

## MANIFEST ERROR REVIEW IN WASHINGTON'S APPELLATE COURT: A HALF-CENTURY OF CONFUSION AND INCONSISTENCY

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### ABSTRACT

*In 1976, the Washington State Supreme Court codified a rule for determining when Washington's appellate courts would review unpreserved errors on appeal—Rule of Appellate Procedure (RAP 2.5(a)(3)). Under this rule, appellate courts will review unpreserved constitutional errors if they are “manifest.” In the almost half-century since the rule's enactment, the Washington State Supreme Court has developed two very different interpretations of the rule—the Scott definition and the O'Hara definition—leaving the appellate bench and bar in a quandary. These competing interpretations concern the definition of the word “manifest” as used in the rule. Despite conflicting interpretations and widespread calls to clarify the law, Washington's Supreme Court still vacillates between the two interpretations. This Article studies the origins of RAP 2.5(a)(3), surveys the decades of case law interpreting the rule, and highlights judges' calls to clarify the law. Ultimately, this Article agrees with the critics of the Washington State Supreme Court's conflicting case law and urges the Court to abandon the Scott definition and affirm the O'Hara definition as the proper interpretation of RAP 2.5(a)(3).*

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## INTRODUCTION

One of the greatest benefits of retaining new counsel on appeal is the chance to get a fresh set of eyes on a case. A new lawyer may see the case in a different light and may identify errors hidden inside the trial counsel's blind spots. But the raising of new errors on appeal is generally frowned upon in the United States (U.S.) because of the place of primacy that the trial holds in American legal tradition.<sup>1</sup> The trial is supposed to be "the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative [appeal]."<sup>2</sup> For that reason, appellate courts will not review every error that trial counsel failed to see.<sup>3</sup>

Some errors, however, are too unjust to leave unremedied—they "appear[] with disquieting obtrusiveness upon an examination of the [appellate] record," leaving the appellate court and counsel restless.<sup>4</sup> To balance these competing interests, appellate courts have devised various criteria for choosing when to review unpreserved errors.<sup>5</sup>

The Washington State Supreme Court has balanced these competing interests through the development of the manifest error doctrine.<sup>6</sup> Codified in Washington Rule of Appellate Procedure (RAP) 2.5(a), the rule states:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: . . . (3) manifest error affecting a constitutional right.<sup>7</sup>

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1. See *Wainwright v. Sykes*, 33 U.S. 72, 85–90 (1977); see also *Ball v. United States*, 967 F.3d 1072, 1078 (10th Cir. 2020) ("The proceedings in district court are not just a rehearsal, a dry run, for the ultimate performance on appeal, where the parties can discard what did not work below and introduce new scenes for a new audience. We review the case litigated below, not the case fleshed out for the first time on appeal. In fairness to opposing parties and to prevent further burden on overburdened courts caused by interminable litigation, we expect parties 'to give it everything they've got at the trial level.'" (quoting *Fish v. Kobach*, 840 F.3d 710, 730 (10th Cir. 2016))).

2. *Wainwright*, 433 U.S. at 90; see also *Ball*, 967 F.3d at 1078 (quoting *Fish*, 840 F.3d at 730).

3. See *Wainwright*, 433 U.S. 90, at 85–90; see also *Ball*, 967 F.3d at 1078 (quoting *Fish*, 840 F.3d at 730).

4. *Wiles v. Dep't of Lab. & Indus.*, 209 P.3d 462, 465 (Wash. 1949).

5. See generally 4 C.J.S. *Appeal and Error* §§ 297–98 (2023) (collecting different standards used by courts across the United States for reviewing unpreserved errors).

6. See WASH. R. APP. P. 2.5(a)(3).

7. WASH. R. APP. P. 2.5(a).

The rule is short and simple enough to understand. But, when the time comes to apply the rule, an ambiguity appears. What does it mean for an error to be “manifest”? The court rules do not define the term. And, the term is not one that the general public, or even lawyers, use regularly.

Since the rule’s adoption almost a half-century ago, the Washington State Supreme Court has attempted several times to define the term and has applied the court rule in dozens of cases.<sup>8</sup> But, the Court has yet to settle on a single, coherent, definition of the term. This Article traces the history of Washington State’s manifest error doctrine, illuminating the two main definitions of “manifest” utilized by the Washington Supreme Court. It follows the Court’s inconsistent applications of these definitions through the decades and proposes a solution to this mess.

Part I details the history of the manifest error doctrine and the sources for the court rule. Part II introduces the ongoing conflict in the doctrine’s interpretation and application. Part III notes some of the criticisms that the Supreme Court’s inconsistent case law has garnered. Part IV sets forth this Article’s interpretation and recommendation for resolving the ongoing conflict. Part V addresses a few additional rules concerning RAP 2.5(a)(3) that are relevant to practitioners.

### I. HISTORY OF RAP 2.5(A)(3)

In 1976, the Washington State Supreme Court adopted the Rules of Appellate Procedure (RAPs), replacing the Supreme Court Rules on Appeal (ROA) and Court of Appeals Rules on Appeal (CAROA).<sup>9</sup> The RAPs kept many of the same rules that existed under the ROAs and CAROAs, but also added several new provisions,<sup>10</sup> including RAP 2.5(a)(3).

The drafters’ commentary, which was reprinted (but not adopted) by the Supreme Court, explains the drafters’ intent stated:

Exception (3) is intended to encompass developing case law. Thus, certain constitutional questions can be raised for the first time on review. See, e.g., *Osborn v. Public Hosp. Dist. 1*, 80 Wn.2d 201, 492 P.2d 1025 (1972); *State v. Myers*, 6 Wn. App. 557, 494 P.2d 1015 (1972); *State v. Van Auken*, 77 Wn.2d 136, 460 P.2d 277 (1969). It is derived from New

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8. See discussion *infra* Part II.

9. See 86 Wash. 2d 1132 (1976) (available in print only).

10. Compare 76 Wash. 2d xxvi–clxii (1969) (adopting the ROAs and CAROAs) (available in print only), with 86 Wash. 2d 1133, 1133–1281 (1976) (adopting the RAPs).

Jersey Rule 2: 10-2 and conforms to federal practice. *Fleming v. Goodwin*, 165 F.2d 334 (8th Cir. 1948).”<sup>11</sup>

This commentary also points readers to three sources that are relevant to interpreting this rule. First, it points to Washington State cases, suggesting that the rule was already in use to some degree as a common law rule. Second, it points to a similar rule from New Jersey. Third, it points to comparable federal appellate practice. Each of these sources will be examined in-depth below.

#### A. *Washington History*

*Osborn v. Public Hospital District 1*,<sup>12</sup> the first case cited by the drafters’ commentary, concerned a medical negligence claim against a healthcare facility.<sup>13</sup> The case was dismissed mid-trial due to insufficient evidence of negligence on the part of the hospital.<sup>14</sup> The trial court found that only the attending physician possessed a “duty of care for the patient’s safety,” not the hospital; thus, the court released the hospital from the case.<sup>15</sup> On appeal, the plaintiff-appellant raised a new theory of liability, arguing that a statute and corresponding administrative regulation imposed a duty of care on the hospital independent of any duty owed by the physician.<sup>16</sup>

The hospital argued that the Supreme Court of Washington should not consider this new argument because it was not presented to the trial court.<sup>17</sup> The Court disagreed, stating, “[t]he issue of the hospital’s duty for the safety of its patients was squarely before the trial court and the statutes of this state in regard thereto are therefore pertinent to our consideration.”<sup>18</sup> The Court then remanded for retrial.<sup>19</sup>

*State v. Myers*,<sup>20</sup> the second case cited by the drafters’ commentary, involved a defendant convicted of murder after a jury rejected his insanity defense.<sup>21</sup> On appeal, Myers raised several new issues relating to instructions not given to the jury, the constitutionality of other jury instructions, and the sufficiency of the

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11. 86 Wash. 2d at 1152.

12. 492 P.2d 1025 (Wash. 1972).

13. *Id.* at 1026.

14. *Id.*

15. *Id.* at 1027.

16. *Id.*

17. *Id.* at 1028.

18. *Id.*

19. *Id.*

20. 494 P.2d 1015 (Wash. Ct. App. 1972).

21. *Id.* at 1016.

evidence.<sup>22</sup> The appellate court declined to review some issues as unpreserved and reviewed other issues despite noting they were unpreserved.<sup>23</sup> The Court offered no explanation for how it picked what unpreserved errors to review, and it ultimately affirmed the conviction.<sup>24</sup>

*State v. Van Auken*,<sup>25</sup> the third case cited by the drafters' commentary, involved a husband and wife tried and convicted of embezzlement.<sup>26</sup> For the first time on appeal, the appellants argued the State committed misconduct during closing argument.<sup>27</sup> The Supreme Court of Washington refused to review the issue, stating:

We have repeatedly stated the general rule that the trial court must be given an opportunity to rule on asserted errors and to correct them; and that a failure to afford the trial court this opportunity constitutes a waiver of the right to assert that error on appeal. An established exception to this general rule is found where the misconduct or error is of such a flagrant or prejudicial nature that any curative measure would have been futile. Defendants having failed to apprise the trial court of this claimed error, their contention here must fail unless the misconduct was "incurable" and thus within the exception.<sup>28</sup>

The Court's refusal in 1969 to review the unpreserved error in *Van Auken* followed by seemingly opposite decisions in the 1972 *Osborn* and *Myers* decisions suggest a changing viewpoint on error preservation in Washington. Notably, none of the three cases cited by the drafters contain any language remotely resembling RAP 2.5(a)(3). In this context, the drafters' comment that "[e]xception (3) is intended to encompass developing case law"<sup>29</sup> suggests that the intent was not so much to "encompass developing case law" but to bring consistency to the case law. Unfortunately, Washington State's experience under RAP 2.5(a)(3) has been anything but consistent.

