2019 IL App (3d) 160508-U

Order filed January 8, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
	)	Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-16-0508
v.	)	Circuit No. 15-CF-97
	)	
CEDRIC D. CHILDS,	)	Honorable
	)	John P. Vespa,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice Schmidt concurred in the judgment.
Justice Lytton dissented.

ORDER

¶ 1 *Held*: The trial court did not deprive defendant of his sixth amendment right to a public trial when it closed the courtroom to family members during *voir dire*.

¶ 2 Following a jury trial, defendant was convicted of a single count of criminal sexual assault. Defendant appeals his conviction and assigns error to the trial court's closure of the courtroom during *voir dire*.

¶ 3 I. BACKGROUND

¶ 4 On February 26, 2016, the State charged Cedric D. Childs (defendant) by way of indictment with a single count of criminal sexual assault pursuant to section 11-1.20(a)(1) of the Criminal Code of 2012 (720 ILCS 5/11-1.20(a)(1) (West 2014)), and alleged that on or about May 4, 2014, defendant knowingly committed an act of sexual penetration on the victim by the use or threat of force. On April 25, 2016, defendant's case proceeded to a jury trial in Peoria County circuit court. Prior to *voir dire*, the trial judge made the following statement:

> "[Defendant], I'm about to have the jury pool brought in, and members of the family or whatever cannot be in here. Now they have to leave the courtroom. You cannot watch jury selection."

The defense did not object to the trial court's exclusion of "family or whatever"[1] during the jury selection process. Thereafter, 12 jurors and 2 alternates were selected to serve on the jury. The record reveals that all spectators were allowed into the courtroom for the remainder of the trial.

¶ 5 The jury found defendant guilty of criminal sexual assault. On May 20, 2016, defendant filed a motion for a new trial which did not include an issue pertaining to the trial court's exclusion of spectators during jury selection. Prior to defendant's sentencing on July 6, 2016, the trial court denied defendant's motion for a new trial. The trial court sentenced defendant to serve 10 years in the Illinois Department of Corrections. Defendant appeals.

¶ 6 II. ANALYSIS

¶ 7 On appeal, defendant contends the trial court violated his sixth amendment right to a public trial by announcing that members of either the alleged victim's or accused offender's family could not remain in the courtroom during the jury selection process. In opposition, the

[1]We note that neither the parties nor the transcript can confirm whether spectators other than the family were excluded from the courtroom.

State asserts that the issue was not properly preserved for appeal and argues defendant cannot establish plain error required to excuse forfeiture.

¶ 8 At the outset, defendant argues he did not forfeit this issue on appeal, and cites *Walton v. Briley*, 361 F. 3d 431, 433-34 (2004) for the principle that the right to a public trial may not be relinquished absent a knowing and voluntary waiver on behalf of defendant. However, the *Briley* case concerns waiver of a defendant's right to a public trial, not procedural forfeiture on appeal. See *id*. As this court has previously observed in *Radford*, had defendant waived his right to a public trial our analysis would be complete. *People v. Radford*, 2018 IL App (3d) 140404, ¶ 53.

¶ 9 In this case, defense counsel did not insist on an open courtroom during *voir dire* by contemporaneously objecting to the court's exclusion of family members. Further, defense counsel did not express any dissatisfaction with the court's decision to excuse family members from the courtroom during *voir dire*. Consistent with defense counsel's tacit approval of the *voir dire* procedures adopted by the trial court, defense counsel did not include the issue in the posttrial motion. Consequently, we conclude defendant forfeited the issue for purposes of this appeal. *People v. Thompson*, 238 Ill. 2d 598, 611-12 (2010).

¶ 10 Having found forfeiture, our analysis necessarily shifts to the doctrine of plain error, which serves as a bypass to the typical consequences of forfeiture. *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007). In order for the doctrine of plain error to excuse the obvious forfeiture in this case, defendant must show that: (1) a clear and obvious error occurred, and (2) the error was so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. *Id*.

