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2014 IL App (3d) 120528-U

Order filed October 21, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of the 14th Judicial Circuit,
	)	Rock Island County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal Nos. 3-12-0528 and 3-12-0537
v.	)	Circuit Nos. 10-CF-684 and 08-CF-1114
	)	
DEREK JOHN PORTER,	)	Honorable
	)	Frank R. Fuhr,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE SCHMIDT delivered the judgment of the court.  
Justice Wright concurred in the judgment.  
Justice McDade dissented.

**ORDER**

¶ 1           *Held:* The trial court did not abuse its discretion when it closed the courtroom during the testimony of a six-year-old witness.

¶ 2           Following a bench trial, defendant, Derek John Porter, was found guilty of aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2010)), and was sentenced to six years' imprisonment. Defendant appeals, arguing that: (1) his right to a public trial was violated when the trial court cleared the courtroom during the testimony of a six-year-old witness; and (2) the sentencing order requiring him to submit a deoxyribonucleic acid (DNA) sample and pay a \$250

analysis fee should be vacated because his DNA profile was already on file at the time of sentencing. We affirm in part and vacate in part.

¶ 3

### FACTS

¶ 4

On July 21, 2010, defendant was charged by information with aggravated battery of a child. 720 ILCS 5/12-4.3(a) (West 2010). Pursuant to defendant's motion, the trial court held a hearing on March 28, 2011, to determine the competency of J.P., defendant's five-year-old son and the victim's brother, to testify at trial. At the hearing, the trial court questioned J.P. to determine if he understood the difference between telling the truth and lying. In response to the trial court's questions, J.P. would nod his head or shrug his shoulders and was resistant to provide audible responses. However, J.P.'s gestures indicated that he understood the difference between the truth and a lie. The court and defense counsel continued to question J.P., who provided audible responses when asked about his school and what it meant to tell the truth and a lie. When asked what would happen if he did not remember something, J.P. said he would get into trouble. When asked who told him he would get into trouble, J.P. pointed toward his mother, Jessica K. Over defense counsel's objection, the court found J.P. competent to testify at trial, noting J.P. understood the difference between the truth and telling a lie.

¶ 5

The cause proceeded to trial on August 31, 2011. The State informed the court that its first witness was J.P., who had turned six years old, and requested the courtroom be cleared during his testimony because he was "very young and very nervous." The State, however, asked that Jessica and J.P.'s grandparents be allowed to stay in the courtroom during the testimony. Defendant objected to J.P.'s family being allowed to stay in the courtroom, noting that they would be testifying at trial and the defense was attempting to establish potential witness tampering with respect to J.P. The court questioned whether a nontestifying family member was available to assist J.P. during his testimony. The State indicated that J.P.'s grandfather was not a

witness, but insisted that Jessica be allowed to remain in the courtroom because J.P. would not be comfortable testifying without his mother. The court suggested that the State call Jessica to testify first, so that she could remain in the courtroom while J.P. testified, or have J.P.'s grandfather remain in the courtroom. The State expressed its concern about not calling J.P. first, noting the short attention span of a six-year-old, but agreed to call Jessica as its first witness.

¶ 6 Jessica testified that she and defendant had been dating and had two children together, J.P. and his younger brother, who was six months old on July 11, 2009. On that date, defendant was home alone with his two children when the baby sustained a head injury. Jessica arrived home around 8:15 p.m. that evening to find defendant on the phone with 911 and the baby unresponsive on the living room couch. J.P. was sitting on the other couch and appeared frightened. Defendant told Jessica that the baby had fallen off the couch and hit his head on a remote control device. Jessica attempted to wake up the baby, but his eyes would only open and then roll back. Jessica noticed that the baby's head was wet, he had no color in his lips, and his breathing was heavily labored. An ambulance arrived and transported the baby to the local hospital, where doctors ordered him to be life-flighted to Peoria. The doctors told Jessica that the injuries were nonaccidental and there needed to be an investigation.

¶ 7 Before J.P. testified, the trial court cleared the courtroom, except for Jessica. Defendant renewed his objection to Jessica being allowed to stay, noting that her presence was more destructive than helpful. The court overruled the objection.

¶ 8 J.P. testified that on the night of the incident, defendant was angry because the baby would not stop crying. J.P. witnessed defendant hit the baby's head hard against the arm of the couch. After defendant hit the baby's head on the armrest, the baby stopped crying. J.P. said the baby looked like he went to sleep, but when defendant tried to wake him up, the baby would not respond. When the baby did not wake up, defendant called the police, and an emergency crew

arrived. J.P. went to the hospital with his family and was questioned by the police.