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22. *Id.* at 1018–22.

23. *Id.* at 1019–24.

24. *See generally id.*

25. 460 P.2d 277 (Wash. 1969).

26. *Id.* at 278.

27. *Id.* at 281–82.

28. *Id.* at 282 (citations omitted).

29. 86 Wash. 2d 1152 (1976).

*B. New Jersey History*

The drafters' comment states that they used New Jersey court rule 2:10-2 as a template for RAP 2.5(a)(3).<sup>30</sup> New Jersey's rule provides:

Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court.<sup>31</sup>

When comparing these authorities three distinctions emerge. One, the Washington State rule is expressly limited to constitutional errors, while the New Jersey rule is not.<sup>32</sup> Two, the Washington rule requires the unpreserved error to be "manifest," while the New Jersey rule requires the error to be "plain."<sup>33</sup> Three, Washington's rule is silent on any prejudice requirement, while New Jersey requires the error be "clearly capable of producing an unjust result."<sup>34</sup> These differences yield three corresponding questions: (1) why is RAP 2.5(a)(3) limited to constitutional errors, (2) does "manifest error" have a different meaning than "plain error," and (3) what, if any, degree of prejudice does RAP 2.5(a)(3) require? The following sections provide answers to these questions.

*C. Federal History*

The drafters of RAP 2.5(a)(3) stated that the rule "conform[ed] to federal practice" and cited *Fleming v. Goodwin*<sup>35</sup> as authority.<sup>36</sup> In *Fleming*, a federal agency sued a business for violating federal law.<sup>37</sup> The case was prosecuted in

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30. *Id.*

31. N.J. CT. R. 2:10-2. This exact language existed in the 1970s when RAP 2.5(a)(3) was drafted. *See, e.g., State v. Macon*, 273 A.2d 1, 7–8 (N.J. 1971) (quoting R. 2:10-2 in full and stating that it was adopted in 1969).

32. Compare WASH. R. APP. P. 2.5(a)(3), with N.J. CT. R. 2:10-2.

33. Interestingly, New Jersey's 1894 statutory predecessor to Rule 2:10-2 used the term "manifest," not "plain." *Macon*, 273 A.2d at 7. But the *Macon* opinion also indicates that New Jersey's courts never defined the term "manifest" before replacing it with "plain." *Id.* at 7. *Macon* appears to still be the leading case in New Jersey on the plain error rule. *See, e.g., State v. Prall*, 177 A.3d 755, 763 (N.J. 2018) (quoting *Macon*); *State v. Clark*, 276 A.3d 1126, 1138 (N.J. 2022) (same).

34. Compare WASH. R. APP. P. 2.5(a)(3), with N.J. CT. R. 2:10-2.

35. 165 F.2d 334 (8th Cir. 1948).

36. *See supra* note 11 and accompanying text.

37. *Fleming*, 165 F.2d at 336.

the name of the agency administrator.<sup>38</sup> When the administrator resigned and a successor came into office, the government sought to continue the prosecution by substituting the new administrator as plaintiff.<sup>39</sup> The federal court denied the motion and dismissed the lawsuit, apparently because the government waited too long to substitute plaintiffs.<sup>40</sup> For the first time on appeal, the government argued that it did not need to substitute plaintiffs because the prosecution belonged to the government, and not the administrator in any personal capacity.<sup>41</sup>

In deciding to reach the merits of this new argument, the Eighth Circuit stated, “Ordinarily this Court will not consider a question which was not presented to or passed upon by the District Court, but this rule does not preclude the Court from correcting a plain error, particularly in a case in which the public interest is involved.”<sup>42</sup> In 1948, when *Fleming* was decided, the plain error doctrine was already entrenched in federal case law<sup>43</sup> and had recently been codified in the federal criminal and civil rules of procedure through Rule 52(b) and 51(d)(2), respectively.<sup>44</sup>

Since *Fleming*, federal case law has further developed to define “plain error” and when it has “affected substantial rights.” In *United States v. Olano*,<sup>45</sup> the Supreme Court explained that an unpreserved error will be addressed only if it “is ‘plain’ and . . . ‘affect[s] substantial rights.’”<sup>46</sup> To receive the benefit of the rule, the party raising the error<sup>47</sup> must make three showings: (1) “that there indeed be an ‘error,’” (2) “that the error be ‘plain,’” and (3) “that the plain error ‘affect[ed] substantial rights.’”<sup>48</sup> “‘Plain’ is synonymous with ‘clear’ or,

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38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 336–337.

42. *Id.* at 337 (citation omitted).

43. See, e.g., *Wiborg v. United States*, 163 U.S. 632, 658 (1896) (“And, although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it.”).

44. Federal Rule of Criminal Procedure 52(b) was adopted in 1944 and presently states: “A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.” FED R. CRIM. P. 52(b). Federal Rule of Civil Procedure 51(d)(2) was adopted in 1937 and presently states: “A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.” See FED R. CIV. P. 51(d)(1).

45. 507 U.S. 725 (1993).

46. *Id.* at 732 (alteration in original).

47. *Id.* at 734 (“It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.”).

48. *Id.* at 732, 734 (alteration in original).



equivalently, ‘obvious.’”<sup>49</sup> Furthermore, the error must be “clear under current law.”<sup>50</sup> Finally, for the error to have affected substantial rights, “[i]t must have affected the outcome of the district court proceedings.”<sup>51</sup>

Assuming a party is able to meet all three requirements of the plain error rule, the rule still does not mandate correction on appeal. Rather, “the court of appeals has authority to order correction, but is not required to do so.”<sup>52</sup> In deciding whether to use this discretion in the presence of a plain error, the Supreme Court explained that it would be an abuse of discretion not to correct a plain error if “the defendant is actually innocent”<sup>53</sup> or if leaving the error “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.”<sup>54</sup>

The Supreme Court has since synthesized *Olano* into a more concise four-part inquiry:

[The plain error rule] authorizes an appeals court to correct a forfeited error only if (1) there is an error, (2) the error is plain, and (3) the error affects substantial rights. Pointing out that Rule 52 is permissive, not mandatory, we added (4) that the standard that should guide the exercise of remedial discretion under is whether the error seriously affects the fairness, integrity or public reputation of judicial proceedings.<sup>55</sup>

In subsequent opinions, the U.S. Supreme Court has provided some clarification to the *Olano* test.

With respect to plainness, the *Olano* court stated, “We need not consider the special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified.”<sup>56</sup> The Court answered that question in *Henderson v. United States*,<sup>57</sup> holding that whether an error was plain is based on “the law in effect at the time” of the direct appeal, not at the time of trial.<sup>58</sup> Similarly, as the Court stated in *Johnson v. United States*,<sup>59</sup> for example, if the law was clear and settled at the time of trial and clearly changes pending

49. *Id.* (citing *United States v. Young*, 470 U.S. 1, 17 n.14 (1985); *United States v. Frady*, 456 U.S. 152, 163 (1982)).

50. *Olano*, 507 U.S. at 734.

51. *Id.* (citing *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255–257 (1988)).

52. *Id.* at 735.

53. *Id.* at 736.

54. *Id.* (quoting *United States v. Atkinson*, 297 U.S. 157 (1936)).

55. *Henderson v. United States*, 568 U.S. 266, 272–73 (2013) (quotation omitted).

56. *Olano*, 507 U.S. at 734.

57. 568 U.S. 266 (2013).

58. *See id.* at 271–77.

59. 520 U.S. 461 (1997).

appeal, plain error is based on the law in effect at the time of appeal.<sup>60</sup> One question that remains unanswered by the U.S. Supreme Court is whether unpreserved structural errors<sup>61</sup> are exempt from showing prejudice.<sup>62</sup>

The preceding discussion of the federal plain error rule reveals a doctrine with well-defined requirements. The rule's criteria are mostly objective. The requirement that the error be obvious under current law leaves some room for subjective opinion but is still objective in that the party seeking relief must be able to point to existing authority in order to obtain relief—rather than arguing for a change in the law. As discussed in Part II, Washington State's parallel manifest error doctrine is anything but well-defined or objective. This is in spite of Washington basing its rule on the federal rule.

## II. CONFLICTING WASHINGTON INTERPRETATIONS

### A. State v. Scott

The Supreme Court of Washington's first decision to consciously interpret the provisions of RAP 2.5(a)(3) was *State v. Scott*.<sup>63</sup> When the Court decided *Scott* in 1988, RAP 2.5(a)(3) had already been in effect for a decade. During that

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60. See *id.* at 468 (“[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be ‘plain’ at the time of appellate consideration.”).

61. Structural errors include complete denial of counsel, a biased trial judge, racial discrimination in grand jury selection, denial of self-representation, denial of a public trial, and defective reasonable doubt instruction. See *Washington v. Recuenco*, 548 U.S. 212, 218 n.2 (2006). For a thorough overview of the structural error doctrine and a more complete listing of errors deemed to be structural, see Zachary L. Henderson, *A Comprehensive Consideration of the Structural Error Doctrine*, 85 MO. L. REV. 965, 969 (2020).