¶ 11 We first consider whether the court erroneously directed family members to leave the courtroom before the process of *voir dire* began. It is well established that members of the public

may only be excluded from a public proceeding where: (1) an overriding interest is likely to be prejudiced; (2) the closure is no broader than necessary to protect that interest; (3) the court considers reasonable alternatives to closing the proceeding; and (4) the trial court makes findings on these three considerations that support the trial court's decision to closure or partial closure. *Waller v. Georgia*, 467 U.S. 39, 48 (1984). The trial court failed to announce findings on these three factors. It is unknown whether this was an oversight by the trial court or whether the court was unaware that *voir dire* is considered to be part of a criminal trial since the decision in *Presley v. Georgia*, 558 U.S. 209, 217 (2010).We acknowledge the dissent's point of view that the trial court may have had a standard practice of conducting *voir dire* in a partially closed courtroom.

¶ 12 Regardless, defendant asserts that his right to a public trial was violated because the trial court in this case did not "make the proper findings before closing the courtroom." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1909 (2017). The defense's contention is not supported by the Supreme Court's recent decision in *Weaver*. In the *Weaver* case, as in the case at bar, closure of the courtroom was an unpreserved issue.[2] Before reaching the merits of defense counsel's failure to object to courtroom closure, the *Weaver* court observed that "[n]ot every public-trial violation will lead to a fundamentally unfair trial." *Id*. at 1904. The *Weaver* court ultimately held that though there was an assumption that the closure was a sixth amendment violation, the violation "did not pervade the whole trial or lead to basic unfairness." *Id*. When coming to this conclusion, the court distinguished between preserved versus unpreserved errors. In addition, the court noted that while the trial court excluded petitioner's mother and minister from *voir dire* in *Weaver*, "his trial was not conducted in secret or in a remote place; closure was limited to the jury *voir dire*;

[2]The propriety of the courtroom closure in *Weaver* arose in the context of an allegation of defendant's sixth amendment right to effective assistance of counsel in a collateral proceeding.

the courtroom remained open during the evidentiary phase of the trial; the closure decision apparently was made by court officers, not the judge; venire members who did not become jurors observed the proceedings; and the record of the proceedings indicates no basis for concern." *Id.* Like the circumstances in *Weaver*, following *voir dire*, defendant's trial was open to the public during all other phases.

¶ 13 Recently, this court considered an analogous set of circumstances in *Radford*, 2018 IL App (3d) 140404. In that case, due to limited space in the courtroom, the trial court excluded all spectators from the courtroom during *voir dire* except for two people who supported the defendant and two people who did not. *Id.*, ¶¶ 4, 5. Similar to the case at bar, the defendant in *Radford* did not make a contemporaneous objection to the partial closure of the courtroom for purposes of *voir dire* in the trial court but later alleged a violation of his right to a public trial on appeal. *Id*., ¶¶ 28, 54.

¶ 14 After finding that the defendant forfeited review of this issue, our court reviewed the defendant's claim in the context of plain error. *Id*., ¶¶ 49-60. In our analysis, we explained that while public trial violations were structural in nature, the court's error, if any, would be subject to a "triviality standard." *Id*., ¶¶ 55, 56. For practical reasons, our court looked to whether the actions of the trial court in *Radford* deprived the defendant of the protections conferred by the sixth amendment, which exists to: (1) ensure a fair trial, (2) remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, (3) to encourage witnesses to come forward, and (4) to discourage perjury. *Id*., ¶ 56; *Peterson v. Williams*, 85 F. 3d 39, 42 (1996).

¶ 15 Based on guidance from the United States Supreme Court in *Weaver*, we noted in *Radford*, the partial closure of the courtroom during the process of jury selection in that case

"implicated none of the values underlying defendant's right to a public trial," and reasoned that the trial court's closure was not clear error. *Radford*, 2018 IL App (3d) 140404, ¶¶ 59, 60. Furthermore, with regard to the difference in analyzing a preserved versus an unpreserved claim of a public trial violation, we noted that without contemporaneous objection from defendant, the trial court is not likely to formally convey the requisite findings before partially closing the courtroom to begin the task of selecting a jury. *Id*. ¶ 58; see *Weaver*, 137 S. Ct. at 1904.

