IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

91996-8

STATE OF WASHINGTON

PETITIONER,

V.

JON G. DEVON,

RESPONDENT

AMENDED PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

The Petitioner is the State of Washington, represented by Karl F. Sloan, Okanogan County Prosecuting Attorney.

B. DECISION

The Petitioner seeks review of the Court of Appeals decision reversing Mr. Devon's conviction, in case number 24958-1-III, filed July 09, 2015. A copy of the decision is in the Appendix at pages A-1 through 14.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Defendant preserve a public right to trial claim for appellate review where there was no contemporaneous objection and no showing of actual prejudice?

2. Was the automatic reversal doctrine followed by the Court of Appeals incorrect, in conflict with precedent and federal case law, and harmful?

3. Was there a violation of the right to public trial during a limited closure, where analysis of the record and weighing of competing rights supported the Bone-Club factors?

D. STATEMENT OF THE CASE

The defendant and his co-defendant were tried for the crime of Homicide by Abuse in a joint trial. CP 313; Clerks Papers for Jon Devon, hereinafter "CP-D" 650, 668. The charges stemmed from the beating death of Aden Valdovinos, who was approximately 22 months old at the time of his death. CP-D 668

At a pretrial hearing the co-defendant's attorney expressed concern about the level of pre-trial publicity and suggested the need for conducting individual voir dire in chambers. 12/10/05 RP 27. The defendants' continued to be concerned about the impact of trial publicity, and the defendant's attorney filed a motion to sequester the jury. CP-D 509-530. The co-defendant's attorney joined the motion. 1/05/06 RP 19-22. The defendants also proposed a supplemental jury questionnaire due to the nature of the charges and publicity surrounding their case. 1/05/06 RP 8, 161, 162.

General questioning of the jury panel was conducted. The judge later advised the jurors, in open court, that individual questioning would also be conducted by the attorneys and defendants in chambers. 1/10/06 RP 24-25. After the individual questioning was completed, general questioning of the juror panel resumed in open court. RP 1.

The evidentiary portion of the trial followed and on January 26, 2006, the jury found Jon Devon guilty of Homicide by Abuse. RP 1959. The defendant appealed. The case was stayed by the Court of Appeals for several years, and an opinion was finally issued on July 09, 2015.

E. ARGUMENT

1. **The unpreserved public right to trial claim should not have been permitted to be raised for the first time on appeal.**

The general rule governing issues raised for the first time on appeal is set out in RAP 2.5(a)(3), which requires a showing of "manifest error." "The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error "manifest", allowing appellate review." *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). If the error is "purely abstract and theoretical," it is not subject to review under. *State v. Lynn*, 67 Wn. App. 339, 346, 835 P.2d 251 (1992).

A public trial claim, like the one asserted in this case, is an example of an error that is purely abstract and theoretical. As this court has recognized, the impact of a public trial violation is "necessarily unquantifiable and indeterminate." *State v. Wise*, 176 Wn.2d 1, 19, 288 P.3d 1113 (2012). In a theoretical way, it could be argued that a different outcome might have occurred if the complained of questioning was in the courtroom. However, as a practical matter, that proposition is extremely unlikely, and is unsupported by any facts. Where the defendant cannot make a showing of any actual prejudice, the ordinary application of RAP 2.5(a)(3) would properly preclude the issue from being raised for the first time on appeal.

This court has nevertheless allowed claims of a public trial violation to be raised for the first time on appeal.[1]

Contrary to the reasoning in *Wise*, 176 Wn.2d 1, preservation of issues on appeal is not based on "waiver". In *Wise*, 176 Wn.2d 1, this Court found that the issue could be raised for the first time on appeal because the defendant had not "waived" his right to a public trial. *Wise*, 176 Wn.2d at 15-16, 22-23.

This reasoning confuses the concepts of waiver and issue preservation. As the U.S. Supreme Court has pointed out, waiver of a right eliminates any error. Failure to object does not eliminate the error, but it may prevent it from being raised on appeal. *United States v. Olano*, 507 U.S. 725, 733-34, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

If a "waiver" standard is applied, then RAP 2.5(a)(3) could not be applied to any constitutional right. In general, waiver of a constitutional right must be knowing, voluntary, and intelligent. Counsel's mere inaction is not sufficient to establish a waiver. *See, e.g., State v. Tomal,* 133 Wn.2d 985, 990, 948 P.2d 833 (1997) (waiver of right to appeal). In this regard, the right to a public trial is no different from any other constitutional right.

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[1] *E.g., State v. Wise*, 176 Wn.2d 1; *State v. Paumier*, 176 Wn.2d 29, 34, 288 P.3d 1126 (2012); *State v. Frawley, 181 Wn. 2d 452, 334 P.3d 1022 (2014)*. However, these different cases have set out different rationales for this rule.