62. See *Puckett v. United States*, 556 U.S. 129, 140 (2009) (noting the unresolved issue).

63. 757 P.2d 492, 493 (Wash. 1988).

first decade, the Supreme Court cited the rule in approximately thirty cases,<sup>64</sup> but did not interpret its text.<sup>65</sup>

*Scott* concerned an alleged failure to give a necessary jury instruction that neither party had requested.<sup>66</sup> The court of appeals had declined to review the issue, finding that no “‘obvious and manifest injustice’” had occurred.<sup>67</sup> But, other cases (one pre-RAP and one post-RAP) had held that any instructional errors of constitutional magnitude could “be raised for the first time on appeal without considering the degree to which the asserted errors were ‘manifest.’”<sup>68</sup> Given this split of authorities, the Washington State Supreme Court found it necessary to “explain the ‘manifest error’ standard.”<sup>69</sup>

The *Scott* court agreed that RAP 2.5(a)(3) should not be so broad as to permit review of every constitutional issue.<sup>70</sup> But, it also disagreed with the court of appeals “that by deciding that an error is not ‘manifest,’ an appellate court can usefully shortcut the review process.”<sup>71</sup> The Court believed that the threshold determination of reviewability necessarily involved a thorough review of the record in order to determine whether reversal was required; “[t]hus, no appellate effort is saved by cutting off *review* of those cases in which *reversal* is determined to be unnecessary.”<sup>72</sup>

The *Scott* court then laid out a two-step inquiry for errors raised under RAP 2.5(a)(3). According to the Court, “what is meant by ‘manifest’” is “that the error

64. See Basic Search for RAP 2.5, WESTLAW, <https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=%28sc.Default%29> (search for “RAP 2.5”; then filter starting with Washington State Supreme Court cases; then filter for cases decided on or between 08/11/1976 to 06/09/1988 (the date of the earliest search result through the date *Scott* was published)). This search is overinclusive because it includes cases discussing RAP 2.5(a)(1) and (2), but the over-inclusivity is necessary because several cases applying subsection (a)(3) cite only to RAP 2.5 or RAP 2.5(a). See, e.g., *State v. Ermer*, 621 P.2d 121, 126 (Wash. 1980) (citing RAP 2.5(a)). The search yields 41 cases (including *Scott*). This author’s review of those 41 cases revealed that roughly 30 cases cited, quoted, paraphrased, or mentioned RAP 2.5(a)(3). Many of these cases cited RAP 2.5(a)(3) as creating a general rule allowing for constitutional claims to be raised for the first time on appeal. See, e.g., *State v. Hieb*, 727 P.2d 239, 245 (Wash. 1986).

65. See *State v. Bertrand*, 267 P.3d 511, 522 n.23 (Wash. Ct. App. 2011) (demonstrating that research done by Judge Quinn-Brintnall confirms that *Scott* was the Supreme Court’s first foray into the interpretation of RAP 2.5(a)(3)).

66. See *State v. Scott*, 757 P.2d 492, 493 (Wash. 1988).

67. *Id.* at 685 (quoting *State v. Scott*, 739 P.2d 742, 747 (Wash. Ct. App. 1987)).

68. *Id.* at 494 (citing *State v. McCullum*, 656 P.2d 1064, 1067 (1983)).

69. *Scott*, 757 P.2d at 494.

70. *Id.* at 494.

71. *Id.* at 495.

72. *Id.* (emphasis in original).

is truly of constitutional magnitude.”<sup>73</sup> If so, the appellate court then determines whether the error was “harmless beyond a reasonable doubt.”<sup>74</sup> Presumably somewhere before step two, either before or after step one, the court would also determine whether an error actually occurred.

Two obvious problems follow from *Scott*’s methodology. First, *Scott* cited no authority for the proposition that “manifest” simply means the error is “truly of constitutional magnitude.”<sup>75</sup> As was previously covered, there is no historical support for this interpretation.<sup>76</sup> Second, this interpretation of the court rule renders superfluous the term “manifest.” Court rules are interpreted using the same rules as when interpreting statutes.<sup>77</sup> “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.”<sup>78</sup>

### B. *State v. Lynn*

A few years later, the Washington State Court of Appeals reinterpreted *Scott* in *State v. Lynn*.<sup>79</sup> Based on *Scott*’s statement that the court must “satisfy itself that the error is truly of constitutional magnitude,” the court of appeals was faced with an interpretation of *Scott* that would allow any claim of constitutional error to be asserted on appeal, regardless of preservation.<sup>80</sup> The court of appeals wondered if the *Scott* court had worded the opinion “more broadly stated than intended.”<sup>81</sup> The court then set out a four-step process in *Lynn* that it believed satisfied *Scott*’s intent:

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if

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73. *Id.*

74. *Id.*

75. *See generally id.*

76. *See discussion supra* Part I.

77. *See State v. Blilie*, 939 P.2d 691, 694 (Wash. 1997) (“Court rules are interpreted using principles of statutory construction.”).

78. *Whatcom Cnty. v. City of Bellingham*, 909 P.2d 1303, 1308 (Wash. 1996) (citing *Stone v. Chelan Cnty. Sheriffs Dep’t*, 756 P.2d 697 (1982)).

79. 835 P.2d 251 (Wash. Ct. App. 1992).

80. *Id.* at 253.

81. *Id.*

the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.<sup>82</sup>

*Lynn* also quietly diverged from *Scott*'s definition of manifest. *Scott* had equated "manifest" with any issue that was "truly of constitutional magnitude."<sup>83</sup> Looking to how the word "manifest" had been interpreted in another area of criminal law, *Lynn* defined "manifest" as "unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed."<sup>84</sup> *Lynn* predates the U.S. Supreme Court's opinion in *Olano* by a year, but *Lynn*'s definition of "manifest" coincides well with *Olano*'s definition of "plain."<sup>85</sup>

In support of its reinterpretation of "manifest," the *Lynn* court cited several policy justifications for pulling back on any expansive reading of *Scott*:

- A narrow reading of RAP 2.5(a)(3) "places responsibility on trial counsel to properly prepare their cases and will reduce claims that are discovered solely for purposes of appeal."<sup>86</sup>
- "An expansive reading of manifest sends a message to trial counsel not to worry about overlooking constitutional claims, since such claims can always be asserted on appeal."<sup>87</sup>
- "[S]ophisticated defense counsel may deliberately avoid raising issues which have little or no significance to the jury verdict but may be a basis for a successful appeal."<sup>88</sup>
- An expansive reading of *Scott* "undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts."<sup>89</sup>

By reinterpreting *Scott* and the definition of "manifest," the *Lynn* court sought to balance these stated policies against any "denigrat[ion]" of

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82. *Id.* at 254.

83. *State v. Scott*, 757 P.2d 492, 495 (Wash. 1988).

84. *Lynn*, 835 P.2d at 255 (citing *State v. Taylor*, 521 P.2d 699 (Wash. 1974)) (defining "manifest injustice" pursuant to WASH. CRIM R. 4.2)).

85. *Olano*, 507 U.S. at 734 (defining "plain" as "clear" or "obvious" pursuant to the "current law").

86. *Lynn*, 835 P.2d at 253.

87. *Id.*

88. *Id.*

89. *Id.* at 254.

constitutional protections that would arise from a policy of prohibiting review of all unpreserved constitutional errors.<sup>90</sup>

### C. State v. McFarland

Following *Lynn*, the Washington State Supreme Court took up the rule again in *State v. McFarland*.<sup>91</sup> The *McFarland* court repeatedly quoted and cited *Lynn* with approval.<sup>92</sup> However, the Court did not adopt, quote, or discuss *Lynn*'s four-part test or its redefinition of "manifest." *McFarland* only cited and quoted *Lynn* to confirm that *Scott* does not permit review of every purported constitutional error and to adopt some of the policy reasons cited by *Lynn* in support of a narrow reading of RAP 2.5(a)(3), specifically the concerns about undesirable retrials and wasting of limited resources.<sup>93</sup>

With respect to "manifest," the *McFarland* court continued to apply *Scott*'s "actual prejudice" standard.<sup>94</sup> While *McFarland* inexplicably relied on both *Scott* and *Lynn* without acknowledging their conflict, the opinion made an important clarification to RAP 2.5(a)(3) jurisprudence. The Court held that to be "manifest," "the facts necessary to adjudicate the claimed error" must already be in the record.<sup>95</sup> The appellate court will not remand for a reference hearing or otherwise expand the record to review the issue.<sup>96</sup>

### D. State v. WWJ Corp.

The Washington State Supreme Court's next extensive treatment of RAP 2.5(a)(3) came in *State v. WWJ Corp.*<sup>97</sup> In *WWJ*, the Supreme Court held that "an error is manifest if it results in actual prejudice to the defendant"<sup>98</sup> and clarified that actual prejudice can be shown when "the asserted error had practical and identifiable consequences in the trial of the case."<sup>99</sup>

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90. *Id.*

91. 899 P.2d 1251 (Wash. 1995).

92. *See id.* at 1255–56 (citing *Lynn* three times while addressing RAP 2.5(a)(3)).

93. *Id.*

94. *Id.*

95. *Id.* ("If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.").

96. *Id.* at 1258 ("[R]emanding for expansion of the record is not an appropriate remedy. If either Fisher or McFarland wishes a reviewing court to consider matters outside the record, a personal restraint petition is the appropriate vehicle for bringing those matters before the court.").

97. 980 P.2d 1257 (Wash. 1999).

98. *Id.* at 1261 (1999) (discussing *State v. McFarland*, 899 P.2d 1251 (Wash. 1995)).

99. *Id.* (quoting *State v. Lynn*, 835 P.2d 251, 254 (Wash. Ct. App. 1992)).

*WWJ* then explained that this inquiry requires the court to “preview the merits of the claimed constitutional error to see if the argument has a likelihood of succeeding.”<sup>100</sup> The Court stated:

Reading manifest in this way is consistent with *McFarland*’s holding that exception to RAP 2.5(a) should be construed narrowly. The policy behind RAP 2.5(a)(3) is simply this: Appellate courts will not waste their judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.<sup>101</sup>

The problem with this statement should be obvious. If the court is “previewing the merits” it is necessarily deciding the issue. If the court is going to decide the issue, then what judicial resources have been saved? None.

