STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1431

State of Minnesota,
Respondent,

vs.

Gary Christopher Petersen,
Appellant.

Filed September 3, 2019
Remanded
Johnson, Judge

Anoka County District Court
File No. 02-CR-17-2064

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Anthony C. Palumbo, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Adam Lozeau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Johnson, Judge; and Hooten, Judge.

S Y L L A B U S

A criminal defendant's constitutional right to a public trial applies throughout *voir dire* proceedings. If a district court closes the courtroom without making adequate findings concerning the reasons for the closure, the necessary breadth of the closure, and the existence or absence of reasonable alternatives to closure, as required by *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210 (1984), the appropriate initial remedy is a remand to the

district court for an evidentiary hearing and findings concerning whether the closure was justified.

O P I N I O N

JOHNSON, Judge

An Anoka County jury found Gary Christopher Petersen guilty of three criminal offenses. During a portion of the jury-selection process, the district court closed the courtroom without making adequate findings concerning the reasons for the closure, the necessary breadth of the closure, and the existence or absence of reasonable alternatives to the closure. Therefore, we remand to the district court for an evidentiary hearing and findings concerning whether the courtroom closure was justified.

FACTS

In September 2016, Anoka County detectives searched a cellular telephone that was seized during a traffic stop and, by happenstance, discovered video-recordings of several persons assaulting a man. Detectives identified the perpetrators in the video-recordings as Petersen and four other persons. Detectives also identified the victim of the assault. Detectives contacted the victim, but he initially did not want law-enforcement officers to become involved. Approximately six months later, however, the victim contacted a detective and said that he wished to give a statement about the incident. A few days later, the victim gave a statement that was consistent with the video-recordings, which he had not seen.

In April 2017, the state charged Petersen with three offenses. In March 2018, the state amended the complaint by adding a charge. The amended complaint charged Petersen

with aiding and abetting first-degree criminal sexual conduct, in violation of Minn. Stat. §§ 609.05, subd. 1, 609.342, subd. 1(e)(i) (2016); aiding and abetting second-degree criminal sexual conduct, in violation of Minn. Stat. §§ 609.05, subd. 1, 609.343, subd. 1(e)(i) (2016); aiding and abetting kidnapping, in violation of Minn. Stat. §§ 609.05, subd. 1, 609.25, subd. 1(2) (2016); and aiding and abetting second-degree assault, in violation of Minn. Stat. §§ 609.05, subd. 1, 609.222, subd. 1 (2016).

The case was tried to a jury in April 2018. During the jury-selection process, prospective jurors were asked to complete written questionnaires, which asked whether, among other things, they or anyone close to them had ever been a victim of physical abuse, sexual abuse, or another crime. Based on the completed jury questionnaires, the parties identified the prospective jurors whom they wished to question individually, outside the presence of other jurors. Before the first prospective juror was questioned individually, the prosecutor asked the district court to close the courtroom, stating, "Some of the answers in this questionnaire lead me to think that's what the jurors would be more comfortable with." The district court asked Petersen's attorney whether there was an objection. She responded by noting that "only one or two . . . stated they had concerns about the contents of what they'd be viewing," by questioning whether it was "necessary to exclude everyone during all individual questioning," and by suggesting that closure might be appropriate only "for those people who express[ed] concern in their jury questionnaire." After the district court referred to "the confidentiality issues," Petersen's attorney reiterated that "there's only a handful of people within these jury questionnaires who stated that they had concerns about sharing information publicly" and that she "didn't think it was necessary." She added,

"[B]ut if the Court feels more comfortable excusing everyone from the courtroom, that's fine as well." The district court stated that it would close the courtroom "at least as to these first three" prospective jurors and asked persons sitting in the gallery to leave the courtroom. The district court did not re-open the courtroom throughout the remainder of *voir dire*, during which time the parties' attorneys individually questioned 28 of the 46 prospective jurors on a variety of topics.

During the evidentiary phase of trial, the state called six witnesses and introduced 12 exhibits, including the video-recordings that were found on the cellular telephone. Peterson called only one witness and did not present any other evidence.