The holding in *State v. Paumier*, 176 Wn.2d 29, 34, 288 P.3d 1126 (2012) that no objection (or showing of prejudice) is necessary to find reversible error, is unsound. In *Paumier*, 176 Wn.2d 29, the court's first reason for its holding was that the absence of the public renders the trial "an improper vehicle for determining guilt or innocence." Paumier, 176 Wn.2d 37 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)[2]. However, such a proposition may be made of every constitutional right associated with a criminal trial, and does not justify an exception in this case to raise the public trial issue without any

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[2] The origin of this quote is convoluted and does not support the proposition that no objection is necessary or that automatic reversal is required. The Court in *Fulminante* was weighing the application of the harmless error standard to the admission of an involuntary confession. In doing so, it listed other cases as examples of constitutional errors that were not subject to harmless error analysis: including: the right to public trial, citing *Waller v. Georgia*, 467 U.S. 39, 49, n. 9, 104 S.Ct. 2210, 2217, n. 9, 81 L.Ed.2d 31 (1984). *Fulminante*, 499 U.S. at 309-310. *Fulminante then* quoted *Rose v. Clark*, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). *Clark* was also weighing the application of the harmless error standard to an erroneous jury instruction. In doing so, *Clark* also listed examples of some constitutional errors that were "structural" and required reversal, citing: *Payne v. Arkansas*, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958) (introduction of coerced confession); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (complete denial of right to counsel); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (adjudication by biased judge). *Clark*, 478 U.S. at 577. Regarding those errors, *Clark* stated: Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair. *Clark*, 478 U.S. at 577-78, (internal citations omitted). The passages were dicta. Moreover *Clark* did not refer to, nor consider, the public right to trial. On the contrary, *Waller*, the case that *did* address the public right to trial based on objection of the defendants, held the remedy should be appropriate to the violation, and did not require a retrial absent a material change in the positon of the parties on remand. In the absence of that, *Waller* concluded a new trial would be a windfall for the defendant, and not in the public interest. *Waller* 467 U.S. at 42, 50.

showing of prejudice. Most other constitutional rights have a far greater potential impact on the determination of guilt than the public trial right; but when these rights are raised for the first time on appeal, the court requires a showing of actual prejudice.[3]

The court's second rationale in *Paumier*, 176 Wn.2d 29, was that the right to a public trial is important both to the defendant and the public. This is a reason for enforcing a requirement of timely objection – not for abandoning that requirement.[4] The public's interest is to have trials open to the public. Eliminating the requirement of a timely objection creates perverse incentives to violate the public interest. From the defendant's point of view, there is little advantage in objecting to a courtroom closure. It is highly unlikely that such an objection will alter the outcome of the case. There is, however, a great advantage to withholding such an

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[3] For example, this Court has recognized that confrontation of witnesses is necessary to protect "the ultimate integrity of [the] fact-finding process." *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). Nevertheless, a violation of the Confrontation Clause cannot be raised for the first time on appeal without a showing that it had practical and identifiable consequences in the trial of the case. *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007) overruled by *State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012). See also *State v. Kirkman*, 159 Wn.2d 918, 926-928, 155 P.3d 125 (2007) (admission of impermissible opinion testimony cannot be raised for the first time on appeal absent a showing of actual prejudice).

[4] The purpose underlying our insistence on issue preservation is to encourage the efficient use of judicial resources. Issue preservation serves this purpose by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. *State v. Robinson*, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011).

objection. If it results in conviction, the defendant can raise the issue for the first time on appeal, thereby obtaining a second chance at acquittal.

In short, the public interest in the right to a public trial is not a valid reason for allowing the claim to be raised for the first time on appeal. Rather, it is a reason for requiring timely objections to closure. Such objections allow the court to correct the error before it occurs. For the public, that is the only desirable outcome.

The third reason in *Paumier*, 176 Wn.2d 29 for dispensing with the "actual prejudice" requirement is that if this requirement were enforced, there would be a "wrong without a remedy." The court confused the existence of a remedy with procedural restrictions on the exercise of that remedy. In law, every remedy must be exercised in some prescribed manner. If a party does not follow the proper procedure, the remedy will be lost. This does not mean, however, that the wrong was without a remedy.[5]

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[5] For example, in both civil and criminal cases, parties have the right to jury instructions that correctly inform the jury of applicable law. *See Gammon v. Clark Equip. Co.*, 104 Wn.2d 613, 617, 707 P.2d 685 (1985); *State v. Mark*, 94 Wn.2d 520, 526, 618 P.2d 73 (1980). The parties must, however, take timely exception to improper instructions. If they fail to do so, the issue may not be raised on appeal, absent manifest error affecting a constitutional right. *State v. Dent*, 123 Wn.2d 467, 477, 869 P.2d 392 (1994); *Hamilton v. State Farm Ins. Co.*, 83 Wn.2d 787, 795, 523 P.2d 193 (1974). In other words, when parties fail to object to jury instructions, they lose their remedy for any non-constitutional error. But this does not result in a "wrong without a remedy."

When constitutional rights are involved, procedural requirements are relaxed. Although issues can often be raised for the first time on appeal, it is subject to a requirement of "actual prejudice."[6]

Violations of that right have a prompt and efficient remedy – timely objection to the improper proceeding. Ordinarily, such an objection will result in the trial court correcting its own error, which is the most desirable outcome. If the court then fails to do so, the issue can be raised on appeal. Where the issue is properly preserved, the limitations of RAP 2.5(a)(3) will be irrelevant.

In short, the issue before this court is not whether the "wrong" of a non-public trial has a remedy. Clearly it does have a remedy via timely objection. The issue is what happens if the defendant fails to take advantage of that remedy. The answer should be that absent of showing of actual prejudice, the remedy is lost.