Judicial resources are saved only if the *WWJ* court actually meant that it previews prejudice (i.e., analyzes prejudice) before deciding whether to analyze the merits. If the appellate court assumes, without deciding, that an error occurred and decides that any error—assuming error exists—was harmless, then the court need not reach the merits of the claim and the court has saved itself a few pages in the reporter volume. If that is what the *WWJ* court meant, then the approach parallels the method used when addressing claims of ineffective assistance of trial counsel.<sup>102</sup>

The rest of the *WWJ* opinion does not provide much additional insight into what the Court meant by “previewing the merits.” The Court held the assignment of error was unreviewable under RAP 2.5(a)(3), but only because the record was insufficiently developed.<sup>103</sup> In explaining why the record was insufficiently developed, the Court appeared to be addressing the sufficiency of the record to decide the merits, not the sufficiency of the record to decide prejudice.<sup>104</sup> But, it is not entirely clear, because the error at issue—excessive fines—was inextricably linked to prejudice. Said differently, in a case involving an excessive fine, the demonstration of error necessarily demonstrates prejudice.

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100. *Id.*

101. *Id.*

102. See *In re Pers. Restraint of Crace*, 280 P.3d 1102, 1108 (2012) (“We need not consider both prongs of *Strickland* (deficient performance and prejudice) if a petitioner fails on one. We conclude that Crace cannot show prejudice under *Strickland* and therefore do not address the question of whether his counsel’s performance was deficient.” (citation omitted)).

103. *WWJ Corp.*, 980 P.2d at 1262.

104. *Id.*

The *Scott* test, as clarified by *McFarland* and *WWJ*, remained the standard for the Washington State Supreme Court throughout most of the 2000s.<sup>105</sup> But, in the Washington State Court of Appeals, *Lynn*'s definition of "manifest" continued to receive considerable application.<sup>106</sup> In 2009, the Washington State Supreme Court decided *State v. O'Hara*<sup>107</sup> and appeared to change course to mirror the rest of *Lynn* and the federal *Olano* approach.

#### E. *State v. O'Hara*

*O'Hara* started out by reciting *Scott*'s two-step standard. First, the court determines whether the alleged error is truly of constitutional magnitude.<sup>108</sup> Second, the court determines whether the alleged error was manifest, equating "manifest" with "actual prejudice."<sup>109</sup> Citing to *Lynn*'s four-step inquiry, *O'Hara* added a third step to *Scott*'s two-step inquiry: "a harmless error analysis occurs after the court determines the error is a manifest constitutional error."<sup>110</sup>

But, if "manifest" means "actual prejudice" (as *Scott* held), then the question naturally arises of how the "actual prejudice" inquiry is any different from the "harmless error" inquiry. Recognizing this issue, the *O'Hara* court clarified "the focus of the actual prejudice must be on whether the error is so *obvious* on the record that the error warrants appellate review."<sup>111</sup> The Court stated:

It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and

105. See, e.g., *State v. Walsh*, 17 P.3d 591, 594 (Wash. 2001); *State v. Stein*, 27 P.3d 184, 186 (Wash. 2001); *State v. Mills*, 109 P.3d 415, 417 (Wash. 2005); *State v. Gregory*, 147 P.3d 1201, 1243 (Wash. 2006); *State v. Kirkpatrick*, 161 P.3d 990, 993 (Wash. 2007); *State v. Kirkman*, 155 P.3d 125, 134 (Wash. 2007); *State v. Kronich*, 161 P.3d 982, 985 (Wash. 2007); *State v. Kirwin*, 203 P.3d 1044, 1046 (Wash. 2009).

106. For example, a Westlaw search of *Lynn*'s definition of manifest yields forty-seven court of appeals opinions, as of February 7, 2023. See, e.g., *State v. Ackerman*, 453 P.3d 749, 754 (Wash. Ct. App. 2019); *State v. Naillieux*, 241 P.3d 1280, 1283 (Wash. Ct. App. 2010); *State v. Kirkman*, 107 P.3d 133, 137 (Wash. Ct. App. 2005); *State v. Kassahun*, 900 P.2d 1109 (Wash. Ct. App. 1995).

107. 217 P.3d 756 (Wash. 2009).

108. *Id.* at 760–61 (citing *State v. Scott*, 757 P.2d 492, 494 (1988)) (discussing an example of a run-of-the-mill jury instruction claim falsely dressed up as a due process or fair trial claim, as something that does not actually allege an error of constitutional magnitude).

109. *Id.* at 761 (citing *State v. Kirkman*, 159 P.3d 125 (Wash. 2007)).

110. *Id.* at 98 (citing *State v. McFarland*, 899 P.2d 1251 (Wash. 1995)).

111. *Id.* at 99–100 (emphasis added) (citing *City of Seattle v. Harclon*, 354 P.2d 928 (Wash. 1960)).



identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.<sup>112</sup>

With this subtle redefinition of “manifest,” it appears that the *O'Hara* court was hueing closer to the *Lynn* and *Olano* “obvious” test and the dictionary definition of “manifest,” while trying to avoid overruling the “actual prejudice” line of cases.<sup>113</sup> Ultimately, the *O'Hara* court held that the claimed error was not manifest because “it would not have been obvious to the trial court that the omission in the instruction constituted error.”<sup>114</sup>

After *O'Hara*, the Washington State Supreme Court has continued to show remarkable inconsistency in its RAP 2.5(a)(3) analysis. In several post-*O'Hara* cases, the Court has appeared to follow *O'Hara*'s definition of “manifest,”<sup>115</sup> while in others, the Court has ignored *O'Hara*, but has never overruled or disagreed with it.<sup>116</sup> Thus, any hopes that *O'Hara*'s authors might have had for clarifying the law have not come to pass.

#### F. State v. Robinson

The Washington State Supreme Court's next extended discussion of RAP 2.5(a)(3) came two years after *O'Hara* in *State v. Robinson*.<sup>117</sup> *Robinson* is a unique case in that it addressed an exception to RAP 2.5(a)(3), as opposed to the prior cases, which only interpreted RAP 2.5(a)(3).<sup>118</sup> The issue in *Robinson* was

112. *Id.*

113. *See, e.g.*, *State v. Scott*, 757 P.2d 492, 495 (Wash. 1988); *State v. McFarland*, 899 P.2d 1251, 1255–56 (Wash. 1995); *State v. WWJ Corp.*, 980 P.2d 1257, 1261 (Wash. 1999).

114. *O'Hara*, 217 P.3d at 766.

115. *See, e.g.*, *State v. Schaler*, 236 P.3d 858, 863, 865 (Wash. 2010) (stating the error was manifest because “[t]he trial court could have corrected the error given the clear state of the law at the time that it instructed the jury”); *State v. Gordon*, 260 P.3d 884, 886 n.2 (Wash. 2011) (quoting *O'Hara*'s definition of manifest); *State v. Davis*, 290 P.3d 43, 69 (Wash. 2012) (“If a trial court could not have foreseen the potential error or the record on appeal does not contain sufficient facts to review the claim, the alleged error is not manifest.”); *State v. Lamar*, 327 P.3d 46, 50 (Wash. 2014) (synthesizing both *O'Hara* and *Davis*); *State v. Kalebaugh*, 355 P.3d 253, 256 (Wash. 2015) (discussing how the instructional error was manifest because “the trial court should have known” the instruction misstated the law); *State v. Grott*, 458 P.3d 750, 757 (2020) (stating that trial testimony was not so clear-cut such “that the trial court should have sua sponte rejected the State's proposed first aggressor instruction”).

116. *See, e.g.*, *State v. Chacon*, 431 P.3d 477, 478–79 (Wash. 2018); *State v. A.M.*, 448 P.3d 35, 38–39 (Wash. 2019); *City of Seattle v. Long*, 493 P.3d 94, 105 (Wash. 2021).

117. 253 P.3d 84 (Wash. 2011).

118. Compare *id.* at 88, with *Scott*, 757 P.2d at 493–94, *McFarland*, 899 P.2d at 1255–5, *WWJ Corp.*, 980 P.2d at 1261, and *O'Hara*, 217 P.3d at 766.

whether error preservation rules applied to claims based on post-trial changes in the law.<sup>119</sup> Looking to federal plain error case law, the Washington State Supreme Court essentially adopted the same exception to the rule that the U.S. Supreme Court adopted in *Johnson*.<sup>120</sup>

*Robinson* is remarkable because it is one of the few Washington State cases to look to federal plain error case law for guidance in interpreting RAP 2.5(a)(3).<sup>121</sup> The absence of federal plain error case law in Washington State's RAP 2.5(a)(3) jurisprudence is surprising when considering the rule drafters expressly looked to federal case law when drafting the rule.<sup>122</sup> Moreover, Washington courts have regularly looked to its federal and out-of-state forefather courts when interpreting other court rules,<sup>123</sup> and even the Washington State Constitution.<sup>124</sup>

*Robinson* is also remarkable for its subtle divergence from *Johnson*. *Robinson* held that, when case law changes pending appeal, "there is no requirement that [appellants] demonstrate the existence of a 'manifest error affecting a constitutional right'" in order to receive the benefit of the new law.<sup>125</sup> This rule differs from rule the U.S. Supreme Court adopted in *Johnson*. Rather than creating an exception to the plain error rule, the *Johnson* court viewed the issue as a matter of timing. *Johnson* held that plain error is decided by the case law in effect at the time of appeal, not the time of trial.<sup>126</sup> Thus, *Robinson* and *Johnson* both allow appellants to receive the retroactive benefit of cases decided post-trial. Unlike Washington State appellants under *Robinson*, federal

119. See *Robinson*, 253 P.3d at 87.

120. See *id.* at 89–90 (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)); see also discussion *supra* Section I.C.

121. On few other occasions has the Washington State Supreme Court cited federal plain error case law. See, e.g., *State v. Wise*, 288 P.3d 1113, 1121 n.11 (Wash. 2012); *State v. Beskurt*, 293 P.3d 1159, 1163 (Wash. 2013) (plurality opinion) (Madsen, J., concurring); *State v. Burns*, 438 P.3d 1183, 1194 (2019) (Stephens, J., concurring).

