No. 85737-7

MADSEN, C.J. (concurring)—I would hold that Taner Tarhan's failure to object to the closure precludes his right to review of his claim that his right to a public trial was violated when questionnaires that were used as tools to pre-screen potential jurors and focus voir dire were sealed after the jury was selected. He is not entitled to review under RAP 2.5(a)(3) because the error that he alleges is not manifest error affecting a constitutional right.

I recognize that the court has previously concluded that the failure to object to closure does not preclude appellate review of a claim that the defendant's right to a public trial was violated. However, in doing so, the court followed case law that has been superseded by a court rule. We should make the necessary correction and recognize that just as in the case of other important constitutional rights, review of claimed error involving the right to a public trial should proceed in accord with the Rules of Appellate Procedure. When constitutional error is claimed and no objection was made at trial, RAP 2.5(a)(3) controls and permits review only when the claimed error is manifest error

affecting a constitutional right. Under this standard, review is inappropriate in this case.

Discussion

The prospective jurors filled out questionnaires concerning sensitive and personal matters that might bear on their ability to serve as impartial jurors. Copies of the questionnaires were provided to both sides for use in determining which jurors should be individually questioned outside the presence of the rest of the venire. The questionnaires were also used to assist in voir dire. When the questionnaire answers prompted for-cause challenges, the trial court's decisions on such challenges occurred in open court. Jury voir dire and selection occurred in open court. After the jury was selected, the questionnaires were sealed, as the venire members were told in advance that they would be.

Mr. Tarhan did not object to this procedure. The failure to object to the procedure precludes review under our usual rules for appellate review. But before this conclusion can be reached, the court must correct its mistaken approach to review of this claimed error. In *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), the court held that the defendant's failure to object to a courtroom closure did not constitute waiver under *State v. Marsh*, 126 Wash. 142, 146-47, 217 P. 705 (1923). In recent cases, the court has treated this as an absolute rule that no objection is required for review of any claim that the right to a public trial was violated. *E.g.*, *State v. Brightman*, 155 Wn.2d 506, 514-15, 122 P.3d 150 (2005); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 800, 100 P.3d 291 (2004). But the holdings in *Brightman*, *Orange*, and *Bone-Club* are not based on RAP

2.5(a), but instead on *Marsh*.

The rule set out in *Marsh* was the prevailing general common law rule at the time it was decided. The rule provided that when a constitutional right had been violated, error would be considered on appeal notwithstanding any failure to object. *Marsh*, 126 Wn.2d at 146. However, when we adopted the Rules of Appellate Procedure in 1976, RAP 2.5(a) replaced the general rule stated in *Marsh* for constitutional error when the issue is raised for the first time on appeal. *State v. WWJ Corp.*, 138 Wn.2d 595, 601, 980 P.2d 1257 (1999). In continuing to follow *Marsh*, the court has ignored our own rules for appellate review of claimed constitutional errors, thus undermining the carefully crafted analysis that we otherwise apply to claimed constitutional errors that are just as important as the right to a public trial.

We should refuse to apply a rule that conflicts with the Rules of Appellate Procedure, that rests on a common law rule no longer applicable, and that subverts the intent of RAP 2.5(a). We should apply RAP 2.5(a) when a defendant fails to object and later contends that his constitutional right to a public trial was violated by a courtroom closure.

Under the court rule, although a failure to object will generally bar appellate review of claimed errors, an exception exists in the case of manifest error affecting a constitutional right. RAP 2.5(a)(3). To determine if review is appropriate under the rule, a two-fold inquiry is made. First, the court determines whether the claimed error is truly of constitutional magnitude, and second the court must determine whether the error is

"manifest." To show that alleged error is "manifest" error, the defendant must show actual prejudice, meaning a "'"plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case."'" *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756, 761 (2009) (quoting *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007) (internal quotation marks omitted) (quoting *WWJ Corp*., 138 Wn.2d at 603)). Should the appellate court then determine that a claim of manifest constitutional error has been raised, "it may still be subject to a harmless error analysis." *O'Hara*, 167 Wn.2d at 98.

Assuming, for present purposes, that the questionnaire process and the sealing order raises a possible public trial issue, thus satisfying the first part of the two-part analysis for determining whether claimed constitutional error is subject to review despite the failure to object, i.e., that the error is truly of constitutional magnitude, I turn to the second part of the inquiry, whether any prejudice is shown. On this basis, if not on the basis of both inquiries, it is obvious that the failure to object bars appellate review because no prejudice to Mr. Tarhan resulted.

