State of Wisconsin
Court of Appeals
District 1
Appeal No. 2016AP1803-CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Robert Wayne Huber, Jr,

Defendant-Appellant.

On appeal from a judgment of the Milwaukee County Circuit Court, The Honorable Stephanie Rothstein, presiding

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Defendant-Appellant's Brief and Appendix

Law Offices of Jeffrey W. Jensen
735 W. Wisconsin Avenue, Suite 1200
Milwaukee, WI 53233

414.671.9484

Attorneys for the Appellant

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Statement on Oral Argument and Publication

The issues presented by this appeal are controlled by well-settled law. Therefore, the appellant does not recommend either oral argument or publication.

Statement of the Issues

I Whether the circuit court denied Huber his constitutional right to self-representation.

Answered by the circuit court: No.

II Was Huber's trial counsel constitutionally ineffective for failing to object when the circuit court, *sua sponte*, ordered that the courtroom be entirely closed during the playing of video recordings of Huber having sex with several of the alleged victims.

Answered by the circuit court: No.

Summary of the Arguments

I The circuit court committed structural error by refusing to act upon Huber's invocation of his constitutional right to self-representation. At the January 16, 2014 pretrial conference, Huber unequivocally invoked his constitutional right to self-representation. At that point, the circuit judge flatly denied Huber's request, and the court did not conduct a waiver of counsel colloquy with Huber. This is structural error. Huber's demand was clear, and although waiver of counsel cannot be presumed, the trial judge's failure to conduct a waiver of counsel colloquy is what resulted in a murky record. Huber cannot be denied his constitutional right to self-representation merely because the judge refused to properly address Huber's invocation of the right. To hold otherwise renders the right to self-representation to be chimerical. The trial judge could in effect permanently deny the defendant this right by simply refusing to respond to the defendant's invocation of the right.

II Huber's trial counsel was ineffective for failing to object when the court, *sua sponte*, ordered the courtroom entirely closed during the time that the video evidence was presented. A large part of the state's case against Huber was video recordings that Huber allegedly made while he was sexually assaulting and physically abusing two underaged girls. Just as the video recordings were about to be shown to the jury,

the judge, *sua sponte*, ordered that the entire courtroom be closed. Huber's attorney did not raise the objection that proceeding in this manner deprived Huber of his Sixth Amendment right to a public trial.

Because trial counsel did not object, it was not structural error. Instead, the issue must be analyzed under the rubric of ineffective assistance of counsel. That is, Huber must demonstrate that counsel's failure to object denied him a fair trial. This is easily done.

Huber alleged in his postconviction motion that counsel's failure object was deficient performance because, had he objected, the judge would have been obliged to leave the courtroom open.

Counsel's defective performance was prejudicial because the video evidence was key to the State's case. Therefore, the most important evidence in the case was presented behind closed doors. This, clearly, resulted in the sort of unfair trial that the Sixth Amendment right to a public trial was intended to protect against.

Statement of the Case

I. Procedural History

On November 6, 2013, the defendant-appellant, Robert Huber (hereinafter "Huber"), was named in a criminal complaint filed in Milwaukee County charging him with twenty-two felony counts. (R:2) The counts in the complaint include various forms of sexual assault, physical abuse of a child, strangulation, and child enticement. In a nutshell, the complaint alleged that Huber created a "club" on *Facebook*. The club was for for girls only. Once a girl joined the club, Huber-- using an alias-- would make arrangements to meet the girl claiming that he was their "teacher." According to the complaint, during these private "lessons" with the girls, Huber would sexually assault them and physically abuse them.

The case proceeded to a preliminary hearing. At the conclusion of the hearing, the court found probable cause and bound Huber over for trial. (R:40-32) Huber entered not guilty pleas to all counts, and he demanded a speedy trial. (R:40-33)

The court conducted a final pretrial conference on January 16, 2014. At this hearing, the following exchange took place between Huber and the judge:

> THE DEFENDANT: The next item is I'm moving for immediate dismissal of all charges.

> THE COURT: Okay. Thank you, Mr. Huber. I'm not hearing from any motions [sic] 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.
>
> THE DEFENDANT: At this time, I'm firing my attorney.
>
> THE COURT: You cannot do that.
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> THE DEFENDANT: 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 it or deny it. So I am not going to remove Mr. Poulson at this time.