122. See discussion *supra* Section I.C.

123. See, e.g., *Am. Mobile Homes of Wash., Inc. v. Seattle–First Nat'l Bank*, 796 P.2d 1276, 1279–80 (Wash. 1990) (looking to federal case law to interpret Washington court rule); *Beal v. City of Seattle*, 954 P.2d 237, 241 (Wash. 1998) (citing federal court rule treatise to interpret Washington court rule).

124. See e.g., *Westerman v. Cary*, 892 P.2d 1067, 1074 (Wash. 1994) (reviewing Oregon and Indiana case law to help interpret Washington's constitution); *State v. S.J.C.*, 352 P.3d 749, 758 (Wash. 2015) (same); *State v. Friedlander*, 250 P. 453, 455 (Wash. 1926) (same).

125. *Robinson*, 253 P.3d at 90.

126. See *Johnson v. United States*, 520 U.S. 461, 467–68 (1997).

appellants under *Johnson* still need to show that the change in case law made the error clear and affected substantial rights.<sup>127</sup>

In reading *Robinson*, it is not clear whether the Washington State Supreme Court consciously chose to diverge from *Johnson* or whether the Court even realized that it had done so. Research for this Article did not result in the location of any cases that note this divergence. Considering how infrequently this issue arises,<sup>128</sup> Washington's appellate courts will not likely address it any time soon.

#### G. State v. Shearer

In 2014, the Washington State Supreme Court expressly adopted another exception to RAP 2.5(a)(3). In *Shearer*, the Court faced an unpreserved public trial violation.<sup>129</sup> Relying on prior public trial cases, including a pre-RAP case from 1923, the Court held that such claims could always be raised for the first time on appeal without having to satisfy RAP 2.5(a)(3).<sup>130</sup>

The State argued that those cases should be abandoned to the extent that they either implicitly or explicitly waived error preservation for public trial claims.<sup>131</sup> The Court rejected the argument for several reasons,<sup>132</sup> but primarily due to one of the unique aspects of the public trial right. Before a judge can initiate a courtroom closure, the judge must expressly apply six factors, one of which requires the judge to give the public (including the parties) an opportunity to object.<sup>133</sup> The Court reasoned that applying error preservation standards to public trial claims would, to some extent, invert the right.<sup>134</sup> Given the uniqueness of the public trial factors and that each of the cases relied on in *Shearer* were public

127. *Id.* at 468.

128. In this author's experience working for one of Washington's appellate courts and in researching this Article, the applicability of post-trial changes in case law arises only rarely on direct appeal. The issue arises more often in habeas or personal restraint proceedings, which are outside the scope of this Article. For example, the changes brought by *Padilla v. Kentucky*, 559 U.S. 356, (2010), prompted several personal restraint petitions to be filed. *E.g.*, *In re Pers. Restraint of Tsai*, 351 P.3d 138 (Wash. 2015); *In re Pers. Restraint of Orantes*, 391 P.3d 539 (Wash. Ct. App. 2017); *In re Pers. Restraint of Garcia-Mendoza*, 479 P.3d 674 (Wash. 2021); *In re Pers. Restraint of Isidro-Soto*, No. 46673-2-II, 2017 WL 1907740 (Wash. Ct. App. May 9, 2017); *In re Pers. Restraint of Al-Bedairy*, No. 55003-2-II, 2022 WL 2679227 (Wash. Ct. App. July 12, 2022). Each of these cases sought post-conviction relief under *Padilla*.

129. *See* *State v. Shearer*, 334 P.3d 1078, 1081–82 (Wash. 2014).

130. *Id.* at 1082–83.

131. *Id.*

132. *See id.* at 1082 (noting that the Court considered the matter settled since it had rejected similar arguments in a trio of 2012 cases).

133. *Id.* at 571 (discussing *State v. Bone-Club*, 906 P.2d 325, 329 (Wash. 1995)).

134. *Id.* at 1083.

trial cases,<sup>135</sup> *Shearer* is not likely to apply to other constitutional rights—absent a well-reasoned argument for extension of the rule.<sup>136</sup>

#### H. *State v. Blazina*

In 2015, the Washington State Supreme Court decided the landmark case *State v. Blazina*.<sup>137</sup> *Blazina* is primarily remembered for its substantive holding regarding the imposition of discretionary legal financial obligations on indigent criminal defendants.<sup>138</sup> *Blazina* is also significant for its discussion of RAP 2.5(a).

In *Blazina*, the appellants argued on appeal that the trial court violated a sentencing statute when it imposed costs without an individualized inquiry into the appellants' current or future abilities to pay.<sup>139</sup> The court of appeals declined to reach the unpreserved issue.<sup>140</sup> Because the argument was based on a statutory, non-constitutional, right, the Court held that the appellate court was within its power to decline to review the issue for the first time on appeal.<sup>141</sup> Looking to the text and structure of RAP 2.5(a), the Court held that RAP 2.5(a)(1)–(3) “delineate[] three exceptions that allow an appeal as a matter of right”<sup>142</sup>; lack of trial court jurisdiction, insufficient evidence, and manifest constitutional error.<sup>143</sup> When an unpreserved claim does not fit within one of those three exceptions, Washington's appellate courts still have discretion under the first sentence of RAP 2.5(a) to reach the unpreserved issue.<sup>144</sup>

135. *Id.*

136. The public trial right is unique in that it requires the trial judge to actively solicit objections before closing the courtroom. For most other constitutional errors, the court passively waits for an objection and has no obligation to act sua sponte. *See, e.g., State v. Phillips*, 431 P.3d 1056, 1064–65 (Wash. 2018) (holding that trial court had no obligation to strike a potentially biased juror sua sponte); *State v. K.A.B.*, 475 P.3d 216, 230 (Wash. 2020) (holding that trial court not required to sua sponte raise self-defense for the defendant); *State v. Burns*, 438 P.3d 1183, 1191–93 (Wash. 2019) (holding that trial court had no obligation to raise Confrontation Clause issues sua sponte); *State v. St. Peter*, 408 P.3d 361, 361–62 (Wash. Ct. App. 2018) (holding that trial court had no duty to sua sponte instruct the jury to only deliberate when all twelve jurors are in the room together).

137. 344 P.3d 680 (Wash. 2015).

138. *Id.* at 685.

139. *Id.*

140. *Id.* at 682 (discussing *State v. Blazina*, 301 P.3d 492, 494 (Wash. Ct. App. 2013)).

141. *Id.* at 683.

142. *Id.* at 682.

143. *See* WASH. R. APP. P. 2.5(a).

144. *See Blazina*, 344 P.3d at 683 n.3 (quoting the first sentence of RAP 2.5(a) as authority for appellate court discretion) (“The appellate court may refuse to review any claim of error which was not raised in the trial court.”).

While the text and structure of RAP 2.5(a) clearly support the Court's holding, *Blazina* is noteworthy because it is the first case to expressly state the relationship of RAP 2.5(a)(1)–(3) to the first sentence of RAP 2.5(a).<sup>145</sup> Properly read, RAP 2.5(a) gives the appellate court discretion to review any unpreserved error, but if the claim fits within one of the three enumerated classes of error, then appellate consideration of the issue becomes mandatory.<sup>146</sup>

Since *Blazina*, the Washington State Supreme Court has cited to RAP 2.5(a) to decide other issues that the court of appeals declined to consider, and which did not meet the requirements of RAP 2.5(a)(1)–(3).<sup>147</sup>

Reading RAP 2.5(a) to state a rule of discretionary review as to all errors and RAP 2.5(a)(3) to state a rule of mandatory review of certain constitutional errors places Washington State closer to federal practice.<sup>148</sup> As previously discussed, federal plain error review is not limited to constitutional errors.<sup>149</sup> One important difference remains. At the federal level, the presence of plain error only allows, but does not require, the court to review the issue,<sup>150</sup> while under *Blazina* the presence of a manifest error mandates review.

#### I. State v. Burns

Another sea change occurred in 2019 with the Washington State Supreme Court's closely divided opinion in *State v. Burns*.<sup>151</sup> *Burns* concerned a Confrontation Clause claim raised for the first time on appeal.<sup>152</sup> Rather than engaging in a RAP 2.5(a)(3) analysis, the Court held that the claim was forever waived due to counsel's failure to object.<sup>153</sup> The Court based its decision on a

145. See WASH. R. APP. P. 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court.").

146. A few years after *Blazina*, a four-justice concurrence reiterated this interpretation of RAP 2.5(a)(1)–(3). See *State v. Burns*, 438 P.3d 1183, 1195 n.3 (Wash. 2019) (Stephens, J., concurring).

147. See, e.g., *State v. McFarland*, 399 P.3d 1106, 1111 n.4 (Wash. 2017); *State v. Grott*, 458 P.3d 750, 752 (Wash. 2020).

148. See discussion *supra* Section I.C. (discussing *Olano*).

149. See discussion *supra* Section II.F.

150. See *United States v. Olano*, 507 U.S. 725, 735 (1993).

151. 438 P.3d 1183 (Wash. 2019).

