COURT OF APPEALS
DECISION
DATED AND FILED

November 8, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1803-CR **Cir. Ct. No. 2013CF5047**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT WAYNE HUBER, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: STEPHANIE ROTHSTEIN, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. Robert Wayne Huber, Jr., appeals a judgment of conviction entered after a jury found him guilty of twenty-five felonies arising out of his enticement and sexual and physical assaults of two adolescents in 2013, and an order denying his motion for postconviction relief. Huber argues that he was denied his constitutional rights of self-representation and to a public trial. We reject Huber's claims and affirm.

¶2 Represented by appointed counsel, Huber went to trial on twenty-five felony counts related to two minor females. The evidence at trial showed that Huber set up a Facebook page for a group he called "The Kittenz." The group purported to be for girls who were interested in improving themselves spiritually and physically. Huber held himself out as the teacher or the master. He was eventually able to persuade several girls to come to his rooming house, where, while claiming to "teach them," he would sexually assault and physically abuse them. Some of the assaults were recorded on video, and the recordings were played for the jury. Without objection, the circuit court entered an order closing the courtroom while the videos were played to the jury. During his testimony, Huber admitted performing many of the acts testified to by the two female victims named in the complaint, but claimed he was coerced into performing the acts by an unidentified woman on the telephone who threatened to cause harm to Huber or his family if he did not comply. The jury convicted Huber on all counts and the circuit court imposed an aggregate bifurcated sentence totaling 225 years of initial confinement followed by 135 years of extended supervision.

¶3 Huber filed a postconviction motion claiming for the first time that the circuit court denied him his right to a public trial when it closed the courtroom during the showing of the videotapes. The circuit court denied the motion after concluding that its closure order was proper and that, in any event, Huber forfeited

his public trial claim by failing to timely object. The court also determined that Huber failed to prove that trial counsel was ineffective for not objecting to the brief closure of the courtroom. Huber appeals.

Huber was not deprived of his constitutional right to represent himself at trial.

¶4 For the first time on appeal, Huber claims that the circuit court improperly denied him his constitutional right to represent himself at trial by failing to conduct a further inquiry based on statements made at a January 16, 2014 pretrial hearing. At that hearing, Huber complained about his appointed counsel and also moved on his own for "immediate dismissal of all charges." The following exchange occurred:

> The Court: Okay. Thank you, Mr. Huber. I'm not hearing … any motions directly from you as you're represented by counsel. What else do you feel that you want to take up with the court?
>
> Okay. I'm hearing nothing.
>
> Huber: At this time, I'm firing my attorney.
>
> The Court: You cannot do that.
>
> Huber: You're forcing an attorney on me that I do not want?
>
> The Court: The court decides who will represent individuals and who is allowed to go forward with different attorneys or representing themselves.
>
> Every lawyer has to ask permission of the court to withdraw, and the court has the authority to grant or deny it. So I am not going to remove [trial counsel] at this time.

¶5 The circuit court asked for trial counsel's input. Trial counsel stated "Well, obviously my client wants a new lawyer," and added "I think if he wants a new lawyer, he should get one." The circuit court did not agree and the hearing

proceeded. Huber did not dispute trial counsel's assessment that he "obviously" wanted "a new lawyer" appointed.

¶6 At a subsequent pretrial hearing on February 3, 2014, the circuit court advised that it had received from Huber a written letter stating that he wanted trial counsel removed so that he could represent himself. The circuit court then asked Huber: "Do you still stand by that request, sir?" Huber answered: "No, no. That was actually a mistake." He explained that he inadvertently sent the letter to the circuit court and said the court was "misinformed and it's all my fault. I take responsibility." After further discussion, the circuit court engaged Huber in a colloquy, during which Huber confirmed that he wanted trial counsel to continue representing him.