(R:42-5, 6)[1]

The case was called for trial on February 3, 2014. At that time the judge noted that Huber had sent a letter to the court seeking to exercise his right to self-representation. (R:11) During the hearing, though, Huber told the judge that he had changed his mind, and he sent the letter to the court inadvertently. (R:43-3, 15) Additionally, the prosecutor informed the court that there was some newly-discovered evidence that had only recently been turned over to the defense. (R:43-7)

At that point, a question was raised as to whether Huber

[1] Thereafter, Huber's lawyer told the court that it appears that Huber is requesting a new lawyer. Huber did not request a new lawyer, though. He was attempting to get the court to hear the substance of his motion to dismiss, which the court refused to do as long as he was represented. Huber never told the judge that he wanted a new lawyer.

would waive his speedy trial demand, and seek an adjournment to review the new evidence. The judge asked Huber whether he felt he had a "clear head", and Huber told the judge that, "In all honesty, I'm just saying that. I have a lot of questions about what's going on today." (R:43-16)

Thereupon, the judge gave Huber time to confer with his lawyer. (R:43-18) However, after some amount of time, not specified in the record, the judge interrupted the conference between Huber and his lawyer. *Id.* The judge said that she did not wish to rush Huber, but there was a limited amount of time that could be allowed in court. Then the judge said:

> What we need to do right now is set a date for trial and proceed forward with the assumption that Mr. Poulson is representing you. I'm going to deem that-- we're going to vacate your speedy trial demand . . . because you are joining in this request for-- you're joining in the request for the adjournment based upon the new evidence that's been provided . . . And frankly, for the record, had you not made that request, the Court would have likely ruled that we will go ahead today without the use of that evidence by the state.

(R:43-19)

Another final pretrial conference was set for March 3, 2014. On that date, the judge noted that Huber had sent another letter to the court "[a]sking in effect for permission either to proceed *pro se* or that the Court order Mr. Poulson to withdraw." (R:44-4, 5)

In the March 7, 2014 letter, Huber complained bitterly

about his inability to review the discovery. (R:12) He indicated that he was forced to waive his speedy trial demand at the last hearing because, if he did not, his attorney would have withdrawn, and Huber would have been left with no means of subpoenaing witnesses or presenting his case. *Id.* He wrote, "Because of the dishonesty of the prosecution; if I choose to represent myself, I will have no means to investigate or contact people who could provide exculpatory evidence or information." *Id.*

At that point in the March 3rd final pretrial conference, Huber explained to the court that he has not been able to go over the discovery, and he has not met with his attorney sufficiently to go over the discovery. (R:44-6) Repeating what he had requested in the letter, Huber asked the judge to order that the attorney turn over the discovery to him. *Id.*

The court did not act upon Huber's request to proceed *pro se*. Instead, the judge ordered:

> [n]o counsel of record in this matter shall show, display, forward, disclose, or reproduce to any person other than law enforcement, district attorney staff, defense attorney investigator and staff, any discovery material in this case then only for the purpose of preparation for trial.
>
> In addition, NO COPIES-- and that's in capital letters-- of discoverable material shall be provided to the defendant for his independent possession. The defendant shall have full access to said materials, only in the presence of his attorney . . .

(R:44-8) On March 7, 2014, the court signed a written order to

this effect. (R:13) Several days later, though, the court modified the order so as to permit Huber to have independent possession of the discovery for ten hours during the day. (R:19)

On the morning of the first day of trial, the state filed a motion to amend the information so as to add two additional counts.[2] (R:15) According to the motion, "The defendant was notified of the State's intention to file these additional charges in a conversation with counsel on or about April 28, 2014." *Id.* Additionally, the motion alleged that the facts supporting these additional charges were contained in the discovery materials.

Huber's attorney indicated that there was some discussion about additional charges, but objected to the late filing of motion. (R:46-7). Over Huber's objection, the court granted the state's motion to amend the information. (R:46-8) The judge reasoned that, "[the state is] not inflicting any undue surprise upon the Defense by so doing or they are not bringing any new charges of which the Defense has not had an opportunity to know about and prepare for prior to the trial." (R:46-9)

The matter then proceeded to trial. After several days of testimony, the State proposed to play video recordings that were purportedly made by Huber depicting Huber performing various sex acts on the victims. At that point, the judge ruled,

[2] The additional counts were No. 24: Sexual exploitation of a child-filing; and, No. 25: Sexual exploitation of a child: filming

apparently *sua sponte*[3]:

> Before the jury comes back out, I'm going to advise the parties that the Court is going to-- when we get to that portion of the presentation of evidence where we're going to show various video files that are on evidence, the Court is going to close the courtroom. I understand that there's some members of the District Attorney's office staff in the courtroom . . . But the record should reflect that the Court, pursuant to its discretion and under specifically Chapter 972 of the statutes, is going to find that this is tantamount to the testimony of the child victims. And given the salacious nature of what we are going to see, find that it's appropriate to close the courtroom.

