IN THE SUPREME COURT OF IOWA

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

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

APPELLANT'S REPLY BRIEF AND ARGUMENT

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CERTIFICATE OF SERVICE

On February 25, 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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No Authorities.

II. The total closure of the trial courtroom violated Brimmer's right to a public trial.

Authorities

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Vazquez Diaz v. Commonwealth, 487 Mass. 336, 351-53 (Mass. 2021)

Henson v. Commonwealth, 2021 WL 5984690 (Ky. Dec. 16, 2021)

Iowa Supervisory Order, *In the Matter of Preparation for Coronavirus/COVID-19 Impact on Court Services (March 12, 2020, July 9, 2020, and November 10, 2020 Orders),* (available at https://www.iowacourts.gov/iowa-courts/supreme-court/orders).

Jumpstart Jury Trials Task Force, Report and Recommendations for Resuming Jury Trials in Iowa During the COVID-19 Pandemic, p.8-9 (Filed July 6, 2020) (available at https://www.iowacourts.gov/for-the-public/reports/).

Presley v. Georgia, 558 U.S. 209, 214 (2010)

STATEMENT OF THE CASE

COMES NOW the defendant-appellant, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the State's brief filed on or about January 28, 2022. While the defendant's brief adequately addresses the issues presented for review, a short reply is necessary to address certain contentions raised by the State.

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).

Defendant notes that *only the video portion* of the Exhibit 40 recording of J.H.'s unsworn police station interview was admitted and played at trial - with no audio. See (Tr.Vol.3_24:12-25:19, 113:19-25). Thus while the *video* from that exhibit was before the jury, any *audio* was not. To the extent the State's brief relies on any audio from Exhibit 40 (including J.H.'s oral statements), Defendant respectfully notes

such information was not within the trial evidence and therefore cannot be relied upon to sustain the jury's trial verdict. See e.g., (State's Br. p.14 and n.1) (discussing J.H.'s oral statements from the Exhibit 40 interview); (State's Br. p.15) (same).

II. The total closure of the trial courtroom violated Brimmer's right to a public trial.

Error Preservation:

The instant case is plainly distinguishable from the out-of-state cases cited by the State on error preservation. See (State's Br. p.35-39). In the cases cited by the State, there was neither any objection nor any assertion of the right to a public trial made by the defendant in the district court. See People v. Poe, A160102, 2021 WL 5578080, at *1 (Cal. Ct. App. Nov. 30, 2021) (unpublished)[1]; People v. Virgil, 253 P.3d

[1] The State also suggests that People v. Poe, 2021 WL 5578080, at *3-*4 (Cal. Ct. App. Nov. 30, 2021) (unpublished) may support an additional requirement that the defendant demonstrate how public access would have "bore a reasonably substantial relation to his opportunity to defend himself." But Poe appears to apply this requirement to Poe's claim concerning the right to have people present *to present evidence*

553, 578 (Cal. 2011); State v. Richardson, No. 2020-T-0037, 2021 WL 4477645, at *6 (Ohio Ct. App. Sept. 30, 2021). In contrast, here Brimmer's attorney explicitly objected to the closure of trial to the public, and explicitly cited the defendant's right to a public trial when asserting such objection. See e.g., (Tr.Vol.1_3:22-25) ("I've done some research on the right to a public trial, and I do believe that it is his right and we are requesting that the public be allowed in."); (Tr.Vol.1_4:9-11) ("…I think that we have to permit the public in. So I'm objecting if the public is disallowed.")

Despite Brimmer's explicit objection and assertion of his right to a public trial, the district court ordered a *total closure* of trial to *any* (one or more) members of the public. This ruling was clearly a final (not merely preliminary) ruling, and

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at his sentencing and, moreover, appears to have pulled that standard from the portion of the prior People v. Virgil decision relating not to the right to a public trial but instead to the right of the defendant to be personally present. See People v. Virgil, 253 P.3d 553, 576 ("Defendant does not indicate how *his presence* at any of the various sidebar conferences during voir dire or trial bore a reasonably substantial relation to his opportunity to defend himself.") (emphasis added)

quite explicitly extended to members of Brimmer's family in addition to any other members of the public. See (Tr.Vol.1_6: "it's not going to work to have people in from the public. We have closed a few trials here previously to the public."); (Tr.Vol.1_6:12-16) (citing concerns which "come[] before family members having the ability to come in and sit and watch…."); (Tr.Vol.1_6:21-25) ("…I understand that his family may not be entirely happy that they don't get to sit and watch" but "they're not going to be able to sit in the courtroom and watch, and that's just the way it's going to have to be."). (Tr.Vol.1_8:13-9:1) (proposing waiver of speedy and continuance as alternative to "having trial today without any members of the public or any members of his family being present."). See also (Tr.Vol.1_173:16-21) (court noting it would allow in persons with a role in the trial such as an interpreter, advocate, or other attorney, "even though we're not allowing the public."); (Tr.Vol.1_173:13-14) ("I would allow that to happen, just not the public").

Later, after acknowledging the district court's already-final ruling ("I know the Court's ruling with regard to spectators for Mr. Brimmer") (Tr.Vol.1_172:14-16), defense counsel "renew[ed]" her request that at least one person, Defendant's mother, be allowed to be present during the trial (Tr.Vol.1_174:24-175:1). The court proceeded with a total closure of trial. Error was preserved. It matters not that the court did not specifically state that the request for at least one family member was being denied - it was clearly aware of the request, and it clearly declined to alter its already-final ruling instituting a total closure of trial to *any* member of the public including any family member of the defendant. The adequacy of error preservation on this record is particularly apparent when one considers the reality that, once a defendant has objected to a closure of trial to the public, "trial courts are required to consider alternatives to closure even when they are not offered by the parties". Presley v. Georgia, 558 U.S. 209, 214 (2010).

Merits:

The out-of-state cases cited by the State on the merits are also distinguishable. See (State's Br. p.54-57). Nearly all of the cited cases involve not a total closure of trial to any and all members of the public (as was the case here) but only a limited or partial closure. State v. Bell, No. A20-1638, 2021 WL 6110117, at *4 (Minn. Ct. App. Dec. 27, 2021) (unpublished) (partial closure – no spectators were permitted to be personally present in the courtroom, but all trial proceedings were livestreamed for viewing by spectators in an adjacent room); Lappin v. State, 171 N.E.3d 702, 707 (Ind. Ct. App. June 14, 2021) ("the trial court did not take the drastic measure of closing the courtroom" but instead "provided a[n audio-only] live stream of the venire selection", plus in-person courtroom access for up to four persons from the public during the remainder of trial); Strommen v. Larson, OP 20-0327, 2020 WL 3791665, *3 (Mon. July 7, 2020) (unpublished) (trial was "not truly 'closed'", as the trial court had provided "the public will, at minimum, be able to remotely view the

proceedings in his case live and in real time" and further "that a small number of the public may be allowed to attend Strommen's trial in person"); Vazquez Diaz v. Commonwealth, 487 Mass. 336, 351-53 (Mass. 2021) (Involving "a virtual hearing" which did not amount to a "complete closure" requiring satisfaction of the Waller test. "In the case of a virtual hearing, only the forum has been adjusted, not the prospective audience. Accordingly, such a hearing does not amount to a constitutional closure" at all, much less a total closure.)

Henson v. Commonwealth, 2021 WL 5984690 (Ky. Dec. 16, 2021) (unpublished) is also distinguishable based both on the timing of the trial and the scope of discretion available to the district court under the state supreme court emergency supervisory order then in effect. The "closure of Henson's" March 13-19, 2020 "trial was not a matter of the trial court's adherence to [the Kentucky Supreme Court's] emergency administrative orders" which apparently directed the closure of then-pending trials to spectators. Henson, 2021 WL 5984690,

*3 (Ky. Dec. 16, 2021). In light of the "emergent circumstances" developing "in March 2020," the Kentucky Supreme Court's emergency order in place at that time directed immediate closure of trials to spectators, determining that this "was the most feasible way to continue the work of the judiciary while protecting employees, officials, and litigants from the threat of COVID-19." Id. at *3. As noted by another court, "there was reason to be more cautious in 2020" when "public-health experts were still learning how to prevent infections from COVID-19 "than in [March and April 2021] after many adults had access to the vaccine and more was known about the virus. State v. Bell, No. A20-1638, 2021 WL 6110117, at *5 (Minn. Ct. App. Dec. 27, 2021) (unpublished).

In contrast Brimmer's trial took place more than a year later in April 2021, *after* Iowa trials (including Brimmer's own) were postponed for nearly a year in order to allow for the safe recommencement of trials with precautions such as social distancing. See Iowa Supervisory Order, *In the Matter of Preparation for Coronavirus/COVID-19 Impact on Court Services*

(March 12, 2020, and November 10, 2020 Orders). The Supervisory order in place at that time, unlike the one at issue in Henson, did not mandate a total closure of criminal trials to all spectators. See Iowa Supervisory Order, *In the Matter of Preparation for Coronavirus/COVID-19 Impact on Court Services (July 9, 2020 Order*, p.3*).* To the contrary, supervisory order directed that courts employ six feet of social distancing, and permit access "as physically-distanced space permits". Id. at 5. It further provided that "If the courtroom doesn't have sufficient space to seat spectators with appropriate physical distancing, courts shall set up live feeds of public court proceedings… to permit simultaneous viewing by anyone unable to attend because of space… limitations." Id. at 5-6. See also Jumpstart Jury Trials Task Force, Report and Recommendations for Resuming Jury Trials in Iowa During the COVID-19 Pandemic, p.8-9 (Filed July 6, 2020) (available at https://www.iowacourts.gov/for-the-public/reports/). Further, the Jumpstart Jury Trials Taskforce additionally encouraged courts "to consider options for conducting trial

operations at alternate facilities in larger spaces outside the courthouse, such as school gyms or public auditoriums." Jumpstart Jury Trials Task Force Report, at 11.

In the present case, it was clear the courtroom could accommodate at least some additional persons while preserving social distancing standards. The trial court noted that "Technically, and from a spacing standpoint" the courtroom could accommodate some public access. (4/5/21_Tr.12:20-13:24). Indeed, approximately 10 or so seats were vacated by unselected members of the jury panel, and at least some of these could have been made available for members of the public. See (Tr.Vol.1_7:3-6, 9:9:13-14, 10:19-21, 103:5-105:1). The court also made clear it could and would accommodate additional persons in the courtroom if it viewed them as having a 'role' in the trial (such as additional attorneys, victim advocates, interpreters, etc.) though not spectators. (Tr.Vol.1_173:9-21, 174:10-21). Nevertheless, the trial court ordered a total closure of the trial courtroom to the

public, declining any public access including to even a single member of the defendant's family.

Finally, as to the district court's concern that members of the public, though at least six-feet away from any juror or participant, might pose a risk of being overheard by jurors (4/5/21_Tr.12:20-13:24), the United States Supreme Court's decision in Presley makes clear that such generalized concerns do not suffice to authorize a closure of trial to the public. As the Court there noted: "The generic risk of jurors overhearing prejudicial remarks, unsubstantiated by any specific threat or incident, is inherent whenever members of the public are present during the selection of jurors. If broad concerns of this sort were sufficient to override a defendant's constitutional right to a public trial, a court could exclude the public from jury selection almost as a matter of course." Presley v. Georgia, 558 U.S. 209, 214 (2010).

The court's total closure of Brimmer's trial to any member of the public (including any member of Brimmer's family) violated the right to a public trial, requiring 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.

ATTORNEY'S COST CERTIFICATE

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Reply Brief and Argument was $__0__, and that amount has been paid in full by the State Appellate Defender.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

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 2,037 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(f)(1).

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Dated: *2/25/22*

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