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NO. 90467-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Adoption of M.S.M.-P., a Minor

A.K., and S.K.,

Respondents,

v.

N.P.,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENTS

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 ORIGINAL

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I. THE COURT OF APPEALS DID NOT ERR IN ITS DECISION THAT THE TRIAL COURT SHOULD BE AFFIRMED AND THAT A NEW TRIAL IS NOT WARRANTED IN THIS CASE

This case involved a hearing on a petition to terminate the parental rights of a birth father in a step-parent adoption case. The trial judge referred to RCW 26.33.060 which addressed the subject of who could be in the courtroom during the hearing. The court asked each party whether they had any objection to the courtroom being closed. The Appellant N.P. had no objection.

At the conclusion of the hearing, the trial court entered findings of fact, conclusions of law, and an order terminating the parental rights of the birth father. The Appellant raised no objection to the closing of the courtroom or to any of the findings of fact or conclusions of law.

The birth father Appellant N.P. filed an appeal with the Court of Appeals claiming the closure of the courtroom constituted a constitutional error. The Court of Appeals ruled that the closing of the courtroom was a constitutional error but that the Appellant could raise the constitutional error for the first time on appeal only if it was a manifest error. RAP 2.5(a)(3). In order for the error to be

manifest, the Appellant had to make a showing of actual prejudice. The Washington Court of Appeals held that the Appellant did not point to any actual prejudice. The Appellant did not show any identifiable or practical consequence to the outcome of the trial, resulting from the constitutional error. The decision of the trial court was therefore affirmed.

Appellant sought, and was granted, discretionary review by the Supreme Court. The issues the Appellant wants the Supreme Court to address are:

- 1) Did the Court of Appeals properly conclude that the trial court's error was not "manifest" and that it lacked "practical and identifiable consequences"?
- 2) Is the position of the majority of justices in *In re Det. of D.F.F.*, 172 Wn.2d 37, 256 P.3d 357 (2011), clear that the doctrine of structural analysis does not apply to civil cases?

The answer to each question or issue is "yes".

II. THE COURT OF APPEALS CORRECTLY HELD THAT IN A CIVIL CASE WHERE THE APPELLANT FOR THE FIRST TIME ON APPEAL RAISES A CONSTITUTIONAL ISSUE, THERE MUST BE A SHOWING THAT THE ERROR WAS MANIFEST HAVING IDENTIFIABLE AND PRACTICAL CONSEQUENCES IN THE TRIAL

It has long been held that in a non-criminal case, if no error is raised at the trial court level, it may not be raised at the appellate level unless the appellant can demonstrate for the first time that it is a manifest error affecting a constitutional right. RAP 2.5(a)(3).

To demonstrate that an asserted error is manifest, the appellant must show actual prejudice,^[12] — which means " 'the asserted error had practical and identifiable consequences in the trial of the case.' "^[13]

In re Dependency of J.A.F., 168 Wn. App. 653, 661-662, 278 P.3d 673 (2012) (quoting and citing *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007) and *State vs. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009)).

Appellant asserts that there was a constitutional error in that the courtroom was closed. The Court of Appeals agreed but held that N.P. failed to show any actual prejudice.

The courts of this state have repeatedly held that the

showing of actual prejudice is required for reversal in such a situation. *State v. Kirkman*; *State vs. O'Hara*; *Hickethier v. Washington State Dep't of Licensing*, 159 Wn. App 203, 244 P.3d 1010 (2011); *State v. Kirkpatrick*, 160 Wn.2d 873, 161 P.3d 990 (2007), overruled on other grounds by *State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012).

In these cases, an error was asserted, but no actual prejudice was shown. Therefore, relief was neither warranted nor granted. The appellants could not demonstrate any identifiable and practical effects on the outcomes of the trials.

In the instant case, N.P. completely fails to show any identifiable and practical effect on the outcome of the case. N.P. simply says that the courtroom was closed so the trial took place behind a closed door. Present in the courtroom were the judge, the bailiff, the clerk, the court reporter, counsel for N.P., the petitioner A.K., counsel for A.K., the child's mother S.K., and the Guardian ad Litem for the child. Evidence was presented. The court announced its decision. Findings of fact, conclusions of law, and an order were entered. The trial was unaffected by the door

having a "closed" sign on it. N.P. makes absolutely no showing as to how the trial or the outcome would have been different without the sign on the door.