The jury found Petersen not guilty of aiding and abetting first-degree criminal sexual conduct and found him guilty of aiding and abetting second-degree criminal sexual conduct, aiding and abetting kidnapping, and aiding and abetting second-degree assault. The jury also found three aggravating factors. In June 2018, the district court granted the state's motion for upward durational departures on the convictions of aiding and abetting second-degree criminal sexual conduct and aiding and abetting kidnapping. The district court imposed sentences of 120 months of imprisonment on those two convictions and a sentence of 21 months of imprisonment on the conviction of aiding and abetting second-degree assault.

Petersen appeals. He makes three arguments: that the evidence is insufficient to support his conviction of aiding and abetting second-degree criminal sexual conduct, that the district court violated his constitutional right to a public trial by closing the courtroom during a portion of *voir dire*, and that the district court erred by imposing upward durational

departures for his convictions of aiding and abetting second-degree criminal sexual conduct and aiding and abetting kidnapping. In light of our resolution of his second argument, we do not reach his first and third arguments.

ISSUE

Did the district court violate Petersen's constitutional right to a public trial by closing the courtroom during a portion of *voir dire* proceedings?

ANALYSIS

Petersen argues that the district court erred by closing the courtroom during the individualized questioning of prospective jurors during *voir dire* on the ground that the closure violated his constitutional right to a public trial.

The United States Constitution and the Minnesota Constitution confer on criminal defendants the right to a public trial, with identical language: "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . . ." U.S. Const. amend. VI; Minn. Const. art. I, § 6. "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 2215 (1984) (quotation omitted). The right to a public trial applies during all phases of trial, including *voir dire* of prospective jurors. *Presley v. Georgia*, 558 U.S. 209, 213, 130 S. Ct. 721, 724 (2010) (*per curiam*); *State v. Brown*, 815 N.W.2d 609, 617 (Minn. 2012).

Notwithstanding the text of the Sixth Amendment, the right to a public trial is not absolute. *State v. Taylor*, 869 N.W.2d 1, 10 (Minn. 2015). Rather, the closure of a courtroom during a criminal proceeding may be justified if (1) "'the party seeking to close the hearing . . . advance[s] an overriding interest that is likely to be prejudiced,'" (2) the closure is "'no broader than necessary to protect that interest,'" (3) the district court considers "'reasonable alternatives to closing the proceeding,'" and (4) the district court makes "findings adequate to support the closure." *State v. Fageroos*, 531 N.W.2d 199, 201-02 (Minn. 1995) (alteration omitted) (quoting *Waller*, 467 U.S. at 48, 104 S. Ct. at 2216). The "overriding interest" that is the starting point of the analysis may be the privacy interest of one or more prospective jurors if *voir dire* "touches on deeply personal matters that [the] person has legitimate reasons for keeping out of the public domain." *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 511-512, 104 S. Ct. 819, 825 (1984). "To preserve fairness and at the same time protect legitimate privacy," a district court should inform prospective jurors that they may ask to be questioned in private. *Id.* at 512, 104 S. Ct. at 825.[1]

[1]In Minnesota, a rule of court implements such an approach. It provides that, if a juror questionnaire is administered, the district court "must tell prospective jurors that if sensitive or embarrassing questions are included on the questionnaire, instead of answering any particular questions in writing they may request an opportunity to address the court in camera, with counsel and the defendant present, concerning their desire that the answers not be public." Minn. R. Crim. P. 26.02, subd. 2(3). If a juror does so, the district court "must proceed under [subdivision 4(4)] and decide whether the particular questions may be answered during oral voir dire with the public excluded." *Id.* Subdivision 4(4), in turn, reflects the requirements of *Waller* by providing:

> The court may order voir dire closed only if it finds a substantial likelihood that conducting voir dire in open court would interfere with an overriding interest, including the

