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September 18, 2013

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CASE # 317650
State of Washington v. Anthony Purtell
OKANOGAN COUNTY SUPERIOR COURT No. 121002680

Counsel:

Enclosed is your copy of the Commissioner's Ruling, which was filed by this Court today.

If objections to the ruling are to be considered (RAP 17.7), they must be made by way of a Motion to Modify filed in this Court within 30 days from the date of this ruling (**October 18, 2013**). Please file the original with one copy; serve a copy upon the opposing attorney and file proof of such service with this office.

If a motion to modify is not timely filed, appellate review is terminated.

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:jcs
Encl.

E-Mail
c: Honorable Ted Small, Superior Court Judge

c: Anthony Purtell
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The Court of Appeals
of the
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STATE OF WASHINGTON, Respondent, v. ANTHONY PURTELL, Appellant.	)	No. 31765-0-III COMMISSIONER'S RULING

The State seeks discretionary review of the Okanogan County Superior Court's May 29, 2013 decision which affirmed the district court order that granted Anthony Purtell's motion for a new trial. The district court had read the jury their instructions, and the lawyers had made their closing arguments, after the courthouse doors locked for the night. The defense did not object at the time and, indeed, the State points out that defense counsel knew about the locked doors because he let the prosecutor back into the

courthouse after the recess. Yet the defense subsequently argued to the district court that the locked doors violated the defendant's right to a public trial.

The State contends that RAP 2.3(d)(3) supports discretionary review because the decision below involves "question[s] of public interest which should be determined by an appellate court." Specifically, it argues that Mr. Purtell waived the public trial issue when he did not object at the time to the locked doors. And, in any event, the closure was not a structural error.

1. Waiver.

As to the waiver issue, the State fashions its argument, as follows:

> The Washington Supreme Court has held that a defendant does not waive a public trial claim by failing to object to the closure at trial. *State v. Bone-Club,* 128 Wn.2d 254, 261[, 906 P.2d 325] (1995). However, Justice Madsen, joined by Justices Wiggins, and Gonzalez, recently disagreed with that rule in her concurrence in *State v. Beskurt*, 176 Wn.2d 441, 449[, 293 P3d 1159] (2013). Justice Madsen argued that under RAP 2.5(a)(3) a defendant who does not object to the closure at trial is not entitled to a new trial unless the closure resulted in "actual prejudice, meaning ... [the closure] had practical and identifiable consequences in the trial of the case." *Id.* quoting *State v. O'Hara*, 167 Wn.2d 91, 99[, 217 P.3d 756] (2009).
>
> Justice Madsen reiterated this position in her concurrence in the Court's most recently decided public trial case *In re [Personal Restr. of]Yates,* 177 Wn.2d 1, 66-67, [296 P.3d 872] (2013) ("At trial, Robert Yates failed to object to both the alleged closure and the sealing decision. On direct review, the failure to object would generally preclude review unless the claimed error was manifest error affecting a constitutional right. RAP 2.5(a)(3). The manifest error standard requires a showing of prejudicial effect. I do not believe Yates could meet this standard had he raised these issues on direct review."). In *Yates*, the majority held the locking of the courtroom during jury selection did not violate the defendant's right to a public trial because it was not a "closure" since the door was only locked

when the jurors were being seated. *Id.* 26-30.

> Here, there is no evidence that the closure had any practical identifiable consequences to the defendant at trial, or that it prejudiced him in any way.

Motion at 4-5.

In summary, the State's position is that this Court should accept discretionary review because three of Washington's supreme court justices have indicated that if the defendant did *not* object below, they would require a showing of prejudice before they reversed a case on public trial grounds.

The State has not persuaded this Court that the views of three justices, as expressed in *dicta,* are sufficient to convert the question into one that affects the public interest such that an appellate court should determine it. *See* RAP 2.3(d)(3). Clearly, three justices are not a majority.

2. Structural Error.

The Washington Supreme Court has clearly stated that a trial court commits structural error when it fails to conduct a *Bone–Club* analysis before it closes a proceeding that the constitution requires be open to the public. *State v. Paumier,* 176 Wn.2d 29, 35, 288 P.3d 1126 (2012); *State v. Wise,* 176 Wn.2d 1, 10, 288 P.3d 1113 (2012). Only in *State v. Momah,* 167 Wn.2d 140, 145-46, 217 P.3d 321 (2009) did the court hold that a courtroom closure was not a structural error, but the *Momah* court limited its holding to the facts before it. I.e., the trial court, on the recommendation of

defense counsel, questioned several jurors privately to protect the defendant's right to a fair trial. And, though not explicit, the trial court effectively considered the *Bone–Club* factors. Here, defense counsel did not affirmatively consent to closure. Nor did the trial court effectively consider the *Bone-Club* factors.

Nevertheless, the State argues that the closure was too insignificant to violate the right to public trial. It relies upon cases from other jurisdictions that have held that certain closures are too trivial – i.e., too brief and inadvertent – to implicate the right to a public trial. *See, e.g., United States v. Al–Smadi,* 15 F.3d 153, 154–55 (10th Cir.1994). Our courts, however, "'ha[ve] never found a public trial right violation to be [trivial or] de minimis.'" *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009), quoting *State v. Easterling,* 157 Wn.2d at 180, 137 P.3d 825. And, even if our courts were to so hold, the closure here cannot properly be characterized as brief.

Accordingly, IT IS ORDERED, the State's motion for discretionary review is denied.

September 18, 2013

Monica Wasson
Commissioner