¶7 The United States and Wisconsin Constitutions guarantee a criminal defendant both the right to counsel and the right to self-representation. ***State v. Darby***, 2009 WI App 50, ¶11, 317 Wis. 2d 478, 766 N.W.2d 770. To safeguard those rights, before granting a defendant's request to represent him or herself, a circuit court must undertake an examination to ensure that the defendant's waiver of the right to counsel is knowing, voluntary, and intelligent and that the defendant is competent to proceed pro se. ***State v. Klessig***, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997). Nonwaiver is presumed. ***Id***. at 204. To invoke the right to self-representation and trigger the circuit court's duty, a defendant must clearly and unequivocally demand the right to proceed pro se. ***Darby***, 317 Wis. 2d 478, ¶¶18-19, 24. "[T]he circuit court has no obligation to advise a defendant of that right prior to a clear and unequivocal declaration." ***Id.***, ¶1. This not only protects a defendant from an inadvertent waiver of the right to counsel, it also "prevents a defendant from taking advantage of the mutual exclusivity of the rights to counsel and self-representation." ***Id.***, ¶20 (citations omitted).

¶8 Huber contends that the circuit court committed error at the January 16, 2014 hearing by failing to engage him in a colloquy to determine if he knowingly, intelligently and voluntarily wished to waive his right to counsel, and if he was competent to represent himself. The State disagrees, arguing that Huber's request to fire his attorney was not a clear and unequivocal demand to represent himself sufficient to trigger the circuit court's duty to conduct a ***Klessig*** colloquy. We agree with the State. At the hearing, Huber complained about and asked to fire his attorney but never said he wanted to proceed pro se. When his trial attorney told the court that Huber wanted another attorney, Huber did not disagree. "[A] defendant's expressions of dissatisfaction with his or her current attorney or a request for another attorney do not constitute a clear and unequivocal declaration that the defendant wants to proceed pro se." ***Darby***, 317 Wis. 2d 478, ¶26.[1]

¶9 Further, the circuit court squarely addressed the issue at the February 3, 2014 hearing, after receiving a letter from Huber asserting for the first time that he wanted to waive his right to counsel. Rather than requesting trial

[1] In his opening brief, Huber suggests that the circuit court's failure to conduct a colloquy resulted in a "murky record," and that Huber should not be faulted for any "uncertainty" in the record. Though we disagree with this characterization of the record, to the extent Huber considered it "murky," he could have brought a postconviction motion in order to develop and preserve his self-representation claim. Similarly, we observe that Huber did not address the State's self-representation arguments, including that Huber's invocation was not clear and unequivocal, in his reply brief. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (a proposition asserted by a respondent on appeal and not disputed in the appellant's reply is taken as admitted).

counsel's withdrawal, Huber informed the court that he had sent the letter in error and stated unequivocally that he did not wish to proceed pro se.[2]

Huber was not deprived of his constitutional right to a public trial.

¶10 On the sixth day of trial, the circuit court announced to the parties that it would "close the courtroom" when the video recordings of the sexual assaults were shown to the jury because of their "salacious nature." The court assured everyone that the courtroom would be reopened "immediately" after the videotapes were shown. No one objected. When the time came, as expected and without objection, the circuit court ordered the courtroom closed while the video recordings were played for the jury. The circuit court later elaborated on why it had *sua sponte* ordered the courtroom closed while the "graphic" recordings were played. It was due "not only [to] the nature of the video itself, but also the sound" on the video.

¶11 The Sixth Amendment to the United States Constitution provides a criminal defendant the right to a public trial. That right is not absolute. *See, e.g.*, ***State v. Ndina***, 2009 WI 21, ¶44, 315 Wis. 2d 653, 761 N.W.2d 612. In determining whether a defendant's right to a public trial has been violated, the appellate court first determines whether the closure at issue implicates the Sixth

[2] At a pretrial hearing on March 10, 2014, the circuit court announced that Huber sent another letter asking "for permission either to proceed pro se or that the Court order [trial counsel] to withdraw." Trial counsel first learned about the letter at the hearing. The circuit court reminded Huber that he had previously asked for trial counsel to be removed but then changed his mind. When asked to clarify his current position, Huber did not mention wanting to proceed pro se but asked the court to order trial counsel to provide him with copies of discovery to review in his jail cell so he could "better help [trial counsel] defend me." Huber does not argue that the circuit court violated his right of self-representation at any time after the January 16, 2014 hearing.