The process of having the questionnaires filled out by prospective jurors was an agreed-upon procedure to facilitate questioning the members of the venire. As a result of this process, Mr. Tarhan was better informed about sensitive matters, specific to the potential juror, that might relate to issues in his trial and affect the juror's ability to serve. He was therefore better able to formulate and focus questions during the actual voir dire, which occurred in open court. Indeed, the defendant had the completed questionnaires

available to assist in voir dire and jury selection. Because the potential jurors were told the questionnaires would be destroyed once the jury was selected, the jurors were far more likely to be candid in answers concerning their personal history and experiences because they knew their answers would be protected and not exposed to public scrutiny.

In short, with the information obtained from the questionnaires, which itself did not constitute voir dire, the defendant was in a better position to inquire of the venire and to select jurors than he might have been otherwise.

Actual voir dire occurred in open court. Once the jury was selected, the questionnaires were sealed. At this point, the defendant had actually benefited from the questionnaires and leaving them unsealed would not have enhanced his right to a fair trial. And because the actual voir dire and selection took place in open court, if any assistance in jury selection might have been offered from the public, including relatives and friends, about the jurors or their selection, the opportunity was available.

Tarhan cannot show any practical and identifiable consequences to his trial. He cannot establish prejudice that resulted and, to the contrary, he benefited from use of the questionnaires without harmful consequences. His failure to object to what he now claims was a courtroom closure within the scope of the right to a public trial and his inability to establish resulting actual prejudice precludes appellate review.

This is true regardless of the fact that a closure that violates the public trial right may be structural error.[1] The source of the "structural error" determination is *Waller v.*

[1] Structural error is error that defies harmless error analysis and "'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'"

Georgia, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) together with subsequent United States Supreme Court cases referring to the open courts violation in *Waller* as structural error. *E.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

But despite these references, the Court has indicated several times that appellate review may be denied on procedural grounds where the defendant has failed to object to an alleged violation of the right to a public trial. First, in *Waller*, the Court noted that most of the defendants in the case objected to the closure of the suppression hearing that occurred in the case, but one did not (and in fact joined the prosecution in seeking closure).[2] The Court held that the state courts could determine on remand whether the defendant who did not object was procedurally barred from any relief. *Waller*, 467 U.S. at 42 n.2. The Court specifically narrowed its holding, saying that "we hold that under the Sixth Amendment any closure of a suppression hearing *over the objections of the accused* must meet the tests set out in *Press–Enterprise* and its predecessors." *Id*. at 47

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)).

[2] The Court explained in a footnote:

> Counsel for petitioners Waller, Thompson, Eula Burke, and W.B. Burke lodged an objection to closing the hearing. *Counsel for petitioner Cole concurred in the prosecution's motion to close the suppression hearing*. App. 14a, 15a. Respondent argues that Cole is precluded from challenging the closure. The Georgia Supreme Court appears to have considered the objections of all the petitioners on their merits. 251 Ga. 124, 126–127, 303 S.E.2d 437, 441 (1983). Cole's claims in this Court are identical to those of the others. Since the cases must be remanded, we remand Cole's case as well. *The state courts may determine on remand whether Cole is procedurally barred from seeking relief as a matter of state law.*

Waller, 467 U.S. at 42 n.2 (emphasis added).

(emphasis added).

In *Levine v. United States*, 362 U.S. 610, 619, 80 S. Ct. 1038, 4 L. Ed. 2d 989 (1960), the Court expressly held that the failure to object to a courtroom closure constitutes a waiver of the public trial right. Other courts have noted this holding. *See, e.g.*, *United States v. Christi*, 682 F.3d 138, 143 (1st Cir. 2012); *State v. McGilton*, 229 W. Va. 554, 729 S.E. 2d 876, 881 n.4 (2012). In *Christi*, 682 F.3d at 143 n.1, the First Circuit Court of Appeals pointed out that although the public trial right in *Levine* arose under the Fifth Amendment due process clause, this is not significant because the proceeding was a criminal contempt proceeding and not a Sixth Amendment proceeding.

And in *Peretz v. United States*, 501 U.S. 923, 936-37, 111 S. Ct. 2661, 115 L. Ed. 2d 808 (1991) (citing *Levine*, 362 U.S. at 619), the Court listed numerous constitutional rights where the right to appeal can be forfeited as a result of the failure to object, noting that "failure to object to closing of a courtroom is waiver of the right to public trial."

Thus, the failure to object can result in a procedural bar to appellate review, notwithstanding references in the Court's decisions to *Waller* as involving structural error.