N.P. does not say that any person was actually excluded from the courtroom. N.P. provides no indication that there was anyone who wanted to get into the courtroom. There is no indication that if a person had wanted to get into the courtroom, they actually would have stayed out because of the sign.

N.P. does not point to any identifiable consequence of the courtroom being closed. He does not even speculate as to how evidence presented to the court would have been any different, how there would have been any additional evidence, how any offered evidence might have been countered, etc. N.P. does not give any indication how the findings of fact or conclusions of law would have been any different. In fact, he did not object to the findings or conclusions of law. Having failed to demonstrate any actual prejudice the Court of Appeals correctly ruled that the trial court's error was not "manifest" and that it lacked "practical and identifiable consequences".

III. THERE IS NO CONFUSION THAT THE MAJORITY OF THE COURT IN *D.F.F.* RULED THAT STRUCTURAL ERROR ANALYSIS DOES NOT APPLY TO CIVIL PROCEEDINGS

N.P. argues that the existence of the constitutional error necessitates a new trial, without a demonstration of actual prejudice. He relies on *D.F.F.* for this proposition. This reliance is simply misplaced.

D.F.F. involved an involuntary civil commitment proceeding which was not open to the public according to MPR 1.3. There were three filed opinions. Four Justices signed the lead opinion which applied a structural error analysis to a civil case. Previously, the structural error analysis had been limited to criminal proceedings and not extended to civil proceedings. The four Justices ruled that the closure warranted a new hearing "regardless of whether the complaining party can show prejudice". *D.F.F.* at 42. The opinion did not address the issue of whether the appellant had shown actual prejudice, as has always been required in noncriminal cases when an appellant seeks to raise a constitutional error for the first time on appeal.

The dissent criticized the use of the "structural error" approach in noncriminal cases. The dissent did not find that the appellant had shown actual prejudice.

The two concurring Justices did say actual prejudice was shown, but joined the dissent saying "that "structural error" analysis does not apply to the civil context." *D.F.F.* at 48. Out of the nine Justices, only two found that there had been a demonstration of actual prejudice.

D.F.F. does not stand for the proposition that structural error analysis applies to civil cases. Subsequent appellate opinions have clearly and accurately observed that the majority of the Justices in *D.F.F.* rejected the structural error approach in *D.F.F.* There is no confusion on this point.

In *J.A.F.*, referring to the opinion in *D.F.F.*, the Court of Appeals said "... a majority of the court agreed that a party seeking a new hearing for a violation of the public's Article I, Section 10 rights must show actual prejudice." *J.A.F.* at 663.

In *In re Det. of Reyes*, also referring to *D.F.F.*, the Court of Appeals said:

The doctrine of structural error has never yet been applied to a civil case. ^[23] That is unsurprising since the doctrine was designed to address errors that "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.'" *Neder v. United States*, 527 U.S. 1, 8-9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (quoting *Rose v. Clark*, 478 U.S. 570, 577-78, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1968)). A majority of the Washington Supreme Court rejected the argument that structural error applied to a civil proceeding in *D.F.F.* 172 Wn.2d at 48 (J.M. Johnson, J. concurring), 52-57 (Madsen, C.J., dissenting).

In re Det. of Reyes, 176 Wn.App 821, 843, 315 P.3d 532 (2013).

In *Saleemi v. Doctor's Associates, Inc.*, the Washington State Supreme Court again rejected the application of the structural analysis to civil cases. *Saleemi v. Doctor's Associates, Inc.*, 176 Wn.2d 368, 292 P.3d 108 (2013). There the court said:

Finally, DAI contends that this approach is inappropriate because the trial court's error was structural. Pet'r's Suppl. Br. at 13. Five justices of this court explicitly rejected the proposition that the concept of "structural error" had a place outside of criminal law. *In re Det. of D.F.F.*, 172 Wash.2d 37, 48, 256 P.3d 357 (2011) (J.M. Johnson, J., concurring, joined by Chambers, J.), 53 (Madsen, C.J., dissenting, joined by C. Johnson and Fairhurst, JJ.). We find no place for a structural error analysis in this case.

Saleemi at 385.

Other appellate courts simply have not followed the lead opinion in *D.F.F.* which extended the structural error analysis to civil cases. Instead they have followed the opinion of the five dissenting and concurring justices. There is no confusion on this point in appellate courts. N.P. would have the Supreme Court extend the structural error analysis to the civil case. That is not an appropriate or justified extension of an analysis used exclusively in criminal cases.