Amendment public trial right and, if so, whether the closure was justified under the circumstances of the case. ***Id.***, ¶46. To determine whether closure is justified, courts apply a four-part test: (1) the party seeking to close the courtroom must show an overriding interest likely to be prejudiced by a public trial, (2) the closure order must be narrowly tailored to protect that interest, (3) the trial court must consider alternatives to closure, and (4) the court must make findings sufficient to support the courtroom closure. ***Id.***, ¶56 (citing ***Waller v. Georgia***, 467 U.S. 39 (1984)). "A defendant who fails to object to a judicial decision to close the courtroom forfeits the right to a public trial, so long as the defendant is aware that the judge has excluded the public from the courtroom." ***State v. Pinno***, 2014 WI 74, ¶7, 356 Wis. 2d 106, 850 N.W.2d 207.

¶12 Huber agrees that because he did not object to the courtroom closure, his public trial claim must be raised under the rubric of ineffective assistance of trial counsel. To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's actions or inaction constituted deficient performance which caused prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness. ***Strickland***, 466 U.S. at 687; ***Love***, 284 Wis. 2d 111, ¶30. To prove constitutional prejudice, the defendant must show that but for counsel's unprofessional errors a reasonable probability exists that the result of the proceeding would have been different. ***Strickland***, 466 U.S. at 694; ***Love***, 284 Wis. 2d 111, ¶30. On review, the appellate court will uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Thiel***, 2003 WI 111, ¶23, 264 Wis. 2d 571, 665 N.W.2d 305. Whether counsel's performance was deficient and/or prejudicial are questions of law to be

determined independently. ***Id***. We need not address both prongs of the test if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

¶13 We conclude that Huber failed to show that trial counsel's failure to object to the courtroom closure was deficient. As explained by the circuit court at trial and in its postconviction decision, the four ***Ndina/Waller*** factors justified the closure. First, the court was properly motivated by the overriding interest in protecting the privacy and integrity of the young victims that would be damaged by showing the graphic and salacious video recordings to members of the press and general public who, unlike the jury, had no reason to view and hear them.[3] Second, the closure was narrowly tailored. It was in effect only for that short period of time during which selected video excerpts were shown to the jury, and not during the girls' live testimony. Third, though Huber argues on appeal that the circuit court should have considered alternatives to closure, the court was not required "to consider alternatives that no party asked it to consider." ***Ndina***, 315 Wis. 2d 653, ¶82. Fourth, the circuit court made sufficient findings on the need for closure, including the graphic and salacious nature of the videos involving underage victims, that the video recordings included sound, and that the courtroom was not closed during the victims' live testimony. Indeed, the record as a whole supports the circuit court's decision. *See* ***Ndina***, 315 Wis. 2d 653, ¶86 ("Although we acknowledge that the circuit court's findings on the record are limited and no hearing was held, we nevertheless conclude that the record is sufficient to support the closure order."). Huber has failed to overcome the presumption that trial

[3] Further, it is illegal to view child pornography; closure supports the State's, the victims', and the public's interest in limiting the size of the audience.

counsel's performance was objectively reasonable. *See* ***Strickland***, 466 U.S. at 690. *See also* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (failure to raise an issue is not deficient performance if the issue is later determined to be without merit).

¶14 Additionally, aside from the issue of deficient performance, Huber has not demonstrated that trial counsel's failure to object to the closure was prejudicial. As the circuit court stated: "The jury was not deprived of the evidence as factfinder, and there is nothing to demonstrate that the presence of the public would have had any effect on the verdict." This is especially true given that the girls testified about the assaults and, as Huber concedes, described their ordeal in graphic detail over days of grueling direct and cross-examination in front of the press and the public. Additionally, the videos had nothing to do with Huber's defense which was that he was coerced by an unnamed woman over the telephone to commit the acts but was too scared to tell anyone.

¶15 Huber argues that to demonstrate prejudice, he need only show that had defense counsel objected, and had the court considered the appropriate factors, the courtroom could not have properly been closed. He asserts that the State's outcome-determinative test presents too high a threshold because a public trial violation is a structural error whose prejudicial effect is impossible to quantify. Huber's position was previously rejected in ***Pinno***, where the Wisconsin Supreme Court distinguished between preserved and forfeited errors and stated: "A presumption of harm from an error to which counsel objected does not compel a presumption of prejudice when counsel fails to object." ***Id.***, 356 Wis. 2d 106, ¶91. As in ***Pinno***, see ¶¶ 88-91, we apply ***Strickland's*** longstanding prejudice test and conclude that Huber has not demonstrated any prejudice from the brief courtroom closure.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).