152. See *id.* at 1190.

153. See *id.* at 1192–93 ("Thus, we affirm the Court of Appeals and explicitly adopt a requirement that a defendant raise an objection at trial or waive the right of confrontation. . . . Where a defendant does not object at trial, 'nothing the trial court does or fails to do is a denial of the right, and if there is no denial of a right, there is no error by the trial court, manifest or otherwise, that an appellate court can review.'" (quoting *State v. Fraser*, 282 P.3d 152, 159 (Wash. 2012))).

desire to align Washington State's Confrontation Clause practice with the U.S. Supreme Court's practice originating from its *Melendez-Diaz v. Massachusetts*<sup>154</sup> decision.<sup>155</sup>

In holding that Confrontation Clause claims cannot be raised under RAP 2.5(a)(3), the Washington State Supreme Court acknowledged that it had previously allowed such claims to be raised under RAP 2.5(a)(3) and expressly overruled that prior case law.<sup>156</sup> Because the state supreme court treats such issues as if no error occurred at all,<sup>157</sup> it follows that Washington's appellate courts also lack discretion to reach such claims under the first sentence of RAP 2.5(a)<sup>158</sup> or RAP 12.1(b).<sup>159</sup>

In prohibiting Confrontation Clause claims from being raised under RAP 2.5(a)(3), the Court suggested that several other constitutional errors are also prohibited from consideration under RAP 2.5(a)(3).<sup>160</sup> As discussed below, these possibly prohibited claims include purported violations of the defendant's right to be present,<sup>161</sup> public trial right when defense counsel requests court closure, post-arrest delay,<sup>162</sup> Fourth Amendment search and seizure,<sup>163</sup> double jeopardy, and other Fifth Amendment<sup>164</sup> claims.<sup>165</sup>

The limits of *Burns* have not yet been expressly tested. But, assuming the dicta at the end of *Burns* holds true,<sup>166</sup> appellate defenders would be well-advised

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154. 557 U.S. 305 (2009).

155. See *Burns*, 438 P.3d at 1191.

156. *Id.* (discussing and overruling *State v. Kronich*, 161 P.3d 982 (2007)).

157. *Id.*

158. See WASH. R. APP. P. 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court.").

159. See WASH. R. APP. P. 12.1(b) ("If the appellate court concludes that an issue which is not set forth in the briefs should be considered to properly decide a case, the court may notify the parties and give them an opportunity to present written argument on the issue raised by the court.").

160. See *Burns*, 438 P.3d at 1192 ("Requiring an objection brings this claim to align with what we employ in other cases where we have held that some constitutional rights may be waived by a failure to object.").

161. In a recent post-*Burns* case, the Court of Appeals held that the right to be present cannot be raised for the first time on appeal under RAP 2.5(a)(3). See *State v. Anderson*, 497 P.3d 880, 883 (Wash. Ct. App. 2021).

162. U.S. CONST. amend. VI.

163. U.S. CONST. amend. IV.

164. U.S. CONST. amend. V.

165. See, e.g., *Burns*, at 1192–93 (citing *State v. Slert*, 383 P.3d 466 (2016)).

166. See *id.* at 1193.

to brush up on their personal restraint petitions skills,<sup>167</sup> where such unpreserved errors may still be raised under the framework of ineffective assistance of counsel.<sup>168</sup>

On the other hand, the *Burns* dicta may be just that. In *State v. A.M.*,<sup>169</sup> a case decided five months after *Burns*, the Washington State Supreme Court held that at least some Fifth Amendment claims can be raised as a matter of right under RAP 2.5(a)(3).<sup>170</sup> The decision in *A.M.* with respect to RAP 2.5(a)(3) was unanimous.<sup>171</sup> The Court in *A.M.* also did not discuss or even cite its opinion in *Burns*.<sup>172</sup> Thus, the full scope of *Burns* remains shrouded.

#### J. *State v. Weaver*

In 2021, the Washington State Supreme Court in *State v. Weaver* expressly adopted *Lynn*'s definition of "manifest," but curiously failed to apply it to RAP 2.5(a)(3).<sup>173</sup> *Weaver* involved an unpreserved challenge to a jury instruction, claiming an instruction had relieved the State of its burden of proof.<sup>174</sup> Rather than engaging in a RAP 2.5(a)(3) analysis, the Court cited to prior cases holding that instructions that relieve the State of its burden of proof always satisfy RAP 2.5(a)(3).<sup>175</sup> The Court then assessed whether the instruction was constitutionally adequate and set forth the applicable test as follows: "As a result, the instructions, when read as a whole, must make the relevant legal standard manifestly apparent to the average juror."<sup>176</sup> To define the term "manifestly," the Court then quoted the court of appeal's decision in *Lynn* and the definition of "manifest" that *Lynn* had applied to RAP 2.5(a)(3).<sup>177</sup>

167. For non-Washington lawyers, personal restraint petitions are Washington State's version of habeas proceeding. See WASH. R. APP. 16.3(b) ("The procedure established by rules 16.3 through 16.15 and rules 16.24 through 16.27 for a personal restraint petition supersedes the appellate procedure formerly available for a petition for writ of habeas corpus and for an application for postconviction relief").

168. See *In re Pers. Restraint of Orange*, 100 P.3d 291 (Wash. 2004) (providing an example of how unpreserved constitutional errors are reviewed in personal restraint proceedings).

169. 448 P.3d 35 (Wash. 2019).

170. *Id.* at 38–39.

171. See generally *id.*

172. See generally *id.*

173. *State v. Weaver*, 496 P.3d 1183, 1186 (Wash. 2021) (citing *State v. Ackerman*, 453 P.3d 749, 753–54 (2019)).

174. See *id.* at 1185.

175. See *id.* at 1186 (citing *State v. Stein*, 27 P.3d 184 (Wash. 2001)).

176. *Id.* (citations omitted).

177. See *id.*

Thus, it appears the current members of the Washington State Supreme Court support *Lynn*'s definition of "manifest," but the failure to apply the definition to RAP 2.5(a)(3) in the same case leaves confusion.

### III. CRITICISMS OF THE SUPREME COURT'S RAP 2.5(A)(3) JURISPRUDENCE

For over forty years, the Washington State Supreme Court has vacillated in its application of RAP 2.5(a)(3). This Article is not the first to comment on the Court's inconsistency. At least twice, judges at the court of appeals have commented on the Supreme Court's random applications of RAP 2.5(a)(3).

In *State v. Bertrand*,<sup>178</sup> Judge Christine Quinn-Brintnall at Division II of the Washington State Court of Appeals authored a concurring opinion castigating the state supreme court's RAP 2.5(a)(3) practice.<sup>179</sup> Judge Quinn-Brintnall first reviewed Washington's pre-RAP case law using the term "manifest error" and looked to the term's eighteenth century origins outside of Washington state.<sup>180</sup> As originally understood, the term "manifest error" meant "[a]n error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record."<sup>181</sup> According to Judge Quinn-Brintnall's research, Washington's pre-RAP case law mirrored this definition in practice.<sup>182</sup>

Judge Quinn-Brintnall also looked to the language of the rule, viewing it through the lens of statutory interpretation.<sup>183</sup> Under these rules, a Washington state court first determines whether the text of the rule is ambiguous. If dictionaries and grammatical structure provide only one reasonable interpretation, then the rule is plain and the court does not engage with other rules of statutory construction, legislative history, or case law.<sup>184</sup> Reviewing the overall structure of RAP 2.5(a) and the previously noted definition of "manifest error," Judge Quinn-Brintnall argued that for an error to be "manifest" under

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178. 267 P.3d 511 (Wash. Ct. App. 2011).

179. *Id.* at 518 (Quinn-Brintnall J., concurring).

180. *Id.* at 518–19.

181. *Id.* at 519.

182. *Id.*

183. *Id.* at 521–22. Washington State case law has long held that court rule interpretation follows the same rules as statutory interpretation. *See, e.g., State v. Greenwood*, 845 P.2d 971, 975 (Wash. 1993).

184. *Bertrand*, 267 P.3d at 522 (Quinn-Brintnall, J., concurring) (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 43 P.3d 4, 9 (2002)); *see also State v. Engel*, 210 P.3d 1007, 1010 (2009); *Ravenscroft v. Wash. Water Power Co.*, 969 P.2d 75, 80 (1998); *Christensen v. Ellsworth*, 173 P.3d 228, 232 (2007); *Cerrillo v. Esparza*, 142 P.3d 155, 159 (2006) ("For a statute to be ambiguous, two reasonable interpretations must arise from the language of the statute itself, not from considerations outside the statute.").



RAP 2.5(a)(3), it must be “plain on the record and indisputably contrary to controlling law.”<sup>185</sup> Although *Bertrand* pre-dates *Blazina*, Judge Quinn-Brintnall similarly read RAP 2.5(a)(3) as mandating appellate review when the rule’s requirements were met.<sup>186</sup>

A few years after *Bertrand*, Judge George B. Fearing at Division III of the Washington State Court of Appeals similarly noted Washington’s inconsistent RAP 2.5(a)(3) case law.<sup>187</sup> In *State v. Lazcano*,<sup>188</sup> Judge Fearing characterized the *Scott* line of cases’ emphasis on “prejudice” when deciding whether an error was “manifest” as a “perver[sion]” of that word’s plain meaning.<sup>189</sup> Similar to Judge Quinn-Brintnall, Judge Fearing agreed that RAP 2.5(a)(3) should focus on whether the alleged error was “obvious.”<sup>190</sup> Despite two obvious invitations to clarify the meaning of RAP 2.5(a)(3), the Washington State Supreme Court denied review in both *Bertrand* and *Lazcano*.<sup>191</sup>

#### IV. AUTHOR’S COMMENTARY

Applying rules of statutory construction, as Judge Quinn-Brintnall did in *Bertrand*,<sup>192</sup> the *Lynn/O’Hara* conception of “manifest error” is the only reasonable definition of the term.<sup>193</sup> For an error to be “manifest,” it must be so plain or obvious under existing law that the trial judge should have either recognized it without prompting or easily corrected the error upon objection without the need for significant argument or research.<sup>194</sup> This formulation fits the definitions of “manifest” and “manifest error” currently found in *Black’s Law*

185. *State v. Bertrand*, 267 P.3d 511, 523 (Wash. Ct. App. 2011) (Quinn-Brintnall, J., concurring).