A violation of a defendant's constitutional right to a public trial "is considered a structural error that is not subject to a harmless error analysis." *State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009); *see also Waller*, 467 U.S. at 49 n.9, 104 S. Ct. at 2217 n.9. In general, structural errors "necessarily render a trial fundamentally unfair" and "deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Neder v. United States*, 527 U.S. 1, 8-9, 119 S. Ct. 1827, 1833 (1999) (quotations omitted). Accordingly, structural errors are not susceptible to harmless-error analysis because they "affect the framework within which the trial proceeds, and are not simply an error in the trial process itself." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149, 126 S. Ct. 2557, 2564 (2006) (alteration and quotations omitted). Structural errors generally require automatic reversal of a conviction "because such errors call into question the very accuracy and reliability of the trial process." *State v. Brown*, 732 N.W.2d 625, 630 (Minn. 2007) (quotation omitted).[2]

> defendant's right to a fair trial and the juror's legitimate privacy interests in not disclosing deeply personal matters to the public. The court must consider alternatives to closure. Any closure must be no broader than necessary to protect the overriding interest.
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> . . . .
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> The court must set forth the reasons for the order, including findings as to why the defendant's right to a fair trial and the jurors' interests in privacy would be threatened by an open voir dire. The order must address any possible alternatives to closure and explain why the alternatives are inadequate.

Minn. R. Crim. P. 26.02, subd. 4(4)(c), (f).

[2]In its responsive brief, the state asserts that "Petersen's counsel affirmatively agreed to the courtroom closure." The state does not elaborate on the consequences of such

This court applies a *de novo* standard of review to the question whether a defendant's constitutional right to a public trial has been violated. *Brown*, 815 N.W.2d at 616.

A.

We begin by considering the state's argument that that the district court's closure of the courtroom during individualized *voir dire* of prospective jurors was not a true closure because it was for a "narrow purpose" during a "small portion of the trial proceedings."

"Not all courtroom restrictions implicate a defendant's right to a public trial." *Taylor*, 869 N.W.2d at 11 (alteration and quotation omitted); *see also State v. Smith*, 876 N.W.2d 310, 328-30 (Minn. 2016). Some restrictions on access to the courtroom are so insignificant that they do not amount to a "true closure" of the courtroom and, thus, do not require an analysis of the *Waller* requirements to determine whether the restrictions were justified. *See Taylor*, 869 N.W.2d at 11-12. Accordingly, the threshold question is whether there was a "true closure" of the courtroom, which depends on several factors: (1) whether the courtroom was cleared of all spectators; (2) whether the trial remained open to the

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an agreement. "It is an open question in Minnesota whether unpreserved structural errors lead to the automatic reversal of a conviction." *State v. Little*, 851 N.W.2d 878, 889 n.3 (Minn. 2014) (Stras, J., concurring in part and dissenting in part). In the context of the constitutional right to a public trial, the supreme court more recently applied the invited-error doctrine, and by extension the plain-error test, in a case in which a defendant's trial attorney "actively sought" closure of a courtroom and the defendant confirmed that he wanted the courtroom to be closed. *State v. Benton*, 858 N.W.2d 535, 540-41 (Minn. 2015); *see also Waller*, 467 U.S. 42 n.2, 104 S. Ct. at 2213 n.2 (noting that state court may determine whether defendant who consented to closure "is procedurally barred from seeking relief as a matter of state law"). The *Benton* opinion indicates that, in Minnesota, appellate review of a challenge to a courtroom closure is not foreclosed by a defendant's failure to object. Therefore, we consider Petersen's argument in this case despite his trial attorney's equivocal objection and arguable acquiescence to the courtroom closure.

public and press; (3) whether there were periods where members of the public were absent; and (4) whether the defendant, defendant's family or friends, or any witnesses were excluded. *State v. Silvernail*, 831 N.W.2d 594, 601 (Minn. 2013); *State v. Lindsey*, 632 N.W.2d 652, 660-61 (Minn. 2001).

