

NO. 31018-3-III

90567-3

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON,

Respondent,

v.

JOEY ANDY,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BLAINE G. GIBSON

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**BRIEF OF RESPONDENT**

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JAMES HAGARTY  
Yakima County Prosecuting Attorney

JENNIFER P. JOSEPH  
Special Deputy Prosecuting Attorney  
Attorneys for Respondent

Yakima County Prosecuting Attorney  
128 North Second Street, Room 211  
Yakima, Washington 98901  
(509) 574-1200 FAX (509) 574-1201

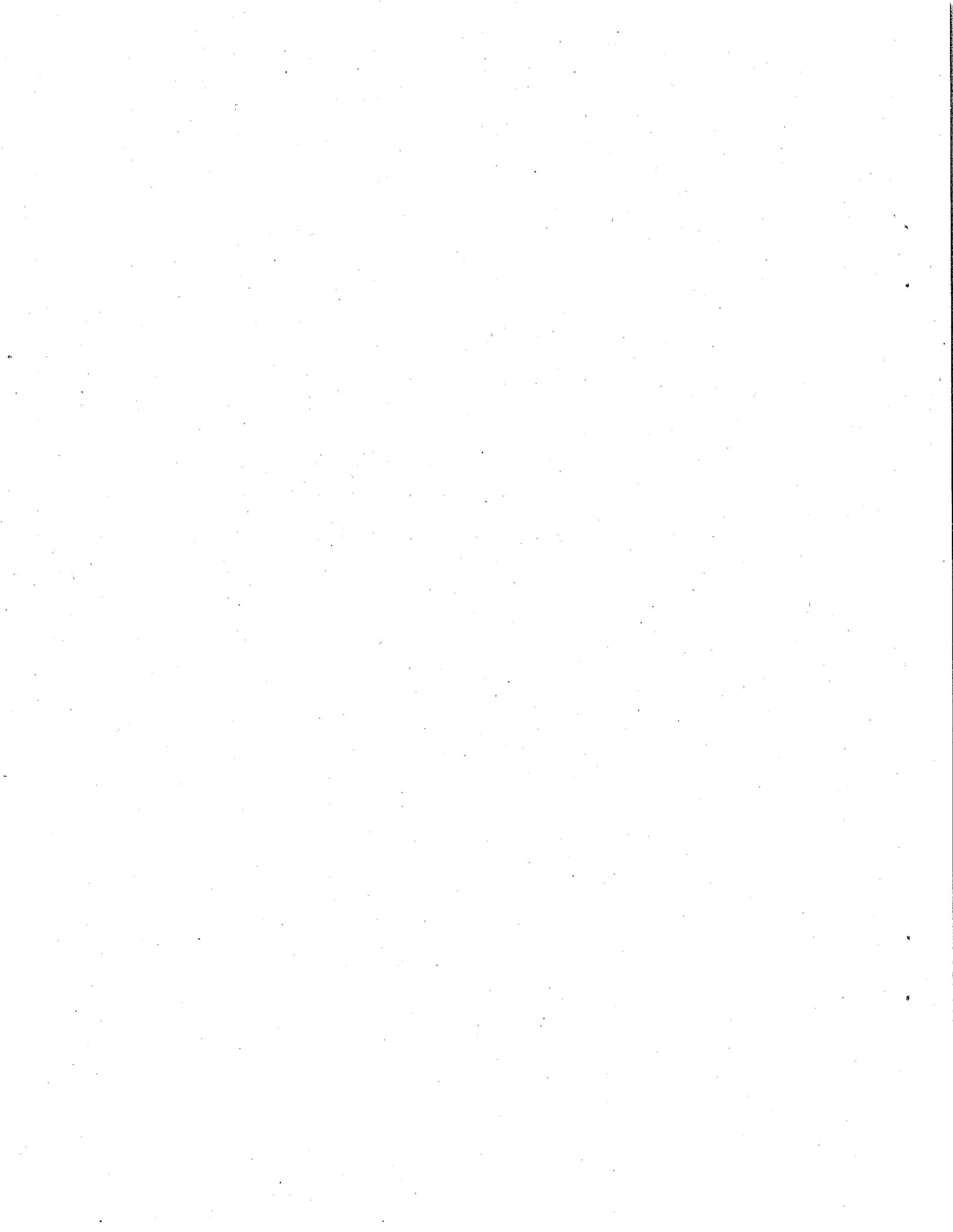


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A. ISSUES PRESENTED

1. The appellant bears the burden of establishing that an improper closure of trial proceedings violated his public trial right. In this case, the record establishes that the court never ordered a closure, that all members of the public had access to the courtroom during the trial, and that no member of the public who desired to attend the trial was prevented or deterred from doing so. Has the appellant failed to establish a violation of the public trial right?

