"THE FEDERAL CORNER"

The Courthouse Was Closed to the Public – But the Trial Continued

Buck Files

It must be such an irritation for a judge to have folks wander into the courtroom when the lawyers are conducting their voir dire examinations of the jury panel. In response to this irritation, some judges began to close their courtrooms during the voir dire – even in the trials of criminal cases. Then the Supreme Court held that a defendant's Sixth Amendment right to a public trial was violated when the trial court excluded the public from the voir dire examination of prospective jurors – and courtrooms began to remain open. *Presley v. Georgia*, 130 S.Ct. 721 (2010).

Seven years after *Presley*, the Supreme Court discussed whether the violation of the right to a public trial is structural error. *Weaver v. Massachusetts*, 137 S.Ct. 1899 (2017). The opinion reads, in part, as follows:

> In *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), this Court 'adopted the general rule that a constitutional error does not automatically require reversal of a conviction.'*Arizona v. Fulminante*, 499 U.S. 279, 306, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (citing *Chapman,supra*). If the government can show 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained,' the Court held, then the error is deemed harmless and the defendant is not entitled to reversal. *Id.*, at 24, 87 S.Ct. 824.
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> The Court recognized, however, that some errors should not be deemed harmless beyond a reasonable doubt. *Id.*, at 23, n. 8, 87 S.Ct. 824. These errors came to be known as structural errors. See *Fulminante*, 499 U.S., at 309–310, 111 S.Ct. 1246. The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'*Id.*, at 310, 111 S.Ct. 1246. For the same reason, a structural error 'def[ies] analysis by harmless error standards.'*Id.*, at 309, 111 S.Ct. 1246 (internal quotation marks omitted).
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> An error can count as structural even if the error does not lead to fundamental unfairness in every case.
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> …*a violation of the right to a public trial is a structural error*. (emphasis added)

So, if a defense lawyer is confronted with a closed courtroom or a closed courthouse and objects, he or she is probably going to win on appeal because the structural error issue has been preserved. What happens, though, when the lawyer does not object? That was a fact

situationthat recently confronted a panel of the United States Court of Appeals for the Seventh Circuit.*United States v. Anderson*, ___F.3d___, 2018 WL 663089 (7th Cir. 2018) [Panel: Circuit Judges Easterbrook, Rovner and Hamilton (opinion by Rovner)]. The Court held that*in the absence of an objection at trialregarding an alleged violation of the defendant's Sixth Amendment right to a public trial*, the plain error standard of review was applicable, as opposed to an automatic reversal being required because any error would be structural – and the defendant lost.

Judge Rovner's opinion reads, in part, as follows:

[The Charges, the Verdict and the Sentence]

On September 23, 2014, a grand jury returned a five-count indictment against Deangelo Anderson, charging him in counts one and two with armed robbery of a bank and brandishing a firearm in furtherance of a crime of violence (*i.e.* the bank robbery), and in counts three, four and five with unlawful possession of a firearm as a felon, possession of crack cocaine with intent to distribute, and possession of a firearm in furtherance of a drug trafficking offense. He was tried before a jury on April 4 and 5, 2016, and on April 5 the jury returned a verdict acquitting him of counts one and two, and convicting him of counts three, four and five. The district court sentenced him to 96 months' imprisonment, comprised of 36 months on counts three and four, to be served concurrently, and sixty months on count five, to be served consecutively to the sentence on counts three and four.

[Anderson's Issue on Appeal]

Anderson now appeals that conviction and sentence to this court. He argues that he is entitled to a new trial because he was denied his Sixth Amendment right to a public trial when the proceedings continued beyond the hours when the courthouse was open.

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The trial began on April 4, 2016, and concluded with a jury verdict on April 5. After the verdict, Anderson filed a motion for a new trial based on a claim that the trial court violated his Sixth Amendment right to a public trial by allowing the trial to proceed on both days beyond the time at which the courthouse was locked for the night. The court denied the motion, and Anderson appealed.

[The Chronology of the Trial]

The first day of trial included jury selection, opening statements, and the testimony of thirteen witnesses.