2. This Court's automatic reversal doctrine is incorrect and conflicts with precedent and federal case law.

The Sixth Amendment of the U.S. Constitution and Wa. Const. art. I, § 22 contain nearly identical provisions guaranteeing the right of an

[6] Even if the issue is not raised on appeal at all, it can often be raised via personal restraint petition, but this remedy also requires proof of actual prejudice. *Matter of Cook*, 114 Wn.2d 802, 810, 792 P.2d 506 (1990). Furthermore, personal restraint petitions are generally subject to a statutory time limit. If no petition is filed within this time period, the remedy is lost. *In re Coats*, 173 Wn.2d 123, 131, 267 P.3d 324 (2011).

accused to a public trial. Under both constitutions, the public's right of access is not absolute, and may be limited to protect other interests. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). In several important cases involving challenges brought by the media, this court defined the public's right to open proceedings under Wa. Const. art. I, § 10. In *Seattle Times Co.*, 97 Wn.2d 30, and *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 848 P.2d 1258 (1993), the Court announced the test to be used to balance the public's right to access against other compelling interests. *See Allied Daily Newspapers of Washington*, 121 Wn.2d at 209-11; *Seattle Times Co.*, 97 Wn.2d at 37-39.

While the right to a public trial applies to all judicial proceedings, including jury selection, the right is not absolute. The presumption in favor of openness may be overcome by an overriding interest based on findings that closure is essential to preserve higher values and narrowly tailored to serve that interest. Thus, the court may close a courtroom under certain circumstances. *State v. Momah*, 167 Wn. 2d 140, 148, 217 P.3d 321 (2009).

In recent decisions, this Court has announced a doctrine: that failing to conduct a *Bone-Club* analysis before closing the court room is structural

error *requiring* reversal, and can be raised for the first time on appeal. *E.g., Paumier*, 176 Wn.2d at 34. [7]

This doctrine is incorrect, is harmful, and should be overruled. *See, e.g., State v. Devin*, 158 Wn.2d 157, 167-72, 142 P.3d 599 (2006) (incorrect and harmful precedent even though doing so was unnecessary to decision).

Though well-intentioned, this Court's holdings that public trial violations are always structural error and can be raised on appeal, regardless of RAP 2.5(a), are incorrect for several reasons: (1) they ignore this Court's own precedent; (2) they require reversal of convictions even where no constitutional violation occurred; and (3) they purport to be based on federal law, but in fact deviate dramatically from federal law.

a. The automatic reversal rule ignores precedent

In *Momah*, 167 Wn.2d 140, this Court unequivocally held that not all courtroom closure errors are fundamentally unfair and thus not all are structural errors. *Id.* at 150. The Court based this holding on *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), where the U.S. Supreme Court found a public trial error but rejected the idea that this

[7] See *State v. Frawley, 181 Wash.2d 452,* and *State v. Wise*, 176 Wn.2d at 13; holding a trial court may question potential jurors individually outside of the public's presence—thereby closing the courtroom—but only after considering the five *Bone-Club* factors on the record. Closure of the courtroom without this analysis is a structural error for which a new trial is the *only* remedy. *Frawley* 181 Wn.2d at 459; *Wise*, 176 Wn.2d at 15. But see, *Momah*, 167 Wn.2d at 149-50 (not all courtroom closure errors are fundamentally unfair and thus not all are structural errors that required a new trial).

necessarily required a new trial. *Id.* at 49. Similarly, in *Momah*, 167 Wn.2d 140, this Court found that the closure was not a structural error requiring reversal. *Momah*, 167 Wn.2d at 156. Thus, *Momah's* declaration that "not all courtroom closure errors are structural errors" was a holding, not dicta. *Id.* at 150.

Subsequent decisions by this Court have attempted to differentiate them from *Momah*, 167 Wn.2d, 148. Yet the holding in *Momah*, 167 Wn.2d 140 remains unchanged by *Wise,* 176 Wash.2d 1, *Frawley,* 181 Wash.2d 452, or other subsequent decisions; and is applicable to the present case.[8]

In *Momah*, 167 Wn.2d 140 (and as recognized in *Wise*, 176 Wn.2d 1) the Court indicated in order to facilitate appellate review, the better *practice* is to apply the five guidelines and enter specific findings before closing the courtroom. But their absence under the facts in *Momah*, 167 Wn.2d 140 did not turn the supported trial court decision into a structural error. *See Momah*, 167 Wn.2d at 152.

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[8] The present case is similar to the facts in *Momah*, 167 Wn.2d 140, where the defendant assented to the closure, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in the present case, like *Momah*, not only sought input from the defendants, but closed the courtroom after consultation with the defense and the prosecution. As in *Momah*, 167 Wn.2d 140, the trial judge closed the courtroom to safeguard the defendant's constitutional right to a fair trial by an impartial jury - not to protect *any* other interests. Where a defendant's other constitutional rights are implicated, the trial court is required to give due consideration to those rights in determining whether closure is appropriate. *Momah*, 167 Wn.2d at 151-52.

Either every public trial violation is structural error requiring reversal, or some are not. *Momah* holds that some are not. Thus, in subsequent cases, the question should have been whether any error was structural given the particular facts of each case. Instead, the Court has simply held that failure to conduct a *Bone-Club* analysis is always structural error.

The Court should either explicitly overrule *Momah,* offering some explanation as to why it is wrong, or return to the rule announced in *Momah,* 167 Wn.2d 140, that not all courtroom closures are structural errors.

b. The doctrine requires reversal of convictions even where analysis would indicate no constitutional violation occurred.

The state and federal constitutions protect the right to a public trial, but that right sometimes gives way to other interests, such as the defendant's right to an impartial jury. *See, e.g., Waller*, 467 U.S. at 45; *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). This Court and the U.S. Supreme Court have developed tests to balance these interests and determine whether a courtroom closure violates the public trial right. This Court's version of the test is the *Bone-Club* analysis. If that analysis shows that a courtroom closure is justified, no public trial violation occurs.

