IN THE SUPREME COURT OF FLORIDA

TONY HOBBS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC02-1679

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Tony Hobbs, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of three volumes, which will be referenced according to the respective number designated in the Index to the Record on Appeal and the term “R” for the record volume. "IB" will designate Petitioner's Initial Brief. “A” will designate the Appendix to this brief. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State declines to accept Petitioner's statement and presents the following comprehensive statement of the case and facts:

On June 16, 1999, Petitioner was charged with sexual battery on a child under 12 years old, in violation of Section 794.011, Florida Statutes. (A 1). As the victim[1] in this case prepared to testify during Petitioner's trial, the State asked that pursuant to statute, the courtroom be closed to all spectator personnel. (A 2). The trial judge instructed persons in the gallery that they had to leave the courtroom during the victim's testimony. (A 2). There was no objection made by Petitioner. (A 2). Following the testimony, closings, and jury instructions, the jury found Petitioner guilty as charged. (A 1).

A timely notice of appeal was filed on Petitioner's behalf by the Office of the Public Defender and the present issue was appealed to the First District Court of Appeals. (R 35). The First District Court of Appeals found that the record indicated that the closure of the courtroom was partial and not total and that because there was no objection, any error was not preserved for review. (A 5). Subsequent to this

[1] The victim was twenty years old at the time of trial.

ruling, the Office of the Public Defender filed a motion for rehearing and certification of conflict. The trial court denied the motion for rehearing but certified conflict with Whitson v. State, 791 So.2d 544 (Fla. 2d DCA 2001). This appeal follows.

SUMMARY OF ARGUMENT

The record on appeal does indicate, as the First District found, that in the context of the request, the trial judge was attempting to only partially clear the courtroom pursuant to Section 918.16, Florida Statutes. The record on appeal does not speak (as Petitioner alleges it does) to exactly whom from the gallery was asked to retire from the courtroom. Where there is only a partial closure of the courtroom and not total closure, a court's formal examination of the requirements under Waller are not triggered. Thus, the trial judge did not err by dismissing spectator personnel from the courtroom during the victim's testimony.

ARGUMENT

ISSUE I

DID THE TRIAL COURT REVERSIBLY ERR BY FINDING THE TRIAL COURT'S CLOSURE OF THE COURTROOM TO BE PARTIAL AND NOT TOTAL AND THUS, NOT TRIGGERING THE REQUIREMENTS OF WALLER V. STATE, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed. 31 (1984)? (Restated)

Petitioner contends that the trial court's closure of the courtroom was a total closure rather than a partial closure. Further, Petitioner alleges that because the closure was total and the trial court made no findings pursuant to Waller v. State, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed. 31 (1984), this was fundamental error. The State respectfully disagrees.

Standard of Review

The proper standard of review concerning a trial judge's ruling to partially close a courtroom from spectators is abuse of discretion. U.S. v. Doe, 63 F.3d 121, 129 (2d Cir. 1995); also see Graham v. Stinson, 164 F.3d 617 (2d Cir. 1998).

Preservation

Plain error or fundamental error, affecting the substantial rights of the parties, has only been found by the United States Supreme Court to apply in a very limited class of cases. Johnson v. United States, 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997). Among this limited class are

cases involving the right to a public trial. Id. at 467, 117 S.Ct. at 1549. However, when an issue is unpreserved, as was the case here, it is axiomatic that the error must be fundamental error. For an error to be raised for the first time on appeal, the error must be so prejudicial as to vitiate the entire trial. Chandler v. State, 702 So.2d 186, 191 n. 5 (Fla. 1997).

Argument

Petitioner maintains that the trial judge's closure of the courtroom was total closure rather than a partial closure. Thus, the trial judge reversibly erred by failing to make the required findings, as numerated in the United States Supreme Court decision of Waller v. State, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed. 31 (1984). The State disagrees.