The phrase "actual prejudice" is not an undefined concept. It means an identifiable and practical effect on the outcome of a trial which is obviously detrimental to the party claiming actual prejudice. It does not include mere speculation. In *Russell v. Dep't of Human Rights*, the Court of Appeals said:

Speculative allegations that witnesses are unavailable or that memories have dimmed is insufficient to demonstrate actual prejudice. See *State v. Potter*, 68 Wn. App. 134, 142-43, 842 P.2d 481 (1982).

Russell v. Dep't of Human Rights, 70 Wn. App. 408, 418, 854 P.2d 1087 (1993).

In the instant case, again, N.P. points to no identifiable or practical consequences in the trial of the case resulting from the

courtroom being closed. N.P. does not point to anything that would have altered the result. N.P. does not even speculate as to how the result would have been any different. The Court of Appeals noted that there was little, if any, likelihood that a new trial would yield a different outcome.

Moreover, other than the closure, N.P. does not dispute the trial court's findings of fact or claim that the trial court's conclusions of law are erroneous. ^[15] Thus, there is little, if any likelihood, that a new termination trial would yield a different outcome. Yet, reversing the termination order would have the additional consequence of setting aside M.S.M.-P.'s adoption. The trial court found that N.P.'s withholding of his consent to the adoption was not in the best interest of M.S.M.-P. We see nothing in the record to dispute this finding. In light of that, we see no reason, and N.P. offers none, to disturb the finality of M.S.M.-P.'s adoption by the only father he has known.

In re Adoption of M.S.M.-P., 181 Wn.App 310, 314-15, 325 P.3d 392 (2014).

The findings of the trial court were fairly overwhelming.

The trial court found, among other things, that: N.P. displayed a "serious pattern of criminal conduct," including his incarceration at the time of the hearing for drug and firearms violations; N.P. had never expressed "personal concern for the health, education, and general well-being of [M.S.M.-P.]." ; N.P. had never spent time with M.S.M.-P., whether incarcerated or free; N.P. had never expressed love or affection for M.S.M.-P.; N.P. was an unfit parent

and his withholding of consent to the adoption was contrary to M.S.M.-P.'s best interests; and that, until the adoption proceedings began, M.S.M.-P. had no memory of N.P. Clerk's Papers at 250-53.

M.S.M.-P. at 314, n.15.

N.P. seeks to apply "structural error analysis" to civil cases. That is contrary to the law of this State. Applying that analysis to civil cases would allow litigants, such as N.P., seeing an error at the trial to merely keep quiet, knowing that if dissatisfied with the result, they can simply allege the error on appeal for the first time, without having to show the error had any consequences on the trial, and be granted a new trial. This will essentially encourage litigants who see an error to deprive the trial court of the opportunity to correct the error and thus earn a second bite at the apple. This is not the intent of the courts of this state. In *State v. Kirkpatrick*, the court noted:

However, this court has also stated that "the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can 'identify a constitutional issue not litigated below.'" *Id.* at 687, 757 P.2d 492 (quoting *State v. Valladares*, 31 Wash. App. 63, 76, 639 P.2d 813 (1982), *aff'd in part, rev'd in part*, 99 Wash.2d 663, 664 P.2d 508 (1983)).

State v. Kirkpatrick at 879.

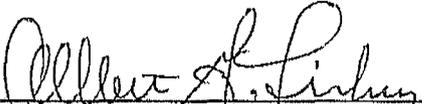
Recall that here, the trial court asked the Appellant about closing the courtroom and the Appellant had no objection. Recall also that the RCW 26.33.060 specifically says that “those persons shall be admitted whose presence is requested by any person entitled to notice”, such as N.P. By the clear language of the statute, the Appellant could have had anybody admitted to the courtroom. There is no confusion regarding the holding of the majority of the court in *D.F.F.* that structural error analysis should not be extended to civil cases.

IV. CONCLUSION

The Court of Appeals did not err in affirming the trial court where Appellant failed to establish the claimed error was manifest and holding that the structural error analysis does not apply to civil proceedings. For the reasons set forth above, the decision of the Court of Appeals should be affirmed.

DATED this 18TH day of March, 2015.

Respectfully submitted by:
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Dear Supreme Court Clerk:

Attached is the Supplemental Brief of Respondents for filing. A copy has been served on petitioner's counsel via cc to this email.

Please let me know if you have trouble with the attachment. Thank you very much.

Sincerely,

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