¶ 9 Dr. Channing Petrak, the State's expert, testified that she evaluated the baby the day after the incident and determined that the baby sustained a serious head injury. Petrak stated that while the long-term damage could not be assessed until the baby was older, he was developmentally delayed and required long-term therapy as a result of the injury. She opined that the baby's head injury occurred from an incident more serious than a fall from the couch and was consistent with the baby's head being struck against the armrest of the couch. Petrak determined that the baby's injuries were a result of nonaccidental trauma or abusive head trauma.

¶ 10 Dr. John Plunkett, defendant's expert, testified that the baby had an existing head injury before the incident, which predisposed him to subdural bleeding from minimal impact trauma. As such, Plunkett opined that it was likely that the baby's injuries resulted from a fall from the couch. Plunkett also testified that it would be irresponsible to opine whether the injury was intentional or accidental without analyzing the couch in question.

¶ 11 The trial court ultimately found defendant guilty of aggravated battery of a child. 720 ILCS 5/12-4.3(a) (West 2010). The court denied defendant's motion for a new trial and sentenced him to six years' imprisonment. The court ordered defendant to submit a DNA sample and pay a \$250 DNA analysis fee, unless he previously provided DNA. Due to defendant's conviction for aggravated battery of a child, the court also revoked defendant's probation in a prior case, case No. 08-CF-1114. Defendant appeals.

¶ 12 ANALYSIS

¶ 13 Defendant first argues that his sixth amendment right to a public trial was violated when the trial court cleared the courtroom during J.P.'s testimony. Defendant argues that because the right to a public trial is a fundamental right, the trial court committed a structural error when it closed the courtroom, and therefore he should be granted a new trial.

¶ 14 Defendant admits that he has forfeited this issue by failing to raise it with the trial court, but asks this court to review it under the plain error doctrine. Under the plain error doctrine, a reviewing court may consider errors when either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant; or (2) the error is so serious that it denied defendant a fair trial and challenged the integrity of the judicial process. *People v. Thompson*, 238 Ill. 2d 598 (2010). However, before addressing whether defendant's claim satisfies the plain error doctrine, we must first determine whether a clear or obvious error occurred. *Id.*

¶ 15 The right to a public trial is granted to a defendant through the sixth and fourteenth amendments of the United States Constitution. U.S. Const., amends. VI, XIV. While a criminal trial is presumed open, the right is not absolute. *Waller v. Georgia*, 467 U.S. 39 (1984). To close a court proceeding to the public, the following factors must be satisfied: (1) the party requesting the closure must provide an overriding interest that is likely to be prejudiced; (2) the closure must be no broader than necessary to protect that interest; (3) the trial court must consider reasonable alternatives; and (4) the court must make findings adequate to support the closure. *Id.* The standard to be applied in determining whether there is a sufficient record to support the exclusion of spectators from a courtroom is whether there has been an abuse of discretion. *People v. Cooper*, 365 Ill. App. 3d 278 (2006).

¶ 16 Defendant argues that both the State and the trial court failed to identify any overriding interest to justify closure of the courtroom and did not consider any alternatives to closure. An overriding interest must be sufficiently supported by specific facts so that the reviewing court may determine the propriety of the closure. *People v. Holveck*, 141 Ill. 2d 84 (1990). However, a formal declaration of the reasons for closure is not required where the record shows sufficient reasons for the closure. See *id.*

¶ 17 In this case, the State requested that the courtroom be cleared during J.P.'s testimony because he was "very young and very nervous." Safeguarding the well-being of a minor witness is an overriding interest that warrants clearing a courtroom. See *People v. Leggans*, 253 Ill. App. 3d 724 (1993). However, the closure must not exceed the scope necessary to protect the overriding interest. *People v. Seyler*, 144 Ill. App. 3d 250 (1986). Accordingly, the court limited the closure to just J.P.'s testimony at trial. As such, the courtroom was open to the public during the remainder of the proceedings. See *People v. Morgan*, 152 Ill. App. 3d 97 (1987) (finding that restricting the closure to the minor witnesses' testimony was narrow enough to protect the State's interest while still allowing defendant a fair trial). Additionally, prior to the closure, the trial court discussed several options with the parties that would make J.P. feel comfortable, yet still addressed defense counsel's concern with potential witnesses being present. Ultimately, the court determined that Jessica would be allowed in the courtroom when J.P. testified.

