66202-3

66202-3

No. 66202-3-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,

vs.

RANDY WHITMAN, Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington State Court of Appeals

Washington State Supreme Court

Federal Cases

Rules and Statutes

A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether a defendant may raise the issue of an alleged violation of his right to public trial under Article 1 Sections 10 and 22 of the Washington State Constitution and the Sixth Amendment of the United State Constitution regarding a motion to join his two cause numbers for trial for the first time on appeal where he did not object below despite the issue being clearly before the court.

2. Whether a defendant's right to public trial under Article 1 Section 22 and the Sixth Amendment extended to a court's in chambers discussion regarding a motion to join the defendant's two causes for trial where the court did not resolve any disputed facts during the discussion, made only a legal conclusion that the two causes should be joined for trial and where the values underlying the right to public trial were not hindered by the proceeding occurring in chambers.

3. Whether an alleged violation of the right to public trial regarding an in chambers proceeding to address a motion to join the defendant's two causes for trial is structural error requiring reversal of the conviction where the trial was not rendered fundamentally unfair or an unreliable vehicle for determining guilt or innocence.

C. FACTS

1. Procedural Facts.

On April 16, 1996 Appellant Randy Whitman was charged under cause number 96-1-00293-6 with Felony Violation of a No Contact Order, in violation of RCW 10.99.050(2), for his acts on or about April 7th, 1996.

CP 63-64. He was subsequently charged on December 26, 1996 under cause number 96-1-01058-1 with Felony Telephone Harassment, in violation of RCW 9.61.230(1)(3)(b) for his acts on or about October 18th, 1996. CP 58-59. Whitman failed to appear on both cause numbers in March 1997, bench warrants were issued, and he wasn't brought back before the court until 12 years later. Supp CP __, Sub Nom. 15, 24; RP 16.

The day of trial on October 26, 2010, the two cause numbers were joined for trial. CP 57/62. A First Amended Information was filed that same day alleging both counts. CP 54-56. Whitman was tried by a jury and found guilty of the Felony Violation of No Contact Order and not guilty of the Felony Telephone Harassment. CP 28. The judge sentenced Whitman to seven months, with an option to perform the last three months on electronic home detention if eligible, on the Felony Violation No Contact Order, within the range of 0-365 days for an unranked offense. CP 21; RP 171, 181.

2. Substantive Facts.

On the morning of trial defense counsel informed the court that he was prepared to go forward on both of Whitman's two cause numbers and moved to join them for trial. RP 3. The prosecutor indicated he might agree to the joinder as long as his witnesses were available. Id. The court indicated that since they were not joined, the one cause number would be

tried right after the one the State was prepared to go forward on. RP 4. That afternoon, while the venire panel waited in the courtroom, the court stated in chambers:

> The record should reflect that we are in chambers on the State v. Whitman matter, and to alleviate *the State's* concerns that this brief hearing that we are going to have in chambers might not be open to the public I sent the clerk out to the courtroom, she asked if there was anybody in the courtroom that was not a juror and nobody raised their hand and therefore there isn't anybody out there that would care to attend this hearing.

RP 9-10 (emphasis added); Supp CP __, Sub Nom. 66 at 1-2. The State then indicated that it was agreeing to defense's earlier motion to join the two cause numbers for trial. RP 11. It requested that the court join the two cause numbers for trial due to the cross-admissibility of the evidence and judicial economy. Id. Defense counsel then reversed his earlier position and objected to having the matters joined for trial because he believed the evidence was not cross admissible and prejudicial to Whitman. He indicated a preference to have them heard back to back. RP 12. After reviewing the probable cause affidavits, the court concluded that the evidence in the first case would be admissible in the telephone harassment cause under ER 404(b) to show motive and granted the State's motion to join. RP 13-14.

At trial, the evidence showed that Whitman's ex-wife, Catherine Jones, had obtained a protection order during the course of their divorce proceedings. RP 40-42. In violation of that order, Whitman came to stay with Ms. Jones the weekend of April 7, 1996, in hopes of getting back together with her. RP 43-45. When they returned from an evening out together, Whitman, who had been drinking, became enraged that they had been 15 minutes late getting back for the babysitter. RP 46. Whitman grabbed Ms. Jones by the throat, shoved her face in the mirror, screamed at her and choked her. Id. Ms. Jones thought she was going to be dead this time and managed to call Whitman's nephew for help. RP 46-47, 50. After the nephew arrived, Ms. Jones went outside but Whitman came outside as well and told the nephew to go away, that it wasn't any of his business. RP 46, 49. Whitman dragged Ms. Jones back inside, threw her in a chair and told her to stay there. RP 46. He flipped the chair over, smashing the side of her face and body. RP 47. Deputies eventually arrived. RP 51, 86. One of the deputies noted visible injuries to Ms. Jones's right eye and that she complained of pain in the right side of her body, although Ms. Jones refused medical attention. RP 86.

