COURT OF APPEALS
DECISION
DATED AND FILED

April 13, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2496-CR **Cir. Ct. No. 2007CF5359**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD MARION CARPENTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Ronald Carpenter appeals from a judgment of conviction of kidnapping, false imprisonment, four counts of second-degree sexual assault by use of force, and four counts of first-degree sexual assault as a party to the crime. He argues that his constitutional right to a public trial was violated

when the trial court posted a sign on the courtroom door that no one under eighteen could enter the courtroom because a sexual assault trial was being conducted. We conclude that no constitutional deprivation occurred when the trial was closed to persons under eighteen. We affirm the judgment.

¶2 The victim testified first in the jury trial. After a break in the victim's testimony for lunch, Carpenter objected to a sign posted on the door prohibiting persons under eighteen from entering the courtroom. The trial court made a record that the sign had been on the door while the victim was testifying and that victim had given a very sexually explicit narrative of what happened to her.[1] The court indicated that it was not going to permit children under eighteen to be exposed to such sexually explicit material.

¶3 Under the Sixth Amendment to the United States Constitution a defendant has the right to a public trial. ***State v. Ndina***, 2009 WI 21, ¶40, 315 Wis. 2d 653, 761 N.W.2d 612. Whether a defendant has been denied the right to a public trial requires the application of constitutional principles to the trial court's findings of evidentiary or historical fact. ***Id.***, ¶45. We uphold the trial court's findings unless they are clearly erroneous and independently apply the constitutional principles to those findings but benefiting from the trial court's analysis. ***Id.***

[1] The trial court also made a record that a school group was in the courtroom during the morning session and that "I did not tell that school group to leave. They were told what was going on and their teacher decided that they were going to leave." The prosecutor confirmed that she became aware of the group of what appeared to be eighth graders or freshmen and she approached the teachers and told them that what they had heard so far was "just the tip of the iceberg," and that in the prosecutor's opinion the case was not appropriate for children of that age. The prosecutor expressed agreement with the court's placement of the sign on the door. While it is not stated so in the record, it appears the sign was put on the door following a midmorning break in the victim's testimony and the exodus of the school group.

¶4 Although a presumption of openness exists, the right to a public trial is not absolute. ***Id.***, ¶44. A presumption may be overcome by an "overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." ***Waller v. Georgia***, 467 U.S. 39, 45 (1984) (quoting ***Press-Enterprise Co. v. Superior Court of California***, 464 U.S. 501, 510 (1984)).

¶5 A two-step analysis is applied to determine whether a defendant's Sixth Amendment right to a public trial has been violated. ***Ndina***, 315 Wis. 2d 653, ¶46. The court first considers whether the closure at issue implicates the four values served by the constitutional protection: to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. ***Id.***, ¶¶46, 49. If the closure implicates the Sixth Amendment right to a public trial, the court then determines whether the closure was justified under the circumstances of the case. ***Id.***, ¶46.

¶6 Here we will assume arguendo that the closure of the trial to persons under eighteen implicates the four values to be served by the constitutional right to a public trial.[2] We turn to consider whether the partial closure to persons under eighteen was properly justified. *See* ***id.***, ¶55 (unless properly justified a closure that implicates the Sixth Amendment is a constitutional violation).

[2] We recognize that the interests to be served by the right to a public trial were not specifically discussed when Carpenter's objection was heard. The issue arose in the middle of the first evidentiary day of trial and Carpenter's trial counsel indicated she did not have research available to assist the trial court in the analysis.

¶7 Closure of a criminal trial is justified when: (1) the party seeking to close the proceeding advances an overriding interest which is likely to be prejudiced by a public trial, (2) the closure is no broader than necessary to protect that interest, (3) the trial court considers reasonable alternatives to closure, and (4) the trial court makes findings sufficient to support the closure. ***Waller***, 467 U.S. at 48; ***Ndina***, 315 Wis. 2d 653, ¶56. We separately consider the four parts of the ***Waller*** test.

¶8 It was the trial court itself that advanced an interest in protecting children from exposure to sexually explicit narratives from the trial testimony. The crimes occurred over an entire day, involved more than one perpetrator, and involved various sex acts. Although the trial court cited WIS. STAT. § 948.11 (2009-10),[3] which makes it a crime to expose children under eighteen to harmful descriptions or narrations, which includes explicit and detailed descriptions or narrative accounts of sexually explicit conduct, we need not consider whether the trial court's concern that a crime would be committed if children were allowed in the courtroom was valid. Unquestionably the need to protect children from hearing sexually explicit and sexually violent testimony is an overriding public interest. That interest would be not only prejudiced but obliterated if children were allowed to be present during the trial.

¶9 The closure of the trial was limited to persons under eighteen. That is a narrow and clearly defined group. The trial court indicated that the public at large was not being excluded and made a record that adults were in fact present in

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

the courtroom during the victim's testimony. Carpenter asserts that the prohibition of persons under eighteen could also exclude adults that might accompany children to court because the adult would not want to separate from the child. That is an individual decision for each adult to make. It was not necessary that the partial closure makes exception for the perhaps rare and incidental exclusion of a person accompanying a child. Carpenter also contends that the closure should have been limited only to the victim's testimony since the remaining trial testimony did not involve sexually explicit facts. The nature of the remaining testimony could not be precisely anticipated. We conclude that the partial closure was narrowly defined and was no broader than necessary to protect children from exposure to sexually explicit material.

¶10 The trial court did not make explicit reference to the consideration of reasonable alternatives to the partial closure of the trial. However, the trial court had already expressed concern in the beginning of the trial about disruptions to the jury when it indicated that the victim advocate would not be allowed to escort the victim to the witness stand. Implicitly the trial court was concerned about the trial moving along with minimal disruptions. Further, it is obvious it would be burdensome on the trial court to keep watch on the door and interrupt the proceedings to examine whether every youthful appearing spectator entering the courtroom was an appropriate person to hear the sexually explicit evidence. Also the nature of the testimony could not be anticipated so it would have been equally burdensome for the trial court to have to consider the ages of courtroom spectators as the evidence approached sexually explicit material. Carpenter did not suggest

any alternatives. In short, there were no other reasonable alternatives to partial closure of the trial to persons under eighteen.[4]

¶11 Carpenter argues that the trial court made no findings to support its closure. All that is necessary is that the record be sufficient to allow a reviewing court to determine whether the order for closure was properly entered. ***Ndina***, 315 Wis. 2d 653, ¶84. That the first three ***Waller*** requirements are satisfied here is apparent from the trial court's and parties' discussion of the partial closure. So despite the absence of explicit findings, the record is sufficient to support the closure. *See* ***Ndina***, 315 Wis. 2d 653, ¶86.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[4] The sign posted on the courtroom door is not reproduced in the record and its exact wording or appearance is not known. A sign which includes in bold letters "Do Not Enter" is clear but possibly intimidating to others to whom the prohibition does not apply. We caution the trial court in the future to use wording that children "should not" enter or directing youths or their responsible adults to check with the bailiff or use discretion because a sexual assault trial is being conducted.