

FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING

FEB 09 2009

Stephan Harris, Clerk
Cheyenne

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 07-CR-032-B
)	
)	
NATHANIEL SOLON,)	
)	
Defendant.)	

ORDER DENYING MOTION FOR NEW TRIAL

This matter came before the Court on Defendant's Motion for New Trial [#135]. A sentencing hearing was held on January 21, 2009. James C. Anderson appeared on behalf of the United States, and Thomas R. Smith appeared on behalf of the Defendant, Nathaniel Solon. At the sentencing the Court requested that the parties address the Motion for New Trial. Both parties stated that they would rest upon their briefs already submitted. After considering the motion, reviewing the materials on file, and being fully advised in the premises, this Court FINDS that Defendant's Motion for New Trial should be DENIED. The Court further FINDS and ORDERS the following:

I. BACKGROUND

Defendant's jury trial began on November 3, 2008 with proceedings being held before this Court. At the jury trial James C. Anderson represented the United States and Thomas R. Smith represented the Defendant. The jury trial lasted six days with counsel from both sides giving final arguments on November 10, 2008. The jury returned a guilty verdict the same day. Defendant was sentenced by this Court on January 21, 2009.

Defendant's request that the Court grant him a new trial stems from events occurring during his counsel's closing argument. After defense counsel began his closing argument, the Judge excused himself from the courtroom. The Judge urged defense counsel to proceed with their arguments. However, both defense and prosecuting counsel felt uncomfortable doing so. Defense counsel waited to resume his closing argument until the Judge was, once again, present in the courtroom. There was no objection made. Nor did either side ask the Court for an additional instruction concerning the Judge's absence from the courtroom.

Defendant claims that the Judge's absence from the courtroom prejudiced him and his trial. Defendant argues that he should be granted a new trial because, by leaving the courtroom during the

Defendant's closing argument but not during the prosecution's, the Judge was sending a message to the jury that it was not worth listening to Defendant's closing argument. It is with this factual background that the Court turns to the Motion for New Trial.

II. DISCUSSION

Federal Rule of Criminal Procedure 33 provides, "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). A district court is given wide discretion in determining whether the "interest of justice" requires a new trial. See United States v. Zabriskie, 415 F.3d 1139, 1144 (10th Cir. 2005) (stating "We review the district court's denial of a Rule 33 motion for abuse of discretion, reversing only if the court made a clear error of judgment or exceeded the bounds of permissible choice under the circumstances."). The Court finds that the "interest of justice" does not require a new trial in this matter, and that the Defendant's motion should be denied.

A. Structural Error

Defendant characterizes the Judge's absence from the courtroom as a structural error. A structural error is one that affects "the framework within which the trial proceeds, rather than simply an

error in the trial process itself." Arizona v. Fulminante, 499 U.S. 279, 310 (1991). The Supreme Court has stated that a structural defect occurs when a basic protection is violated during the trial without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." Id. These kinds of defects are "so intrinsically harmful as to require automatic reversal . . . without regard to their effect on the outcome." Neder v. United States, 527 U.S. 1, 7 (1999).

The Tenth Circuit has recognized that structural error occurs "only in a very limited class of cases." United States v. Pearson, 203 F.3d 1243, 1260 (10th Cir. 2000) (citations and quotations omitted). The Supreme Court has rarely made the determination that a court has committed a structural error, thereby requiring a new trial. See Sullivan v. Louisiana, 508 U.S. 275 (1993) (defective reasonable doubt instruction given); Gomez v. United States, 490 U.S. 858 (1989) (denial of right to have a district court judge, rather than a magistrate judge, preside over trial); Vasquez v. Hillery, 474 U.S. 254 (1986) (unlawful exclusion of members of the defendant's race from the grand jury); McKaskle v. Wiggins, 465 U.S. 168 (1984) (right to self-representation at trial not amenable

to harmless error analysis); Waller v. Georgia, 467 U.S. 39 (1984) (denial of right to public trial); Gideon v. Wainwright, 372 U.S. 335 (1963) (deprivation of the right to counsel at trial); Tumey v. Ohio, 273 U.S. 510 (1927) (presiding judge biased).

In addition to the abbreviated list of defects in proceedings constituting structural error, there is also a strong presumption that an error occurring in the proceedings before a district court is harmless error rather than structural. See Rose v. Clark, 478 U.S. 570, 579 (1986). As stated by the Supreme Court, "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." Id.

The Defendant simply cannot overcome this strong presumption. The events that occurred here did not taint the entire "framework within which the trial proceed[ed]." Fulminante, 499 U.S. at 310. The Judge was away from the bench for a very short period of time. Additionally, the Judge informed the clerk of court that he would be in his chambers attending to some urgent business, and would be available to rule on any objections. Also, the attorneys from both sides agreed to suspend the remaining of defense counsel's closing argument until the Judge returned to the bench, so nothing actually

occurred while the Judge was absent from the courtroom. Finally, the Judge explained his absence to the jury when he returned, stating that he had to attend to business in chambers. Cf. United States v. Love, 134 F.3d 595, 605 (4th Cir. 1998) (stating that the judge's explanation as to why he would be absent during portions of the trial would serve to dispel any perception by the jurors that he had made up his mind about the defendant's guilt or innocence).