D. ARGUMENT

Whitman asserts that the discussion in chambers regarding the State's motion to join his two causes for trial violated his right to public

trial under Article 1 Sections 10 and 22 of the Washington State Constitution and the Sixth Amendment of the United States Constitution. First, Whitman should not be able to raise this issue for the first time on appeal because he did not object when the issue was clearly raised and before the court. Second, his right to public trial was not implicated by the in chambers proceeding because it was not the type of adversarial proceeding to which the right attaches. No facts were in dispute or resolved by the judge. There were no allegations of government misconduct. The judge simply made a legal conclusion as to whether Whitman's two cause numbers should be joined for trial. The purposes served by open proceedings would not have been furthered by having the joinder discussion heard in public. Finally, even if the motion should have been heard in an open courtroom, there was no structural error that occurred here warranting the relief requested by Whitman, reversal.

1. Whitman may not assert a violation of his right to public trial regarding the motion for joinder hearing for the first time on appeal.

The State asserts that Whitman should be obligated to demonstrate that the in chambers discussion regarding the motion to join causes constitutes a manifest error of constitutional magnitude given his failure to object and his apparent acquiescence to having the matter heard in chambers. Under RAP 2.5(a), an error is waived if not preserved below

unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). It is the defendant's burden to show how the alleged constitutional error was manifest, *i.e.*, how it actually prejudiced his rights. State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999).

The State acknowledges this Court has held that a criminal defendant may assert a violation of the Sixth Amendment and Article 1 Section 22 rights to public trial for the first time on appeal. *See*, State v. Lam, __ Wn. App. __, 2011 WL 1486018 (April 18, 2011), ¶9 (as long as defendant can establish a violation of the right to public trial, he may assert it for the first time on appeal); In re Detention of Ticeson, 159 Wn. App. 374, 382, 246 P.3d 550 (2011) ("It is well settled that a criminal defendant may raise the Section 22 right to a public trial for the first time on appeal and will enjoy a presumption of prejudice where the right has been violated.").

This Court has also held, however, that a civil defendant may not assert a violation of Article 1 Section 10 for the first time on appeal. In Ticeson, the court also held that in order for a party in a civil case to assert an Article 1 Section 10 violation of the State Constitution for the first time on appeal, they must do so in accord with RAP 2.5(a)(3). Ticeson, 159

Wn. App. at 382-83. The court explained its rationale for distinguishing between Article 1 Section 22 and Section 10 rights:

> In criminal cases, the court must ensure that any waiver of Section 22 rights is knowing, intelligent and voluntary—which means the court must be sure the defendant knew he possessed such a right and knowingly waived it. ... But if the same test applies to Section 10 rights, the court would be required to ensure, sua sponte, that all parties (and possibly, everyone in the courtroom), know about and waive any rights under Section 10. Otherwise, the losing party may raise the issue for the first time on appeal, and the only remedy is reversal. This is an unjust and costly proposition and the rule does not permit it. A party who perceives a possible violation of Section 10 must make its argument to the trial judge, thereby ensuring a record for review.

Ticeson, 159 Wn. App. at 383. This rationale applies equally well to criminal defendants asserting violation of Section 10 rights as it does to civil defendants. Whitman waived his ability to assert a violation of Article 1 Section 10 by failing to object below.[1] While this Court's precedent permits a criminal defendant, and thus Whitman, to raise Article 1 Section 22 rights for the first time on appeal, Whitman may not raise a violation of Article 1 Section 10 for the first time on appeal without complying with RAP 2.5(a)(3).[2]

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[1] Moreover, if Whitman has standing to assert the public's right to open proceedings under Article 1 Section 10, then he waived the right by failing to object. *See*, In re Detention of Morgan, 161 Wn. App. 66, ___ P.3d ___ (2011) ¶14 n.4 ("We note only that if the *Ticeson* court is correct that criminal defendants and/or SVP committees have standing to raise article 1, section 10 violations on behalf of the public, then they must also have the ability to waive the public's open trial rights.")

[2] The State makes this argument in order to preserve this issue for a petition for review.