¶ 16 We would be remiss if we did not state the obvious. Jury selection for a trial on a sexual offense often times requires require the attorneys or the court to question prospective jurors about personal matters pertaining to whether a prospective juror has ever been the victim of such a crime or has ever been accused of such a crime. These discussions, in the full view of the public, can be unavoidably invasive and uncomfortable for potential jurors. Trials involving such issues require a trial court to balance many factors before beginning *voir dire*.

¶ 17 Consistent with our approach in *Radford*, assuming for the sake of argument that the trial court erred by asking family members to leave the courtroom, nothing in this record suggests that potential and excused jurors, other members of the public, or the press, were excluded from *voir dire*. After *voir dire*, the courtroom was open to the public for the remainder of defendant's trial, including the evidentiary phase, the closing arguments, and the process of returning the verdict in an open courtroom.

¶ 18 Furthermore, much like the factual scenarios set forth in *Radford* and *Weaver*, "[d]efendant raises 'no suggestion that any juror lied during *voir dire*; no suggestion of misbehavior by the prosecutor, judge, or any other party; and no suggestion that any of the participants failed to approach their duties with the neutrality and serious purpose that our system demands.' " *Radford*, 2018 IL App (3d) 140404, ¶ 59 (quoting *Weaver*, 137 S. Ct. at 1913).

¶ 19 We acknowledge that the trial court should have clearly stated its reasoning for temporarily closing the courtroom to family members during *voir dire*. However, after forfeiting the issue in the trial court, defendant has not pointed out any facts suggesting this particular trial was not conducted in a fair fashion or that the trial court's short-lived closure of the courtroom during *voir dire* subverted the integrity of the judicial process in this case. The record in this case more than demonstrates that the trial itself was fundamentally fair from defendant's standpoint. See *Weaver*, 137 S. Ct. at 1910. Based on our precedent established in *Radford*, we conclude this defendant cannot overcome forfeiture of this issue on appeal.

¶ 20 Our holding is limited to these facts. Our decision should not be construed as an opinion on whether this error would be viewed as structural and require a new trial *if* the issue was properly preserved by defense counsel in the trial court.

¶ 21 III. CONCLUSION

¶ 22 The judgment of the circuit court of Peoria County is affirmed.

¶ 23 Affirmed.

¶ 24 JUSTICE LYTTON, dissenting:

¶ 25 I dissent from the majority's decision in this case. I find that the trial court's exclusion of defendant's family from the courtroom during *voir dire* amounted to plain and substantial error, requiring reversal of defendant's conviction.

¶ 26 Here, without even mentioning *Waller* or its factors, the trial court intentionally excluded all members of defendant's family from the courtroom for the entirety of *voir dire*. When a trial court closes a courtroom without analyzing and making specific findings regarding the *Waller* factors, "any intentional closure is unjustified and will, in all but the rarest of cases, require

reversal." *United States v. Gupta*, 699 F. 3d 682, 687 (2d Cir. 2012). Where a closure is unjustified, the presumptive result is reversal of the defendant's conviction. *Id*. at 688.

¶ 27 Reversal is inappropriate only where "errors are 'not significant enough to rise to the level of a constitutional violation.' " *Id*. (quoting *Carson v. Fischer*, 421 F. 3d 83, 94 (2d Cir. 2005)). This is known as the "triviality standard" and applies only in rare circumstances. *Id*. Excluding a defendant's family members from the courtroom during jury selection is not "a 'trivial' closure." *People v. Evans*, 2016 IL App (1st) 142190, ¶ 17; see also *Gupta*, 699 F. 3d at 689 ("Whatever the outer boundaries of our 'triviality standard' may be ***, a trial court's intentional, unjustified closure of a courtroom during the entirety of *voir dire* cannot be deemed 'trivial.'"); *Cf. United States v. Rivera*, 682 F.3d 1223, 1232 (9th Cir. 2012) (exclusion of defendant's family members from sentencing hearing was "not trivial"). "Given the exceptional importance of the right to a public trial, excluding the public for all of *voir dire* without justification grounded in the record, [citations], is not trivial." *Gupta*, 699 F.3d at 689.