The events that occurred here cannot compare with the events occurring in those cases cited by the Supreme Court as constituting structural error. Additionally, neither attorney objected to the Judge's absence. Nor did defense counsel request that the Court include a curative instruction. For these reasons, the Court finds that the error that occurred here, if it be called such, did not constitute a structural defect in the proceedings requiring a new trial.

B. Harmless Error

The determination by this Court that structural error did not occur in this case does not end the Court's analysis. Next, the Court must determine whether the error that occurred amounted to harmless error. In ascertaining whether an error is harmless, the Court "simply reviews the . . . evidence against the defendant to

determine whether the [error] was harmless beyond a reasonable doubt." Fulminante, 499 U.S. at 310.

When the Court looks to the evidence presented in this case, it is convinced that the error was harmless. The prosecution offered enough evidence to prove Defendant's guilt beyond a reasonable doubt. Expert testimony established that pornographic images of children were downloaded on Defendant's computer. Additionally, during the time frame that these images were downloaded, the Defendant admitted that he was living alone and that he was the only person with access to the computer. Furthermore, the prosecution offered evidence that the Defendant was using the computer, on at least one occasion, on the same night that pornographic images of children were downloaded. This evidence was enough for the jury to find that Defendant was guilty beyond a reasonable doubt. The Court is satisfied that the jury determined Defendant's guilt based on the evidence, and not on the Judge's abbreviated absence from the courtroom. In short, the Court finds beyond a reasonable doubt that the error, if any occurred, was harmless.

C. Case Law

The Court has failed to find any case on point decided by the

Tenth Circuit. Nevertheless, looking to the decisions of other circuits, this Court is further convinced that new trial is not warranted here.

The Defendant urges this Court to adopt the decision of the Third Circuit in United States v. Mortimer, 161 F.3d 240 (3d Cir. 1998). That case is substantially similar to the case here. However, the Court notes some critical differences. In that case, the judge was apparently absent from the courtroom without anyone noticing for an unknown period of time. Id. at 241. The attorneys simply looked up and the judge was gone. Id. They did not know where he had gone, or if he would be available to rule on objections. Id. In this matter, the Judge informed the clerk of court that he needed to return to chambers to attend to some urgent business. All in the courtroom witnessed the Judge leaving. Additionally, he told the clerk that he would be available if an objection was made. Upon his return, the Judge explained his absence to the Court. Most notably, however, is the fact that defense counsel suspended his closing argument until the Judge returned to the bench. There was no comment made during the Judge's absence that would have prejudiced the Defendant. Additionally, the explanation by the Judge upon his return "should

have dispelled any potential perception by jurors that the [J]udge left because he had already been persuaded by the government's case." Love, 134 F.3d at 605. For these reasons, the Court finds that the holding in Mortimer should not be adopted in this case.

Instead, the Court finds Heflin v. United States instructive here. 125 F.2d 700 (5th Cir. 1942). The facts in that case are nearly identical to the facts here. The Appellate Court cited them as follows:

In the trial of this charge of conspiracy, during the argument to the jury of defendants' counsel, the judge left the bench for two to three minutes to go to the lavatory in an adjoining room, closing the door behind him. The jury and defendants' counsel noticed that the judge was gone, and counsel continued his argument. Nothing else happened. No motion or objection was made. The jury found the defendants guilty, and the action of the judge was complained of in a motion for a new trial.

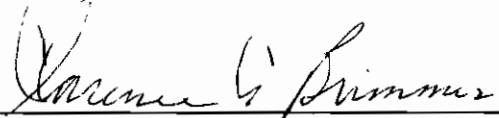
Id. at 700. In that case, the Court concluded that the defendants did not suffer any prejudice. Id. at 701. The Court pointed out that nothing happened during the judge's absence aside from "what their own counsel was saying." Id. The Court also explicitly noted that, "Counsel, on observing that the judge was absent, could have paused for his return, but saw fit to continue, and made no complaint until after a verdict of guilty." Id. The Court finds this statement especially useful in the present case. Counsel did,

in fact, suspend his closing argument until the Judge returned in this case. The Court, therefore, finds no reason why in light of the Court's decision in Heflin, this Court should find any differently here than the Fifth Circuit did in that case. Clearly, the Defendant was less prejudiced by the Judge's actions here than the defendants were in Heflin where defense counsel continued with his closing statement despite the judge being absent from the courtroom. The Court, therefore, finds that the Defendant was not prejudiced by the Judge's absence from the courtroom, and a new trial is inappropriate.

III. CONCLUSION

NOW THEREFORE, IT IS HEREBY ORDERED, that Defendant's Motion for New Trial is DENIED.

Dated this 6th day of February, 2009.


UNITED STATES DISTRICT JUDGE