While some assertions of violations of the right to public trial have been permitted for the first time on appeal,[3] and most recently in Momah[4] and Strode[5], the Supreme Court has also held that a defendant can waive the right to public trial issue by failing to assert it below. *See*, State v. Collins, 50 Wn.2d 740, 748, 314 P.2d 660 (1957) (defendant could not raise court's closure of the courtroom due to overcrowding for the first time on appeal). Whitman should be required to demonstrate that any constitutional error was *manifest*, *i.e.*, prejudicial, particularly given the holding in Momah that not all errors regarding a defendant's right to public trial result in automatic reversal.[6] Now, post-Momah, violations of the right to public trial are not always structural error or prejudicial per se. Therefore, Whitman should be obligated to demonstrate that the court's in chambers discussion regarding a motion to join two causes for trial constituted a manifest error in the context of his case.

Here, on the morning of trial defense counsel moved to join both of Whitman's causes for trial. The prosecutor didn't agree at that time but

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[3] *See, e.g.*, State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995), State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006).
[4] State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009).
[5] State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009).
[6] In Strode the plurality opinion relied on Orange for the proposition that the right to public trial was an issue of "such constitutional magnitude" that it could be raised for the first time on appeal. Strode, 167 Wn.2d at 229. In Orange, the court, however, assumed that the constitutional error would have been prejudicial per se and therefore it could be raised for the first time on appeal. *See*, In re Orange, 152 Wn.2d 795, 800, 100 P.3d 291 (2004).

indicated that he might if his witnesses were available. That afternoon, while the venire panel waited in the courtroom, the court stated in chambers:

> The record should reflect that we are in chambers on the State v. Whitman matter, and to alleviate *the State's* concerns that this brief hearing that we are going to have in chambers might not be open to the public I sent the clerk out to the courtroom, she asked if there was anybody in the courtroom that was not a juror and nobody raised their hand and therefore there isn't anybody out there that would care to attend this hearing.

RP 9-10 (emphasis added); Supp CP __, Sub Nom. 66 at 1-2. Obviously there was a discussion between the parties and the court that was not captured on the record. It is also clear from the court's statement that only the State, and not the defense, had an issue with hearing the matter in chambers. As the defense did not object to hearing the motion in chambers and was fully aware of the issue, defense waived its right to assert the issue and should not be able to raise it for the first time on appeal.

Even if defense merely remained silent and did not affirmatively indicate that it did not have an objection, courts should not countenance a defendant remaining silent below when the issue is clearly before the court, permitting the trial court to believe and operate under the assumption that the defendant has no objection, and then permit that

defendant to raise it on appeal. It was for this reason that the court in Collins did not permit a right to public trial issue to be raised for the first time on appeal, where there was not a clear deprivation of the defendant's right to public trial:

> Where the ruling is discretionary, a defendant who does not object when the ruling is made waives his right to raise the issue thereafter. ... A trial court is entitled to know that its exercise of discretion is being challenged; otherwise, it may well believe that both sides have acquiesced in its ruling.

Collins, 50 Wash. 2d at 747-48 (internal citation omitted). Defense counsel has an obligation to protect his client's rights when he believes they are being violated. To permit defense counsel to remain silent when the issue is clearly before the court, or worse to affirmatively indicate no objection, and then permit the issue to be raised for the first time on appeal, allows defense to sandbag and wait to see what the verdict is before raising the issue.

However, the State acknowledges that this Court has held that a defendant may raise an Article 1 Section 22 and Sixth Amendment right to public trial issue for the first time on appeal. Therefore this Court's precedent permits Whitman to raise the issue for the first time on appeal without having to demonstrate how the in-chambers discussion regarding the State's motion for joinder, a motion which defense counsel had made earlier that day, was a manifest error of constitutional magnitude.

2. Whitman's right to a public trial under the Sixth Amendment and Article 1 Section 22 did not extend to the in chambers consideration of the State's motion to join the causes for trial because the values advanced by the public trial right would not have been furthered by requiring the proceeding to be open.

Whitman asserts that the in chambers discussion regarding the State's motion to join his two cause numbers for trial violated his rights to a public trial. A defendant's right to public trial is not implicated by the type of in-chambers discussion here where the court did not resolve disputed facts and only made the legal conclusion that the two causes should be joined trial. While it was the State moving to join the causes at the time of the in-chambers discussion, defense had made the same motion earlier that morning, although it subsequently withdrew its motion when the State indicated it was prepared to go forward on both cases together. The discussion in chambers as to whether to join the causes for trial was not the type of "adversarial proceeding" to which the right to public trial extends.