¶ 18 Based on the record before us, we find that the trial court had sufficient reasons to justify the closure. See *Holveck*, 141 Ill. 2d 84. J.P. was only six years old at the time of trial and was intimidated about testifying in front of strangers. J.P. showed a similarly hesitancy to testifying at the competency hearing, and that did not involve testimony regarding his father's actions. Moreover, the closure at trial was limited to just J.P.'s testimony. Therefore, we cannot say the trial court abused its discretion when it closed the courtroom in order to protect J.P.'s well-being. Since we find no error, the plain error exception does not apply, and we must therefore honor defendant's forfeiture of this issue. See *Thompson*, 238 Ill. 2d 598.

¶ 19 Defendant next argues, and the State concedes, that the sentencing order requiring defendant to submit a DNA sample and pay an analysis fee should be vacated because his DNA profile was already on file at the time of sentencing. Any individual convicted of an offense that is classified as a felony under Illinois law after January 1, 1998, is required to submit to the

taking, analysis, and indexing of the offender's DNA, and the payment of an analysis fee. 730 ILCS 5/5-4-3(a), (j) (West 2012). However, a defendant is only required to submit and pay for a DNA assessment when he is not currently registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285 (2011).

¶ 20 Here, the records of the Illinois State Police DNA indexing laboratory establish that defendant's DNA profile has been on file since 2005. See *People v. Jimerson*, 404 Ill. App. 3d 621 (2010) (reviewing court may take judicial notice of public records). Accordingly, we vacate the portion of the sentencing order requiring defendant to submit DNA and pay an analysis fee. See *Marshall*, 242 Ill. 2d 285.

¶ 21 CONCLUSION

¶ 22 The judgment of the circuit court of Rock Island County is affirmed in part and vacated in part.

¶ 23 Affirmed in part and vacated in part.

¶ 24 JUSTICE McDADE, dissenting.

¶ 25 The majority has found that the trial court did not abuse its discretion in closing the courtroom during the portion of the defendant's trial in which his 6-year-old accuser would be testifying. The decision also vacated the part of the sentencing order requiring the defendant to submit his DNA and pay an analysis fee. I concur with the latter finding but, for the reasons that follow, I respectfully dissent from the conclusion that there was no abuse of discretion and thus no error.

¶ 26 If the defendant is guilty of the charged offense, he deserves the conviction and the sentence. If he is not, an injustice has been done. The purpose of our review is to determine whether the rights of the victim and "the people" (as represented by the State) and the rights of the defendant have been properly balanced to achieve a fair trial and a true and just result.

¶ 27 With regard to the specific issue raised in the instant case, the factors that must be satisfied when closing a court proceeding to the public bear restating here. They were set out 30 years ago by the United States Supreme Court in *Waller v. Georgia*, 467 U.S. 39 (1984), and they require: (1) the party requesting the closure must provide an overriding interest that is likely to be prejudiced; (2) the closure must be no broader than necessary to protect that interest; (3) the trial court must consider reasonable alternatives; and (4) the court must make findings adequate to support the closure. *Id.* The United States Supreme Court reiterated those same four factors in *Presley v. Georgia*, 558 U.S. 209, 213-14 (2010).

¶ 28 In *People v. Holveck*, 141 Ill. 2d 84 (1990), the Illinois Supreme Court clarified that the fourth factor may be satisfied without a formal declaration of the reasons for the closure, stating:

“Though the judge did not make a formal declaration of the reasons, the record clearly shows the reasons for closure. An examination of the record demonstrates that the trial judge balanced the interests and factors in the case.” *Holveck*, 141 Ill. 2d at 100.

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“By allowing the media to attend, the judge preserved the defendant’s sixth amendment right to a public trial. \*\*\* The judge explained that the age of the witnesses, their psychological immaturity, the nature of the case, and the wishes of the victim contributed to his decision.” *Id.* at 101-02.

The trial court’s rationale in *Holveck* was expressed on the record even though it was not a formal declaration.

