RAP 2.5 in the context of open trial violations, ordering new trials for defendants who never objected to limited chambers voir dire and who cannot show any resulting prejudice. Justice Stephens's reference to "our clear precedent" might lead the reader to conclude that we have actually analyzed how RAP 2.5 applies in the public trial context. To the contrary, we have no clear precedent on point, only cursory, unexamined assertions. In *Bone-Club*, we reviewed a courtroom closure, brushing aside the lack of any contemporaneous objection without analysis: "We also note Defendant's failure to object contemporaneously did not effect a waiver. *State v. Marsh*, 126 Wash. 142, 146–47, 217 P. 705 (1923)." *Bone-Club*, 128 Wn.2d at 257. *Bone*-Club never even mentions RAP 2.5, let alone explains why the 1923 *Marsh* decision overrides our 1976 adoption of RAP 2.5, half a century after *Marsh*.

The closest we have ever come to analyzing this issue is a footnote in *State v. Easterling*:

> We have the discretion to review an issue raised for the first time on appeal when it involves a "manifest error affecting a constitutional right." RAP 2.5(a); *see* RAP 13.4. 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. *See In re Pers. Restraint of Orange*, 152 Wn.2d 795, 800, 100 P.3d 291 (2004); *Bone-Club*, 128 Wn.2d at 257.

157 Wn.2d at 173 n.2. The footnote is a non sequitur; it states that an issue is a "manifest error affecting a constitutional right" by citing *Orange* and *Bone-Club*, which

mention neither RAP 2.5 nor "manifest error."

Nor does *Marsh* justify disregarding our rules of appellate procedure. At the time *Marsh* was decided, RAP 2.5 did not exist, nor was there any parallel requirement in our case law that a defendant show prejudice before we would review an un-objected-to constitutional error. *See State v. Warwick*, 105 Wash. 634, 637, 178 P. 977 (1919) (citing *State v. Crotts*, 22 Wash. 245, 60 P. 403 (1900); *State v. Jackson*, 83 Wash. 514, 145 P. 470 (1915); *Eckhart v. Peterson*, 94 Wash. 379, 162 P. 551 (1917)). In other words, *Marsh* was consistent with the contemporaneous objection rule of its time. However, in 1976, this court adopted a completely rewritten set of rules, the Rules of Appellate Procedure. The newly adopted RAP 2.5(a)(3) required a showing of actual prejudice any time a litigant wished to raise a constitutional issue not raised at trial. *See O'Hara*, 167 Wn.2d at 99. *Bone-Club* failed to recognize this significant difference and simply cited *Marsh* with no further analysis. *Bone-Club*, 128 Wn.2d at 257.

Applying RAP 2.5 is consistent with our past public trial cases as well, including *Bone-Club*, 128 Wn.2d 254 (1995); *Orange*, 152 Wn.2d 795 (2004); *Easterling*, 157 Wn.2d 167 (2006); and *State v. Brightman*, 155 Wn.2d 506, 122 P.3d 150 (2005). As I explain in detail in my dissenting opinion in *State v. Paumier*, No. 84585-9, slip op. at 12-15 (Wash. Nov. 21, 2012) (Wiggins, J., dissenting), RAP 2.5 was satisfied in those cases because the public trial error there was structural, and we presumed prejudice despite the lack of an objection. When an error is structural, it defies harmless error

analysis. Further, it makes sense to presume prejudice despite the lack of an objection for structural errors because such errors necessarily render a trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. Prejudice is inherent in a structural error. Thus, RAP 2.5 will always be satisfied in cases of structural error like *Bone-Club*, *Orange*, *Easterling*, and *Brightman*. However, we held in *Momah* that not all public trial errors are structural. 167 Wn.2d at 150-51; *see Paumier*, No. 84585-9, slip op. at 12-15 (Wiggins, J., dissenting). And where an error is not structural, we must conduct a thorough RAP 2.5 analysis.