(R:56-36). There was no objection by defense counsel. At the point the videos were played, the judge did, in fact, order that the courtroom be closed. (R:56-70) Later, all parties agreed that the courtroom was, in fact, closed during the playing of the videos. (R:58-7)

The court conducted a verdict and instruction conference. Huber requested that the court instruct the jury using Wis. JI 790 (coercion). (R:57-177, 178) The court declined the request. Specifically, the judge said, "And I think in this case the defendant's testimony itself is pretty clear that while he may have thought that his compliance was the safest course, it certainly was not the only course for him to avoid committing a crime and, therefore, the defendant fails to meet their [sic] burden of production on that issue. (R:57-181)

[3] The record appears as though the ruling was *sua sponte*; however, it should be noted that the transcript indicates that immediately before the ruling there were at least two discussions off the record. (R:80-35)

Following the presentation of the evidence, the jury returned verdicts finding Huber guilty of all counts. (R:128 et seq.) The matter was then set for sentencing.

Prior to the sentencing date, though, Huber's attorney filed a motion to withdraw, indicating that, due to a change in circumstances, he was no longer able to continue to represent Huber. The court granted the motion. (R:59-3)

Thereafter, with new counsel, Huber proceeded to sentencing. The court sentenced Huber to a total of 225 years of initial confinement, and 135 years of extended supervision.

Huber timely filed a notice of intent to pursue postconviction relief.

Huber filed a postconviction motion alleging that his trial counsel was constitutionally ineffective for failing to object to the court's order closing the courtroom during the presentation of the video recordings.[4] According to Huber, the court's order denied him his constitutional right to a public trial. The circuit court denied Huber's postconviction motion without conducting an evidentiary hearing. (R:66) The circuit court, by memorandum decision, found that trial counsel was not ineffective because, even if counsel had objected to closing the courtroom, the court would have overruled the objection. According to the judge, there is an overriding interest in

[4] Huber first filed a notice of appeal. While the case was pending before the court of appeals, Huber filed a motion seeking remand so that he could file a postconviction motion. The court granted Huber's request.

protecting the "privacy concerns for the child victims and their integrity." (R:66-3)

Huber then filed a notice of appeal from both the judgment of conviction, and from the court's order denying his postconviction motion.

II. Factual Background

Again, in a nutshell, the evidence presented at trial was to the effect that Huber set up a *Facebook* page for a group he called "The Kittenz." The group was purportedly for girls who were interested in improving themselves spiritually and physically. Huber held himself out as the teacher or the master. Huber was eventually able to persuade several girls, including LE and RD, to come to his rooming house, where, while claiming to "teach them", he would sexually assault them, physically abuse them, and some of the incidents were video-recorded.[5]

Huber admitted that most of this was true, but he claimed that he was coerced into doing this by some "Russians", who were threatening to cause him, or his family, harm if he did not comply.

[5] The testimony presented at trial went into massive detail concerning the various members of The Kittenz, the various communications that took place between the members, and the motivation for each of the girls to follow "Adon's" instructions. Most of this is not necessary for a clear understanding of the factual context for the issues on appeal. In fact, even if it were possible to summarize all of the evidence in a meaningful matter, it would probably be counterproductive to an understanding of the issues. Therefore, for the sake of clarity, this statement of the facts is abridged, and it will present only those facts that are necessary for an understanding of the issues.

