STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0843

State of Minnesota,
Respondent,

vs.

Gary Christopher Petersen,
Appellant.

Filed December 14, 2020
Reversed and remanded
Segal, Chief 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 Segal, Chief Judge; Larkin, Judge; and Jesson, Judge.

U N P U B L I S H E D O P I N I O N

SEGAL, Chief Judge

Appellant challenges the sufficiency of the evidence supporting his conviction for criminal sexual conduct, argues that the district court's unjustified closure of the courtroom

during jury voir dire entitles him to a new trial on all charges, and contends that the jury's findings were insufficient to support the imposition of aggravated sentences. Although the evidence was sufficient to have supported the jury's guilty verdict with respect to the criminal-sexual-conduct offense, we reverse appellant's convictions and sentences and remand for a new trial based upon the district court's improper courtroom closure.

FACTS

In September 2016, Anoka County Sheriff's Deputies found videos on a cell phone that was recovered during an unrelated incident. The cell phone videos showed a man being beaten. Detectives identified the perpetrators of the beating in the videos as appellant Gary Christopher Petersen, his son Jarrod Petersen, Jeffrey Brummett, Gary Carlson, and Rebecca Aspinwall. Detectives also identified the victim as E.P. When detectives spoke with E.P. about the incident, E.P. provided a statement consistent with the events shown on the videos.

According to E.P.'s testimony, he had gone to Brummett's home on September 5, 2016, where Brummett told him that he needed to speak with Petersen and Petersen's son about an incident involving the burning of the Petersens' truck. E.P., Petersen, and Petersen's son went to the basement of the home where the two men began assaulting E.P. Petersen's son hit E.P. in the head, and Petersen grabbed a hammer and hit E.P.'s hands with it. Petersen then tied a rope around E.P.'s hand, threw the rope over a beam, and held it taut while Petersen's son continued to hit E.P. and yell at him.

Shortly thereafter, Brummett, Aspinwall, and Carlson entered the basement. Brummett handed Aspinwall a taser and told her to "tase [E.P.] in the nuts." Petersen

continued to hold the rope, restraining E.P., while Aspinwall tased E.P. in the genitals. Aspinwall then handed the taser to Carlson, who tased E.P. in the side. Brummett continued to physically assault E.P. and, after Petersen had released the rope restraining him, Brummett further sexually assaulted E.P. as well. E.P. estimated that he was in Brummett's home for approximately five or six hours before he was permitted to leave.

The state initially charged Petersen with aiding and abetting first-degree criminal sexual conduct, aiding and abetting second-degree criminal sexual conduct, and aiding and abetting kidnapping. The state later amended the complaint to include an additional charge of aiding and abetting second-degree assault. After a trial, the jury acquitted Petersen of aiding and abetting first-degree criminal sexual conduct but found him guilty of aiding and abetting second-degree criminal sexual conduct, kidnapping, and second-degree assault. The jury also found as aggravating factors that E.P. was unable to defend himself during the commission of the crimes, that multiple weapons were used against E.P., and that Petersen committed the crimes as part of a group of three or more active participants.

The district court sentenced Petersen to concurrent aggravated sentences of 120 months for aiding and abetting second-degree criminal sexual conduct and kidnapping, and imposed a concurrent guidelines sentence of 21 months for aiding and abetting second-degree assault.

Peterson filed a direct appeal from the district court's judgments of conviction, arguing that (1) the evidence was insufficient to prove that he aided and abetted criminal sexual conduct, (2) the district court denied his right to a public trial when it closed the courtroom during jury voir dire, and (3) the jury's findings were insufficient to support the

upward durational sentencing departures. In a published opinion, this court held that the district court's closure constituted a "true closure" of the courtroom, but that the record did not provide a basis on which to determine whether the closure was justified. *State v. Petersen*, 933 N.W.2d 545, 552-53 (Minn. App. 2019). This court did not address appellant's remaining arguments, and instead remanded the case to the district court "for an evidentiary hearing and findings concerning whether the closure was justified." *Id.* at 553.

Following an evidentiary hearing, the district court issued an order concluding that the closure of the courtroom was not justified. It declined to address the question of remedy, however, stating that it "did not receive an instruction to grant a new trial" from this court, and that it was complying "with the clear, limited instructions to conduct an evidentiary hearing and make findings." Petersen filed the current appeal from the district court's order on remand. This court directed the parties to submit briefs concerning the district court's order and addressing any appropriate remedy, and granted expedited review to address this issue as well as those reserved in this court's prior opinion.

D E C I S I O N

The issues now before us for resolution include, first, Petersen's claim that his conviction for aiding and abetting second-degree criminal sexual conduct was not supported by sufficient evidence and must, therefore, be reversed and cannot be retried. The second issue is Petersen's entitlement to a reversal of all convictions and a new trial based on the district court's conclusion that the closure of the courtroom during jury voir dire was not justified. The final issue relates to Petersen's contention that the jury's

findings were not sufficient to support the imposition of aggravated sentences. We will address each in turn.