If the rule is that reversal is required, regardless of whether that analysis would have shown the closure to be justified, the rule cannot

withstand scrutiny for several reasons. First, it makes no sense to claim that simple failure to conduct the *Bone-Club* analysis is itself unconstitutional. If that were correct, then *every* closure in *every* criminal trial in Washington before this Court decided *Bone-Club*, 128 Wn.2d 254 in 1995 was unconstitutional.

Second, this Court and the U.S. Supreme Court have repeatedly conducted after the fact inquiries to determine whether a public trial violation occurred, even if the trial court failed to apply the test.[9]

Third, holding that failure to apply *Bone-Club* is itself unconstitutional leads to absurd consequences. It means that identical courtroom closures, identically tailored and based on identical concerns, lead to different results depending on whether the judge first detailed these considerations pursuant to *Bone-Club*.

Bone-Club is the *test* to determine whether a constitutional violation occurred. Simply reciting the test is not the constitutional requirement. Nonetheless, this Court has recently overturned many serious convictions for the mere failure to state *Bone-Club* language, regardless of whether a public

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[9] *See, e.g., Momah*, 167 Wn.2d at 151-56; *In re Orange*, 152 Wn.2d 795, 807, 100 P.3d 291 (2004), as amended on denial of reconsideration (Jan. 20, 2005), (although trial court never analyzed *Bone-Club* factors, this Court "measur[ed] the trial court's order ... against the *Bone-Club* test") (internal quotation marks omitted); *Waller*, 467 U.S. at 48-49.

trial violation occurred. This rule stands alone, uniquely harmful to victims, the public, and the interests of justice.

c. The doctrine deviates from the federal law it purports to be based on.

This Court has said that its recent public trial decisions are required by federal law. *See, e.g., Wise*, 176 Wn.2d at 13. But as this Court's public trial doctrines have developed, they are untethered from federal law, despite the Court never having conducted a *Gunwall, 106 Wash.2d 54,* analysis to support such deviation. The Court's public trial jurisprudence deviates from federal law in several crucial respects. (1) The U.S. Supreme Court has never held that *every* public trial violation is structural error requiring reversal of a conviction, but this Court has (notwithstanding *Momah).*[10] (2) Federal courts uniformly recognize that some courtroom closures are so trivial that they do not warrant a new trial.[11] (3) This Court has held that closing the courtroom for virtually any portion of voir dire is error, but federal courts routinely find

10 See, e.g., Anne Ellington & Jeanine Lutzenhiser, Anne L. Ellington & Jeanine Blackett Lutzenhiser, Anne L. Ellington & Jeanine Blackett Lutzenhiser, Anne L. Ellington & Jeanine Blackett Lutzenhiser, Anne L. Ellington & Jeanine Blackett Lutzenhiser, *In Washington State, Open Courts Jurisprudence Consists Mainly of Open Questions*, 88 Wash. L. Rev. 491, 515 (2013)("There is nothing in the federal cases to suggest that an open courts violation is always structural error, and the Washington State Supreme Court has not explained why a more strict application of the doctrine ... is required by the state constitution.").

11 *See Easterling*, 157 Wn.2d at 180-81 (rejecting triviality approach); *Id.* at 182-185 (Madsen, J., concurring) (detailing federal approach to trivial violations).

such closures trivial.[12] The U.S. Supreme Court has directed trial courts to offer jurors the option of being questioned in chambers.[13] (4) Under federal law, failure to object to a closure at trial means that any claimed public trial violation is reviewed only for plain error (requiring a showing that the error was obvious and prejudicial), but this Court reviews such claims de novo.

This Court's public trial rule deviates markedly from federal law, requiring reversal of far more convictions than federal law would. [14] The Court is of course free to adopt doctrines that differ from federal law, but not without explaining why the costs of those doctrines are required under our state constitution, where the alleged violation being addressed does not create actual prejudice.

Moreover, the Court's automatic reversal rule needlessly harms crime victims, their families, and the broader public. This Court's automatic reversal rule has nullified dozens of serious criminal convictions and

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12 *See, e.g., Gibbons v. Savage*, 555 F.3d 112, 114 (2d Cir. 2009) (finding violation trivial where courtroom was closed during several hours of voir dire).

13 *Press-Enter. Co. v. Superior Court of California, Riverside Cnty.*, 464 U.S. 501, 512, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984)("a trial judge ... should inform the array of prospective jurors ... that those individuals believing public questioning will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge In camera")

14 *See, e.g., United States v. Bucci*, 525 F.3d 116, 129 (1st Cir. 2008) (courtroom closure only for plain error because of defendant's failure to object).

imposed enormous costs on counties, forcing countless retrials. [15] Yet neither precedent nor principle requires these harms be imposed - especially where a defendant shows no prejudice resulting from the claimed violation to begin with.

3. There was no violation of the right to public trial where the court conducted limited individual questioning. Alternatively, the *Bone-Club* factors were satisfied.

Before a court may close a hearing that could implicate a defendant's public trial right, it must engage in a multi-factor analysis, considering the interests justifying the potential closure, the tailoring of means to protect those interests, and alternatives to excluding the public. *See Waller*, 467 U.S. at 48; *Bone-Club*, 128 Wn.2d at 258-59.

