STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1755

State of Minnesota,
Respondent,

vs.

Daniel Thomas Infante,
Appellant.

Filed September 17, 2012
Affirmed
Ross, Judge

Itasca County District Court
File No. 31-CR-09-1848

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John J. Muhar, Itasca County Attorney, Todd S. Webb, Assistant County Attorney, Grand Rapids, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

ROSS, Judge

The district court presiding over Daniel Infante's second-degree assault trial ordered Infante's daughter and granddaughter out of the courtroom during the state's

closing argument. The jury found Infante guilty. He appealed, arguing to this court that the courtroom eviction violated his constitutional right to a public trial. We remanded the case to the district court to conduct an evidentiary hearing and make findings adequate to support the partial courtroom closure under *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210 (1984). The district court conducted the hearing and issued findings, holding that it had an adequate basis to remove the two excluded persons. Infante appeals, contending again that the exclusion violated his right to a public trial. Because the record on remand establishes that the partial courtroom closure was justified under *Waller* and that retrial is unnecessary, we affirm.

FACTS

D.I. was home in bed in the morning of May 31, 2009, when she first heard her husband Daniel Infante's truck pull into the driveway and then heard two gunshots. Infante entered the house and twice tapped D.I.'s temple with the barrel of a gun. He called her a "slut" and a "bitch," accused her of sleeping with others, and then left the house. He telephoned D.I. four times over the next two hours, leaving her threatening voicemail messages. He returned to the house later in the morning carrying a .357 Magnum. He showed D.I. an empty prescription bottle and told her that he had taken all the pills. He sat on the couch and, in front of D.I., "methodically load[ed]" the revolver, looking up at her each time he inserted a bullet in the cylinder. Infante told D.I. that no one would get through the door, and he sat there for three hours. Then he left the house again, and D.I. called police.

The state charged Infante with one count of second-degree assault with a dangerous weapon. The district court conducted a three-day jury trial. After D.I.'s testimony was interrupted, the district court dismissed the jury and told Infante's daughter, Cherise Infante, that it had observed her twice shaking her head and rolling her eyes when D.I. answered questions. It warned that if she did it a third time, she would be removed from the courtroom and face criminal contempt charges.

Another incident occurred during the state's closing argument; the district court later recorded it this way:

> [There] is one other thing that I think should be put on the record. During the—just to make it clear for the record what happened during final arguments, [the prosecutor] was in his final argument, and I think it is Mr. Infante's sister who came in with a young child, and [the prosecutor] was going to object to that—did object to it, and what happened is—
> . . . .
> As soon as the bailiff saw the minor child in the courtroom, he did walk and escort them out of the courtroom. I don't think there was anything more to it than that, unless one of the attorneys want[s] to say something on that.

Neither attorney added to the district court's description. The jury found Infante guilty of second-degree assault with a dangerous weapon and the district court entered judgment on the conviction and sentenced Infante to prison.

Infante appealed his conviction to this court. *State v. Infante*, 796 N.W.2d 349 (Minn. App. 2011). He argued that the district court violated his constitutional right to a public trial when it allowed the bailiff to order his "sister" and a "young child" out of the courtroom during the state's closing argument. *Id.* at 353. This court remanded the case

to the district court to apply the four-part test of *Waller v. Georgia* to its decision to exclude the woman and the child. *Id.* at 355.

The district court conducted an evidentiary hearing and found that Cherise Infante is Infante's daughter, not his sister, and that the young child is Cherise's daughter. The trial bailiff testified that when he saw the child with Cherise, he told Cherise that the child could not be in the courtroom, and he led them out the door. Once they were outside the courtroom, he told Cherise that the child was too young to be inside. The bailiff estimated that the child was about ten years old. He explained that he had been taught "that juveniles weren't allowed in the courtroom unless it was a juvenile case or traffic case where they were on trial" and that the policy is to direct anyone younger than eighteen to leave. The bailiff also believed that the subject matter of the case was not the type to which a child should be exposed. He did not tell Cherise that she was also excluded from the courtroom.

The district court analyzed the exclusion under the *Waller* factors and concluded that exclusion was warranted. Infante appeals.

D E C I S I O N

Infante argues that the removal of his daughter and granddaughter from the courtroom deprived him of his constitutional right to a public trial. The United States and Minnesota Constitutions provide that "In all criminal prosecutions the accused shall enjoy the right to a . . . public trial." U.S. Const. amend. VI; Minn. Const. art. I, § 6. "[T]he requirement of a public trial is for the benefit of the accused." *State v. Mahkuk*, 736 N.W.2d 675, 684 (Minn. 2007) (quoting *Waller*, 467 U.S. at 46, 104 S. Ct. at 2215).

A public trial allows "the public [to] see he is fairly dealt with and not unjustly condemned, and . . . the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Id.*

Infante contends that the district court's removal violated his right to a public trial because its analysis on remand falls short of justifying the removal under *Waller*. We review de novo whether a defendant's right to a public trial has been violated. *State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009). A violation of a criminal defendant's constitutional right to a public trial is considered a structural error that is not subject to a harmless error analysis. *Id.* But the right to a public trial is not absolute and may "give way in certain cases to other rights or interests." *Id.* (quotation omitted). The presumption of an open proceeding can be overcome. For this to occur, the party seeking to close the hearing "must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make adequate findings to support the closure." *Waller*, 467 U.S. at 46, 48, 104 S. Ct. at 2215, 2216.