2. Appellate courts ordinarily refuse to consider an alleged constitutional error that is raised for the first time on appeal unless the error is truly constitutional and manifest. The appellant did not object when trial proceedings extended past the courthouse's posted business hours and fails to demonstrate any constitutional error or resulting practical and identifiable consequences. Has the appellant failed to preserve his public trial claim?

B. STATEMENT OF THE CASE

Joey Andy was charged in Yakima County Superior Court with first-degree assault and first-degree burglary, both while armed with a deadly weapon. CP 14-15. Following a jury trial with Judge

Blaine Gibson presiding, a jury found Andy guilty of first-degree burglary and second-degree assault and found that he was armed with a deadly weapon during both crimes. CP 50-57; 6/18/2012 RP 732-34. Based on an offender score of 9+, the court sentenced Andy to 138 months of confinement, which included the deadly weapon enhancements. CP 58-66.

Andy appealed. CP 70-71. Before he filed his opening brief, this Court granted his motion to remand for additional evidence pertaining to whether the courthouse doors were locked at 4:00 p.m. during the trial and if so, whether that closure barred entry to the ongoing courtroom proceedings. Commissioner's Ruling 3/13/13; Appellant's Motion to Remand 3/5/13.

Following a two-day reference hearing, the trial court found no evidence that the courthouse doors were locked at any point during Andy's trial:

[T]he public entrance of the Yakima County Courthouse was open at all times when the Joey Andy trial was in session. At no time was the public entrance of the Yakima County Courthouse closed while the Joey Andy trial was in session. Security officers ensured that the public entrance to the Yakima County Courthouse remained open and that all members of the public had access to the courtroom while the Joey Andy trial was in session. Even though other county offices may have been closed, security officers admitted any member of the

public who came to the public entrance if he or she wanted to attend the Joey Andy trial and directed him or her to the courtroom. No member of the public who desired to attend the Joey Andy trial was prevented from attending any session.

CP 85-86 (FF 7).<sup>1</sup> The court further found that “[n]o member of the public was deterred by the sign [stating that the courthouse closed at 4:00 p.m.] from entering the Yakima County Courthouse and attending any session of the Joey Andy trial.” CP 86 (FF 9).

Accordingly, the court concluded there was no violation of Andy’s right to a public trial or the public’s right to the open administration of justice. CP 86-87 (CL 2, 3).

C. ARGUMENT

1. NO PUBLIC TRIAL RIGHT VIOLATION OCCURRED WHERE THE RECORD ESTABLISHES THAT THERE WAS NO CLOSURE.

Andy contends that the trial court closed the courtroom by conducting portions of the trial after 4:00 p.m., when a sign on the courthouse door indicated that offices other than the courts were closed. All evidence is to the contrary. Given the trial court’s express finding that the courthouse was never closed during Andy’s

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<sup>1</sup> The court’s findings and conclusions are attached to this brief for the Court’s convenience.

trial and no member of the public was excluded, his public trial right claim must be rejected.

Whether a courtroom closure violates a defendant's right to a public trial or the public's right to the open administration of justice is a question of law reviewed de novo. State v. Momah, 167 Wn.2d 140, 147, 217 P.3d 321 (2009). In reviewing a trial court's findings and conclusions, appellate courts determine whether substantial evidence supports the challenged findings and whether the findings support the conclusions of law. State v. McHenry, 124 Wn. App. 918, 924, 103 P.3d 857 (2004). See In re Personal Restraint of Gentry, 137 Wn.2d 378, 972 P.2d 1250 (1999) (court reviews findings from a reference hearing for substantial evidence). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person that the declared premise is true. McHenry, 137 Wn. App. at 924.