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The testimony of the last three witnesses extended beyond the 5:00 p.m. time at which the doors to the courthouse—but not to the courtroom—were locked. *The detective's testimony, which regarded chain-of-custody matters, began at 4:58 p.m. and ended at 5:21 p.m. He was followed by a forensic scientist, who testified*

from 5:22 p.m. to 5:34 p.m. confirming that dye stains in the Honda Civic contained chemicals commonly associated with bank dye packs. Finally, the forensic investigator who concluded the testimony for the day, testified on direct and cross-examination from 5:38 p.m. to 6:18 p.m. regarding his unsuccessful efforts to locate fingerprints and obtain DNA from the firearm, ammunition and crack cocaine baggies recovered from Anderson's vehicle. Prior to the testimony of each of the last two witnesses, the trial court held side-bar conferences, but no objection to the testimony was raised at those times. (emphasis added)

On the following day, the government presented the testimony of seven additional witnesses, and the court also entertained closing arguments, followed by the jury instructions, deliberations, and verdict. *All of the witnesses testified before 5:00 p.m. Closing arguments by the government began at 4:01 p.m. and concluded at 4:38 p.m. The defense commenced its closing arguments at 4:39 p.m., finishing at 5:21 p.m. The government rebuttal occurred from 5:22 p.m. until 5:38 p.m., and the court instructed the jury immediately afterward. The jury retired to deliberate at 6:09 p.m., but the court briefly went on record at 6:40 p.m. and again at 7:56 p.m. to address notes from the jury. The jury reported a verdict at 9:16 p.m., and was discharged at 9:20 p.m.*(emphasis added)

[The Sixth Amendment Right to a Public Trial]

The Sixth Amendment to the United States Constitution provides that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.' U.S. Const. Amend. VI. Public trials are viewed as preserving the integrity of the justice system, by deterring the use of the courts as a means of persecution, encouraging unknown witnesses to come forward, preventing perjury, and imbuing the proceedings with the gravitas and sense of responsibility that facilitates a just process. *See Walton v. Briley*, 361 F.3d 431, 432 (7th Cir. 2004). A violation of the right to a public trial is a structural error, and therefore *if objected to at trial*, can be reversed without any need to show prejudice. *Weaver v. Massachusetts*, ––U.S. ––––, 137 S.Ct. 1899, 1907, 198 L.Ed.2d 420 (2017). (emphasis added)

Anderson did not object at trial to the continuation of proceedings beyond 5:00 p.m. (emphasis added)

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[The Sixth Amendment Right to a Public Trial Is Not an Absolute One]

Anderson alleges on appeal that, despite the failure to object, automatic reversal is required because the error is structural and was raised in the trial court in a post-trial motion.

We agree with the government that the plain error standard set forth in Federal Rule of Criminal Procedure 52(b) applies in this case. Under the plain error standard, 'an appellate court may, in its discretion, correct an error not raised at

trial only where the appellant demonstrates that (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'*United States v. Marcus*, 560 U.S. 258, 262, 130 S.Ct. 2159, 176 L.Ed.2d 1012 (2010) (internal quotation marks omitted).

* * *

The Sixth Amendment right to a public trial is not an absolute one that forbids any exclusion of spectators regardless of context. In fact, courts have upheld the closure of the courtroom in a number of circumstances, such as where security or safety concerns require it. *Peterson v. Williams*, 85 F.3d 39, 42 (2d Circuit 1996); *Presley v. Georgia*, 558 U.S. 209, 213–15, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010).

[The Triviality Standard]

Moreover, we have recognized that some exclusions of spectators from a trial simply do not rise to the level of a violation of the right to public trial. *Braun v. Powell*, 227 F.3d 908, 918 (7th Cir. 2000). As we noted in Braun (adopting the approach of Peterson), this triviality standard differs from a harmless error assessment:

> A triviality standard, properly understood, does not dismiss a defendant's claim on the grounds that the defendant was guilty anyway or that he did not suffer 'prejudice' or 'specific injury.' It is, in other words, very different from a harmless error inquiry. It looks, rather, to whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant—whether otherwise innocent or guilty—of the protections conferred by the Sixth Amendment.*Braun*, 227 F.3d at 918, quoting *Peterson*, 85 F.3d at 42.
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> In assessing whether a closure rises to the level of a Sixth Amendment violation, we consider the extent to which the closure implicates the values underlying the public trial right: '(1) to ensure a fair trial; (2) to 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.'*Peterson*, 85 F.3d at 43, citing *Waller v. Georgia*, 467 U.S. 39, 46–47, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); *Braun*, 227 F.3d at 918. A trivial violation that does not run afoul of those values will not present a Sixth Amendment violation.