In order to determine whether the right to a public trial is implicated by the closure of a particular hearing, the court looks to the principles underlying the right to public trial to determine whether they are negatively impacted by the closure of the particular proceeding.

> "...[W]hether a particular closure implicates the constitutional right to a public trial is determined by inquiring whether the closure has infringed the 'values that the Supreme Court has said are advanced by the public trial guarantee...' ... This analysis tends to safeguard the right at stake without requiring new trials where these values have not been infringed by a trivial closure."

State v. Easterling, 157 Wn.2d 167, 183-84, 137 P.3d 825 (2006) (J. Madsen concurring); State v. Rivera, 108 Wn. App. 645, 652, 32 P.3d 292 (2001), *rev. den.* 146 Wn.2d 1006 (2002) (judge's discussion in chambers regarding a juror's complaint mid-trial was a ministerial matter, not an adversarial proceeding, and opening such a conference to the public would not further the goals of the right to public trial); *see also*, United States v. Waters, 627 F.3d 345, 360 (9th Cir. 2010) (public-trial right attaches to those hearings whose subject matter "involve[s] the values that the right to a public trial serves."); United States v. Norris, 780 F.2d 1207, 1210 (5th Cir. 1986) (Waller concerns are not implicated by non-public exchanges between counsel and the court in chambers and in bench conferences on technical legal issues and routine administrative matters because such exchanges do not hinder the objectives fostered by a public trial).

The underlying objective of the right to public trial is so that:

> ... the public may see [the defendant] is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.

Bone-Club, 128 Wn.2d at 259 (*quoting,* In re Oliver, 333 U.S. 257, 270 n.25, 68 S.Ct. 499, 92 L.Ed.2d 682 (1948)). The values advanced by the public trial guarantee have been summarized as: "(1) to ensure a fair trial; (2) to remind the prosecutor and the judge of their responsibility to the accused and the importance of their functions; (3) to encourage witnesses to come forward; and (4) to discourage perjury." U.S. v. Ivester, 316 F.3d 955, 960 (9th Cir. 2003); Easterling, 157 Wn.2d at 184 (J. Madsen concurring). The primary goal in the context of a *defendant's* right to public trial is to ensure that the defendant is treated fairly, by allowing the public to view his or her treatment in court. Rivera, 108 Wn. App. at 652 (emphasis added).

In the Norris case the Fifth Circuit court held that the non-public proceeding that the defendant asserted violated his right to public trial related to arguments of counsel and legal rulings and therefore did not implicate the right to public trial. Norris, 780 F.2d at 1210. It explained its rationale:

> Non-public exchanges between counsel and the court on such technical legal issues and routine administrative problems do not hinder the objectives which the Court in *Waller* observed were fostered by public trials. Unlike the trial of a suppression motion, such exchanges ordinarily relate to the application of legal principles to admitted or assumed facts so that no fact finding function is implicated. A routine evidentiary ruling is rarely determinative of the

> accused's guilt or innocence. Also, such evidentiary rulings ordinarily pose no threat of judicial, prosecutorial or public abuse that a public trial is designed to protect against.

Norris, 780 F.2d at 1210-11.

Similarly, the Ninth Circuit in Waters recently held that the right to public trial extends to those proceedings in which the values the right to public trial is designed to protect are implicated.

> We have previously stated that the public-trial right attaches to those hearings whose subject matter "involve[s] the values that the right to a public trial serves." ... Those values are:
>
> > (1) to ensure a fair trial, (2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, (3) to encourage witnesses to come forward, and (4) to discourage perjury.

Waters, 627 F.3d at 360 (internal citations omitted). The court held that the right to public trial extended to an omnibus hearing in which motions in limine were heard because the values served by the right to public were implicated by the motions. Id. One of the motions sought to have the charge dismissed due to government misconduct:

> The hearing would therefore have benefitted from the "salutary effects of public scrutiny." *Waller,* 467 U.S. at 47, 104 S.Ct. 2210. Opening the hearing to the public might have encouraged other witnesses to come forward and discouraged perjury. Further, as with any allegation of misconduct, government agents must be reminded of their "responsibility to the accused and the importance of their function." *Id.* Last but not least, the public has an interest in

> learning of all allegations of government misconduct, including prosecutorial misconduct.

