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IN THE
COURT OF APPEALS OF INDIANA

Dustin Lappin,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 14, 2021

Court of Appeals Case No.
20A-CR-2208

Appeal from the Marion Superior
Court

The Honorable Sheila Carlisle,
Judge

The Honorable Stanley E. Kroh,
Magistrate

Trial Court Cause No.
49G03-2007-F3-21144

Riley, Judge.

[1]

STATEMENT OF THE CASE

[2] Appellant-Defendant, Dustin Lappin (Lappin), appeals his conviction for robbery resulting in bodily injury, a Level 3 felony, Ind. Code § 35-42-5-1(a)(1).

[3] We affirm.

ISSUE

[4] Lappin presents this court with one issue on appeal, which we restate as: Whether the trial court violated Lappin's right to a public trial when the court limited the public's attendance to audio-only during voir dire and limited public seating during trial in the midst of the COVID-19 pandemic.

FACTS AND PROCEDURAL HISTORY

[5] Early in 2020, Geoffrey Wilson (Wilson) became Facebook friends with Lappin. They chatted on Facebook for a couple of months before they met in person at a gas station in downtown Indianapolis. On June 6, 2020, Lappin sent a message to Wilson, asking to "hangout" again and to pick him up at a hotel in Plainfield. (Transcript Vol. II, p. 167). When Wilson arrived at the hotel, Lappin entered Wilson's Jeep, carrying a backpack and duffel bag. They then drove around "aimlessly," deciding what they should do. (Tr. Vol. II, p. 168). They eventually ended up parking in a parking lot on the southwest side of Indianapolis, in the Mars Hill neighborhood. After talking for a couple of hours in the vehicle, Wilson decided to return home. As Wilson exited the parking lot, Lappin asked him to stop at another parking lot. Wilson did so, thinking that Lappin just needed to use the restroom before leaving. As soon as

Wilson parked the car, Lappin “went for the keys, turned off the car and pulled the keys out of the ignition.” (Tr. Vol. II, pp 177-78). While Lappin removed the keys, he also pulled out a foot-long hatchet with a rusted blade from between the passenger seat and the vehicle’s center console. He ordered Wilson to “[j]ust get out of the car.” (Tr. Vol. II, p. 178).

[6] As Wilson exited the car, he began honking the car’s horn and screaming for help. People started to approach, and Wilson went for the hatchet. During the ensuing struggle, Lappin pushed Wilson into the front seat of the Jeep and eventually fled into a tree line at the edge of the parking lot with the keys. When Lappin emerged from the woods, he was wielding a two-by-four piece of lumber. He entered the Jeep and started to leave. One of the bystanders attempted to prevent Lappin from leaving and grabbed the door of the vehicle. The bystander’s hand became stuck and he fell to the ground, injuring his hand and knee. Wilson’s vehicle was found later that night abandoned in Plainfield. Approximately one week later, the same bystander noticed Lappin walking in the neighborhood. The bystander approached Lappin and subdued him until the police arrived and arrested Lappin.

[7] On July 7, 2020, the State filed an Information, charging Lappin with armed robbery, a Level 3 felony; and robbery resulting in bodily injury, a Level 3 felony. On October 1, 2020, during the COVID-19 pandemic, Lappin proceeded to a jury trial. The trial was not conducted in Marion Superior Court 3’s normal courtroom, but instead was moved to Marion County Traffic Court because, as explained by the trial court, it was “the only place we’ve been able

to identify that we're able to keep the six foot separation both in the courtroom and in the jury room for jury trials." (Tr. Vol. II, pp. 23-24). The trial court had the capability to stream audio and video into the building's lobby and also to provide a live stream on the internet. For all portions of the trial, except during voir dire, the trial court had secured chairs in the back of the courtroom, with appropriate social distancing, for members of the public who wished to attend the hearing. During voir dire, the chairs in the courtroom were not available and the live stream to the lobby was audio only. The trial court explained these proceedings as follows:

we do have plenty of room out in the lobby. And one of our bailiffs will be in the lobby, so if there are members of the public who want to watch the trial, they'll be welcome to come into the lobby during jury selection. If either side knows of any individuals that will be coming in, please let us know so we can identify them and keep them separate from any prospective jurors. Just so we — you know, we want to be careful there's not any communication between the public and the prospective jurors. We do have some concerns about privacy with the live stream. Also the [c]ourt [has an] obligation to ensure that the proceedings are not recorded or rebroadcast. There is significant concern with live streaming that we can't ensure that. We give an admonition, and know it's on that — on the live stream there's little — whatever you call the word that's blip on its screen that has that warning, but — that is significant concern the [c]ourt has. But, yes, we can make accommodations for having members of the public. We have limited amount of seats in the courtroom, but we will have some seats outside in the lobby. And especially after jury selection is finished, there — there's seats out there, although, I'm not sure we'll be broadcasting the trial out to the lobby.

(Tr. Vol. II, pp. 5-6). Lappin objected to the voir dire being streamed to the lobby as audio only and the limited public attendance during the hearing:

Lappin has competing constitutional rights at this point. The right to speedy trial, which we are prioritizing. But there's also the right to public trial. That encompasses the public being able to make sure that the — that the system is working the way that it should. The witnesses to have to testify in front of strangers other than the jurors, other people, which increases the likelihood that they're going to tell the truth. And also if there are people, either in [Lappin's] family or the witnesses' family, or the alleged victim's family that might have health issues, that they should be able to watch the live stream and that that would be the open [c]ourt -- the public part of the trial and speedy trial that [Lappin] has right to. And our position is that having two seats in here for the State and two seats for the defense is insufficient for that. We would request, at the least live stream to the lobby of the trial, but preferably the live stream that the court have set up and have used for the previous cases. Also think there may be an issue – don't know if the front doors are even unlocked right now, if people wanted to come into the courtroom, so think that sounds like not an open court to me[.]

(Tr. Vol. II, p. 18). The trial court overruled the objection, finding that:

The open to attendance definition means “Individuals have the right to freely attend and observe criminal proceedings.” We are in an unprecedented time right now, and we — we've tried to make accommodations for that. We have someone stationed out at the front door — that's how it was when I came in. And we'll make sure that we do have someone stationed out at the front door. If there's anyone that wants to come watch the trial. Do you know is there is anyone that fits that category related to [Lappin] or anyone else interested in this that has health concern, that's not able to come to court? Just want to make sure there's

no one specific that you can identify that wants to come watch the trial and is not able to come here due to health reasons or other reasons.

(Tr. Vol. II, p. 19). After the venire panel was seated and the presentation of evidence was concluded, the jury found Lappin guilty as charged. On November 20, 2020, the trial court conducted a sentencing hearing at which it vacated the robbery with a deadly weapon conviction and imposed a twelve-year sentence, with four years suspended, for robbery resulting in bodily injury, as a Level 3 felony.

[8] Lappin now appeals. Additional facts will be provided if necessary.

DISCUSSION AND DECISION

[9] Lappin contends that his right to a public trial was violated when the trial court closed the courtroom to members of the public during voir dire and limited public attendance during the remainder of the trial.

[10] The Sixth Amendment of the U.S. Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ...” U.S. CONST. amend. VI. This right was made applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Kendrick v. State*, 661 N.E. 2d 1242, 1244 (Ind. Ct. App. 1996). In addition to the Sixth Amendment, Section 13 of the Indiana Constitution provides that “in all prosecutions, the accused shall have the right to a public

trial.” IND. CONST. art. 1, § 13.¹ The right to a public trial has long been recognized as a fundamental right of the accused. *In re Oliver*, 333 U.S. 257, 266-67, 68 S.Ct. 499, 504, 92 L.Ed 682 (1948). It helps ensure a fair trial because “the presence of interested spectators may keep [the accused’s] triers keenly alive to a sense of their responsibility and to the importance of their functions.” *Waller v. Georgia*, 467 U.S. 39, 46, 104 S.Ct. 2210, 2215, 81 L.Ed.2d 31 (1984). “[A] public trial encourages witnesses to come forward and discourages perjury.” *Id.*

[11] However, the right to a public trial is not unlimited. *Hackett v. State*, 360 N.E.2d 1000, 1004 (Ind. 1977). The right can be limited by other interests of justice “such as the defendant’s right to a fair trial or the government’s interest in inhibiting disclosure of sensitive information.” *Waller*, 467 U.S. at 45, 104 S.Ct. at 2215. Situations where other interests override the presumption of openness of the courts will be rare and a careful balancing of the interests at issue must occur. *Id.* The United States Supreme Court has set forth a four-part analysis for courts to use in determining whether to close proceedings to the public:

- (1) The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the

¹ Lappin makes no contention based on the language or history of the State Constitution. To the extent he cites Indiana authority, he relies on no case that effectively treat the public trial guarantee under the Indiana Constitution as distinct from its federal counterpart. Rather, the Indiana cases he cites discuss both rights together as yielding the same result. Accordingly, we resolve Lappin’s U.S. and Indiana constitutional claims on the basis of federal constitutional doctrine and express no opinion as to what, if any, differences there may be under Article I, Section 13 of the Indiana Constitution. *See Williams v. State*, 690 N.E.2d 162, 167 (Ind. 1997).

closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure.

Waller, 467 U.S. at 48, 104 S.Ct. at 2216-17. In order to obtain a reversal for a violation of the right to a public trial, a defendant does not need to show specific prejudice. *Williams*, 661 N.E.2d at 1244. It is difficult, if not impossible, for a defendant to show specific prejudice resulting from closure of a courtroom. *Id.* Because the loss to both the defendant and society from improperly closing courtrooms is intangible, the prejudice of the non-public proceeding is implied. *Id.*

I. *Voir Dire Proceedings*

[12] Relying on the test articulated in *Waller*, Lappin contends that the live audio stream of the voir dire proceedings was not a reasonable alternative to the closure of these proceedings to the public. He asserts that “[t]he trial court’s agreement to let members [of the public] sit in the lobby, where audio of voir dire was being streamed, was an insufficient substitute for a live-stream.” (Appellant’s Br. pp. 15-16).

[13] In the midst of the COVID-19 pandemic, our supreme court, in response to Governor Holcomb’s declared public health emergency, issued *In the Matter of Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus* (COVID-19), No. 20S-CB-123 (Mar. 16, 2020), in which it allowed trial courts to limit spectators in the courtrooms to the extent necessary

to provide adequate social distancing. A subsequent order allowed the trial courts to “use audiovisual communications [] to select a jury.” *In the Matter of Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus* (COVID-19), No. 20S-CB-123 (May 13, 2020). This order also noted that “no confidential proceedings shall be broadcast on any public platform.” *Id.* In furtherance of these orders and in light of the ongoing public health emergency, the trial court decided, over Lappin’s objection, to stream the audio of the voir dire proceedings to the lobby of the traffic court. Citing privacy concerns, the trial court did not make a visual available of the venire selection.

[14] In *Press-Enterprise Co. v. Supreme Court of Cal.*, 404 U.S. 501, 512-13, 104 S.Ct.819, 825-26, 78 L.Ed.2d 629 (1984), the United States Supreme Court found that the California court improperly closed six weeks of voir dire to the public, including the press. The Court held that the closure, in an attempt to increase the candor in the responses by individual jurors in a trial where the defendant was charged with the rape and murder of a teenage girl, was not narrowly tailored to protect privacy, while maintaining the openness essential to public confidence in the criminal justice system. *Id.* We do not believe *Press-Enterprise Co.* to be on point for the situation at hand. At the core of *Press-Enterprise Co.* was the overbreadth of the trial court’s response of complete closure of the courtroom to a legitimate privacy interest—that of potential jurors who may be required to reveal personal matters during a criminal trial in which they were called upon to serve. Here, the trial court was faced with a

global health pandemic and while the privacy concern at stake—the revelation of personal matters in a criminal trial—remained the same as in *Press-Enterprise Co.*, the trial court did not take the drastic measure of closing the courtroom. Instead, the trial court followed the supreme court’s order and provided a live stream of the venire selection. However, to protect the privacy of the venire panel² and to strike a balance between this competing privacy concern and Lappin’s right to a public trial, the trial court limited the live stream to audio only.³ In all, we conclude that the trial court implemented reasonable accommodations to deal with a nearly unprecedented global pandemic during the voir dire selection of Lappin’s trial. Accordingly, in light of *Waller*, we find that the trial court’s limitation on attendance during voir dire was reasonable and did not constitute reversible error.

II. Trial Proceedings

[15] With respect to the remainder of the trial proceedings, Lappin asserts that “[w]hile the best safeguard of these values [of a public trial] is a fully open courtroom, the ongoing pandemic has undoubtedly made that difficult. A live-

² The Indiana Jury Rules recognize these privacy concerns by excluding jury questionnaires from public access and allowing trial courts to order that sensitive information provided by jurors during an individual voir dire is excluded from public access. *See* Ind. Jury Rule 10.

³ Lappin also claims that the audio-only stream would impede a *Batson* challenge, as “[m]embers of the public [who are] only able to hear the proceedings would not learn if one party was striking all prospective jurors of a given race, nor would they be able to determine if a justification based on demeanor was accurate.” (Appellant’s Br. p. 16). We agree with the State that the trial court and the parties police the use of peremptory challenges, and while spectators being able to see the race of the jurors could be interesting to them, the public cannot make any decisions with respect to *Batson* challenges.

stream would allow the public the next best opportunity to see and hear the proceedings, to cast a critical eye on the judicial process, and ensure the fairness of a trial.” (Appellant’s Br. p. 18).

[16] Although during the remainder of the trial, public access to the courtroom was limited to four spectators due to COVID-19 restrictions, the courtroom was not closed. Public access to attend the trial in person was available, and there is no evidence that individuals were turned away or prevented from attending. To the contrary, when the trial court inquired whether the parties knew of any potential spectators who were planning to attend in person, none were identified. Accordingly, as the trial court was open to the public and no person was turned away, Lappin failed to establish that his right to a public trial was denied.

CONCLUSION

[17] Based on the foregoing, we hold that the trial court did not violate Lappin’s right to a public trial.

[18] Affirmed.

[19] Mathias, J. and Crone, J. concur