The state and federal constitutions afford criminal defendants the right to a public trial. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); U.S. Const. amend. VI; Wash. Const. art. I, § 22. Before a trial court orders closure of a proceeding implicating the public trial right, it must first determine that the closure is essential and narrowly tailored to preserve higher

values.<sup>2</sup> State v. Lormor, 172 Wn.2d 85, 91, 257 P.3d 624 (2011).

However, these rules apply “only when the public is fully excluded from proceedings within a courtroom.” Lormor, 172 Wn.2d at 92.

The threshold question is whether the courtroom was actually closed. In re Personal Restraint of Yates, 177 Wn.2d 1, 27, 296 P.3d 872 (2013). It is the appellant’s burden to establish that a closure and resulting public trial right violation occurred. Id. at 29; State v. Sublett, 176 Wn.2d 58, 77-78, 292 P.3d 715 (2012); State v. Halverson, 176 Wn. App. 972, 977, 309 P.3d 795 (2013). If the appellant fails to establish a closure, he can show no public trial right violation. Sublett, 176 Wn.2d at 77-78. “[A] ‘closure’ of a courtroom occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.” Lormor, 172 Wn.2d at 93; Sublett, 176 Wn.2d at 71.

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<sup>2</sup> To determine whether closure is appropriate, the trial court must consider the following factors and enter specific findings on the record: (1) The proponent of closure must show a compelling interest and, if based upon anything other than defendant’s right to a fair trial, must show serious and imminent threat to that right; (2) anyone present when the motion is made must be given an opportunity to object; (3) the least restrictive means must be used; (4) the court must weigh the competing interests; and (5) the order must be no broader in application or duration than necessary. State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). The trial court must also consider reasonable alternatives to closure. Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); State v. Sublett, 176 Wn.2d 58, 102, 292 P.3d 715 (2012).

Andy argues that the sign posted on the courthouse doors establishes that the courtroom was closed on the five days that his trial extended past 4:00 p.m.<sup>3</sup> Brief of Appellant at 11. He argues that it “makes no difference” that the courthouse was actually unlocked with a security officer available at the entrance to facilitate entry because the sign itself effectively barred the public from entering the courtroom. Id. Andy’s argument is unsupported by the record, inconsistent with governing precedent, and must be rejected.

To begin with, the trial court entered findings and conclusions that are dispositive of Andy’s claims. CP 83-89. Although Andy assigns error to a number of these findings and conclusions, he fails to provide argument or authority to support the assignments of error. RAP 10.3(a)(5) requires argument in support of the issues presented for review, together with citations to legal authority. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). The failure to present argument on

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<sup>3</sup> Andy makes no distinction in his argument between the single day on which trial extended past 5:00 p.m. and the four days on which trial extended past 4:00 p.m., but concluded before 5:00 p.m. Indeed, he argues that the explicit language on the sign itself that “court closes at 5:00 p.m.,” 5/22/2013 RP 122, is irrelevant because members of the public wishing to enter a building cannot be expected to read all seven lines of text on a sign describing the hours of admittance. Brief of Appellant at 11.

assigned errors waives the issues. Id. Because Andy fails to present any argument or authority as to why the findings are erroneous, this Court should consider the assignments of error abandoned. State v. Motherwell, 114 Wn.2d 353, 358 n.3, 788 P.2d 1066 (1990). See also Henderson Homes, Inc. v. City of Bothell, 124 Wn.2d 240, 877 P.2d 176 (1994) (assignments of error to findings were "without legal consequence" and findings would be taken as verities, where appellant did not argue that findings were not supported by substantial evidence, made no citation to the record to support its assignments, and cited no authority).

In any event, substantial evidence supports the trial court's findings that the courthouse was open at all times during Andy's trial, that all members of the public had access to the courtroom, that no member of the public was prevented from attending the trial, and that the sign on the courthouse door did not deter or bar any member of the public from attending trial. CP 83-86.