Here, there is a sufficient record to justify what amounts to a limited or partial "closure" of the courtroom. Application of the *Bone-Club* standards in the present case shows the trial court was justified in a partial or limited "closure" of the courtroom for the individual voir dire.[16]

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15 *See, e.g., Frawley*, 181 Wn.2d 452 (reversing convictions for murder and child rape); *State v. Hummel*, 165 Wn. App. 749, 266 P.3d 269 (2012) (reversing murder conviction); *In re D'Allesandro*, 178 Wn. App. 457, 314 P.3d 744 (2013) review denied, 182 Wn.2d 1021, 345 P.3d 784 (2015)(reversing murder conviction); see generally *State v. Smith*, 181 Wn.2d 508, 528 n.4, 334 P.3d 1049 (2014) (Wiggins, J., concurring in result) (citing many more cases).

16 In *Momah*, 167 Wn.2d 140, as in the present case, the record demonstrated that the trial court recognized the competing Wa. Const. art. I, § 22 interests and in consultation with the defense and the prosecution, carefully considered the defendant's rights and closed a portion of voir dire to safeguard the accused's right to an impartial jury. Further, the

The first factor, the purpose of the closure, was for the defendant's benefit in picking a fair jury. The defendants proposed a supplemental jury questionnaire which was intended to identify the impact of pre-trial publicity and the emotional nature of the charges. The individual questioning, to obtain candid details regarding those responses, was for the benefit of the defendant solely to select a fair, unbiased, and impartial jury to hear the case and ensure the defendant's right to a fair trial.[17]

In addition to the need to address specific juror responses to the supplemental questionnaire, the defendants' change of venue motion also warranted individual questioning in order to avoid the risk of tainting the entire jury panel with responses related to the supplemental questionnaire.

Due to the defendant's concerns about being able to select a fair jury, the first factor heavily favored closure of the courtroom.

The second factor, permitting anyone present when the closure is made the *opportunity* to object, was met. The cases require an opportunity

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closure was narrowly tailored to accommodate those jurors who indicated that they may have a problem being fair or impartial. *Momah*, 167 Wn.2d, 156.

[17] Unlike *State v. Frawley*, the defendant did not waive his right to be present for the individual voir dire and was present during all jury questioning Similarly, the defendant was not excluded from *any* portion of the voire dire or trial, as occurred in *State v. Easterling*, 157 Wn.2d 167, 137 P.3d 825 (2006).

to object, not an invitation.[18] The record was sufficient to demonstrate that potential objectors present were provided with the opportunity, and with sufficient information, to object to the limited restriction of individual questioning. [19]

The third factor is whether the court uses the least restrictive means of achieving its goals. That was done in the present case. There was no practical way to question potential jurors with regard to their written answers, except for making individual inquiry.

The physical layout of the Okanogan County Superior Court and courthouse does not permit, for example, holding large groups of jurors in

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[18] *See Bone-Club*, 128 Wn.2d at 261 (citing *Seattle Times Co.*, 97 Wn.2d at 39). In *Seattle Times Co.*, 97 Wn.2d *at 38* the court stated: Anyone present when the closure [and/or sealing] motion is made must be given an opportunity to object to the suggested restriction. For this opportunity to have meaning, the proponent must have stated the grounds for the motion with reasonable specificity, consistent with the protection of the right sought to be protected. At a minimum, potential objectors should have sufficient information to be able to appreciate the damages which would result from free access to the proceeding and/or *records*. This knowledge would enable the potential objector to better evaluate whether or not to object and on what grounds to base its opposition. (Emphasis added; internal citations omitted.)

[19] The initial questioning of the jury panel was conducted in open court. There was no closure of the courtroom and it was open to any member of the public. *See* 1/10/06 RP. The trial judge stated in open court on the record that there would be individual questioning of jurors conducted. 1/10/06 RP 25. Jurors completed their supplemental questionnaires in court and the judge reconvened court again before beginning individual questioning. 1/10/06 RP, p. 19, 23-26. The jurors were advised that individual questioning would be conducted based on the answers to the questionnaires. 1/10/06 RP, p. 25. The judge also invited and responded to questions about the individual questioning schedule. 1/10/06 RP, p. 26-29 There was no objection by anyone to the proposed individual questioning, despite ample opportunity to do so. 1/10/06 RP, p. 25-30; S*ee also RP Individual Jury Questioning, Vol. I and II.* At the conclusion of individual questioning, questioning of the entire panel again resumed in open court. *See* 1/10/06 RP; RP 1.

another location and bringing jurors who are subject to individual questioning into the open courtroom.[20] Moreover, in this case, general questions were conducted in open court, both before and after the individual questioning.

The fourth factor, the weighing of the interests, clearly favored "closure". The defense was the proponent of closure to ensure selection of a fair jury. In this case, the defendant's right to a fair trial substantially outweighed the potential limitation of the right to have the public present for a limited portion of individual questioning.

The fifth factor was also satisfied, in that the questioning of each juror was brief and limited. The entire panel was subject to questioning in open court before and after the individual questioning. The limited closure was not more broad or extensive than was necessary.

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[20] There is no available nearby physical space hold the large jury panel outside of the courtroom for the number of days necessary to complete jury selection. The record reflects that during the questioning, jurors had to remain in the courtroom despite tight seating. 1/10/06 RP, p. 25-26, 29; RP 11, 14. More importantly, the parties do not have the ability to conduct side bars, make and discuss challenges, etc. in the open court room and at the same time create a sufficient digital recorded record. To do so would require clearing the courtroom each time. *See State v. Clinkenbeard*, 130 Wn. App. 552, 571, 123 P.3d 872 (2005). The record in the present case contains reference to the limitations of the electronic recording system, and that sidebars and objections could not be recorded with the jury present. *See e.g.*, RP 15, 59, 188, 208, 999-1000.