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[There Was No Closing of the Courtroom]

…here there was no total exclusion of spectators from the court, nor did the locking of the courthouse impact a significant portion of the case. The doors of the courthouse were locked at 5:00 p.m. as part of the security measures for the courthouse. The doors to the courtroom itself remained open, and any persons who were in the building prior to 5:00 p.m. could attend the trial in its entirety. Nor did the lateness of the hour render that unlikely. On the first day of the trial, the testimony extended for just over an hour past 5:00 p.m., terminating at 6:18 p.m. Although Anderson points to the testimony of three witnesses that extended beyond 5:00 p.m. that day, the testimony of the first witness began prior to 5:00 p.m. and ended at 5:21 p.m. Anyone wishing to be present for that testimony could have heard it by arriving when that testimony began at 4:58 p.m. Potential spectators arriving after 5:00 p.m. would have heard little of the testimony regardless, as they would have to navigate the normal courthouse electronic security and proceed to the courtroom, and the testimony ended at 5:21 p.m. The only potential impact was on the ability to attend the testimony of the forensic witnesses who testified from 5:22 p.m. to 6:18 p.m., and Anderson does not even argue that their testimony concerning the chemicals used in dye packs and the inability to obtain fingerprint or DNA evidence was a significant part of the trial. See *Gonzalez v. Quinones*, 211 F.3d 735, 739 (2d Cir. 2000) (noting that any exclusion during a chemist's testimony would be trivial because 'the testimony ... was brief (under 20 minutes), perfunctory, and uncontested').

Similarly, the closing arguments in the case began well before the courthouse doors were locked at 5:00 p.m. The government concluded at 4:38 p.m., and defense commenced at 4:39 p.m. As the defense concluded by 5:21 p.m., anyone seeking to attend presumably would have entered the building by 5:00 p.m. Only the government rebuttal, and the subsequent jury instructions, response to questions, and announcing of the verdict, occurred after 5:00 p.m. It is an insignificant possibility that persons would seek to attend the trial only to witness the government rebuttal and subsequent jury interaction.

And as the district court noted, Anderson 'makes no claim that any spectators present in the courtroom were required to leave at 5:00 p.m., that anyone tried to attend after 5:00 p.m. but could not get in, or that anyone was actually excluded from the courtroom at any time.' Therefore, we are not presented with a case in which friends or relatives of the defendant, or anyone else for that matter, were actually excluded because the courthouse was locked at 5:00 p.m. See *In re Oliver*, 333 U.S. 257, 271–72, 68 S.Ct. 499, 92 L.Ed. 682 (1948) (noting that all courts have held that a defendant is entitled to have friends and relatives attend his trial); *Braun*, 227 F.3d at 917 (same); *United States v. Perry*, 479 F.3d 885, 890–91 (D.C. Cir. 2007).

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[The Court's Reasoning and Conclusion]

…we do not have any factual findings by the district court as to the availability of that access generally, so we do not base our decision on that.

> Nevertheless, the closure in this case was a minimal one because anyone in the building before 5:00 p.m. could attend the trial in its totality, and there were only minimal proceedings after 5:00 p.m.
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> We simply cannot conclude that the partial closure of only the outside doors in this case, with the trial still accessible to those in the building and with relatively minimal proceedings after closure, implicated the values of the Sixth Amendment such as ensuring a fair trial, reminding the prosecutor and judge of their responsibility, encouraging witnesses to come forward, and discouraging perjury. *Peterson*, 85 F.3d at 43, citing *Waller*, 467 U.S. at 46–47, 104 S.Ct. 2210; *Braun*, 227 F.3d at 918. In light of the law in this area establishing that trivial violations do not run awry of the Sixth Amendment, Anderson has failed to demonstrate an error that is 'plain' or 'obvious' as required under the plain error standard.

[A Stern Warning to District Judges]

> Certainly, district court judges seeking to continue criminal proceedings beyond the closing hours of a courthouse should ensure that members of the public have a means of access to that courthouse. In some cases, such as in *Walton*, the failure to do so will violate the Sixth Amendment. The closure in this case was trivial and did not violate those Sixth Amendment rights, but to avoid such questions in the future, the court should ensure that some means of access to the courthouse is available for trials that run after hours.

[My Thoughts]

- The Court's admonition to the district judges of the Seventh Circuit was not surprising – and is good advice for all federal judges *and* for ourTexas judges as well.
- So, what happens if the judge fails to follow that admonition and continues the trial of a case in a courtroom or courthouse that has been closed to the public? Object, object, object!
- *Anderson,* to me, is such a common sense case and the opinion is easy reading.