Nor would calling the error structural in every case[3] require that we conclude prejudice is necessarily established. As explained, under RAP 2.5(a)(3) there have to be actual, identifiable, consequences to the trial. Appellate rules governing review can be applied to claimed structural error. The United States Supreme Court has expressly stated

[3] I do not address here whether this is an appropriate conclusion, but question it in my concurrence in *State v. Sublett*, No. 84856-4 (Wash. Nov. 21, 2012).

that rules governing appellate review can be applied to claims of structural error. *Johnson v. United States*, 520 U.S. 461, 466, 117 S. Ct. 1544, 1548, 137 L. Ed. 2d 718 (1997) (the federal plain error rule of Federal Rule of Criminal Procedure 52 applies even in the context of structural error; "the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure"). Accordingly, we should not assume that alleged error consisting of a violation of the public trial right is beyond the well-settled meaning of our appellate rules.

Many jurisdictions hold that the failure to object precludes review of claimed violations of the right to a public trial or subjects such claims to the particular jurisdiction's rules for forfeited constitutional error. Cases include: *Bucci v. United States*, 662 F.3d 18, 29 (1st Cir. 2011), *cert. denied*, 133 S. Ct. 277 (2012); *Downs v. Lape*, 657 F.3d 97 (2d Cir. 2011) (recognizing state procedural rule); *United States ex rel. Bruno v. Herold*, 408 F.2d 125, 128-29 (2d Cir. 1969); *United States v. Bansal*, 663 F.3d 634, 661 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2700 (2012); *United States v. Hitt*, 473 F.3d 146, 155 (5th Cir. 2006) (and noting that claim was of structural error); *Tillman v. Bergh*, No. 2:06-CV-11555, 2008 WL 6843654 at *15 (E.D. Mich. July 2, 2008) (unpublished); *Chase v. Berbary*, 404 F. Supp. 2d 457, 464 (W.D.N.Y. 2005); *Wright v. State* 340 So. 2d 74, 79-80 (Ala. 1976) (accused may waive the right to a public trial expressly or by failing to object); *Fisher v. State*, 480 So. 2d 6, 7 (Ala. Crim. App. 1985) (same); *People v. Edwards*, 54 Cal. 3d 787, 812-13, 819 P.2d 436, 1 Cal. Rptr. 2d 696 (1991); *People v. Lang*, 49 Cal. 3d 991, 1028, 782 P.2d 627, 264 Cal. Rptr. 386 (1989);

People v. Bradford, 14 Cal. 4th 1005, 1046-47, 929 P.2d 544, 60 Cal. Rptr. 2d 225 (1997); *Mansingh v. State*, 68 So. 3d 383 (Fla. Dist. Ct. App. 2011); *Alvarez v. State*, 827 So. 2d 269, 273-76 (Fla. Dist. Ct. App. 2002); *Hunt v. State*, 268 Ga. App. 568, 571, 602 S.E.2d 312 (2004); *State v. Loyden*, 2044-1558 (La. App. 3 Cir. 4/6/05); 899 So. 2d 166; *Robinson v. State*, 410 Md. 91, 976 A.2d 1072 (2009) (stating that the fact structural error is involved does not mandate appellate review); *Commonwealth v. Cohen*, 456 Mass. 94, 105-06, 921 N.E.2d 906 (2010) (court looks to whether defendant raised claim of violation of right to a public trial in a timely matter because, like other structural rights, it can be waived); *Commonwealth v. Wells*, 360 Mass. 846, 274 N.E.2d 452 (1971); *People v. Vaughn*, 491 Mich. 642, 821 N.W.2d 288 (2012); *People v. Pollock*, 50 N.Y.2d 547, 550, 407 N.E.2d 472, 429 N.Y.S.2d 628 (1980); *People v. Marathon*, 97 A.D.2d 650, 469 N.Y.S.2d 178 1983); *State v. Butterfield*, 784 P.2d 153, 155-57 (Utah 1989).

We should do the same and join the courts that have recognized that review of a claimed violation of the right to a public trial may be forfeited.

Conclusion

The court has continued to apply a common law rule despite the fact that it was supplanted by RAP 2.5(a)(3) and, in doing so, has placed alleged violations of the right to a public trial in a category all their own. We have mandated review in every case where this error is alleged, regardless of whether an objection was made, regardless of the impact the asserted closure could have had, regardless of whether the defendant affirmatively participated in the closure, and regardless of whether the closure was of

benefit to the defendant.

We should make the necessary course correction and consider such violations under the same Rules of Appellate Procedure that apply to claims of other valuable constitutional rights. If the defendant failed to object to an alleged courtroom closure and seeks to raise a claim of constitutional error based on the right to a public trial, the defendant must establish that review is justified under RAP 2.5(a)(3).

I would hold that review is barred under RAP 2.5(a)(3) because Mr. Tarhan did not object to what he now claims was a closure in violation of his right to a public trial and, even assuming a constitutional error occurred, he cannot establish prejudice resulting from the alleged error.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR:

Justice Charles K. Wiggins

Justice Steven C. González