In light of *Momah*, the five-factor test clearly favored the limited or partial closing of the courtroom in the present case. The court did not err in permitting individual voir dire outside of the public eye.

F. CONCLUSION

Defendant was not denied his right to public trial by conducting individual juror questioning. The Defendant should not have been permitted to raise the issue for the first time on appeal. The claimed partial closure was not a "structural" error supporting a new trial. Even if there was error, it was trivial, not manifest or structural, and did not require reversal absent some indication of prejudice. Review of the Court of Appeals decision should be granted, and its decision reversed.

Dated this 17 day of August 2015

Respectfully Submitted by:

KARL F. SLOAN, WSBA #27217
Attorney for Petitioner

Appendix A

FILED
July 9, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. JON GABRIEL DEVON, Appellant.	)	No. 24958-1-III UNPUBLISHED OPINION

LAWRENCE-BERREY, J. — Jon DeVon appeals his conviction for homicide by abuse. He raises several issues, but we find it necessary only to address three: (1) whether Mr. DeVon's right to a public trial was violated, (2) whether the State presented sufficient evidence to establish a pattern or practice of abuse; and (3) whether the lower court must recuse itself on remand. We answer the first two questions in the affirmative, reverse Mr. DeVon's conviction as required by recent Supreme Court precedent, and remand for a new trial. We find no need for the lower court to recuse itself.

FACTS

Mr. DeVon was charged by amended information with homicide by abuse. The charges resulted from the February 1, 2005, death of 22 month old A.R.V. A.R.V. was the son of Mr. DeVon's wife, Yolanda DeVon, and lived with the couple. Ms. DeVon was also charged in A.R.V.'s death. The defendants' cases were joined at trial.

At a pretrial hearing on December 19, 2005, counsel for Ms. DeVon raised the issue of conducting individual voir dire in chambers. The court discussed beginning general voir dire questioning to determine which jurors had heard of the case, and then moving to individual voir dire in chambers to weed out biased jurors. In addition, Mr. DeVon orally requested that jurors be sequestered throughout the trial to protect them from being tainted. Ms. DeVon joined in that motion. The court denied the motion to sequester, but agreed to revisit the motion depending on the juror responses during voir dire.

When the court convened on January 10, 2006, the venire jurors answered general questions and completed written questionnaires. In response to a question of whether any had heard of the case, a large number responded that they had. In the afternoon, the court announced that individual voir dire of all jurors would be conducted in chambers in the presence of the parties, counsel, and the court reporter. Prior to proceeding in that

manner, the court did not conduct a *Bone-Club*[1] analysis. After nearly two days of individual voir dire in chambers, the court reconvened in the courtroom to complete the voir dire process.

At trial, Ms. DeVon's mother, Ms. Debra Garrison, testified that she observed bruising on A.R.V.'s legs, arms and cheeks weeks before A.R.V.'s death. Ms. Garrison also reported that Mr. DeVon and Ms. DeVon admitted to biting A.R.V. on the arm as a form of discipline.

Additionally, multiple witnesses testified that they observed injuries to A.R.V. between January 25 and January 31, 2005. Testimony established that A.R.V. was in the care of the DeVons during this time frame, and A.R.V. would often spend time with Mr. DeVon outside of Ms. DeVon's presence.

The DeVons' explanation for the injuries given to witnesses were contradictory. The most common explanation given and also reported to police was that A.R.V. fell off of a woodpile sometime around January 28 or 29. However, witnesses present with Mr. DeVon and A.R.V. on those days did not see A.R.V. fall off a woodpile. Instead, the witnesses said that A.R.V. fell near a woodpile and/or on a porch. The witnesses also said that A.R.V. fell onto his hands and did not seem affected by the incident. One

[1] *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

witness said A.R.V. suffered only a few red marks on his face and slivers in his hands, while another witness said A.R.V. did not hit his head.

Testimony established that Ms. DeVon reported to coworkers on January 29 and 30, two days before A.R.V.'s death, that A.R.V. was sick and vomiting. Ms. DeVon told some of the workers, but not others, about A.R.V.'s fall from the woodpile. Witnesses said that Ms. DeVon was not worried about the multiple bruises covering A.R.V. Ms. DeVon did not want to take A.R.V. to the hospital because she was afraid of what others might think.

Testimony from those treating A.R.V. when he arrived at the hospital in the early morning of January 31 was that A.R.V. was in full cardiac arrest and had been so for some time. One doctor reported that A.R.V. "basically appeared dead." Report of Proceedings at 759. One witness described A.R.V. as unrecognizable due to the swelling. Another thought he had been in a traumatic accident due to the extent of his visible injuries.

A doctor who helped treat A.R.V., testified that the numerous injuries to A.R.V. were extensive. He testified that the type of retinal hemorrhages and brain injury A.R.V. suffered could not have resulted from a direct or accidental blow to the head. Instead, the

doctor described that the location, nature, and shape of many of the injuries indicated that they were clearly inflicted injuries and not accidental.

A pediatric neurologist who also evaluated A.R.V. noted the extensive injuries. The neurologist indicated that A.R.V. suffered from multiple types of trauma occurring both relatively recently and from a longer time ago. He testified that the severe injury was not one he would expect to see from a short fall from a woodpile but that most likely occurred as the result of non-accidental trauma or child abuse. He indicated that the amount of retinal hemorrhages indicated significant force was applied to A.R.V.'s head either by shaking or repeated blows.

The jury found Mr. DeVon guilty of homicide by abuse. The court sentenced Mr. DeVon to 450 months of confinement. The jury found Ms. DeVon guilty of second degree manslaughter. The court sentenced Ms. DeVon to 27 months of confinement.