Just as troubling, Justice Stephens confuses the concepts of waiver and preservation of an issue for appeal. The two are not the same. A waiver is a deliberate choice to forgo a right. Waivers allow a defendant the freedom to choose one course of action versus another. By contrast, a failure to preserve an issue is sometimes deliberate and sometimes inadvertent.[6] And we generally do not know if the failure to preserve is deliberate or inadvertent because the choice—or inadvertent lack of choice—is generally not made of record. The purpose of requiring an objection

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[6] Justice O'Connor distinguished forfeiture from waiver in *United States v. Olano*:

> Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938) . . . . Mere forfeiture, as opposed to waiver, does not extinguish an "error" under [Fed. R. Crim. P.] Rule 52(b). . . . If a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then there has been an "error" within the meaning of Rule 52(b) despite the absence of a timely objection.

507 U.S. 725, 733-34, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) (citations omitted).

is to promote judicial economy and efficiency, an entirely different purpose from the waiver doctrine. *See* 2A Karl B. Tegland, Washington Practice: Rules Practice RAP 2.5(1), at 192 (6th ed. 2004); *see also Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

Requiring compliance with RAP 2.5 is not the same as saying the defendant "waived" the right to a public trial. There is no question of "waiver" here. RAP 2.5 is concerned with issue preservation. The only question here is whether the public trial right will be on equal footing with all other constitutional rights with respect to RAP 2.5 or whether it should be placed on a pedestal. I see no reason why the public trial right should be any different than every other constitutional right with respect to the clear parameters of our appellate rules.

Our failure to adhere to RAP 2.5(a)(3) leads to unjustifiable consequences. In many situations, the defendant and defense counsel might willingly consent to closing part of a trial or indeed might prefer it. Both the prosecution and the defense may benefit from a closure, but it provides an interesting win-win for the defense. If the judge or the prosecution suggests closing part of a trial, the defense can remain mute and obtain the benefits of closure while nursing a secret life preserver virtually guaranteeing a successful appeal. Indeed, under Justice Stephens's analysis, the defendant has the benefit of an issue that is not subject to RAP 2.5(a)(3), requires no showing of actual prejudice, and is not subject to harmless error analysis. We need not even assume that the 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.

Our failure to apply RAP 2.5(a)(3) to a public trial violation is at odds with a basic sense of fairness. *State v. Rinkes*, 70 Wn.2d 854, 859, 425 P.2d 658 (1967) ("The general rule is that one cannot voluntarily elect to submit his case to the jury and then, after an adverse verdict, claim error which, if it did exist, could have been cured or otherwise ameliorated by some action on the part of the trial court." (citing *State v. Perry*, 24 Wn.2d 764, 167 P.2d 173 (1946))); *State v. Case*, 49 Wn.2d 66, 72, 298 P.2d 500 (1956). It does not make sense to say that the defendant can silently consent to closure, then claim on appeal that the closure was constitutional error.

Finally, we have never explained any historical or legal basis for placing the right to public trial on a pedestal by skipping the RAP 2.5(a)(3) analysis that applies to so many other constitutional rights. Consider some of the other rights under article I, section 22. The defendant has the right to self-representation but must ask to exercise the right; the trial court is not required to advise the defendant of the right. *State v. Garcia*, 92 Wn.2d 647, 600 P.2d 1010 (1979). The defendant has a right to a speedy trial but waives the right by failing to raise it. *State v. Green*, 70 Wn.2d 955, 425 P.2d 913 (1967). Defendant's waiver of the state constitutional right to testify must be made knowingly, voluntarily, and intelligently, but the trial court need not obtain an on-the-record waiver by defendant. *State v. Robinson*, 138 Wn.2d 753, 982 P.2d 590 (1999). These constitutional issues seem as important as the right to a public trial, but a

contemporaneous objection or a showing of prejudice is required to pursue the right on appeal.

I conclude that the same must be true of the public trial right. A defendant who raises a public trial violation for the first time on appeal must comply with RAP 2.5(a)(3) by showing that the violation actually prejudiced the defendant: that the asserted error had "'practical and identifiable consequences in the trial of the case.'" *O'Hara*, 167 Wn.2d at 99 (quoting *Kirkman*, 159 Wn.2d at 935). The court will consider the error only after such a showing. If the court determines there has been a constitutional violation that actually affected the defendant's rights, the burden shifts to the state to show that the error was harmless beyond a reasonable doubt. *Id.* Of course, if the defendant had objected at trial, the error would be preserved for appeal and RAP 2.5(a)(3) analysis would be unnecessary. For these reasons, I concur in the lead opinion's result.

I concur in the lead opinion's result.

AUTHOR:
Justice Charles K. Wiggins

WE CONCUR: