IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	S.CT. NO. 21-0744
	)	
RONALD BRIMMER,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR DUBUQUE COUNTY
HONORABLE THOMAS A. BITTER, JUDGE (JURY TRIAL & SENTENCING)

APPELLANT'S BRIEF AND ARGUMENT
AND
CONDITIONAL REQUEST FOR ORAL ARGUMENT

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FINAL

CERTIFICATE OF SERVICE

On February 15, 2022, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Ronald J. Brimmer, No. 6543809, Anamosa State Prison, 406 North High Street, Anamosa, IA 52205-1199.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The evidence was insufficient to establish that "During the commission of the [defendant's sex] act, *the defendant was aided or abetted by one or more persons*", as necessary to sustain the Count I conviction of Second-Degree Sexual Abuse (rather than only the submitted lesser-included offense of Third-Degree Sexual Abuse).

Authorities

State v. Petithory, 702 N.W.2d 854, 856 (Iowa 2005)

State v. Gibbs, 239 N.W.2d 866, 867 (Iowa 1976)

State v. Hopkins, 576 N.W.2d 374, 377 (Iowa 1998)

State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984)

State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981)

State v. Truesdell, 679 N.W.2d 611, 618–619 (Iowa 2004)

Iowa Code § 709.3(1)(c) (2017)

State v. Henderson, 908 N.W.2d 868, 876 (Iowa 2018)

State v. Wolf, 84 N.W. 536, 538 (Iowa 1900)

Cockburn, C.J., Bish. Cr. Law, §§ 628-633

State v. Barnes, 204 N.W.2d 827, 829 (Iowa 1972)

Iowa Code § 703.3 (2019)

State v. Finnigan, 478 N.W.2d 630, 631-32 (Iowa 1991)

State v. Williams, 574 N.W.2d 293, 296 (Iowa 1998)

State v. Ledezma, 549 N.W.2d 307, 312 (Iowa Ct. App. 1996)

II. The jury trial was closed to the public, and defendant was denied allowance of even a single family member in the courtroom. The closed trial violated Brimmer's right to a public trial.

Authorities

State v. Rees, 868 N.W.2d 881 (Iowa Ct. App. 2015)

State v. Schultzen, 522 N.W.2d 833, 835–36 (Iowa 1994)

State v. Lawrence, 167 N.W.2d 912, 913 (Iowa 1969)

U.S. Const. amend VI, XIV

Iowa Const. art. I, §10

Gannett Co. v. DePasquale, 443 U.S. 368, 411-412 (1979)

Craig v. Harney, 331 U.S. 367, 374 (1947)

In re Oliver, 333 U.S. 257, 271 (1948)

1 Bentham, Rationale of Judicial Evidence 524 (1827)

Richmond Newspaper, Inc. v. Virginia, 448 U.S. 555, 573 (1980)

Waller v. Georgia, 467 U.S. 39, 43 (1984)

Presley v. Georgia, 558 U.S. 209, 213 (2010)

Des Moines Register & Tribune Co v. Iowa District Court, 426 N.W.2d 142, 145 (Iowa 1988)

United States v. Haller, 837 F.2d 84, 86-87 (2nd Cir. 1988)
Weaver v. Massachusetts, 137 S.Ct. 1899, 1908-1909 (2017).

Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty., 478 U.S. 1, 13–14 (1986) (Press-Enterprise II)

Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984) (Press-Enterprise I))

Iowa Supreme Court Supervisory Orders, *In the Matter of Preparation for Coronavirus/COVID-19 Impact on Court Services (May 14, 2021 Order, and August 27, 2021 Order)*

Iowa Supreme Court Statement on Ongoing COVID-19 Iowa Judicial Branch Court Services and Processes Continued to January 1, 2022 (September 7, 2021 Update), https://www.iowacourts.gov/iowa-courts/covid-19-information-and-updates/september-7-2021-supreme-court-statement/ (last accessed November 30, 2021)

State v. Tucker, 290 P.3d 1248, 1258-1259 (Ariz. Ct. App. 2012)

United States v. Thunder, 438 F.3d 866, 868 (8th Cir. 2006)

Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68, (2020)

Commonwealth v. Penn, 562 A.2d 833, 837 (Pa. Super. Ct. 1989)

Chapman v. California, 386 U.S. 18, 23 n.8 (1967)

Arizona v. Fulminante, 499 U.S. 279, 309–310 (1991)

Lado v. State, 804 N.W.2d 248, 252 (Iowa 2011)

Krogmann v. State, 914 N.W.2d 293, 308 (Iowa 2018)

Bennett v. Rundle, 419 F.2d 599, 608 (3rd Cir. 1969)

ROUTING STATEMENT

This case should be transferred to the Court of Appeals because the issues raised involve the application of existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case: Defendant-Appellant Ronald Brimmer appeals from his jury trial conviction for Sexual Abuse in the Second Degree, a Class B Felony in violation of Iowa Code § 709.3(1)(c) (2017).

Course of Proceedings: The State filed an August 23, 2019 Criminal Complaint charging Defendant-Appellant Ronald Brimmer with Sexual Abuse in the Second Degree, a Class B Felony in violation of Iowa Code § 709.3(1)(C). The offense was alleged to have been committed on or about July 19-20, 2018. (8/23/19 Criminal Complaint) (Conf. App. pp. 4-5). Brimmer was arrested on the Complaint on September 11, 2019. (9/11/19 Service of Warrant) (App. p. 4).

A Trial Information followed on August 23, 2019, formally charging Brimmer with two counts of sex abuse, both

committed on or about July 19, 2018. The first count (Sexual Abuse in the Second Degree, a Class B Felony in violation of Iowa Code § 709.3(1)(c)) was alleged to have been committed by Brimmer against the will of J.H., while aided and abetted by another (namely, co-defendant Augustin Bon-Orduno, who was charged under a separate case number which resolved without trial). The second count (Sexual Abuse in the Third Degree, a Class C Felony in violation of Iowa Code § 709.4(1)(d)) was alleged to have been committed by Brimmer while J.H. was mentally or physically incapacitated or physically helpless. (9/20/19 TI; 6/24/20 Amended TI) (App. pp. 5-6, 12-14).

Brimmer entered a plea of not guilty and demanded his right to a speedy trial. (10/14/19 Written Arraignment) (App. pp. 7-8). He later waived, but then reasserted, his speedy trial right. (12/12/19 Waiver of Speedy; 3/11/20 Pro Se Motion; 1/11/21 Redemand Speedy Trial; 2/11/21 Order Re: Ex Parte Communic. with Attachment) (App. pp. 9-11, 15-17).

On March 12, 2020, the Iowa Supreme Court issued the first in a series of emergency supervisory orders in response to the outbreak of the Coronavirus pandemic. All Iowa jury trials were suspended, with no criminal jury trials to commence after March 13, 2020. See Iowa Supervisory Order, *In the Matter of Preparation for Coronavirus/COVID-19 Impact on Court Services (March 12, 2020).*[1] Jury trials then resumed statewide beginning on February 1, 2021. Iowa Judicial Branch, Orders, *In the Matter of Preparation for Coronavirus/COVID-19 Impact on Court Services* (*November 10, 2020 Order).*

Brimmer's jury trial commenced April 6, 2021. (Tr.Vol.1_1:1-25). Both prior to trial and at the time of trial, Brimmer sought to be afforded his right to a public trial. Over Brimmer's objections, the district court instituted a total

[1] Except as otherwise noted, all COVID-19 Supervisory orders referenced herein are accessible on the Iowa Judicial Branch website at: Iowa Judicial Branch, Orders, https://www.iowacourts.gov/iowa-courts/supreme-court/orders/ (last accessed on November 30, 2021)

closure of the trial courtroom to the public and declined to make allowance for any member of Brimmer's family to observe the trial proceeding. (4/5/21_Tr.11:19-13:24; Tr.Vol.1_3:11-7:20, 8:13-9:11, 172:11-176:6).

At the close of the trial evidence, Brimmer made a motion for directed verdict challenging, inter alia, the aiding and abetting element (element 3) of the Count 1 Sexual Abuse in the Second Degree offense. The motion was denied by the district court, and the matter was submitted to the jury. (Tr.Vol.3_99:15-20, 102:8-106:5).

The jury commenced its deliberations on April 9, 2021 at 10:33 a.m. (Tr.Vol.4_1:1-25, 37:16-17). At 11:54 a.m., a jury question was received inquiring whether the jury could see transcripts of the testimony of the complaining witness (J.H.) and if Defendant Brimmer. The court responded that it could not provide transcripts of any testimony, and that the jurors must rely on their own memory of the evidence. (Tr.Vol.4_37:18-39:3). At 2:06 p.m. on April 9, 2021, the jury returned its verdicts, finding Brimmer guilty of Sexual Abuse

in the Second Degree as charged under Count 1, as well as Sexual Abuse in the Third Degree as charged under Count 2. (Tr.Vol.4_39:4-24).

On May 9, 2021, Brimmer filed a post-trial motion for new trial and in arrest of judgment. The motion again urged that Brimmer had been denied his right to a public trial, and that the evidence had been insufficient to establish the aiding and abetting element of the Count 1 offense. The motion was considered and denied at the time of sentencing. (5/19/21 Mot. New Trial; 5/24/21 State's Resistance) (App. pp. 20-23); (Sent.Tr.3:16-6:6, 7:9-11:24).

Sentencing was held on May 24, 2021. (Sent.Tr.1:1-25). The sentencing court determined that the Count 2 offense merged into the Count 1 offense, such that a conviction and sentence would be entered on Count 1 only. (Sent.Tr.16:16-17:8). The court accordingly entered judgment against Brimmer for: Sexual Abuse in the Second Degree, a Class B Felony in violation of Iowa Code § 709.3(1)(c) (Count 1). As required under statute, the court sentenced Brimmer to an

indeterminate 25 years of incarceration, with a mandatory minimum of 70 percent to be served before obtaining eligibility for parole. The court also imposed applicable surcharges, a lifetime special sentence of supervision under Chapter 903B, and registration on the sex offender registry. (Sent.Tr.23:19-24:15); (5/24/21 Judgment and Sentence; 5/24/21 Order Nunc Pro Tunc; 6/8/21 Mot. Nunc Pro Tunc; 6/11/21 Order Nunc Pro Tunc) (App. pp. 24-30, 32-34).

Brimmer, through trial counsel, filed a May 27, 2021 notice of appeal. (5/27/21 NOA) (App. p. 31).

Facts: Based on the evidence presented at trial, the jury could have found the following facts:

On the evening of July 19, 2018, then-16-year-old J.H. got off work from McDonald's and sent out a Snapchat message asking if anyone could get her alcohol. She received a response from 35-year-old Agustin Bon-Orduno, who she'd met a few weeks earlier when he'd asked for and received her number as she was working the McDonald's drive-through. (Tr.Vol.2_19:11-22:25). Then-20-year-old Ronald Brimmer

had been in the vehicle with Bon-Orduno at the time of the exchange in the drivethrough, but Brimmer did not interact with J.H. at the time. (Tr.Vol.2_41:13-42:1).

Bon-Orduno was Brimmer's boss at John Deere, and the two had worked together for a few months prior to the July 19, 2018 incident. (Tr.Vol.3_79:4-15). They became friends, hanging out from time to time, and Bon-Orduno would sometimes provide Brimmer (who was not yet 21) with alcohol. (Tr.Vol.3_79:4-79:21).

Over the few weeks that elapsed between Bon-Orduno getting J.H.'s number and the July 19, 2018 interaction, J.H. and Bon-Orduno spoke a handful of times. During these conversations, Bon-Orduno told J.H. he was 27, and J.H. said she was 16. Bon-Orduno responded "Oh, well, I guess we probably can't hang out then", and J.H. responded by telling him "that 16 is the age of consent". (Tr.Vol.2_46:3-23).

J.H. had a boyfriend during this period of July 2018. Three days prior to the July 19 interaction, J.H. had texted a friend saying that she and her boyfriend were "on a break. He

decided he wanted to fuck some girl and said lets take a break so yea." (Tr.Vol.2_45:11-46:8, 118:9-10); (Exhibit 43; Exhibit B) (Conf. App. pp. 21, 40). On July 19, J.H. and her boyfriend got into an argument, and J.H. told him she wanted to go get "fucked up." (Tr.Vol.2_43:3-45:10). She thereafter sent out the snapchat message asking for alcohol.

Bon-Orduno responded to J.H.'s July 19 Snapchat, saying he could pick her up and they could drink together at his place. J.H. agreed, and her younger sister N.D. (who was then 14 or 15 years old) ended up accompanying her. N.D. did not intend to drink, but came along to make sure J.H. would be okay. (Tr.Vol.2_23:18-25, 22:20-23:9, 42:10-21, 56:22-57:6, 57:17-20, 78:15-25).

Bon-Orduno drove himself and Brimmer to pick up J.H. and her sister, bringing them back to Bon-Orduno's residence. (Tr.Vol.2_23:7-24, 42:19-43:2, 57:21-58, 79:1-7, 122:23-123:4). There, the group drank alcohol and hung out watching music videos on YouTube in the bedroom. (Tr.Vol.2_24:9-25, 25:19-25, 48:2-4, 58:7-59:11, 60:17-61:8,

79:8-15). At one point, the group drove to a gas station to pick up more alcohol, after which they returned to the bedroom to continue drinking and hanging out. (Tr.Vol.2_25:25-26:13, 63:1-65:3; Tr.Vol.3_57:18-58:7). Bon-Orduno's brother was also at the house, but he remained in another room and did not interact with the group other than to say hello. (Tr.Vol.2_81:11-19).

J.H. was drinking that evening, but N.D. only had a few sips. (Tr.Vol.2_61:9-24, 62:21-25). N.D. told J.H. she wanted them to leave, but J.H. wanted to stay longer and said to just trust her. (Tr.Vol.2_80:23-81:10, 48:2-16). While in the bedroom at Ordano's, J.H. added Brimmer to Snapchat, and two had a conversation via that app. Snapchat is an app where messages disappear shortly after they are viewed by the recipient. (Tr.Vol.2_53:1-3). Brimmer testified that, during this snapchat interaction, he asked J.H. if she'd have a threesome with Bon-Orduno and himself and J.H. indicated her agreement. (Tr.Vol.3_82:2-83:24). J.H. testified she couldn't recall the entire Snapchat conversation, but recalled

that Brimmer had said something about Bon-Orduno liking or being fond of J.H., and that she had responded by saying she was in a relationship. (Tr.Vol.2_46:24-47:10, 51:15-25, 52:20-53:3). When asked at trial if Brimmer's snapchat inquired whether she wanted to have a threesome with he and Bon-Orduno, J.H. testified "No, I don't believe so." (Tr.Vol.2_48:17-21).

Sometime after the above snapchat conversation, J.H. got up from the bedroom to go to the bathroom. (Tr.Vol.2_66:22-67:7, 71:11-13). J.H. testified that, upon exiting the bathroom to walk back to the bedroom, Bon-Orduno met her by the doorway, and pushed her up against the wall holding her arms and trying to kiss her. (Tr.Vol.2_26:21-9). J.H. testified she tried to move her face away, saying "I can't. I have a boyfriend" and "No", but that Bon-Orduno continued trying to kiss her, and then pushed her into the bathroom. (Tr.Vol.2_27:10-28:4, 49:6-8). She testified that no one, including Brimmer, was in the hallway during this interaction between herself and Bon-Orduno. (Tr.Vol.2_48:22-49:2).

She testified that neither she nor Bon-Orduno said anything once in the bathroom. (Tr.Vol.2_49:6-14). J.H. testified that Bon-Orduno just turned the bathroom light off, bent her over the bathtub, pulled her pants and underwear down to her knees, and raped her vaginally and then anally. (Tr.Vol.2_28:18-30:6). J.H. testified that, after Bon-Orduno finished, he let her go and left the bathroom. She testified she remained alone in the bathroom, laying over the bathtub where she'd been left by Bon-Orduno. (Tr.Vol.2_30:7-19).

J.H. did not know how long she remained laying there after Bon-Orduno left, but testified that Brimmer eventually opened the door and came into the bathroom. She testified that Brimmer spoke, but she initially couldn't remember what he said or whether she'd responded to anything he'd said. She later testified that he'd asked "Is this okay?", and that J.H. did not respond to anything. She testified she did not change the position she was in either before or after Brimmer came in. (Tr.Vol.2_30:20-31:10, 49:15-23). J.H. testified Brimmer pulled her up and bent her over, attempting to vaginally

penetrate her with his penis. She testified he couldn't get erect, so he asked if she would give him oral sex. She testified she did not say anything when he asked, and she did not give him oral sex. She testified he then got erect and raped her vaginally and then anally. (Tr.Vol.2_31:11-32:7). She testified that after Brimmer finished, he let her go and she fell back down. Brimmer left the bathroom and J.H. remained sitting alone on the ground. (Tr.Vol.2_32:8-14).

N.D. testified that, after J.H. left for the bathroom, N.D. had remained in the bedroom listening to music on YouTube. She testified Brimmer was hanging out in the back corner of the kitchen area at the time. She said Bon-Orduno stopped over at the bedroom "like, every five to ten minutes" and chatted with her. Brimmer did not similarly stop over or chat with her. (Tr.Vol.2_67:8-68:1).

J.H. testified she eventually heard someone tell her sister to check on J.H. in the bathroom because she was drunk and could have fallen off the toilet. (Tr.Vol.2_32:17-21). N.D. testified it was Bon-Orduno who'd made this statement.

(Tr.Vol.2_68:11-17). N.D. came into the bathroom, closed the door, and sat down next to J.H. asking if she was okay. (Tr.Vol.2_32:22-33:2, 49:24-50:8). J.H. did not tell her sister about any alleged sexual assault at that time. (Tr.Vol.2_33:3-9). N.D. helped J.H. to her feet, and J.H. pulled her pants up, before the two walked out of the bathroom together. (Tr.Vol.2_68:18-69: 22, 83:21-24).

N.D. told Bon-Orduno they needed to go because J.H. wasn't feeling well. Bon-Orduno initially suggested they stay a bit longer and see if J.H. feels better. (Tr.Vol.2_69:21-70:15). This discussion was between N.D. and Bon-Orduno, Brimmer was not a part of it. (Tr.Vol.2_70:16-24). The group then went out to the car so N.D. and J.H. could be driven home. (Tr.Vol.2_33:10-20, 70:1-71:13). It was raining out, so Brimmer brought an umbrella over to cover J.H. on the walk to the car. Bon-Orduno and Brimmer then drove J.H. and N.D. back to their apartment. (Tr.Vol.2_71:1-4).

That evening, J.H.'s boyfriend had been unhappy that J.H. was going out to hang out with guys. J.H. testified she'd

falsely told him she was just hanging out with a girl. (Tr.Vol.2_43:3-45:10). J.H. texted her boyfriend while at Ordano's house, saying "idk when we be back[,] soon though…", "[my sister's] with us", and "I only drank a bit I'll call you when we are back". (Tr.Vol.2_35:9-37:10).

J.H. testified she did not remember agreeing to any sort of sexual contact with either Bon-Orduno or Brimmer. When asked by the prosecutor "Is it possible, looking back on it, that at one of those points when you were blacked out, that you would have agreed?", she responded "I don't remember, but it's possible." (Tr.Vol.2_52:1-7). She testified there were lots of spots she didn't remember, and that all she remembers is having told Bon-Orduno no, and having not responded at all to Brimmer in the bathroom. (Tr.Vol.2_52:8-16).

When they got home, J.H.'s sister helped her inside. J.H's boyfriend had tried to video chat her, and then he called her. J.H. lay in bed and spoke to her boyfriend on the phone. (Tr.Vol.2_37:11-38:4). J.H. told her boyfriend she had been

sexually assaulted, and that "she [her sister] let them two of them". (Tr.Vol.2_34:18-35:8, 37:19-38:6).

After J.H.'s conversation with her boyfriend, N.D. called the police department's nonemergency number. N.D. initially asked the dispatcher if a person would get in trouble if they were drinking while sexually assaulted. She told the dispatcher the person (J.H.) had drunk something but didn't know it was alcohol at the time. At trial, N.D. acknowledged this was not a true statement, but that they'd been afraid of getting in trouble for drinking. J.H. ultimately agreed during the phone call with dispatch to report the alleged sexual assault. (Tr.Vol.2_38:7-19, 73:14-19, 82:21-83:15, 92:23-93:10); (Exhibit 2).

Law enforcement responded to J.H.'s apartment at 1:51 a.m. (Tr.Vol.2_101:9-102:12). After speaking with J.H. at the apartment, law enforcement transported her to the hospital for completion of a sexual assault examination kit. (Tr.Vol.103:21-24). Neither law enforcement nor the Sexual Assault Examination Nurse noticed J.H. exhibit any indicators

of impairment during their interactions with her. (Tr.Vol.2_98:1-24, 104:6-11, 106:2-11). A preliminary breath test administered on J.H. at the hospital at around 4 a.m. yielded a result of 0.03, indicating there was some alcohol in her system though she was well below the legal limit at that time. (Tr.Vol.2_104:12-18, 105:22-106:1, 107:8-10, 107:23-24). A toxicology test was also performed on J.H. at the hospital. No drugs were found in her system. (Tr.Vol.2_96:3-9, 97:2-97:25; Tr.Vol.3_56:12-23, 65:19-67:25, 69:9-70:3); (Exhibit A) (Conf. App. pp. 37-39).

After the hospital, J.H. was taken to the police station for a further interview. She threw up several times while being interviewed. (Tr.Vol.2_76:4-12; Tr.Vol.3_23:23-24:1). After the interview terminated, J.H. went home to rest. (Tr.Vol.2_38:20-39:19).

A search warrant was executed on Bon-Orduno's residence on July 20, 2018 at about 10:31 a.m. Bon-Orduno was the only one present at the residence at the time of the search warrant execution. (Tr.Vol.2_110:10-111:22;

Tr.Vol.3_29:9-30:20). Bon-Orduno was interviewed at that time, and acknowledged that J.H. and N.D. had come over, but denied ever touching either of them. (Tr.Vol.3_30:21-32:24); (Exhibit 39). At some later point during the interview, Bon-Orduno told police he was drinking and couldn't remember if he had sex with J.H. (Tr.Vol.3_53:15-54:2). He also told police that Brimmer liked J.H., but that he didn't know if Brimmer had sex with her. (Tr.Vol.3_32:15-24).

Brimmer was interviewed about a month after the incident, on August 15, 2018. Law enforcement made contact with him, and he voluntarily agreed to come to the police station for an interview. Brimmer was interviewed with his mother present. (Tr.Vol.3_32:25-36:3, 89:7-23); (Exhibit 42). During the interview, Brimmer denied having had any sexual contact with J.H. (Tr.Vol.3_95:4-6).

DNA analysis was performed on the sexual assault examination kit collected from J.H. at the hospital. Bon-Orduno's DNA was located on samples collected from the anal, vaginal, and vulva swabs, as well as on two samples collected

from J.H.s underwear. Brimmer's DNA was located on only a single sample, namely one of the samples collected from J.H.'s underwear. That underwear sample was found to contain a mixture of DNA, with Bon-Orduno identified as the major contributor and Brimmer the minor contributor. m(Tr.Vol.3_8:1-9:2, 9:18-23, 13:1-24, 13:25-15:2, 16:2-10, 17:10-17, 21:7-14); (Exhibit 45) (Conf. App. pp. 34-36).

Brimmer testified in support of his defense at trial. Brimmer had known Bon-Orduno a few months prior to the July 19, 2018 incident. Bon-Orduno had previously talked about not having gotten "laid" since he came to the U.S. Brimmer had been out drinking with Bon-Orduno numerous times previously. At some point, Brimmer told Bon-Orduno that he wanted to help Bon-Orduno get laid. (Tr.Vol.3_97:2-98:2). By that, Brimmer certainly did not mean that he was going to help Bon-Orduno rape somebody – only that he would try to help him in finding a romantic relationship or girlfriend. (Tr.Vol.3_98:22-99:9).

Brimmer testified that, during their snapchat conversation at Bon-Orduno's house, Brimmer asked J.H. if she'd have a threesome with Bon-Orduno and himself. (Tr.Vol.3_82:2-83:6). Brimmer testified that, based on J.H.'s response to his snapchat, he believed they were going to have a threesome. (Tr.Vol.3_83:7-24).

Brimmer testified that at some point, he saw J.H. and Bon-Orduno kissing in the hallway. (Tr.Vol.3_84:4-22). He was not present for and did not see anything that happened between Bon-Orduno and J.H. in the bathroom. (Tr.Vol.3_90:23-91:4). During that time, Brimmer would either have been in the kitchen or in the other room where Bon-Orduno's brother was playing Fortnight. (Tr.Vol.3_84:23-85:5).

Bon-Orduno was not in the bathroom at the time Brimmer later went in. (Tr.Vol.3_96:11-13). Brimmer testified that upon entering the bathroom: he asked J.H. if he could touch her, that J.H. responded in agreement, and that Brimmer understood he had consent at the time he touched

her. (Tr.Vol.85:6-86:7). Brimmer testified that he asked J.H. for a blow job, and that she did not give him a blow job but instead physically turned around and faced the tub. Brimmer testified that he understood from this that she was ready to have sex with him. Brimmer tried to have sex with J.H., and admitted that his penis had made contact with J.H.'s vagina when they attempted vaginal (though not anal) intercourse. He testified the attempt at intercourse was not ultimately successful because he could not get an erection. So he ultimately stopped, put his pants back on, and left the bathroom. (Tr.Vol.3_86:8-87:7, 91:5-7, 91:13-18). Brimmer testified that, when he was pulling his pants on, J.H. sat down on the end of the tub and started crying. Brimmer testified J.H.'s behavior of crying confused him, and he didn't know what was going on. He left the bathroom, found Bon-Orduno and told him what was going on. N.D. then went into the bathroom and, after that, Brimmer and Bon-Orduno took N.D. and J.H. back home. (Tr.Vol.3_87:8-88:6).

Brimmer acknowledged that his August 2018 police interview statements denying any sexual encounter with J.H. had been false. (Tr.Vol.3_89:24-90:1, 96:14-19). However, he testified at trial that he believed the July 19, 2019 encounter to have been consensual. (Tr.Vol.3_90:2-5). He testified that he got affirmative consent from J.H. (Tr.Vol.3_95:15-17). He testified that she did not verbally say yes to him in the bathroom, but that she did verbally said it on the Snapchat message when she'd agreed to have a threesome with Bon-Orduno, and Brimmer. (Tr.Vol.3_95:15-25, 96:5-13). He also testified that though she did not verbally say yes in the bathroom, she turned around and presented herself to him, nonverbally signaling her affirmative consent for sex. (Tr.Vol.3_96:1-4, 98:10-21)

Other relevant facts will be discussed below.

ARGUMENT

I. The evidence was insufficient to establish that "During the commission of the [defendant's sex] act, *the defendant was aided or abetted by one or more persons*", as necessary to sustain the Count I conviction of Second-Degree Sexual Abuse (rather than only the submitted lesser-included offense of Third-Degree Sexual Abuse).

A. <u>Preservation of Error</u>: A record was made that the defense's motion in judgment of acquittal would be made at the close of all evidence but would be treated as if also made at the close of the State's case-in-chief. (Tr.Vol.3_73:23-75:7). Later, following the close of all evidence, defense counsel made a motion in arrest of judgement challenging, inter alia, the aiding and abetting element of the Count I offense. (Tr.Vol.3_99:15-20, 102:8-103:23). The State resisted (Tr.Vol.3_103:24-104:23), and the court denied the defense motion, including with regard to the aiding and abetting element of Count I. (Tr.Vol.3_104:24-106:5). Error was thereby preserved.

B. Standard of Review: Preserved sufficiency-of-the-evidence challenges are reviewed for correction of errors at law. State v. Petithory, 702 N.W.2d 854, 856 (Iowa 2005).

C. Discussion: The burden is on the State to prove every fact necessary to the offense. State v. Gibbs, 239 N.W.2d 866, 867 (Iowa 1976). To be upheld, a jury's verdict must be supported by substantial evidence, meaning evidence which would convince a rational finder the defendant is guilty beyond a reasonable doubt. State v. Hopkins, 576 N.W.2d 374, 377 (Iowa 1998); State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). The evidence must raise a fair inference of guilt on every element and do more than create speculation, suspicion, or conjecture. State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). Such evidence must be viewed in the light most favorable to the State, but consideration must be given to all of the evidence rather than just the evidence supporting the verdict. Petithory, 702 N.W.2d at 856-57. Ultimately, evidence that allows two or more inferences to be drawn,

without more, is insufficient to support guilt. State v. Truesdell, 679 N.W.2d 611, 618–619 (Iowa 2004).

As charged and marshalled herein, the particular element elevating the Count 1 offense from Sexual Abuse in the *Third* Degree to Sexual Abuse in the *Second* Degree, was proof that "During the commission of the [sex] act, the defendant was aided or abetted by one or more other persons." (Instruction 13) (App. p. 18). See also Iowa Code § 709.3(1)(c) (2017) ("1. A person commits sexual abuse in the second degree when the person commits sexual abuse under any of the following circumstances: [...] c. The person is aided or abetted by one or more persons and the sex act is committed by force or against the will of the other person against whom the sex act is committed.").

Specifically, the marshalling instruction provided as follows:

INSTRUCTION NO. 13

> Under Count I, *the State must prove all of the following elements of Sexual Abuse in the Second Degree*:

1. On or about July 19, 2018, the defendant performed a sex act with [JH].

2. The act was done by force or against the will of [JH].

3. During the commission of the act, the defendant was aided or abetted by one or more persons.

If the State has proved all of the elements, the defendant is guilty of Sexual Abuse in the Second Degree under Count I. *If the State has proved only elements 1 and 2, the defendant is guilty of the lesser-included offense of Sexual Abuse in the Third Degree under Count I.* If the State has failed to prove either element 1 or element 2 (or both), the Defendant is not guilty under Count I.

(Jury Instruction 13) (App. p. 18) (emphasis added). The jury was further provided the following instruction on aiding and abetting:

INSTRUCTION NO. 15

Concerning element number 3 in Instruction No. 13, "aid and abet" means to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed. Conduct following the crime may be considered only as it may tend to prove the defendant's earlier participation. Mere nearness to, or presence at, the scene of the crime, without more

> evidence, is not "aiding and abetting". Likewise, mere knowledge of the crime is not enough to prove "aiding and abetting."
>
> The guilt of a person who knowingly aids and abets the commission of a crime must be determined only on the facts which show the part he has in it, and does not depend upon the degree of another person's guilt.

(Jury Instruction 15) (App. p. 19).

Aiding and abetting requires proof that one "assented to or lent countenance and approval to the criminal act either by active participation or by some manner encouraging it prior to or at the time of its commission." State v. Henderson, 908 N.W.2d 868, 876 (Iowa 2018). "Knowledge is essential; however, neither knowledge nor presence at the scene of the crime is sufficient to prove aiding and abetting." Id.

It is not sufficient that one is present at the scene of the crime and has knowledge of the crime or even "mentally approves what is done." State v. Wolf, 84 N.W. 536, 538 (Iowa 1900). Rather, "[t]he party… must… *incite or procure or encourage* the act." Id. (quoting Cockburn, C.J., Bish. Cr. Law, §§ 628-633.) (emphasis added). And such incitement,

procurement, or encouragement must be provided *knowingly*, and must come *at or before* the time of the crime. "[S]ubsequent conduct is relevant only insofar as it tends to prove defendant's *prior encouragement or participation*." State v. Barnes, 204 N.W.2d 827, 829 (Iowa 1972) (emphasis added). See also Id. ("A defendant may not be convicted as a principal on a theory of aiding and abetting for conduct which would only make him an accessory after the fact."); Iowa Code § 703.3 (2019) ("Accessory After the Fact").

The evidence herein was insufficient to establish that "[d]uring the commission of the [defendant's sex] act, the defendant was aided or abetted by one or more persons" as required to establish Second-Degree Sex Abuse. (Jury Instruction 13) (App. p. 18). That is, there was no proof that another person had knowingly provided prior encouragement for, or had actively participated in, Brimmer's commission of a nonconsensual sex act (e.g., the crime of sexual abuse).

The complaining witness's testimony was that Bon-Orduno alone had brought her into the bathroom, perpetrated

a sex act on her person without her consent, and then left the bathroom. (Tr.Vol.2_26:21-9, 27:10-28:4, 28:18-30:19, 48:22-49:14). Some unknown period of time after Bon-Orduno had already left, Brimmer entered the bathroom alone, and independently engaged in a sex act with her. (Tr.Vol.2_30:20-32:14, 49:15-23). Bon-Orduno was not in the room at the time of Brimmer's sex act, and he was neither actively participating in nor actively encouraging Brimmer's commission of a sex act during that time. Nor was there any evidence of a prior agreement between Bon-Orduno and Brimmer to engage in nonconsensual sex with the victim. Brimmer was not present to witness and be encouraged by the allegedly nonconsensual interaction between Bon-Orduno and J.H. inside the bathroom, and there was no indication of any conversation or active encouragement conveyed by Bon-Orduno between the time of Bon-Orduno's sex act and Brimmer's later independent sex act. Compare with State v. Finnigan, 478 N.W.2d 630, 631-32 (Iowa 1991) (evidence established mother's aiding and abetting in sex abuse

perpetrated by father, where mother had: photographed some of the sex acts, initiated the sex acts by demanding the victim go into the bedroom and then directing her in specific ways to engage in the sex acts with the father, and reinforced such directions by threats to hit the victim as well as actually striking the victim if she failed to comply); State v. Williams, 574 N.W.2d 293, 296 (Iowa 1998) (evidence sufficient to prove defendant's active participation in sex abuse aided and abetted by another, where: victim testified four men in succession had sexual intercourse with her against her will, with one person holding her down while another was on top of her, and that the first two men in the room were Defendant and another participant); State v. Ledezma, 549 N.W.2d 307, 312 (Iowa Ct. App. 1996) (evidence was sufficient to support aiding and abetting element of second-degree sexual abuse where: it was clear defendant and the other two men in automobile knew victim was struggling and resisting her confinement, one of the other men put victim in headlock and another held down her feet when she began kicking, during the drive to the remote

area where the sexual assault would be accomplished all three men had conversed amongst themselves, the three men then took turns assaulting victim, and the three men conversed or argued amongst themselves both before and after the assaults took place).

The evidence was insufficient to establish that anyone aided and abetted Brimmer's commission of sexual abuse – either by actively participating in Brimmer's nonconsensual sex act, or by knowingly providing prior encouragement for Brimmer to commit a nonconsensual sex act. As such, the evidence failed to support Brimmer's Count I conviction for Second-Degree Sexual Abuse, rather than for only the submitted lesser-included offense of Third-Degree Sexual Abuse.

II. The jury trial was closed to the public, and Defendant was denied allowance of even a single family member in the courtroom. Brimmer's right to a public trial was violated, and he must now be afforded a new trial.

A. <u>Preservation of Error</u>: Trial counsel objected to the district court's proposed closure of trial proceedings to the

public. The issue was raised prior to trial, again at trial, and then again by post-trial motion. (4/5/21_Tr.11:19-13:24; Tr.Vol.1_3:11-7:20, 8:13-9:11, 172:11-176:6); (5/19/21 Mot. New Trial; 5/24/21 State's Resistance) (App. pp. 20-23); (Sent.Tr.4:4-5:17, 7:2-7:23, 8:6, 8:20-11:24). Brimmer specifically objected to the court's disallowal of public access, and alternatively requested that access be permitted for at least a single member of the defendant's family (his mother). See e.g., (TrialVol.1_3:20-4:11, 174:24-175:1). Both such requests were denied, and the trial court ordered a total closure of the trial courtroom to all members of the public and press. Error was preserved by such ruling by the court, entered over Brimmer's timely objections.

B. Standard of Review: "A public trial is a constitutional right; therefore, the court's review is de novo." State v. Rees, 868 N.W.2d 881 (Iowa Ct. App. 2015) (citing State v. Schultzen, 522 N.W.2d 833, 835–36 (Iowa 1994)).

C. Discussion: As the basis for its total closure of the courtroom, the court cited social distancing requirements triggered by the coronavirus pandemic.

The court noted "[t]he couple of jury trials that we've done up to this point [in the county], we've simply closed the trial to the public". (4/5/21 Tr.12:7-9). The trial court also acknowledged, however, that the courtroom could accommodate both jurors and members of the public while still maintaining at least six-feet of social distancing between all persons. See e.g., (4/5/21_Tr.12:20-13:24) (acknowledging that "Technically, and from a spacing standpoint" the courtroom could accommodate public access).

The court explained the county's practice for accommodating social distancing in jury trial cases was to spread jurors out in the gallery of the courtroom ("behind the bar") instead of in the jury box area ("in front of the bar"). (4/5/21 Tr._11:25-12:3). The court acknowledged that some limited number of persons from the public could be seated either (1) in the gallery area behind or to the side of the jury,

or (2) in the empty jury box area ("in front of the bar"), while still maintaining at least six-feet of social distancing between all persons in the courtroom. (4/5/21 Tr.11:24-12:7, 13:1-12).

In fact, during jury selection, the courtroom had accommodated at least 20 potential jurors at a time, while maintaining compliance with social distancing standards. Based on the morning and afternoon rounds of jury selection, the gallery area could accommodate seating for at least 18 persons, and the jury box area could accommodate seating for at least 5 persons, (meaning there was seating available for at least 23 people) all while maintaining compliance with social distancing requirements. See (Tr.Vol.1_9:9:13-14, 10:19-21) (18 potential jurors seated in gallery, and two additional seated in jury box in first round of jury selection); (Tr.Vol.1_103:5-105:1) (12 jurors seated in gallery, and five additional seated in jury box in second round of jury selection). Only 13 jurors were ultimately sworn in for trial, and at least some of the 10 or so seats vacated by unselected

members of the jury panel could have been made available for members of the public. See also (Tr.Vol.1_7:3-6) ("…is the Court also saying we cannot have members of the public in after jury selection when then those pews would be clear?").

The court also plainly acknowledged the courtroom could accommodate additional persons. The court noted it would allow access to additional persons it viewed as having a 'role' in the trial (such as additional attorneys, victim advocates, interpreters, etc.), just not to members of the public or press. (Tr.Vol.1_173:9-21, 174:10-21). Indeed, the court, though denying access to even a single member of the defendant's family, did permit a victim's advocate to be present and seated in the jury box during the complaining witness's trial testimony. (Tr.Vol.1_172:14-174:8).

In denying public access (including to any of Defendant's family members), the court expressed that placement of members of the public in the gallery (behind or to the side of jurors also seated in the gallery) would result in their "sit[ting] very close to" the jurors – either just over six feet behind, or

just over six feet to the side of some jurors. The court expressed that the alternative placement of the public in the jury box area "in front of the bar" would result in their sitting just over six-feet "behind one of the counsel tables" and "pretty close to" (though certainly more than six feet away from) "the witness stand." (4/5/21_Tr.12:20-13:24).

The district court's total closure of the trial courtroom, without accommodating even a single member of the defendant's family, amounted to reversible error.

The law is well-settled that a criminal defendant is constitutionally entitled to a public trial. "Of uncertain origin, but nevertheless deeply rooted in the common law, the right to public trial has long been regarded as a fundamental right of the defendant in a criminal prosecution." State v. Lawrence, 167 N.W.2d 912, 913 (Iowa 1969). The United States and the Iowa Constitutions guarantee the right to a public trial. U.S. Const. amend VI, XIV; Iowa Const. art. I, §10. See also Lawrence, 167 N.W.2d at 913-914 ("we have recognized that

the right to public trial is guaranteed by Article I, Section 10, of the Iowa constitution").

The public trial provision "reflects the tradition of our system of criminal justice that a trial is a "public event" and that "[w]hat transpires in the court room is public property." Gannett Co. v. DePasquale, 443 U.S. 368, 411-412 (1979) (Blackman, J., dissenting in part) (quoting Craig v. Harney, 331 U.S. 367, 374 (1947)).

> More importantly, the requirement that a trial of a criminal case be public embodies our belief that secret judicial proceedings would be a menace to liberty. The public trial is rooted in the "principle that justice cannot survive behind walls of silence," and in the "traditional Anglo-American distrust for secret trials[]"

DePasquale, 443 U.S. at 412 (Blackman, J., dissenting in part) (other citations omitted).

The right to a public trial protects defendants against unjust convictions. As the United States Supreme Court said long ago:

> Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other

> institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.'

In re Oliver, 333 U.S. 257, 271 (1948) (quoting 1 Bentham, Rationale of Judicial Evidence 524 (1827)).

A "presumption of openness inheres in the very nature of a criminal trial under our system of justice." Richmond Newspaper, Inc. v. Virginia, 448 U.S. 555, 573 (1980). An open trial assures that the proceedings are conducted fairly and discourages perjury, misconduct, and decisions based on secret bias or partiality. Id. at 569. "[T]he concept of public trial includes the entire trial from the impaneling of the jury to the rendering of its verdict." Lawrence, 167 N.W.2d at 915. See also Waller v. Georgia, 467 U.S. 39, 43 (1984) (6th Amendment right to public trial applies to suppression hearings); Presley v. Georgia, 558 U.S. 209, 213 (2010) (6th Amendment right to a public trial extends to the voir dire of prospective jurors); Des Moines Register & Tribune Co v. Iowa District Court, 426 N.W.2d 142, 145 (Iowa 1988) (right to

public trial extends to guilty plea proceedings; citing United States v. Haller, 837 F.2d 84, 86-87 (2nd Cir. 1988)).

The United States Supreme Court "has made clear that the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." Waller v. Georgia, 467 U.S. 39, 45 (1984). But closure of trials should be rare. Id. Both the United States Supreme Court and the Iowa Supreme Court adhere to the "stringent" Waller test. State v. Schultzen, 522 N.W.2d 833, 836 (Iowa 1994); Presley v. Georgia, 588 U.S. 209, 213-214 (2010); Weaver v. Massachusetts, 137 S.Ct. 1899, 1908-1909 (2017).

Waller provides the criteria for courts to apply before excluding the public from any stage of a criminal trial:

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Waller v. Georgia, 467 U.S. 39, 48 (1984). See also State v. Schultzen, 522 N.W.2d 833, 836 (Iowa 1994) (applying Waller test to 6th Amendment right to public trial). Thus, "the proceedings cannot be closed unless specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty., 478 U.S. 1, 13–14 (1986) (Press-Enterprise II) (quoting Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984) (Press-Enterprise I)). "[B]road and general findings are insufficient to meet this requirement." State v. Tucker, 290 P.3d 1248, 1258-1259 (Ariz. Ct. App. 2012) (internal quotation marks and citations omitted).

In the present case, Brimmer's right to a public trial was violated. The district court ordered, over Brimmer's repeated objections, what amounted to a "total closure" of the proceedings. United States v. Thunder, 438 F.3d 866, 868 (8th Cir. 2006) ("total closure" is the exclusion of members of

the public and the press). However, the circumstances did not satisfy the Waller test: (1) There was no overriding interest that would likely be prejudiced by leaving the proceeding open to the public; (2) The closure ordered was not narrowly tailored so as to be "no broader than necessary to protect that interest"; (3) The trial court did not adequately consider reasonable alternatives to the total closure of the proceeding (such as limiting the number of persons from the public who could be present based on room capacity in light of social distancing requirements, or of permitting even a single member of the Defendant's family to be present to observe trial); and (4) The findings made by the court were not adequate to support the total closure of the trial to any and all members of the public.

No likelihood of prejudice from public access. First, there was no overriding interest *that would likely be prejudiced* by the trial proceeding being left open to the public. Certainly, the public health concern posed by the Coronavirus pandemic, and the need for a trial procedure accommodating appropriate

safeguards (such as social distancing and/or masking), would qualify as an important interest worthy of protection. However, the (full or partial) closure of the courtroom from public access was not necessary to safeguard this interest. See e.g., Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68, (2020) ("[E]ven in a pandemic, the Constitution cannot be put away and forgotten.").

The district court acknowledged Brimmer was correct in his assertion that the courtroom was large enough to accommodate members of the public while preserving social distancing standards. See e.g., (4/5/21_Tr.12:20-13:24) ("Technically, and from a spacing standpoint" the courtroom could accommodate public access). And the feasibility of enforcing masking and face-shield requirements for those present in the courtroom would not have been impaired by public access. Certainly and at minimum, the additional presence of a single member of the Defendant's family (his mother) in the courtroom could have been accommodated without impairing public safety interests. The record and

factual findings made by the court did not establish that the interest in public safety was "likely to be prejudiced" by allowing for public access. Waller, 467 U.S. at 48.

The district court also made reference to a concern that allowing public access may result in members of the public sitting closer to the jury or witness stand than otherwise typical, and that this may result in jurors or witnesses overhearing comments or statements by such spectators. (4/5/21_Tr.12:20-13:24). However, as noted by defense counsel "these risks are present in every jury trial". "Spectators are regularly admonished not to react or create problems and placed on notice that they will be removed if they conduct themselves poorly". But in the present case "spectators were not even given a chance to behave." (5/19/21 Mot. New Trial, ¶1) (App. p. 20).