186. *Id.* (“If an appellate court determines that the defendant has met both of these burdens, then the court must review the merits of the claim.”).

187. *See State v. Lazcano*, 354 P.3d 233, 243–44 (Wash. Ct. App. 2015).

188. 354 P.3d 233 (Wash. Ct. App. 2015).

189. *Id.* at 243.

190. *Id.*

191. *See State v. Bertrand*, 287 P.3d 10 (Wash. 2012); *State v. Lazcano*, 366 P.3d 1245 (Wash. 2016).

192. *See supra* notes 179–86 and accompanying text.

193. *See supra* notes 183–84 and accompanying text.

194. *See State v. Lynn*, 835 P.2d 251, 254 (Wash. Ct. App. 1992); *United States v. Olano*, 507 U.S. 725, 734 (1993).

*Dictionary*<sup>195</sup> as well as in 1976<sup>196</sup> when the rule was adopted. This formulation also fits the definition of “manifest” as it is primarily defined in non-legal dictionaries.<sup>197</sup>

Although Washington courts should not look beyond dictionaries when dictionaries provide a single unambiguous interpretation of a rule,<sup>198</sup> another tool of statutory construction, drafters’ intent, also supports this interpretation.<sup>199</sup> As already discussed,<sup>200</sup> the *Lynn/O’Hara* conception effectuates the drafters’ intent of mirroring federal plain error practice<sup>201</sup> and pre-rule Washington practice.<sup>202</sup>

The *Lynn/O’Hara* conception also advances the policy behind error preservation by striking a balance between preserving the integrity of the trial process and protecting against unfair prejudice. One of the purposes of error preservation is to “encourag[e] the efficient use of judicial resources.”<sup>203</sup> If an aggrieved party points out errors midtrial, the trial court might be able to correct the errors, thus eliminating the need for retrial.<sup>204</sup> Courts also consider it an abuse of the trial system to allow parties to “simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal.”<sup>205</sup> Because many errors are inadvertent, courts consider it unfair to

195. See *Manifest Error*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining manifest error as “[a]n error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record” or adjectively as “[c]lear,” “obvious,” and “unquestionable.”).

196. See *Manifest*, BLACK’S LAW DICTIONARY (Rev. 4th ed. 1968) (defining manifest as “[e]vident to the senses, especially to the sight, obvious to the understanding, evidence to the mind, not obscure or hidden, and is synonymous with open, clear, visible, unmistakable, indubitable, indisputable, evidence, and self-evident”).

197. See, e.g., *Manifest*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1993) (defining manifest in its adjective form as “capable of being readily and instantly perceived by the senses” and particularly “by the sight” as well as “not hidden or concealed” and “open to view” or “capable of being easily understood or recognized at once by the mind” and “not obscure”; *Manifest*, OXFORD ENGLISH DICTIONARY (1st ed. Vol. VI L–M Supp. 1970) (defining manifest adjectively as “[c]learly revealed to the eye, mind, or judgment; open to view or comprehension” and “obvious”).

198. See *supra* note 184 and accompanying text.

199. See *Denney v. City of Richland*, 462 P.3d 842, 845 (Wash. 2020).

200. See *supra* note 193 and accompanying text.

201. See *United States v. Olano*, 507 U.S. 725, 732–34 (1993).

202. See *State v. Bertrand*, 267 P.3d 511, 518–519 (Wash. Ct. App. 2011) (discussing pre-rule cases applying the term “manifest error”).

203. *State v. O’Hara*, 267 P.3d 511, 518–19 (Wash. 2009) (quoting *State v. Scott*, 757 P.2d 492 (Wash. 1988)).

204. See *id.*

205. *State v. Weber*, 149 P.3d 646, 656 (Wash. 2006) (quoting *State v. Sullivan*, 847 P.2d 953, 956 (Wash. Ct. App. 1993)); see also *Puckett v. United States*, 556 U.S. 129, 140

the party who prevailed at trial to be deprived of their justice based on errors they had no opportunity to address.<sup>206</sup> Finally, error preservation “facilitates appellate review by ensuring that a complete record of the issues will be available.”<sup>207</sup> Error preservation also respects the role of trial court judges as deciders in the first instance and the role of appellate courts as courts of review.<sup>208</sup>

Error preservation is also a matter of procedural fairness and respect for the adversarial system. Parties are entitled to notice and opportunity to be heard.<sup>209</sup> When errors are raised for the first time on appeal, the opposing party does not have an opportunity to develop the record to disprove the claimed error.<sup>210</sup> Instead of cases being decided on their merits, after full disclosure of the facts and development of the issues, law returns to the pre-rule days of being a game of sporting chance, where cases are decided on technicality, the result of which “is too often a general obfuscation of the issues.”<sup>211</sup> As the Washington State Supreme Court has recognized, “[T]rial gamesmanship by way of obfuscatory tactics is generally offensive to the dignity of the court as an institution and destructive of respect for legal processes. Where life, liberty and protection of communities from crime are the stakes, gamesmanship is out of place.”<sup>212</sup>

On the other hand, insistence on error preservation without exception risks the perpetuation of other injustice. Some examples include unfair trials and potentially unfair outcomes for litigants prejudiced by error, further retrials if other reversible errors are not raised, and possible damage to the public’s view of the courts.<sup>213</sup> The types of injustices potentially perpetuated by the doctrine of

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(2009) (“[T]he defendant cannot ‘game’ the system, ‘wait[ing] to see if the sentence later str[i]kes him as satisfactory.” (some alterations in original) (quoting *United States v. Vonn*, 535 U.S. 55, 73, (2002))); *State v. Kalebaugh*, 355 P.3d 253, 255 (Wash. 2015) (“[I]f applied too broadly RAP 2.5(a)(3) will devalue objections at trial and deprive judges of the opportunity to correct errors as they happen.”).

206. See *State v. Strine*, 293 P.3d 1177, 1180 (Wash. 2013) (citing BENNETT L. GERSHMAN, *TRIAL ERROR AND MISCONDUCT* § 6–2(b), at 472–73 (2d ed. 2007)).

207. *Id.*

208. See, e.g., *In re Shilshole Ave.*, 148 P. 781, 785 (Wash. 1915) (The Supreme Court “is not a court of first instance but purely a court of review”).

209. See U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

210. See WASH. R. APP. P. 9.1 (the record on review consists of documents already on record in the trial court).

211. *State v. Yates*, 765 P.2d 291, 296 (Wash. 1998) (quoting ABA STANDARDS RELATING TO DISCOVERY & PROC. BEFORE TRIAL, § 1.1 cmt. at 31 (Approved Draft, 1970)).

212. *Id.*

213. See *State v. Torres*, 397 P.3d 900, 906 (Wash. Ct. App. 2017) (“Constitutional errors are treated specially under RAP 2.5(a) because they often result in serious injustice to the accused and may adversely affect public perceptions of the fairness and integrity of judicial

error preservation are as myriad as the types of errors that parties normally raise on appeal.

RAP 2.5(a), as understood by *O'Hara* and *Blazina*, strikes a balance between these counterpoised policies.<sup>214</sup> If RAP 2.5(a)(3) is understood as a rule mandating review of unmistakably obvious constitutional errors and RAP 2.5(a) is understood as a rule permitting, but not mandating, review of other unpreserved errors, Washington State's appellate courts strike this balance. Thus, RAP 2.5(a) and RAP 2.5(a)(3) can promote timely objections and bilateral development of the record because counsel cannot guarantee appellate review, with the exception of plain constitutional error, and also mitigate the risk of substantive injustice by leaving appellate courts with discretion to review other unpreserved errors when appropriate.

Importantly and building on *Blazina*, RAP 2.5(a) should not be construed as granting appellate courts unbridled discretion to review unpreserved errors. Without standards to guide the courts' exercise of discretion, RAP 2.5(a)(1)–(3) could easily become superfluous.<sup>215</sup> Without standards guiding appellate discretion, Washington's appellate courts also risk exacerbating other ongoing problems, including uncertainty and loss of respect and confidence in the courts. First, when lawyers cannot reliably predict if or when a court will reach the merits of an unpreserved issue, they cannot accurately advise their clients on the risks, rewards, and costs of appeal. Second, when the public does not know why a court exercises its discretion in favor of one party and not another, the court risks an appearance of bias or favoritism. The potential harm caused by judges who merely *appear* biased, even if not unduly biased, is so important to prevent that Washington's judiciary has developed ethics rules for judges that protect against even the appearance of unfairness.<sup>216</sup>

To that end, the Washington State Supreme Court should guide appellate judges' discretion under RAP 2.5(a). Washington's appellate courts can exercise their discretion under RAP 2.5(a) without creating or contributing to other problems by expressly limiting review of unpreserved claims to cases wherein (1) the record is sufficiently developed and the matter is sufficiently briefed to permit meaningful appellate review, (2) the law is sufficiently developed so that

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proceedings. . . . Prohibiting all constitutional errors from being raised for the first time on appeal would result in unjust imprisonment.” (citations omitted)).

214. See *State v. O'Hara*, 217 P.3d 756, 760 (Wash. 2019); *State v. Blazina*, 344 P.3d 680, 682 (Wash. 2015).

215. For example, if there is unbridled discretion under RAP 2.5(a), judges predisposed to use that discretion without restraint may rely exclusively on RAP 2.5(a) to grant review on all matters, thus eliminating the need to ever rely on RAP 2.5(a)(1), (2), or (3) to review unpreserved errors.

216. See WASH. CODE OF JUD. CONDUCT Canon 2, R. 2.3, cmt. 1, 2 (2003).

the opposing party should have been on notice of the potential for error at trial,<sup>217</sup> and (3) the aggrieved party demonstrates prejudice.