At the time of trial, RD was fifteen years old. (R:49-11) She was in ninth grade. She was friends with one of the other alleged victims, LE. (R:49-14) LE told RD that she (LE) had been communicating with a man (R:49-15), and RD agreed to communicate with him as well. The man called RD first, and then they all communicated through *Facebook*. (R:49-17) They had started a group called "The Kittenz." *Id.* The man, "Adon", told RD that he was going to improve her spiritually through pleasure and pain. (R:49-22) RD testified that the more she learned about The Kittenz, the more interested she became. (R:49-34) She began meeting with Adon to study, and she eventually went to his boarding house in downtown Milwaukee. (R:49-46)

During her first study session at the boarding house, Adon (who now said his name was Alexander, but who was actually Huber), told RD to undress. (R:49-49) At that point, RD realized that Alexander had his pants off, and he then zip-tied her wrists behind her back. (R:49-56) He pushed RD to her knees, and he put his penis in her mouth. (R:49-57) While she was in this position, Alexander whipped her buttocks with a belt, and then with a cable wire. (R:49-65, 68) At some point he put clamps on RD's nipples. (R:49-69) The clamps caused her nipples to bleed. (R:49-70) Near the end, RD noticed that Alexander was video-recording their activities. (R:49-74)

RD went to Alexander's boarding house again about two

weeks later. (R:49-84) Again, RD sucked on Alexander's penis, but this time he whipped her more, and he put a clamp on her clitoris. (R:49-85)

LE also testified. She was also under the age of eighteen, and she told the jury that she met with Adon/Alexander over fifty times, and four out of five times something sexual would happen. (R:53-7) During one incident, she began to panic, and said she wanted to die. (53-18) LE said that Huber then grabbed her by the throat and choked her until she lost consciousness. *Id.*

Huber also testified. Concerning the state's case, Huber said that while he was living in the rooming house, he received a telephone call from an unidentified person who asked whether he (Huber) "would be interested in having sex with some underaged minors." (R:56-129) Huber said that he thought it was a sick joke, so he hung up on the person. *Id.*

Then, according to Huber, about two weeks later, the same person called again, and said that "they" had two girls that they wanted Huber to "train", and that they wanted Huber to have sex with the girls. (R:56-130) If Huber refused, they said, they were going to firebomb Huber's mother's house. *Id.* Again, Huber said that he "called their bluff", and told them that he was sure that his mother would not mind meeting his deceased father again. *Id.*

Then, about a week later, Huber received another call

from the same person, only this time the person threatened to kill Huber. *Id.*

Not long after that, Huber said, he was riding his bicycle home when someone fired a gun at him. (R:56-134) Then, shortly after that, he got another telephone call. This time the voice said, “Next time we’re not going to miss.” (R:56-135)

Huber considered going to the police, however, the voice on the phone threatened to harm a person who, according to Huber, had been responsible for his wrongful incarceration. (R:56-137) Huber thought that he would be blamed for hurting this person, since he was the one most likely to hold a grudge against the person.

Huber decided to follow the instructions he received by telephone. He said the events began when he heard the back door open, and it was LE (R:56-144) She came into the room, and she began taking off her clothes. (R:56-145) Huber told LE that she did not need to do this, but then she said, “I’m grateful that my mind, body, and soul are yours to do with as you please.” *Id.* Huber explained that he had considered simply allowing LE to come to his house, but then doing nothing but talk to her. This was not possible, though, because the voice had told him that he was required to video record the sexual encounter as proof that he had followed instructions. (R:56-146)

During his testimony, Huber admitted that he did, in fact, perform many of the acts claimed by the girls, LE and RD, and

which are depicted on the video recordings; however, according to Huber, he was coerced into doing so by the telephone calls he had been receiving.

Huber denied that he set up the *Kittenz, Inc.* website. (R:56-156)

Argument

I The circuit court denied Huber his constitutional right to self-representation.

At the January 16, 2014 pretrial conference, Huber unequivocally invoked his constitutional right to self-representation. At that point, the circuit judge flatly denied Huber's request without conducting a waiver of counsel colloquy with Huber. This is structural error. Huber's demand was clear, and although waiver of counsel cannot be presumed, the trial judge's failure to conduct a waiver of counsel colloquy is what has resulted in a murky record. Huber cannot be denied his constitutional right to self-representation merely because the judge refused to properly address his invocation of the right. To hold otherwise, renders the right to self-representation to be chimerical. The trial judge can permanently deny the defendant this right to self-representation by simply refusing to respond to the defendant's invocation of the right.

The contours of the constitutional right to self-representation were described as follows:

> The Court has said that the right to self-representation, which is "necessarily implied by the structure of the [Sixth] Amendment," *id.* at 819–20 and n. 15, 95 S.Ct. at 2533–34 and n. 15, "exists to affirm the accused's individual dignity and autonomy," *McKaskle v. Wiggins,* 465 U.S. 168, 178, 104 S.Ct. 944, 951, 79 L.Ed.2d 122 (1984). The right is grounded in "a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." *Faretta,* 422 U.S. at 817, 95 S.Ct. at 2532.