During the reference hearing, the State presented testimony from several witnesses knowledgeable about courthouse access and security. Former Court Administrator Harold Delia testified that changes were made based upon a security audit by federal marshals that left them "very concerned." 5/17/2013 RP 12. As a

result of these changes, which were made effective in October 2011, public access to the courthouse was through a single, secure entrance equipped with a metal detector. 5/17/2013 RP at 13-15. At the time of Andy's trial, a sign on the courthouse door advised that "the courthouse closes at 4:00 p.m. Office hours, auditor 9:00 to 3:30, HR, which was human resources, 9:00 to 4:00, district court clerks, 8:00-4:00, superior court clerks 8:30 to 4:00. All others 8:00 to 4:00. The bottom line on the document says court closes at 5:00 p.m." 5/22/2013 RP 152. Ensuring public access to court proceedings was a predominant concern when the courthouse security improvements were made. 5/17/2013 RP 17-18, 42, 46.

Delia and Lieutenant Brian Winter, head of the Sheriff's Department of Security, explained that when there are no courts in session, the courthouse doors are locked at 4:00 p.m., when all other offices in the courthouse closed. 5/17/2013 RP 22, 152. But if any court is still in session, the doors remain unlocked. 5/17/2013 RP 18, 22, 50-52.

To make sure that the courthouse doors stay open, court staff inform the security office when court will continue after posted

courthouse hours.<sup>4</sup> 5/17/2013 RP 16, 22, 98; 5/22/2013 RP 128. Security officers then keep the doors open until they are notified that the proceedings have finished for the day. 5/22/2013 RP 98. Even if court staff fail to advise security that proceedings will continue past 4:00 p.m., the courthouse doors are not automatically locked at that time. 5/17/2013 RP 63. Rather, security officers routinely make a sweep through the courthouse at approximately 4:00 p.m. to determine whether any courts are in session. 5/17/2013 RP 63, 65-67; 5/22/2013 RP 98. If so, the doors remain open. 5/17/2013 RP 65-67. Security officers may also call the court to inquire about its estimated quitting time and observe when in-custody defendants are escorted from the courthouse to help determine when court proceedings have finished for the day. 5/22/2013 RP 98.

When courts are in session after 4:00 p.m., Yakima Department of Security Officer Ron Rogers testified that he positions himself near the security entrance so that he can see if someone is approaching. 5/22/2013 RP 102. Even if he were instead inside the nearby security office, monitors that display the

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<sup>4</sup> This procedure was in place even before the October 2011 security improvements, and judges have known about the policy for at least ten years. 5/17/2013 RP 28.

entire public entrance area would allow him to see if a member of the public were attempting to enter the courthouse. 5/22/2013 RP 121, 123. If someone enters the building after posted business hours, security officers ascertain whether the person was there to observe the trial, and if so, assist that person. 5/17/2013 RP 51-52; 5/22/2013 RP 123-24.

Andy's trial extended past 4:00 p.m. on five days.<sup>5</sup> CP 85; 5/17/2013 RP 54; 5/22/2013 RP 95-97. Officer Rogers was on duty and testified that he kept the public entrance to the courthouse open until after court adjourned on each of those days. 5/22/2013 RP 94-97. Overtime records confirmed that Rogers worked until 6:00 p.m. on the one day that the Andy trial extended past his usual 5:00 p.m. quitting time. 5/17/2013 RP 54-56; 5/22/2013 RP 94.

Although Officer Rogers had no specific recollection of what occurred on the days of Andy's trial, Andy presented no evidence to contradict or undermine Roger's testimony about his routine practice to ensure that the courthouse and courtroom were open and accessible to the public at all times during trial. On appeal,

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<sup>5</sup> On 6/11/12, court adjourned at 5:41 p.m. On 6/12/12, court adjourned at 4:33 p.m. On 6/13/12, court adjourned at 4:04 p.m. On 6/14/12, court adjourned at 4:07 p.m. On 6/15/12, court adjourned at 4:45 p.m. CP 85; 5/22/2013 RP 95-97.

Andy points to nothing but his own disbelief that a member of the public would enter the courthouse after 4:00 p.m. when a sign on the door said that the courthouse would be closed. Because substantial evidence supports the trial court's findings, Andy has established no courtroom closure and public trial violation claim therefore fails. Sublett, 176 Wn.2d at 77-78.