History has regularly “demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.”<sup>218</sup> With the three above limitations in place, the court’s risk of appearing biased is reduced, parties have greater predictability and confidence in the law, and opposing parties have less reason to complain that they were not on notice of the issue. Furthermore, requiring the aggrieved party to demonstrate prejudice under RAP 2.5(a) (not 2.5(a)(3)), regardless of the constitutional or non-constitutional nature of the error, mitigates the risk that the non-appealing party did not have a reasonable opportunity to develop the record with respect to harmlessness.<sup>219</sup>

By adopting the interpretation of RAP 2.5(a)(3) advanced in *Lynn, O’Hara*, and *Blazina*, while also adopting appropriate limits on RAP 2.5(a), Washington’s appellate courts can finally bring consistency and clarity to a rule that has confounded lawyers and judges for almost fifty years. More importantly, this consistency and clarity can be achieved without unduly hindering litigants on either side of a case.

#### V. ADDITIONAL NOTES ON RAP 2.5(A)(3)

This Part briefly discusses five additional important aspects of RAP 2.5(a)(3) that do not fit within this Article’s preceding discussion. These aspects are drawn out here because, although important, they can be easily missed by lawyers who have not widely surveyed the case law applying the rule.

##### A. Application to Civil Cases

Most of the preceding discussion in this Article has concerned criminal cases. However, RAP 2.5(a)(3) “makes no distinction between civil and criminal cases. . . . [Thus,] civil parties may raise constitutional issues on appeal if they

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217. By requiring the law to be sufficiently developed to put the parties on notice, this author means that ruling in the appellant’s favor does not require overruling existing case law or creating new law, as opposed to applying existing law to a new set of facts, but also does not require the law to be so obviously settled as to be considered manifest.

218. *In re Application of Gault*, 387 U.S. 1, 18–19 (1967).

219. A similar rule of burden shifting applies to collateral attacks where unpreserved constitutional errors are regularly at issue. See *In re Pers. Restraint of St. Pierre*, 823 P.2d 492,495–96 (Wash. 1992). By shifting the burden of establishing prejudice, the appellate court, in addition to ensuring the opposing party is not unduly ambushed, also promotes respect for the trial court, reaffirms the primacy of the jury system, and upholds the principle of finality of judgments. See *id.* at 496.

satisfy the criteria listed in RAP 2.5(a)(3).<sup>220</sup> As noted by the drafters' commentary to RAP 2.5(a)(3),<sup>221</sup> even pre-rule cases permitted review of manifest errors in civil appeals; thus, it should be no surprise that this practice has been continued under RAP 2.5(a)(3).<sup>222</sup>

### B. *Constitutional Error Limitation*

The federal plain error rule, on which RAP 2.5(a)(3) was partially based, permits review of both constitutional and non-constitutional errors.<sup>223</sup> "RAP 2.5(a)(3) is significantly narrower" than federal plain error review because RAP 2.5(a)(3) is expressly limited to constitutional errors.<sup>224</sup> But, as explained in *Blazina*, non-constitutional errors are reviewable as a matter of appellate court discretion under RAP 2.5(a).<sup>225</sup>

### C. *Law of the Case and Invited Error*

The "law of the case" doctrine takes primacy over RAP 2.5(a)(3),<sup>226</sup> and so does the invited error doctrine.<sup>227</sup> Thus, if a party could have raised an issue in a prior appeal or contributed to the creation of the claimed error, RAP 2.5(a)(3) does not provide an avenue for appellate review.

### D. *Prejudice Standard*

In *Scott*, the Washington State Supreme Court held that the constitutional harmless error standard<sup>228</sup> applied to errors addressed under RAP 2.5(a)(3), meaning the State has the burden of disproving prejudice.<sup>229</sup> But, in *O'Hara* and

220. *State v. WWJ Corp.*, 980 P.2d 1257, 1260 (Wash. 1999) (expressly overruling post-rule cases to the contrary).

221. 86 Wash.2d 1133, 1152 (1976).

222. *Id.* (citing *Osborn v. Public Hosp. Dist. 1*, 492 P.2d 1025 (1972)).

223. *State v. Scott*, 757 P.2d 492, 494–95 n.4 (Wash. 1988).

224. *Id.*

225. *State v. Blazina*, 344 P.3d 680, 683 n. 3 (Wash. 2015).

226. *State v. Sauve*, 666 P.2d 894, 896 (Wash. 1983). The law of the case doctrine dictates that matters either settled or not raised during previous appellate review in a case may not be revisited or raised for the first time on subsequent appellate review in the same case.

227. *State v. Henderson*, 792 P.2d 514, 515–16 (Wash. 1990). The invited error doctrine precludes a party from seeking appellate relief for an error they encouraged the court to commit.

228. *See, e.g., State v. Franklin*, 180 Wash. 2d 371, 382 (2014) (discussing the constitutional harmless standard).

229. *Scott*, 757 P.2d at 495 (citing *Chapman v. California*, 386 U.S. 18 (1967)).

*State v. Lamar*,<sup>230</sup> the Court held that the defendant bears the burden of proving prejudice, rather than the State having the burden of disproving it.<sup>231</sup> At the federal level, when a criminal defendant seeks plain error review, the defendant always has the burden of demonstrating prejudice, regardless of the constitutional status of the claim.<sup>232</sup> While it appears that *Scott* may have been overruled on this point,<sup>233</sup> the Washington State Supreme Court has never clearly held as much.

Regardless of which prejudice standard applies to errors raised under RAP 2.5(a)(3), the Court has been clear that “[h]armless error analysis occurs after the court determines the error is a manifest constitutional error and is a separate inquiry.”<sup>234</sup> Thus, if constitutional harmless error analysis is eventually held to apply during RAP 2.5(a)(3) review, the appellant cannot rely on the presumption of prejudice to prove that the alleged error was “manifest.”

#### *E. Application of RAP 2.5(a)(3) to Structural Errors*

Earlier this Article noted that the U.S. Supreme Court has not answered whether structural errors raised under plain error require a showing of prejudice.<sup>235</sup> The Washington State Supreme Court has answered this question in the negative.

In *State v. Wise*,<sup>236</sup> the Washington State Supreme Court held that structural errors raised under RAP 2.5(a)(3) do not require a showing of prejudice.<sup>237</sup> The structural error involved in *Wise* was a public trial violation.<sup>238</sup> However, six years later, the Court decided *State v. Schierman*<sup>239</sup> and overruled *Wise* in part. In *Schierman*, the Court held that public trial violations are subject to a de minimis exception, despite their general status as structural error.<sup>240</sup> Post-*Schierman*, it appears that structural errors are still exempt from RAP 2.5(a)(3)’s

230. 327 P.3d 46 (Wash. 2014).

231. See *State v. O’Hara*, 217 P.3d 756, 761–62 (Wash. 2009); *Lamar*, 327 P.3d at 50.

232. See *United States v. Olano*, 507 U.S. 725, 734 (1993) (Under Rule 52(b), “[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.”); see also *United State v. Dominguez Benitez*, 542 U.S. 74, 82–83 (2004).

233. See *supra* note 232 and accompanying text.

234. *State v. Grott*, 458 P.3d 750, 756–57 (Wash. 2020) (quoting *State v. Kalebaugh*, 355 P.3d 253 (2015)).

235. See *supra* note 61 and accompanying text.

236. 288 P.3d 1113 (Wash. 2012).

237. *Id.* at 1121–22.

238. *Id.*

239. 438 P.3d 1063 (Wash. 2018).

240. See *id.* at 1082, 1152–53 (lead opinion of Justice Gordon McCloud and concurring opinion of Justice Yu).

showing of prejudice, but that public trial violations no longer qualify for this special treatment. Until the Supreme Court takes up this issue again, we cannot know whether *Schierman* was intended to overrule *Wise* or just carve out an exception to *Wise*.

To summarize, RAP 2.5(a)(3) applies to both civil and criminal cases, it only applies to constitutional errors, and it cannot be applied to bypass the law of the case doctrine or the invited error doctrine. Although it also appears that the party raising RAP 2.5(a)(3) always has the burden of proving prejudice, even when the constitutional harmless error standard would otherwise apply, the Court could do more to clarify this question. Finally, it is currently an open question as to whether structural errors raised under RAP 2.5(a)(3) are exempt from showing prejudice.

#### CONCLUSION

This Article traced the history of RAP 2.5(a)(3)'s manifest error standard back to its drafting, its federal roots, current federal practice, and the Washington State Supreme Court's decades of inconsistent application. Consequently, this Article agrees with critics of the Washington State Supreme Court's RAP 2.5(a)(3) jurisprudence and advocates adoption of the *Lynn/O'Hara* definition of manifest error as most in keeping with the text of the rule and the federal practice on which the rule was based. This Article also advocates for a more nuanced understanding of how RAP 2.5(a)(3) fits within RAP 2.5(a) as set forth in *Blazina*. Interpreting RAP 2.5(a)(1)–(3) as mandating review and RAP 2.5(a) as granting discretion to review other unpreserved errors is not only in keeping with the structure of the rule, it also is in keeping with the structure and intent of the RAPs generally.<sup>241</sup> Recently, Washington State Supreme Court Justice Sheryl Gordon McCloud expressed similar concerns in a concurring opinion, calling the Court's current interpretation an "absurdity."<sup>242</sup> Justice Gordon McCloud's concurrence offers a glimmer of hope for the future. But, until a lawyer puts this issue squarely in front of the Court, it is likely to remain unresolved and the confusion that Washington's inconsistent RAP 2.5(a)(3) case law has caused will continue to fester.

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241. See WASH. R. APP. P. 1.2(a) ("These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits."); WASH. R. APP. P. 12.2(b) (authorizing the court to raise issues regardless of error preservation).

242. *State v. J.W.M.*, 524 P.3d 596, 619–20 (Wash. 2023) (Gordon McCloud, J., concurring).