State v. Klessig, 211 Wis. 2d 194, 215-16, 564 N.W.2d 716, 725 (1997). The improper denial of a criminal defendant's right to self-representation is structural error, and therefore it is not subject to the harmless error rule. *McKaskle v. Wiggins,* 465 U.S. 168, 184, 104 S. Ct. 944, 954, 79 L. Ed. 2d 122 (1984).

It is worth revisiting the colloquy that took place between the judge and Huber at the pretrial conference on January 16, 2014:

> THE DEFENDANT: The next item is I'm moving for immediate dismissal of all charges.
>
> THE COURT: Okay. Thank you, Mr. Huber. I'm not hearing from any motions [sic] directly from you as you're represented by counsel. What else do you feel that you want to take up with the court?
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> THE DEFENDANT: At this time, I'm firing my attorney.
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>
> Every lawyer has to ask permission of the court to withdraw, and the court has the authority to grant it or deny it. So I am not going to remove Mr. Poulson at this time.

(R:42-5, 6).

At that point, the structural error was complete. Huber had clearly been denied his constitutional right to self-representation. Shortly after that hearing, Huber sent a letter to the judge demanding that he be permitted to represent himself.

Certainly, though, the state will argue that the error was mitigated, if not wholly absolved, by the facts that (1) the judge did not engage Huber in a waiver of counsel colloquy, and waiver of counsel cannot be presumed; (2) at later hearings, Huber in effect withdrew his demand for self-representation by telling the judge that he had inadvertently sent the letter demanding to proceed *pro se*; and, then, (3) when he made his second request to represent himself, he was somewhat less clear in his demand. That request was to *either* represent himself, or to have the court remove Mr. Poulson as his lawyer.

Huber's claim is that, when he initially fired his attorney, and then wrote a letter demanding self-representation, the structural error was complete.

However, waiver of counsel will not be presumed and, therefore, where the circuit judge fails to conduct a valid waiver of counsel colloquy, the defendant has not been denied his constitutional right to self-representation. Here, though, the judge made no attempt to engage Huber in a waiver of counsel colloquy. Instead, the judge flatly denied Huber's request to represent himself.

The Wisconsin Supreme Court has explained:

> So important is the right to attorney representation in a criminal proceeding that nonwaiver is presumed." *Pickens*, 96 Wis.2d at 555, 292 N.W.2d 601; *see also Klessig*, 211 Wis.2d at 204, 564 N.W.2d 716. The presumption of nonwaiver is overcome only upon an affirmative showing that the defendant knowingly, intelligently, and voluntarily waived the right to counsel. *Klessig*, 211 Wis.2d at 204, 564 N.W.2d 716. In *Klessig*, this court mandated the circuit court's use of a colloquy in order to prove the defendant's valid waiver. *Id.* at 206, 564 N.W.2d 716. Such an examination on the record assists the circuit court in "establish[ing] that '[the *198 defendant] knows what he is doing and his choice is made with eyes open.'

State v. Imani, 2010 WI 66, ¶ 22, 326 Wis. 2d 179, 197-98, 786 N.W.2d 40, 49.

In *Imani*, the circuit judge conducted a *defective waiver of counsel colloquy*, and then denied Imani's request for self-representation. Imani proceeded to trial with counsel, and he was convicted. On appeal, Imani claimed that the circuit court denied him his constitutional right to self-representation. The Wisconsin Supreme Court wrote:

> We disagree. We conclude that Imani was not deprived of his constitutional right to self-representation because the circuit court properly determined that Imani did not validly waive his right to counsel under *Klessig*. We are cognizant of the fact that the circuit court did not engage Imani in the full colloquy prescribed in *Klessig* and did not utilize the exact language or "magic words" of *Klessig* when conducting its colloquy. The circuit court's inquiry could have been better. Nevertheless, it is evident from the record that the circuit court engaged Imani in two of the four lines of inquiry prescribed in *Klessig*: whether Imani made a deliberate choice to proceed without counsel and whether Imani was aware of the difficulties and disadvantages of self-representation.[9] Because we answer both in the negative, it necessarily follows that Imani did not validly waive his right to counsel.

State v. Imani, 2010 WI 66, ¶ 26, 326 Wis. 2d 179, 199-200, 786 N.W.2d 40, 50.

Here, though, the circuit judge's colloquy was not defective, it was *non-extant*. This is precisely the reason that what occurred ought to be structural error. To say that a defendant has a constitutional right to self-representation, but to then permit the circuit court to deny the defendant that right-- and to effectively foreclose an appeal by failing to conduct a waiver of counsel colloquy-- renders the constitutional right to self-representation a chimerical right. All the trial judge has to do is to refuse to engage the defendant in a waiver of counsel colloquy, and then the right does not exist.

Therefore, the fact that the record does not establish that

Huber knowingly, voluntarily, and intelligently waived his right to counsel, ought not foreclose Huber from raising this issue on appeal. It was the trial judge's refusal to conduct a waiver of counsel colloquy that put the record in this state.

Nevertheless, the state may argue that had the trial judge engaged Huber in a waiver of counsel colloquy, it is likely that Huber would not have waived counsel. This inference, the state might say, is demanded by the fact that, later, Huber told the judge that he had "inadvertently" sent the letter to the court demanding to proceed *pro se*, and that a fair understanding of his later demand to proceed *pro se*, was equivocal; that Huber was not actually invoking his right to self-representation, rather, he was really trying to get a new lawyer by getting rid of Attorney Poulson.

This sort of speculation, though, is, again, precisely the reason that the circuit court's refusal to act upon Huber's initial, unequivocal, demand to proceed *pro se* is structural error. Had the court honored Huber's invocation of his right to self-representation, and then and there engaged Huber in a waiver of counsel colloquy, there would be no uncertainty in the record. We would not be in the position in which we currently find ourselves, having to discern what might have occurred at a waiver of counsel colloquy by piecing together the scant circumstantial evidence in the record

For these reasons, the court should find that, in flatly

denying Huber's demand for self-representation, the circuit court committed structural error.

II By closing the courtroom during the presentation of the video evidence, the circuit court denied Huber his constitutional right to a public trial.

Huber, like all criminal defendants, has a Sixth Amendment right to a public trial. Here, without objection from defense counsel, the circuit judge *sua sponte* entirely closed the courtroom during the playing of the videos. Had defense counsel objected, and had the appellate court found that Huber was denied his right to a public trial, the remedy would have been automatic reversal.

However, defense counsel did not object. Thus, the issue must be evaluated under the rubric of ineffective assistance of counsel. In other words, Huber must show that the closure of the courtroom resulted in an unfair trial; that is, that counsel's error was prejudicial.

Here, though, that is easily demonstrated. Had counsel objected, and had the court considered the *proper legal standard*, closure of the courtroom could not have been justified.

The videos were exceedingly important evidence; and this important evidence was presented to the jury *behind closed doors*. This entirely frustrates the reasons for a public trial.

There were many measures, short of complete closure of the courtroom, that could have been taken to spare the girls any further humiliation. For example, the video screen could have been positioned so that the jury could see the images, but the gallery could not. The right to a public trial does not include the right of the public to closely examine all documentary evidence and images.

Nevertheless, the circuit court denied Huber's postconviction motion without hearing. The judge reasoned, "The court concludes that its order was appropriate under the circumstances and that the defendant was not denied his right to a public trial, and even if it exclusion order was error, the error was harmless. The court also find that any objection from counsel would have been denied and that the defendant's right to a fair trial was not compromised or prejudiced." (R:66-2)

A. Standard of appellate review

"Whether counsel was ineffective is a mixed question of fact and law. [internal citation omitted] The circuit court's findings of fact will not be disturbed unless shown to be clearly erroneous. [internal citation omitted] The ultimate conclusion as to whether there was ineffective assistance of counsel is a question of law." *State v. Balliette,* 2011 WI 79, ¶ 19, 336 Wis. 2d 358, 370, 805 N.W.2d 334, 339

Here, no evidentiary hearing was held. Therefore, there

are no findings of historical fact. Thus, it is a question of law as to whether trial counsel was ineffective.

B. Ineffective assistance of counsel generally

The standard for ineffective assistance of counsel is well-known.

> "[T]he right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson,* 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 1449 n. 14, 25 L.Ed.2d 763 (1970). The benchmark for judging whether counsel has acted ineffectively is stated in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That requires the ultimate determination of "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S.Ct. at 2064. The overall purpose of this inquiry is to ensure that the criminal defendant receives a fair trial. A fair trial is defined as "one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." *Id.* at 685, 104 S.Ct. at 2063.
>
> The *Strickland* Court set forth a two-part test for determining whether counsel's actions constitute ineffective assistance. The first test requires the defendant to show that his counsel's performance was deficient. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 104 S.Ct. at 2064. Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. Rather, the case is reviewed from counsel's perspective at the time of trial, and the burden is placed on the defendant to overcome a strong

presumption that counsel acted reasonably within professional norms.[4] *Id.*

State v. Johnson, 153 Wis. 2d 121, 126-27, 449 N.W.2d 845, 847-48 (1990)

C. The right to a public trial

"The Sixth Amendment to the United States Constitution guarantees "a public trial" to every criminal defendant.[3] The Sixth Amendment is binding on the states through the Constitution's Fourteenth Amendment. *Gannett Co., Inc. v. DePasquale,* 443 U.S. 368, 379, 99 S.Ct. 2898, 61 L.Ed.2d 608 1979). Article I, § 7 of the Wisconsin Constitution also guarantees a public trial for every criminal defendant. *See also State v. Ndina,* 2009 WI 21, ¶¶ 41–42, 315 Wis.2d 653, 676–677, 761 N.W.2d 612, 623. Not every exclusion of a member of the public, however, violates a defendant's right to a public trial. *Id.,* 2009 WI 21, ¶ 48 & n. 23, 315 Wis.2d at 681–682 & n. 23, 761 N.W.2d at 625–626 & n. 23."The Supreme Court has described four values furthered by the Sixth Amendment guarantee of a public trial: (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." *State v. Small,* 2013 WI App 117, ¶ 8, 351 Wis. 2d 46, 52–53, 839 N.W.2d 160, 163

As mentioned above, not every exclusion of a member of the public violates a defendant's right to a public trial. On this point, the court of appeals wrote, where only unruly members of the gallery were excluded::

> As to whether the proceedings were "fair," we are convinced that was the case. The trial court did not "close" the courtroom in the sense that the public was not permitted to enter. The trial court gave several warnings in an attempt to maintain the fairness and integrity of the result in this case. It is not unreasonable for a court to expect those in the gallery, family or not, to remain quiet during testimony so that the jury can remain attentive to the evidence rather than people in the gallery. Accordingly, we conclude that Ndina has not established that he was prejudiced by counsel's failure to object to the trial court's decision to exclude family members from part of the trial.
>
> The key distinction as to the issue in this case is that when a defendant makes a timely objection at trial raising a public trial challenge, a defendant receives the benefit of automatic reversal without having to prove prejudice if the public trial violation is proven. *Smith v. Hollins,* 448 F.3d 533, 536-37 (2d Cir.2006); however, if a defendant fails to make a timely objection at trial on a public trial challenge, then the issue can only be reviewed in the context of ineffective assistance and prejudice must be established. *Purvis v. Crosby,* 451 F.3d 734, 738-39 (11th Cir.), *cert. denied,* 549 U.S. 1035, 127 S.Ct. 587, 166 L.Ed.2d 436 (2006).

State v. Ndina, 2007 WI App 268, ¶¶ 20-21, 306 Wis. 2d 706, 718-20, 743 N.W.2d 722, 729, *aff'd on other grounds,* 2009 WI 21, ¶¶ 20-21, 315 Wis. 2d 653, 761 N.W.2d 612.

Here, Huber's attorney did not object at the time of the closure, and, therefore, Huber is not entitled to automatic reversal. The issue must be analyzed under the ineffective assistance of counsel rubric; that is, Huber must show that the exclusion of the public resulted in an unfair trial.

D. Counsel's failure to object to closure was ineffective, and the error is prejudicial because there was no factual basis for the court to completely close the courtroom.

In closing the courtroom, the judge stated that she was doing so pursuant to the discretion granted to the court by Chapter 972, Stats. Significantly, there is nothing in Chapter 972 that grants the circuit court discretion to close the courtroom during a criminal jury trial (i.e. to deny the defendant his constitutional right to a public trial). Thus, the judge's order was not based on the proper legal standard, and, therefore, it was an erroneous exercise of discretion.[6] Had defense counsel objected, the court would have been prompted, perhaps, to consider the proper factors. Had the court done so, complete closure could not have been justified.