Id. at 360-61.[7]

Washington courts that have addressed the issue of whether in-chambers discussions not related to juror voir dire implicate a defendant's right to trial have largely held they do not. *See*, In re Detention of Ticeson, 159 Wn. App. 374, 246 P.3d 550 (2011) (in chambers conferences to discuss evidentiary objections and the court's rulings thereon did not violate the public's right to open proceedings under Art. 1 §10); State v. Castro, 159 Wn. App. 340, 246 P.3d 228 (2011) (right to public trial not implicated by court's in chambers decisions regarding pretrial motions on legal issues); State v. Koss, 158 Wn. App. 8, 241 P.3d 415 (2010) (right to public trial not violated by in chambers conference regarding jury instructions); State v. Sublett, 156 Wn. App. 160, 231 P.3d 231, *rev. granted*, 170 Wn.2d 1016 (2010) (right to public trial did not extend to court's conference in chambers regarding legal question of how to respond to jury's inquiry during deliberations);[8] Rivera, 108 Wn. App. at 653 (right to public trial did not extend to judge's discussion in chambers regarding a juror's complaint mid-trial); *but see*; State v. Heath,

[7] In both Norris and Waters defense lodged objections to the closed proceedings, and/or the court did not review right to public trial violation allegations which were not objected to below.

[8] Oral argument was heard in Sublett on June 16th, 2011.

150 Wn. App. 121, 206 P.3d 712 (2009) (defendant's right to public trial was violated by in-chambers pre-trial motions and jury voir dire); State v. Sadler, 147 Wn. App. 97, 117, 193 P.3d 1108 (2008) (defendant's right to public trial extended to in chambers discussion re *Batson* challenge because such a determination was integral part of jury selection and involved credibility determinations by the trial court).

Under these cases the right to public trial applies to evidentiary phases of the trial as well as adversarial proceedings, suppression hearings and the jury selection process. Castro, 246 P.3d at 230; Sublett, 156 Wn. App. at 181. The right does not extend to in chambers or bench conferences regarding legal or ministerial issues, issues not involving the resolution of disputed facts. Rivera, 108 Wn. App. at 653; Sadler, 153 Wn. App. at 114. "The resolution of 'purely ministerial or legal issues that do not require the resolution of disputed facts' is not an adversary proceeding." In re Ticeson, 159 Wn. App. At 384.

In Castro, the defendant asserted that his right to public trial was violated when his pretrial motions were heard in chambers, which motions he asserted "dealt exclusively with issues related to trial, including the State's witnesses and the admissibility of evidence." Castro, 246 P.3d at 230. The court determined that those were legal issues, ones that did not

involve any fact finding required to be open to the public, and concluded the defendant's public trial right had not been violated. Id.

Here, during pretrial motions the court discussed with the parties and addressed in open court the issue of whether Whitman's two cause numbers should be joined for trial. Defense counsel moved that they be joined and the prosecutor did not agree at that time to the motion because he wasn't sure if all his witnesses on the second cause would be available. The court indicated that the cases would be heard back to back because they were not currently joined. It was clear at that time that the issue would be readdressed, which it was right before jury selection. At that time, in chambers, the State indicated it would join in the defense's earlier motion for joinder. However, in the meantime defense counsel had reversed his position and now wanted to not have the causes joined in order to preclude evidence he believed prejudicial to his client being heard in the first cause. The court reviewed the affidavits of probable cause, determined that the evidence would be cross-admissible and then concluded that legally the causes should be joined. There was no dispute as to what the evidence would be, the court did not need to resolve any facts. There was no allegation of government misconduct, no testimony was taken. The in-chambers discussion was not a proceeding to which the right to public trial attached.

Easterling, cited by Whitman, is distinguishable. The court there determined that the closure of a co-defendant's motion to sever cases, which resulted in a plea agreement for the codefendant to testify against Easterling, "undermined the fairness of the proceedings" and prevented Easterling from arguing against severance. Easterling, 157 Wn.2d at 178. The Easterling case presented a "unique situation" and the "narrow issue" regarding whether a co-defendant's pretrial motion implicated the other co-defendant's right to public trial where the first codefendant requested closure and specifically exclusion of the other codefendant. Id. at 177. The co-defendant's motion to sever was also combined with a motion to dismiss the case based on allegations that the State had unfairly conducted pretrial negotiations and had "sandbagged" defendant by misleading him during plea negotiations. Id. at 172. The court also held that Easterling's right to public trial had been violated because the cases had already been joined at the time of the closed hearing, and therefore there was only one proceeding involving both defendants. Id. at 178. The court's holding was also compelled by the court's desire to maintain the transparency and fairness of criminal trials. Id. at 178. The prejudice to Easterling's case from the closure order was obvious.