Mr. DeVon appealed to this court in 2006, claiming among other errors, that his right to a public trial was violated when the trial court allowed individual voir dire in chambers. We stayed his appeal pending a decision by the Supreme Court in *State v. Frawley*, 181 Wn.2d 452, 334 P.3d 1022 (2014). We lifted the stay subsequent to the recent decision in *Frawley*. We now address his appeal.

ANALYSIS

I. *Whether Mr. DeVon's right to a public trial was violated when the trial court allowed individual questioning of venire jurors in chambers*

Review of a defendant's public trial right challenge on direct appeal is a question of law that receives de novo review. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

Article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution guarantee a defendant the right to a public trial. *State v. Njonge*, 181 Wn.2d 546, 553, 334 P.3d 1068, *cert. denied*, 135 S. Ct. 880, 190 L. Ed. 2d 711 (2014). However, the right to a public trial is not absolute. *Id.* A trial court may close a courtroom to the public if it finds the closure is justified. *Id.* Prior to closure, the trial court must balance several factors on the record by conducting a *Bone-Club* analysis. *Id.*

"*Bone-Club* requires that trial courts at least: name the right that a defendant and the public will lose by moving proceedings into a private room; name the compelling interest that motives closure; weigh these competing rights and interests on the record; provide the opportunity for objection; and consider alternatives to closure, opting for the least restrictive." *State v. Wise*, 176 Wn.2d 1, 10, 288 P.3d 1113 (2012).

A defendant's right to a public trial applies to jury selection. *Id.* at 11. "[T]he public trial right in voir dire proceedings extends to the questioning of individual prospective jurors." *Id.* The private questioning of individual jurors in chambers is a courtroom closure that requires a *Bone-Club* analysis before questioning occurs. *Id.* at 11-12.

It is the trial court's responsibility to weigh the *Bone-Club* factors and enter specific findings to support the closure. *Bone-Club*, 128 Wn.2d at 260-61. On appeal, "[w]e do not comb through the record or attempt to infer the trial court's balancing of competing interests where it is not apparent in the record." *Wise*, 176 Wn.2d at 12-13.

A trial court's failure to give any consideration to the *Bone-Club* factors before closing a courtroom for voir dire is a structural error that is presumed to be prejudicial. *Wise*, 176 Wn.2d at 14.[2] An improper courtroom closure violates the fundamental constitutional right to a public trial and is not subject to a harmless error analysis. *State v.*

[2] *But see State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009) where the voir dire courtroom closure without a *Bone-Club* analysis was not considered a structural error because the trial court effectively considered the *Bone-Club* factors and the defendant was an active proponent of the closure. "At bottom, *Momah* presented a unique confluence of facts: although the court erred in failing to comply with *Bone-Club*, the record made clear—without the need for a post hoc rationalization—that the defendant and public were aware of the rights at stake and that the court weighed those rights, with input from the defense, when considering the closure." *Wise*, 176 Wn.2d at 14-15.

Easterling, 157 Wn.2d 167, 181-82, 137 P.3d 825 (2006). We do not consider this kind of public trial right violation to be de minimis or trivial. *Id.* at 180-81. "[W]e cannot know what the jurors might have said differently if questioned in the courtroom; what members of the public might have contributed to either the State's or defense's jury selection strategy; or, if the judge had properly closed the court under a *Bone-Club* analysis, what objections, considerations, or alternatives might have resulted and yielded." *Wise*, 176 Wn.2d at 18.

A defendant's failure to object to a public trial violation does not preclude appellate review under RAP 2.5. *State v. Paumier*, 176 Wn.2d 29, 36, 288 P.3d 1126 (2012). The improper closure of the courtroom during voir dire is presumed to be prejudicial to the defendant and, correspondingly, is a manifest error affecting a constitutional right. *Id.* at 36-37. Similarly, a defendant's failure to object at trial does not equate to a waiver of his right to a public trial. *Brightman*, 155 Wn.2d at 514-15.

A defendant may affirmatively waive his right to a public trial if the waiver is knowingly, voluntarily, and intelligently given. *Frawley*, 181 Wn.2d at 461-62 (plurality opinion). A valid waiver can occur in the absence of a *Bone-Club* analysis. *Id.* at 467 (plurality opinion) (Stephens, J., concurring with seven concurring and dissenting justices in agreement). The Washington Supreme Court has not agreed on the standard or process

for ensuring that a defendant's waiver is knowing, voluntary, and intelligent, but the prevailing opinion is that waiver "can be met without the same type of 'on-the-record colloquy' that waiver of certain other rights (like the right to counsel) requires." *Id.* at 473. Still, a valid wavier will not be found if the record presents no evidence that the defendant knew that he was waiving his right to a public trial, understood what the right entailed, and voluntarily agreed to waive his right. *State v. Shearer*, 181 Wn.2d 564, 575-76, 334 P.3d 1078 (2014) (plurality opinion) (McCloud, J., concurring).

Here, Mr. DeVon's right to a public trial was violated. The trial court allowed private questioning of jurors in chambers. This courtroom closure occurred without first conducting a *Bone-Club* analysis. Moreover, although a large number of venire jurors responded that they had heard of the case, all venire jurors were questioned individually in chambers. The trial court's failure to give any consideration to the *Bone-Club* factors before allowing private questioning in chambers is a structural error that is presumed to be prejudicial to Mr. DeVon. Furthermore, there is no evidence in the record that Mr. DeVon knowingly, voluntarily, and intelligently waived his right to a public trial. Despite the State's contentions, Mr. DeVon did not suggest the courtroom closure; the suggestion was made by Mr. DeVon's wife. Also, although Mr. DeVon suggested and argued for

sequestration of the jury, his advocacy for sequestration does not evidence an intention to waive his right to a public trial.