[6] . "A circuit court does not erroneously exercise its discretion if its decision is based on the facts of record and on the application of a correct legal standard." *Larry v. Harris,* 2008 WI 81, ¶ 15, 311 Wis.2d 326, 752 N.W.2d 279 (citing *Hartung v. Hartung,* 102 Wis.2d 58, 66, 306 N.W.2d 16 (1981)).

Regarding closure, the Wisconsin Supreme Court has explained the proper legal standard:

> Closure of a criminal trial is justified when four conditions are met: "(1) the party who wishes to close the proceedings must show an overriding interest which is likely to be prejudiced by a public trial, (2) the closure must be narrowly tailored to protect that interest, (3) alternatives to closure must be considered by the trial court, and (4) the court must make findings sufficient to support the closure." The case law typically refers to this four-part test as the "*Waller* test," referring to the United States Supreme Court's decision in *Waller v. Georgia,* 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

State v. Ndina, 2009 WI 21, ¶ 56, 315 Wis. 2d 653, 687, 761 N.W.2d 612, 628.

Here, neither party requested closure. Thus, we are left to speculate as to the "overriding interest" that would be prejudiced by a public trial, and which prompted the court to make the *sua sponte* order closing the courtroom. In fairness, it is probably safe to assume that the judge intended to spare the minor girls-- that is, the alleged victims-- the added humiliation of a public showing of the video recording depicting them involved in various forms of sexual activity with Huber.

The key words, though, are *added humiliation.* It is important to point out that, during trial, the girls testified to the things that Huber did to them. Thus, the information itself was made public. Although one cannot accurately quantify humiliation, the added humiliation that the girls might have felt if the courtroom had not been closed during the playing of the

videos is probably insignificant compared to the humiliation of testifying.

But, by comparison, the importance of a public trial is significant. Whether Huber committed these acts was the main issue of the trial. The video evidence is, perhaps, the most probative evidence on this point; and this important evidence was played to the jury behind closed doors.

Thus, there is no overriding interest that would have been unfairly prejudiced by keeping the courtroom open during the playing of the videos. While, on the other hand, the evidence presented during the closed session was exceedingly important.

Secondly, the court's order was not narrowly tailored to the interests at stake (i.e. to protect the girls from further humiliation), and the judge did not consider alternatives to closure. Instead, the judge issued a blanket order excluding all members of the public. Once can easily think of much less restrictive measures that court have been taken, measures that would have protected the girls from further humiliation without totally denying Huber his right to a public trial. For example, the video screen could have been positioned so that the jury could see it, but the members of the gallery could not. A public trial means that the courtroom is open to the public. The members of the public, though, have no right examine documentary or photographic evidence that is marked and admitted at the trial.

In other words, the public has a right to be in the courtroom, but this does not mean that they have a right to closely examine all of the evidence.

Finally, and perhaps most importantly, the judge made no findings of fact to support the court's order closing the courtroom. Thus, we are left to discuss, in the abstract, whether the courtroom should have been closed.

For these reasons, Huber's trial counsel was ineffective in failing to object to complete closure of the courtroom during the time that the video evidence was presented.

Conclusion

It is respectfully requested that the court of appeals reverse Huber's conviction for the reason that Huber was denied his constitutional right to self-representation; and, further, that Huber was denied his constitutional right to a public trial. The court should remand the case to the circuit court with instructions conduct a new trial; and with further instructions that the court conduct a proper waiver of counsel colloquy with Huber, and be bound by Huber's decision in that regard. Further, the circuit court should be instructed to not close the courtroom during the playing of the video-recordings.

Dated at Milwaukee, Wisconsin, this _____ day of November, 2016.

Law Offices of Jeffrey W. Jensen
Attorneys for Appellant

By:_____
Jeffrey W. Jensen
State Bar No. 01012529

735 W. Wisconsin Avenue
Suite 1200
Milwaukee, WI 53233

414.671.9484

Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 7324 words.

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Dated this _____ day of November, 2016:

_____

Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District 1
Appeal No. 2016AP000241-CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Robert Wayne Huber, Jr,

Defendant-Appellant.

Defendant-Appellant's Appendix

A. Record on Appeal
B. Memorandum decision denying postconviciton motion

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the

administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this ____ day of November, 2016.

_____

Jeffrey W. Jensen