¶ 29 The State’s and the majority’s reliance on *Holveck* regarding the first *Waller* factor is

misplaced. I find nothing in the record in the instant case that constitutes either specific findings or a demonstration of the requisite balancing by the court. The State provided no facts supporting the existence of an overriding interest that is likely to be prejudiced. While the well-being of a child may constitute an overriding interest (*People v. Leggans*, 253 Ill. App. 3d 724 (1993)), the State's naked assertion that J.P. was "very young and very nervous" does not prove that his well-being was threatened or at risk. Nor did the State produce any facts to establish that the child would be prejudiced if the court declined to close the courtroom. To find that the mere assertion of youth and nervousness satisfies the first *Waller/Presley* factor is to reduce it to a nullity. Such a finding also begs the questions: is "young" as opposed to "very young" enough? What about "nervous" as opposed to "very nervous?" Is "young" enough without "nervous?" What about "nervous" without "young?"

¶ 30 *Holveck* is further distinguishable because the young witnesses in the two trials reviewed in *Holveck* were victims. The court recognized that testifying to the sexual assault they had personally experienced could be psychologically damaging, and allowed the fathers of the victims and a psychologist to remain in the courtroom during their testimony. With regard to the psychologist, the *Holveck* court said: "After weighing the interests of the defendant and the witness, cautioning the counselor not to make any comments during the trial, and receiving the consent of the defendant's counsel, the judge allowed the counselor to sit in the courtroom." *Id.* At 101. The trial court in this case made no findings with regard to any possible negative effects on J.P.

¶ 31 While the State also has an interest in securing convictions of guilty parties, it presented no facts or advanced no argument to establish that that interest is subject to such prejudice if the courtroom is not closed that it overrides the defendant's right to a public trial.

¶ 32 Without a determination of what the "overriding interest" is, there is no way to assess the

second *Waller* factor—whether the closure was no broader than necessary to protect that interest. Indeed, in the absence of an identification of such an interest, there is no justification for a closure at all.

¶ 33 Finally, turning to the third *Waller* factor, the trial court’s consideration of other reasonable alternatives did not balance the interests of the defendant with those of the young witness. At the State’s suggestion, the court not only decided to close the courtroom to protect the child, it determined that the mother and grandparents should be allowed to remain in the room while J.P. testified.

¶ 34 The defendant did not object to the closure of the courtroom but raised two objections to allowing the mother to remain. First, he knew that the mother was scheduled to testify and feared that there was a danger that she could conform her testimony to her son's. The court, over the State’s objection, ruled that the mother should testify first and thereby eliminate that concern of the defendant. The defendant's second objection was that the mother had previously interfered with J.P.'s testimony and he feared that she would do so again.

¶ 35 The trial court did not make a specific finding as to why it closed the courtroom during J.P.'s testimony. Based on J.P.'s hesitancy to testify at the competence hearing, it would appear that the court closed the courtroom so that he would not be intimidated by a large number of unknown people in the room. The court limited the closure to the period in which J.P. testified. Despite this, it is unclear from the record whether the closure of the courtroom or only allowing his mother to be present was narrowly tailored to protect J.P.'s well-being during his testimony.

¶ 36 Furthermore, the court did not consider alternatives to closure, such as seating the public in the back rows of the courtroom so their presence would not intimidate J.P., while seating his family members closest to the stand. Additionally, the court could have limited the entrance of the public during certain points of J.P.'s testimony or limited the number of people allowed in the

courtroom. I would find it is impossible to glean from the record sufficient reasons and adequate balancing to justify the closure. See *People v. Cooper*, 365 Ill. App. 3d 278, 282 (2006) ("the presumption of openness will yield only to an 'overriding interest' that is specifically articulated"). I would further find that the trial court abused its discretion and, therefore, erred when it closed the courtroom.

¶ 37 Here on appeal, the defendant argues that his right to a public trial was violated. Even though he did not object to the closing of the courtroom at trial, the right to a public trial is a fundamental right afforded through the sixth amendment of the United States Constitution, and a violation constitutes a structural error. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 (2006) (denial of the right to a public trial is one of rights that would create a "structural defect" in the framework of the trial). See also *People v. Thompson*, 238 Ill. 2d 598, 609 (2010). The violation of such a right warrants an automatic reversal, regardless of whether the error was properly preserved at trial. *Id.*

¶ 38 Accordingly, I would find the proper remedy in this case is to reverse defendant's conviction for aggravated battery in case No. 10-CF-684 and remand for a new trial. Since defendant's probation was revoked in case No. 08-CF-1114 based solely on his conviction for aggravated battery, I would reverse the probation revocation, pending the outcome of a new trial.