The appropriate remedy for a violation of a defendant's constitutional right to a public trial is reversal and remand for a new trial. *Easterling*, 157 Wn.2d at 182. "Although a new trial will undoubtedly place on the affected community an extremely difficult burden, a burden that will be particularly painful for the families and friends of the victims of the crimes charged in this case, our duty under the constitution is to ensure that, absent a closure order narrowly drawn to protect a clearly identified compelling interest, a trial court may not exclude the public or press from any stage of a criminal trial." *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 800, 100 P.3d 291 (2004).

II. *Whether the State presented sufficient evidence to establish guilt beyond a reasonable doubt*

We address Mr. DeVon's sufficiency of the evidence challenge because, if successful, the remedy of reversal and dismissal would alleviate the need for a new trial to address the public trial violation.

Mr. DeVon contends that the State failed to establish all of the elements of homicide by abuse. Specifically, he contends that the State did not prove that he previously engaged in a pattern or practice of assault or torture of A.R.V.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). When a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.*

Circumstantial evidence and direct evidence are equally reliable. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). An appellate court "must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

"A person is guilty of homicide by abuse if, under circumstances manifesting an extreme indifference to human life, the person causes the death of a child or person under

sixteen years of age, . . . and the person has previously engaged in a pattern or practice of assault or torture of said child." RCW 9A.32.055.

Here, the evidence is sufficient to show that Mr. DeVon engaged in a practice or pattern of abuse of A.R.V. The pattern of abuse was established by the extensive medical evidence showing a huge number of inflicted injuries, pattern injuries, observed changes in the child's demeanor, injuries observed by other witnesses more than one week before death, and statements made by both defendants admitting to biting and swatting A.R.V. After viewing the evidence in the light most favorable to the State, a rational trier of fact could have found Mr. DeVon guilty beyond a reasonable doubt. Therefore, we reverse Mr. DeVon's conviction, but remand for a new trial.

III. *Whether Judge Allan must recuse herself from the new trial*

Mr. DeVon also requests that we direct Judge Allan to recuse herself from the criminal proceeding on remand. He contends that Judge Allan could be perceived as being impartial, and for this reason, must recuse herself.

Judge Allan previously heard a three-hour shelter care hearing involving the DeVons' other child. The subject of that hearing concerned the DeVons' request for increased visitation. Judge Allan did not reduce Mr. DeVon's visitation, but rather maintained the status quo. In denying Mr. DeVon's earlier motion to recuse, Judge Allan

stated that she did not have knowledge of personal matters as prohibited by Cannon of Judicial Conduct, (3)D.[3] Mr. DeVon presents no evidence to the contrary. Rather, he speculates that she might have been exposed to information that made her biased.

The appearance of fairness doctrine is based on the fundamental notion in our system of justice that judges must be fair and unbiased. *GMAC v. Everett Chevrolet, Inc.*, 179 Wn. App. 126, 153, 317 P.3d 1074 (2014). Judges must not only be impartial, but they must also demonstrate the *appearance* of impartiality. *Id.* at 154. "Even 'a mere suspicion of irregularity, or an appearance of bias or prejudice' should be avoided by the judiciary." *Id.* (quoting *Chi., Milwaukee, St. Paul & Pac. R.R. v. Wash. State Human Rights Comm'n*, 87 Wn.2d 802, 809, 557 P.2d 307 (1976)). There must be proof by the litigant of actual or perceived bias to support an appearance of impartiality claim. *Id.* Whether a proceeding satisfies the appearance of fairness doctrine is judged by how it appears to a reasonably prudent person. *Id.*

We find no basis to order Judge Allan to recuse herself. Mr. DeVon has failed to prove actual or perceived bias. Simply because Judge Allan presided over a hearing

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[3] Former Canon 3(D) provides in relevant part: (1) Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which: (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

which involved Mr. DeVon, and even decided that hearing adversely to him, does not establish actual or perceived bias. Nor does it establish that she has personal knowledge of a disputed fact in the criminal proceeding. Moreover, during the criminal trial, Judge Allan made decisions that favored Mr. DeVon. Judge Allan dismissed the alternative count against Mr. DeVon of first degree murder by extreme indifference and denied the State's motion to amend the information to include a count of first degree premeditated murder. A reasonable prudent person could not perceive that Judge Allan had any actual or perceived bias against Mr. DeVon.

We reverse Mr. DeVon's conviction and remand for a new trial.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Siddoway, C.J.

Fearing, J.

PROOF OF SERVICE

I, Karl F. Sloan, do hereby certify under penalty of perjury that on August 17, 2015, I provided email service, a true and correct copy of the **Amended Petition for Review**, to:

E-mail: nodblspk@rcabletv.com
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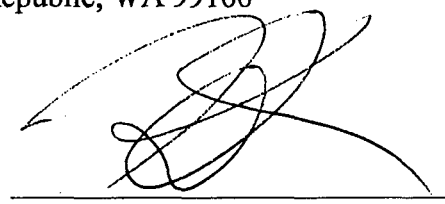

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Please fine attached the State's Amended Petition for Review; Appendix 'A' of Decision in COA; and Proof of Service.

Sincerely,

Karl Sloan
Okanogan Co. Prosecutor