In this case, the relevant factors indicate a true closure. The courtroom was cleared of all spectators during individualized questioning. During those proceedings, the courtroom was not open to any member of the public or the press. The courtroom remained closed until the parties completed individualized questioning of 28 prospective jurors, which appears to have lasted approximately five to six hours and is reflected on approximately 250 pages of transcript. This case is distinguishable from other cases in which courtroom closures or restrictions have been deemed to not be true closures. Such cases generally have involved the limited exclusion of certain identified persons while persons already present in the courtroom were allowed to remain. *See, e.g.*, *State v. Zornes*, 831 N.W.2d 609, 620-21 (Minn. 2013) (concluding that removal of one victim's brother, who was on witness list, was not true closure); *Brown*, 815 N.W.2d at 617-18 (concluding that locking of courtroom doors during jury instructions was not true closure); *Lindsey*, 632 N.W.2d at 660-61 (concluding that removal of two minor children was not true closure); *State v. Hicks*, 837 N.W.2d 51, 61-62 (Minn. App. 2013) (concluding that closures for administrative proceedings typically conducted in chambers but conducted in courtroom for *pro se* defendant were not true closures), *aff'd*, 864 N.W.2d 153 (Minn. 2015).

In light of the complete exclusion of the public during all individualized questioning of prospective jurors, which was a significant portion of *voir dire* proceedings, the courtroom closure in this case was a true closure.

B.

We now turn to the substance of Petersen's argument that the district court erred by closing the courtroom during the individualized questioning of prospective jurors in violation of his constitutional right to a public trial.

We immediately note that our ability to determine whether the courtroom closure was justified is significantly hindered by the fact that the district court did not make findings concerning the reasons for closing the courtroom. The district court simply referred to "confidentiality issues." But the district court did not elaborate on those issues or otherwise describe the "overriding interest that is likely to be prejudiced," which is the first *Waller* requirement. *See Waller*, 467 U.S. at 48, 104 S. Ct. at 2216. In addition, the district court did not make findings concerning the necessary breadth of the closure or the existence or absence of reasonable alternatives to closure, which are the second and third *Waller* requirements. *See id.* Given the absence of findings or explanations by the district court relevant to the first, second, and third *Waller* requirements, this court is unable to determine whether the closure of the courtroom was justified. *See id.* at 45, 104 S. Ct. at 2215; *Fageroos*, 531 N.W.2d at 200, 202-03; *State v. McRae*, 494 N.W.2d 252, 259 (Minn. 1992); *State v. Infante*, 796 N.W.2d 349, 355 (Minn. App. 2011).

The remedy for a violation of the Sixth Amendment right to a public trial "should be appropriate to the violation." *Waller*, 467 U.S. at 50, 104 S. Ct. at 2217. In Minnesota,

"a retrial is not required if a remand will remedy the violation." *Bobo*, 770 N.W.2d at 139. Specifically, if a district court does not make findings to justify the closure of the courtroom, the appropriate initial remedy is a remand to the district court for an evidentiary hearing and findings concerning the closure. *See State v. Biebinger*, 585 N.W.2d 384, 385 (Minn. 1998); *Fageroos*, 531 N.W.2d at 200, 203; *McRae*, 494 N.W.2d at 259-60; *Infante*, 796 N.W.2d at 355. The supreme court and this court have ordered this remedy in prior appeals in which district courts did not make express findings relevant to the *Waller* requirements. *See, e.g.*, *Biebinger*, 585 N.W.2d at 385; *Fageroos*, 531 N.W.2d at 203; *Infante*, 796 N.W.2d at 355. Accordingly, we order that remedy in this case, in which the district court did not make findings concerning the reasons for closing the courtroom, the necessary breadth of the closure, and the existence or absence of reasonable alternatives to closure.

D E C I S I O N

The district court did not make adequate findings concerning the reasons for closing the courtroom during a portion of *voir dire* of prospective jurors, the necessary breadth of the closure, and the existence or absence of reasonable alternatives to closure, as required by *Waller*. Therefore, we remand to the district court for an evidentiary hearing and findings concerning whether the closure was justified. In light of that resolution of Petersen's second argument, we do not reach his first and third arguments, which are reserved.

Remanded.