Here, however, we are concerned with one defendant and two causes, not two defendants with one case. There is no obvious prejudice

to Whitman from the joinder motion not being heard in a public proceeding. He wasn't excluded from any proceeding and the proceeding did not address any allegations of misconduct by the State. The motion to join here did not require any resolution of disputed facts, and thus it was not an adversarial proceeding to which the public trial right extends.

3. Even if the proceeding was one to which the defendant's right to public trial attaches, there was no structural error and therefore reversal is not an appropriate remedy.

Whitman asserts that the appropriate remedy here where the court did not make sufficient Bone-Club findings to close the motion proceeding is reversal of the trial. He relies on Easterling's presumption of prejudice for this proposition and fails to address the holding in Momah that unless the error is structural, i.e., renders the trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence, that reversal is not required. There was no structural error that occurred here, even if the proceeding was one to which Article 1 Section 22 and/or the Sixth Amendment extends, and therefore reversal is not mandated.

As the court summarized in Momah:

> ... courts grant automatic reversal and remand for a new trial only when errors are structural in nature. An error is structural when it necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. In each case, the remedy must be appropriate to the violation.

Momah, 167 Wn.2d at 155-56. Under Momah whether a closure error constitutes structural error necessarily depends upon the nature of the violation: "If, on appeal, the court determines that the defendant's right to public trial has been violated, it devises a remedy appropriate to the violation." Id. at 149. If the error is structural, automatic reversal is warranted. Id. An error is only structural though if the error "'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" Id. (*quoting* Washington v. Recuenco, 548 U.S. 212, 218-19, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)).

In Waters, the Ninth Circuit determined that the right to public trial attached to an omnibus hearing in which the defendant moved to dismiss the indictment for government misconduct, a motion the court concluded resembled a motion to suppress evidence. Waters, 627 F.3d at 360-61. Although it determined the right attached because the "hearing would ... have benefitted from the 'salutary effects of public scrutiny,'" the court disagreed that the error was structural error requiring automatic reversal. Id. at 360. It noted, quoting Waller[9], the "remedy should be appropriate to the violation." Id. at 361. While the court did not have to decide the appropriate remedy because it reversed the conviction on other grounds,

[9] Waller v. Georgia, 467 U.S. 39, 404 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

the court surmised that the violation could have been remedied by making the transcript of the hearing available to the public. Id.

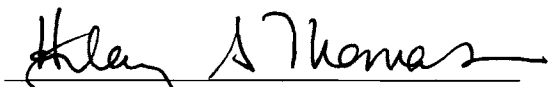
Here, the issue of joinder of the causes for trial was originally addressed in open court. The State indicated in open court that it would agree to the defense's original motion to join as long as the witnesses for the second cause were available. Then, later in chambers, the State informed the trial court that it was ready to proceed on both cause numbers and therefore it felt joinder for trial was appropriate in the interest of judicial economy. There was no dispute about the basis for joinder. Defense then had a change of heart and decided it was not in Whitman's best interest to have the cases joined. There is nothing about that discussion not being heard in an open courtroom that rendered the trial itself fundamentally unfair or an unreliable vehicle for determining guilt or innocence. The only issue before the court was whether the cases would be heard one after the other or together. This was a procedural issue, not a substantive one, and one that only called for a legal conclusion. Moreover, the only persons who were excluded from the proceeding at the time the court decided to hold the proceedings in chambers were potential jurors, who are not considered members of the public in this context. *See,* State v. Price, 154 Wn. App. 480, 487, 228 P.3d 1276 (2009), *rev. den.*, 169 Wn.2d 1021 (2010) (court's voir dire of

individual jurors inside the courtroom apart from the rest of the jury venire did not constitute a closure of the courtroom). A new trial under these circumstances would result in the type of windfall that Momah and Waller did not countenance. Even if the proceeding should have occurred in public, reversal, the only relief Whitman requests, is not warranted here.

E. CONCLUSION

Based on the foregoing the State requests this Court deny Whitman's appeal and affirm his conviction for felony violation of a no contact order.

Respectfully submitted this 20th day of June, 2011.



HILARY A. THOMAS, WSBA#22007
Appellate Deputy Prosecuting Attorney
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, GREGORY C. LINK, addressed as follows:

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101

Sydney A. Kass — 06/20/2014

LEGAL ASSISTANT — DATE