2. RAP 2.5(a)(3) SHOULD BE APPLIED TO THE RIGHT TO A PUBLIC TRIAL, AS IT IS TO OTHER CONSTITUTIONAL RIGHTS.

Andy correctly points out that our supreme court has held that courtroom closure claims may be raised for the first time on appeal. Brief of Appellant at 9 (citing State v. State v. Bone-Club, 128 Wn.2d 254, 257, 906 P.2d 325 (1995); State v. Brightman, 155 Wn.2d 506, 514-15, 122 P.3d 150 (2005)). But these cases rely on State v. Marsh, 126 Wash. 142, 217 P. 705 (1923), a case decided before the Washington Supreme Court adopted RAP 2.5(a). See Bone-Club, 128 Wn.2d at 257(citing Marsh only); Brightman, 155 Wn.2d at 514-15 (citing Bone-Club only). At that time, courts allowed some constitutional claims to be raised for the first time on appeal in criminal cases, but the Rules of Appellate Procedure

replaced that common law practice with RAP 2.5(a). State v. WWJ Corp., 138 Wn.2d 595, 601, 980 P.2d 1257 (1999). As a result, simply identifying a constitutional issue is no longer sufficient to obtain review of an issue not litigated below. State v. Scott, 110 Wn.2d 682, 687-88, 757 P.2d 492 (1988). Review is inappropriate if either the record from the trial court is insufficient to determine the merits of the constitutional claim, or if the defendant does not establish practical and identifiable consequences from the alleged error. WWJ, 138 Wn.2d at 602-03. The Bone-Club court did not consider the change effected by RAP 2.5(a); its holding that a public trial error need not be raised in the trial court should be corrected.<sup>6</sup>

RAP 2.5(a) would preclude review of Andy's public trial claim because he has not established any practical and identifiable consequence from the court allowing trial proceedings to continue after 4:00 p.m. There is no indication in the record that any member of the public was prevented or deterred from attending the proceedings. This Court should hold that Andy has failed to

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<sup>6</sup> This issue is currently pending in the supreme court in State v. Nionge, No. 86072-6 and State v. Grisby, No. 87259-7 (consolidated under No. 86216-8). The court heard oral argument in that case on October 17, 2013. No decision has yet been filed.

preserve the public trial issue and accordingly decline to reach the merits of the claim.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Andy's conviction for first-degree burglary and second-degree assault.

DATED this 20<sup>th</sup> day of May, 2014.

Respectfully submitted,

JAMES HAGARTY  
Yakima County Prosecuting Attorney

By:   
JENNIFER P. JOSEPH, WSBA #35042  
Special Deputy Prosecuting Attorney  
Attorneys for Respondent

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David N. Gasch, the attorney for the respondent, at P.O. Box 30339, Spokane, WA 99223-3005, containing a copy of the BRIEF OF RESPONDENT, in STATE v. JOEY A. ANDY, Cause No. 31018-3 - III, in the Court of Appeals, Division III, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 20<sup>th</sup> day of May 2014.

U Brame

Name

Done in Seattle, Washington

FILED

2013 JUN -7 P 2:58

KIM EATON  
EX OFFICIO CLERK OF  
SUPERIOR COURT

SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

STATE OF WASHINGTON,

Plaintiff,

NO. 12-1-00151-6

vs.

JOEY ANTHONY ANDY  
DOB: 4/1/1981

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW FOR  
REFERENCE HEARING ON  
COURTHOUSE PUBLIC  
ENTRANCE AND HOURS

Defendant.

In response to an order from Court of Appeals, Division Three, a reference hearing was held on Friday, May 17, 2013 and Wednesday, May 22, 2013. The issue was whether the public entrance to the courthouse was closed while trial was in session and, if so, whether the public was denied access to the courtroom. Deputy Prosecuting Attorney Duane R. Knittle represented the State. Attorney Mickey Krom represented Mr. Andy who was present in court. The State presented testimony and submitted exhibits. The court, having heard the evidence and arguments of counsel, now sets forth:

ORIGINAL

## FINDINGS OF FACT

1.

The court hereby incorporates by reference the testimony and exhibits introduced at the reference hearing.

2.

On October 3, 2011, a secure entrance became the only means for the public to enter and exit the Yakima County courthouse. All members of the public had access to the courthouse through this secure entrance, which lay on the east side of the courthouse facing North Second Street.

3.

Entering the courthouse, a member of the public proceeded to metal detectors staffed by officers of the Yakima County Department of Security. Security officers screened members of the public with metal detectors before allowing them access to the courthouse interior.