The record and factual findings made by the court did not establish that the referenced interests were "likely to be prejudiced" absent some restriction on public access. A "bald assertion" of possible prejudice will not justify the

encroachment on public trial entailed by a closed courtroom. Commonwealth v. Penn, 562 A.2d 833, 837 (Pa. Super. Ct. 1989). There must be some credible evidence or findings concerning likely prejudice to the overriding interest claimed to be posed by an unrestricted public trial. Gannett Co., Inc. v. DePasquale, 443 U.S. at 388 n.19; Penn, 562 A.2d at 837. Such specific and credible evidence and findings of necessity were absent here.

Restriction not narrowly tailored. Even if there were some risk of prejudice to an overriding interest, however, the court's closure here was not *narrowly tailored* so as to be "no broader than necessary to protect that interest". Waller v. Georgia, 467 U.S. at 48. The court did not, for example, allow a limited number of persons from the public into the courtroom, subject to limitations created by space and social distancing requirements. And indeed, the court denied Defendant's request to permit even a single family member (Defendant's mother) be present in the courtroom to observe trial. (Tr.Vol.1_8:18-9:7, 174:24-175:1). These reasonable

and more narrowly tailored alternatives were available and/or specifically offered up by Brimmer. But the court rejected these alternatives, opting instead for a total closure of trial from any members of the public.

The only alternative to total closure offered by the court was for Brimmer to waive his right to a speedy trial and further delay his trial until after the Coronavirus pandemic had resolved. (Tr.Vol.1_8:13-9:12, 175:2-176:6). But, as noted by defense counsel below, Brimmer's prosecution commenced in 2019 (prior to the emergence of Coronavirus), and he had been incarcerated for nearly 15 months by the time of the April 6, 2021 trial. (Tr.Vol.1_1:1-25, 175:7-11). Brimmer could not be required to forfeit one constitutional right (the right to a speedy trial) in order to secure the other (the right to a public trial) – at least where, as here, the size of the courtroom was adequate to accommodate (at least some) members of the public while also safeguarding public safety interests via employment of social distancing standards. (Tr.Vol.1_175:7-11; Sent.Tr.4:4-5:17). Moreover, defense

counsel was right to be skeptical of the trial court's estimation that vaccine availability could result in the relaxation of social distancing requirements in six weeks' time. (Tr.Vol.1_175:22-25; Sent.Tr.9:23-10:10, 11:12-24). To the contrary, though there was a brief suspension of the masking requirement for vaccinated persons from May to August 2021, physical distancing requirements have remained consistently in place. Such physical distancing requirements persist even today, with a present sunset date of January 1, 2022. Iowa Supreme Court Supervisory Orders, *In the Matter of Preparation for Coronavirus/COVID-19 Impact on Court Services (May 14, 2021 Order, and August 27, 2021 Order)*; *Iowa Supreme Court Statement on Ongoing COVID-19 Iowa Judicial Branch Court Services and Processes Continued to January 1, 2022*, https://www.iowacourts.gov/iowa-courts/covid-19-information-and-updates/september-7-2021-supreme-court-statement/ (last accessed November 30, 2021).

The district court declined to make even a narrow allowance for the defendant to be permitted just a single family

member in the courtroom at trial. (Tr.Vol.1_8:18-9:7, 174:24-175:1). The United States "Supreme Court has noted a special concern for accommodating the attendance at trial of an accused's family members." State v. Tucker, 290 P.3d 1248, 1257 (Ariz. Ct. App. 2012) (citing In re Oliver, 333 U.S. 257, 271-272, 272 n.29 (1948)). And the Iowa Supreme Court applied the Waller standard when addressing the screening of three family members during the victim's testimony - a partial closure. State v. Schultzen, 522 N.W.2d 833, 836 (Iowa 1994). The exclusion of Brimmer's family along with the rest of the general public strongly suggests the closure here was broader than necessary.

The court failed to properly consider the proffered reasonable alternatives to total closure, and it failed to explain why total closure (rather than allowance of a limited number of persons, or even of a single member of Defendant's family) was the only means by which the identified interests could be adequately safeguarded. The factual findings made by the court failed to support the total closure.

New Trial Required. Some errors are understood as "structural errors" which cannot be deemed harmless. Chapman v. California, 386 U.S. 18, 23 n.8 (1967); Arizona v. Fulminante, 499 U.S. 279, 309–310 (1991). Structural errors are not merely errors in a legal proceeding, but errors "affecting the framework within which the trial proceeds." Fulminante, 499 U.S. at 310. Structural errors (at least when raised directly rather than under an ineffective assistance of counsel framework) are not subject to a harmless error analysis. Weaver, 137 S.Ct. at 1907; Lado v. State, 804 N.W.2d 248, 252 (Iowa 2011); Krogmann v. State, 914 N.W.2d 293, 308 (Iowa 2018). In Weaver v. Massachusetts, the United States Supreme Court explained:

> 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." For the same reason, a structural error "def[ies] analysis by harmless error standards."

Weaver, 137 S.Ct. 1899, 1907 (2017) (citations omitted).

The denial of the right to public trial is considered a structural error which (at least where, as here, it is preserved and raised on direct appeal rather than by way of an ineffective assistance of counsel framework on post-conviction relief) is not subject to harmless error analysis. In Waller, the Supreme Court agreed with the lower federal courts that "the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee." Waller, 467 U.S. at 49-50. The Court noted that the general view was "that a requirement that prejudice be shown "would in most cases deprive [the defendant] of the [public-trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury." " Id. at 50 n.9 (citing Bennett v. Rundle, 419 F.2d 599, 608 (3rd Cir. 1969)).

The court's total closure of Brimmer's trial amounted to structural error requiring reversal and granting of a new trial.

CONCLUSION

Pursuant to the issue raised in Division I, Defendant-Appellant Brimmer requests his conviction for Second-Degree Sexual Abuse be vacated, and that such matter be remanded for entry of a conviction only on the lesser-included offense of Third-Degree Sexual Abuse.

Pursuant to the Issue Raised in Division II, Defendant-Appellant Brimmer respectfully requests his conviction be reversed and remanded for a new trial.

CONDITIONAL REQUEST FOR ORAL ARGUMENT

Counsel does not request to be heard in oral argument unless this Court believes argument may assist in the court's resolution of this case.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $6.93, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(f)(1) because:

> [X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 8,203 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(f)(1).

Dated: *2/15/22*

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