The important distinction between total and partial closure of the courtroom was first recognized in the 11th Circuit case of Douglas v. Wainwright, 739 F.2d 531 (11th Cir. 1984) and later recognized by Florida courts in Clements v. State, 742 So.2d 338 (Fla. 1999). Clements alleged that the trial court failed to make a formal finding as to the four factors enumerated in Waller and Thorton. The Fifth District expressly distinguished Waller as a case which "**addressed the total closure of a hearing, not a partial closure**." Id. at 341 (emphasis supplied). The court additionally held that

even though the trial court did not formally make a finding as to the Waller test,

> [w]e do not view the trial court's decision to follow the statute, without independent inquiry, as error. We hold that the four-factor inquiry of Waller is not imposed on cases where the partial closure order is entered pursuant to section 918.16, Florida Statutes.

Id. at 341. Thus, a clear distinction exists between partial closings and total closings of a courtroom. Cf. Whitson v. State, 791 So.2d 544 (Fla. 2d DCA 2001)(holding that a Waller inquiry is necessary whether the closure is partial or total). The court in Clements went on to describe the proper standard to be applied where there has only been the partial closing of a courtroom. The court stated, "where there has been only a partial closure, the court 'must look to the particular circumstances to see **if the defendant still received the safeguards of the public trial guarantee**." Id. at 341 (emphasis supplied). Because partial closure pursuant to Section 918.16 is easy to administer, it is unnecessary for a full Waller inquiry to occur here as is necessary in the case of total closures.

The defendant in Clements made the same, identical claim that Appellant makes here. In the current case, the record reflects that the trial judge only partially closed the courtroom. Prior to the testimony of the victim, the State made its request that "pursuant to the statute" the courtroom

be cleared of "spectator personnel." The following colloquy ensued:

> MR. COMBS [State]: My first witness will be Tracy who is the victim, and pursuant to statute I ask that the courtroom be cleared of all spectator personnel.
>
> THE COURT: What about the victim advocate?
>
> MR. COMBS: She's actually–- Marlene will be here with the victim. She's not here with the victim.
>
> THE COURT: Okay. For the purpose of the next witness, I'm going to ask that all of you out in the gallery retire from the courtroom. You're welcome to come back after that witness has testified, but not during this one.

(I 34-35). The victim advocate, per the request of the Assistant State Attorney and according to statute, was allowed to remain. While one person was identified as not being with the victim, there is no indication from the record which substantiates the claim that members of the press of family members of the Appellant were asked to leave in violation of the statute.[2] Petitioner fails to present any specific evidence of how the safeguards of a public trial were not

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[2] Petitioner alleges that his family members and the press were excluded (IB 5), however, provides no record cite to support this allegation. It is well established that where the record is silent, error can not be assumed. Soto v. State, 786 So.2d 1218(Fla. 4th DCA 2001)(finding that Appellant failed to demonstrate error where in the trial court, he failed to take issue with the state's explanation of whether this juror had a language problem).

realized. Rather, according to the record, the circumstances under which this partial closure was effected appear to have been pursuant to statute and not in derogation of Petitioner's right to a public trial under the United States and Florida Constitutions. Thus, because the trial court did not totally close the courtroom to all persons, the requirements of Waller are not triggered in the current case.

Considering the above arguments, there is no merit to Petitioner's claim that the trial court reversibly erred by partially closing the courtroom for the testimony of a victim of a sex offense. This Court should accordingly, affirm the judgment and conviction of Petitioner in the current case.

CONCLUSION

Based on the foregoing, the State respectfully submits that the decision of the District Court of Appeal reported at 27 Fla. L. Weekly D727 should be approved, and judgment and sentence entered in the trial court should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Jamie Spivey, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on September 17th, 2002.

Respectfully submitted and served,

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[AGO# L02-1-11516]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

_____
Kenneth D. Pratt
Attorney for State of Florida

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APPENDIX

Hobbs v. State, 27 Fla. L. Weekly D727 (Fla. 1st DCA 2002).