4.

In June, 2012, the public entrance of the Yakima County Courthouse closed at 4:00 p.m. unless a courtroom was still in session in which case security officers kept the public entrance open until all courts were no longer in session for that day. Yakima County's policy was that the public entrance remained open as long as any courtroom was in session. The courts and security officers followed this policy.

5.

To implement this policy, late in the afternoon every day, security officers checked to determine which courtrooms remained in session. Security officers used

various means to check. They visually checked courtrooms. They asked courtroom clerks if courtrooms were still in session. From their office, they watched for jail officers escorting in-custody defendants to "Sally Port," where defendants boarded vans for transport back to jail, which was an obvious indicator that trial was no longer in session that day.

6.

The Joey Andy trial was in session after 4:00 p.m. on these days:

- June 11, 2012 until 5:41 p.m.
- June 12, 2012 until 4:33 p.m.
- June 13, 2012 until 4:04 p.m.
- June 14, 2012 until 4:07 p.m.
- June 15, 2012 until 4:45 p.m.

7.

On each day listed in finding of fact 6, the public entrance of the Yakima County Courthouse was open at all times when the Joey Andy trial was in session. At no time was the public entrance of the Yakima County Courthouse closed while the Joey Andy trial was in session. Security officers ensured that the public entrance to the Yakima County Courthouse remained open and that all members of the public had access to the courtroom while the Joey Andy trial was in session. Even though other county offices may have been closed, security officers admitted any member of the public who came to the public entrance if he or she wanted to attend the Joey Andy trial and directed him

or her to the courtroom. No member of the public who desired to attend the Joey Andy trial was prevented from attending any session.

8.

A sign was posted at the public entrance to the Yakima County Courthouse during June, 2012 when the Joey Andy trial was in session. That sign, admitted as exhibit B, advised that the courthouse closed at 4:00 p.m. but court closed at 5:00 p.m. As stated in finding of fact 4, however, the public entrance of the courthouse always remained open if a courtroom was still in session despite the sign.

9.

No member of the public was deterred by the sign described in finding of fact 8 from entering the Yakima County Courthouse and attending any session of the Joey Andy trial. In the security officers' experience, members of the public always tried the door despite the sign before walking away from the public entrance. No member of the public was barred from entering the courthouse or attending any session of the Joey Andy trial by the sign.

Based on these findings of fact, the court enters the following:

#### CONCLUSIONS OF LAW

1.

The court has jurisdiction over the parties and the subject matter herein.

2.

Joey Andy's right to a public trial under article I, section 22 of the Washington State Constitution and the Sixth Amendment to the United States Constitution was not violated.

The public's right to open administration of justice under Article I, section 10 of the Washington State Constitution was not violated. The public's right to an open trial under the First Amendment to the United States Constitution was not violated.

DATED: June 7, 2013



JUDGE

Presented by:



DUANE R. KNITTLE  
Deputy Prosecuting Attorney  
Washington State Bar Number 16538

Approved for entry, copy received:

MICKEY L KROM  
Attorney for Defendant  
Washington State Bar Number 7064

STATE OF WASHINGTON  
COUNTY OF YAKIMA

I, Kim M. Eaton, Clerk of the above entitled court, do hereby certify that the foregoing is a true, and correct copy of the original filed in my office, IN WITNESS WHEREOF, I have hereunto set my hand and seal of said court this 07-08-2013, 16:48  
Kim M. Eaton, Clerk  
Deputy Clerk



Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David N. Gasch, the attorney for the respondent, at P.O. Box 30339, Spokane, WA 99223-3005, containing a copy of the APPENDIX TO BRIEF OF RESPONDENT, in STATE v. JOEY A. ANDY, Cause No. 31018-3 - III, in the Court of Appeals, Division III, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame

Name

Done in Seattle, Washington

5/21/14

Date

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Joey A. Andy, the appellant, at DOC #815956, PO Box 769, Connell, WA 99326, containing a copy of the APPENDIX TO BRIEF OF RESPONDENT, in STATE v. JOEY A. ANDY, Cause No. 31018-3 - III, in the Court of Appeals, Division III, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame

Name

Done in Seattle, Washington

5/21/19

Date



