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NO. 67341-6-I

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

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STATE OF WASHINGTON,

Respondent,

v.

RODNEY SUMMERS,

Appellant.

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SUPPLEMENTAL BRIEF OF RESPONDENT

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## **I. SUPPLEMENTAL ISSUE**

How do recent cases involving the right to a public trial affect the analysis of this case?

## **II. SUPPLEMENTAL ARGUMENT**

### **RECENT CASES REINFORCE THE CONCLUSION THAT THE DEFENDANT CANNOT OBTAIN REVERSAL WITHOUT A SHOWING OF ACTUAL PREJUDICE.**

The defendant's supplemental brief discusses recent cases involving the right to a public trial. As he acknowledges, this right is distinct from the right to "appear and defend in person or by counsel." Supp. Brief of Appellant at 1. For example, a defendant has no right to be present during conferences on legal issues. In re Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994). In contrast, application of the public trial right does not depend on whether the issue involved is legal or factual. State v. Sublett, \_\_\_ Wn.2d \_\_\_, 292 P.3d 715 ¶ 14 (2012).

Despite his acknowledgement that the rights are distinct, the defendant claims that the remedy in this case is governed by cases involving the right to a public trial. Supp. Brief of Appellant at 7-9. Under the cases that he cites, the two rights are substantially different with regard to remedies. Deprivation of the right to a public trial is "structural error" that cannot be considered harmless. State

v. Wise, \_\_\_ Wn.2d \_\_\_, 288 P.3d 1113 ¶ 19 (2012). On the other hand, deprivation of the right to appear is subject to harmless error analysis. State v. Irby, 170 Wn.2d 864, 885-86 ¶ 19, 246 P.3d 796 (2011); State v. Caliguri, 99 Wn.2d 501, 508-09, 664 P.2d 366 (1983).

The defendant criticizes the analysis of Irby and Caliguri. Supp. Brief of Appellant at 8-9 n. 1. This criticism is addressed to the wrong court. Decisions of the Supreme Court are binding on this court. 1000 Virginia Ltd. Partnership v. Vertecs Corp., 158 Wn.2d 566, 578 ¶ 18, 146 P.2d 423 (2006). Even if this court believed that Irby and Caliguri are wrong, it could not overrule those cases.

As the respondent's brief points out, the standard in the present case is not "harmless error" but "manifest error." Brief of Respondent at 8-9. There is, however, a linkage between these two standards. Ordinarily, an error can be considered "manifest" only if the defendant shows actual prejudice. A "structural error," however, is automatically considered "manifest." Since the absence of a public trial is "structural error," it can be raised for the first time on appeal without a showing of prejudice. State v. Paumier, \_\_\_ Wn.2d \_\_\_, 288 P.3d 1126 ¶¶ 12-13 (2012). In contrast, any

deprivation of the right to appear is not “structural,” so a showing of prejudice is necessary to establish “manifest error.”

“This court has consistently refused to review alleged errors that were not objected to at trial, especially when an objection would have given the trial court an opportunity to correct the error.” State v. Strine, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2013 WL 363528 ¶ 12 (2013). Because the defendant raised no objection in the trial court, his claims are subject to the “manifest error” standard. As explained in the respondent’s brief, he cannot satisfy that standard. Brief of Respondent at 8-11. As a result, his claim cannot be considered for the first time on appeal.

### III. CONCLUSION

For these reasons, as well as those set out in the respondent’s prior brief, the judgment and sentence should be affirmed.

Respectfully submitted on February 15, 2013.

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