We are satisfied that the district court has met its obligation under *Waller*. The remand proceeding clarifies our understanding of the closure. When we previously decided that the district court had violated Infante's constitutional right by its partial courtroom closure, we observed that remand might allow findings that would resolve the constitutional issues without a retrial. The evidentiary hearing on remand clarified that, in fact, the bailiff actually removed only the child from the courtroom and that the child was four years old and is Infante's granddaughter. It also clarified that the bailiff was

following a "policy" of excluding all juveniles from all trials, but that the bailiff also perceived that the specific subject matter of this trial was too mature for the child he was removing.

We do not address the asserted "policy" of excluding of all juveniles from all trials except to say that we are aware of no constitutional justification for such a policy. Because the bailiff added that, in this case, he thought that the subject matter was too mature for the child, and because the district court endorsed that rationale, we will focus our analysis on that basis for the exclusion.

The trial testimony and anticipated ongoing references to that testimony during closing arguments support the district court's conclusion that Infante's four-year-old granddaughter could be excluded from the proceedings. The trial attendees heard testimony of an alleged affair, Infante's discharging a gun in threatening circumstances, Infante's holding a gun to his wife's head, Infante's leaving threatening telephone messages, Infante's implied threats to shoot anyone who might come through the front door, and Infante's methodical and implicitly terroristic loading of a high-caliber handgun while brooding in front of his victimized wife. We recognize that a parent is generally the proper judge of the subject matter to which her child may be exposed. But the supreme court has long recognized the district court's authority to exclude children from the courtroom when the subject matter is of a nature that the district court deems unsuitable for children: "It is everywhere conceded that minors deserve special consideration and may be excluded from the courtroom in trials of a salacious nature," and "[w]here the evidence . . . relates to indecent or immoral matters, persons of

immature years may usually be temporarily excluded." *State v. Schmit*, 273 Minn. 78, 82, 139 N.W.2d 800, 804 (1966); *State ex rel. Baker v. Utecht*, 221 Minn. 145, 149, 21 N.W.2d 328, 331 (1946). The legislature concurs, recognizing that "[w]hen a cause of a scandalous or obscene nature is to be tried, the court or referee may exclude from the courtroom all minors whose presence is not necessary as parties or witnesses." Minn. Stat. § 546.37 (2010). In addition to the claim of adultery that allegedly sent the child's grandfather into the gun-wielding, terroristic fit, the personal and frightening details of the assault and the young child's relationship to the accused assailant justified the district court's action to protect the child by excluding her from the courtroom. The district court's overriding interest to protect the child permitted her exclusion from trial, a remedy that is narrowly tailored to the interest.

We add that because the remand hearing established that the child was only four years old, we can see the constitutional concerns in a clearer light. And that light reveals that the constitutional argument is weaker than we had supposed. Excluding a preschool-aged child raises few, if any, real public-trial concerns on the traditional considerations. That is, it can hardly be said that the child's presence "is for the benefit of the accused" in the usual way. For example, she was not a witness and, because she was barely senior to a toddler, it is difficult for us to imagine that she has the capacity of an "interested spectator" whose presence might keep Infante's "triers keenly alive to a sense of their responsibility and to the importance of their functions." *See Mahkuk*, 736 N.W.2d at 684. The district court did not focus on the relationship between the public-trial purpose and the age of the excluded child, and we note it only as additional support for its conclusion.

We are not similarly persuaded by the district court's reasoning for excluding the child's mother, but our skepticism is not relevant to our analysis given the facts as developed on remand. The district court reasoned on remand that the mother, Cherise, could also be excluded because she had previously been disruptive to the proceedings and, if allowed to stay, she might become disruptive again. But her only previous disruption was a distraction—demonstrably shaking her head and rolling her eyes, and, after the district court ordered her to stop, the record does not suggest that she engaged in any other disruptive or distracting conduct. She was never told not to enter the courtroom after closing argument had begun, and the record does not indicate that her entrance was itself a disruption. The bailiff also ordered the child from the courtroom apparently without knowing that the district court judge was concerned about possible future disruptions by her mother. Before the removal, the district court had already addressed its disruption concern after it "consider[ed] reasonable alternatives to closing the proceeding," as required by *Waller*, 467 U.S. at 48, 104 U.S.at 2216. And it had already followed an alternative that satisfied its compelling interest to preserve order in the courtroom, leaving it no reason to employ the drastic remedy of removal. Having seen that Cherise complied with its admonition, the district court had no constitutionally sufficient ground to remove her from the courtroom.

Despite this weakness in the district court's rationale on remand, we are nevertheless convinced that the rationale is unnecessary. As it turns out, the district court never removed Cherise from the courtroom. The bailiff, acting for the district court, at no time excluded or sought to exclude Cherise. He told her only that the child, who

happened to be in her care, could not remain or return. When we previously opined that the district court might have been justified in removing Cherise from the courtroom if the bailiff advised her that she could return after she found someone to watch the child outside the courtroom, we were writing based on the erroneous assumption that the court had "excluded Infante's sister and the child." *Infante*, 796 N.W.2d at 355. We now know that, instead, the court excluded *only* the child, not Cherise. Under the undisputed facts developed on remand, no one in Cherise's shoes could have reasonably supposed that she could not return without the child.

We hold that the district court satisfied the remand instructions by making factual findings required under *Waller* to support its removal of Infante's four-year-old granddaughter from the courtroom. And we hold that those findings support its actual, limited removal decision.

Affirmed.