¶ 28 The majority relies on *Radford* to support its decision in this case. However, *Radford* is distinguishable. In *Radford*, not all of the defendant's family members were excluded from the courtroom during jury selection. See 2018 IL App (3d) 140404, ¶ 50. "Two people who supported defendant" were allowed to "remain in the courtroom and sit behind the potential jurors." *Id*. Because some of defendant's supporters were allowed to be present in the courtroom during *voir dire*, we found the closure to be "trivial." *Id*. ¶ 60.

¶ 29 The majority also relies on *Weaver*. In that case, the Supreme Court held that the defendant had to prove that he was prejudiced by the trial court's violation of his public trial rights because he raised the public-trial violation in the context of a claim of ineffective assistance of counsel, rather than on direct appeal. *Id*. at 1912. The court explained: "When an

ineffective assistance of counsel claim is raised in postconviction proceedings, the costs and uncertainties of a new trial are greater because more time will have elapsed in most cases." *Id*. Additionally, "[t]he finality interest is more at risk." *Id*. The court held: "These differences justify a different standard for evaluating a structural error depending on whether it is raised on direct review or raised instead in a claim alleging ineffective assistance of counsel." *Id*.

¶ 30 Here, where defendant raised the public-trial violation on direct review and not as an ineffective-assistance of counsel claim, *Weaver* does not apply. See *id*. at 1910. Unlike the defendant in *Weaver*, defendant did not have to show prejudice to succeed on his claim. See *Evans*, 2016 IL App (1st) 142190, ¶ 8; *People v. Willis*, 274 Ill. App. 3d at 554; *People v. Taylor*, 244 Ill. App. 3d at 468; *People v. Ramey*, 237 Ill. App. 3d at 1006. Thus, the majority's reliance on *Weaver* is misplaced.

¶ 31 The majority also justifies its decision by stating that "defendant has not pointed out any facts suggesting this particular trial was not conducted in a fair fashion or that the trial court's *** closure of the courtroom during *voir dire* subverted the integrity of the judicial process in this case." *Supra* ¶ 19. I disagree. Closure of a courtroom without justification raises the appearance of impropriety. See *Gupta*, 699 F. 3d at 689. As explained by the United States Court of Appeals for the Second Circuit:

> "Most *voir dire* proceedings are uncontroversial. But the public trial right is not implicated solely in discordant situations. Rather, the 'value of openness' that a public trial guarantees 'lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known.' [Citation.] Thus, the regularity

> of the proceedings is an important impression with which the courts should leave observers. While a public presence will more likely bring to light any errors that do occur, it is the openness of the proceeding itself, regardless of what actually transpires, that imparts 'the appearance of fairness so essential to public confidence in the system' as a whole. [Citation.]" (Emphasis in original.) *Gupta*, 699 F.3d at 689.

Prohibiting a defendant's family from being present for *voir dire* is "a complete denial" of the defendant's right to a public trial. *Evans*, 2016 IL App (1st) 142190, ¶ 17.

¶ 32 In this case, all members of defendant's family were excluded from the courtroom during *voir dire.* This was a substantial closure that violated defendant's Sixth Amendment right to a public trial. See *Evans*, 2016 IL App (1st) 142190, ¶ 17; *Gupta*, 699 F. 3d at 690. Violation of the right to a public trial is a structural error that requires automatic reversal. *Evans*, 2016 IL App (1st) 142190, ¶ 8. Thus, I would reverse defendant's conviction and remand for a new trial.