I. The evidence was sufficient to support Peterson's conviction for aiding and abetting second-degree criminal sexual conduct.

Petersen argues that the state failed to prove beyond a reasonable doubt that he knew Aspinwall was going to commit criminal sexual conduct against E.P. and that he intended to further the commission of that crime, or that this act of criminal sexual conduct was in pursuance of—and a reasonably foreseeable probable consequence of—the other crimes for which he is liable.

When reviewing the sufficiency of the evidence, we undertake "a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient" to support the jury's verdict. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). "We will view the evidence in the light most favorable to the verdict and assume that the factfinder disbelieved any testimony conflicting with that verdict." *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011) (quotation omitted). A verdict will not be overturned if the fact-finder, "acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense." *Ortega*, 813 N.W.2d at 100.

If a conviction relies on circumstantial evidence, this court uses a heightened standard of review. *See State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010); *State v. Porte*, 832 N.W.2d 303, 309 (Minn. App. 2013). In such a case, we apply a two-step test

to determine the sufficiency of the evidence. *State v. Moore*, 846 N.W.2d 83, 88 (Minn. 2014). First, we identify the circumstances proved. *Id.* (citing *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010)). "In identifying the circumstances proved, we assume that the jury resolved any factual disputes in a manner that is consistent with the jury's verdict." *Id.* (citing *Andersen*, 784 N.W.2d at 329). Second, we "examine independently the reasonableness of the inferences that might be drawn from the circumstances proved," and then "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* (quotations omitted). We consider the evidence as a whole rather than examine each piece in isolation. *Andersen*, 784 N.W.2d at 332.

The second-degree criminal-sexual-conduct statute provides, in relevant part, that "[a] person who engages in sexual contact with another person is guilty of criminal sexual conduct in the second degree if . . . the actor causes personal injury to the complainant, and . . . the actor uses force or coercion to accomplish the sexual contact." Minn. Stat. § 609.343, subd. 1(e)(i) (2016). With regard to aiding and abetting liability, a person is "criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime[,]" and is liable as well "for any other crime committed in pursuance of the intended crime if reasonably foreseeable by the person as a probable consequence of committing or attempting to commit the crime intended." Minn. Stat. § 609.05, subds. 1, 2 (2016).

To "intentionally aid" means "that the defendant knew that his alleged accomplices were going to commit a crime" and "that the defendant intended his presence or actions to

further the commission of that crime." *State v. Bahtuoh*, 840 N.W.2d 804, 810 (Minn. 2013) (quotations omitted). In other words, to impose liability for aiding and abetting an offense, the state must show that the defendant played a knowing role in the commission of the crime and took no steps to thwart its completion. *State v. Ostrem*, 535 N.W.2d 916, 924 (Minn. 1995). The supreme court has distinguished "between playing a knowing role in the crime and mere presence at the scene, inaction, knowledge and passive acquiescence." *State v. Scruggs*, 822 N.W.2d 631, 640 (Minn. 2012) (quotations omitted). But "active participation in the overt act which constitutes the substantive offense is not required," and "a person's presence, companionship, and conduct before and after an offense are relevant circumstances from which a person's criminal intent may be inferred." *Ostrem*, 535 N.W.2d at 924; *see also Bahtuoh*, 840 N.W.2d at 810.

Petersen's conviction for aiding and abetting second-degree criminal sexual conduct was based on his liability for Aspinwall's act of tasing E.P. in his genitals—behavior which the parties do not dispute constitutes second-degree criminal sexual conduct. The circumstances proved that support the jury's verdict for aiding and abetting this offense are as follows: Petersen was with E.P. in the basement of Brummett's home; Petersen tied a rope around E.P.'s hand, threw the rope over a beam, and held it taut so that E.P. was not able to move while Petersen's son physically assaulted him; Brummett handed Aspinwall a taser and told her to "tase [E.P.] in the nuts"; Peterson continued to hold the rope, restraining E.P. while Aspinwall tased him in the genitals; Petersen did not attempt to stop Aspinwall; and Petersen continued to hold the rope after this assault occurred.

Although these proven circumstances are consistent with the conclusion that Petersen knowingly assisted Aspinwall's use of the taser on E.P.'s genitals, Petersen argues that they are equally consistent with the hypothesis that he did not intend to assist with any criminal-sexual-conduct offense, and that Aspinwall's actions were not a reasonably foreseeable consequence of the kidnapping and assault. But the circumstances proved belie Petersen's argument. Due to the fact that Petersen continued to hold the rope restraining E.P. after Brummett handed Aspinwall the taser and directed her to use it on E.P.'s genitals, and his continued restraint of E.P. thereafter, it would be unreasonable to infer that Petersen (1) did not have knowledge of Aspinwall's intent to commit the offense, and (2) did not intend his presence or actions to facilitate the offense. Accordingly, the evidence presented at trial was sufficient to support the jury's verdict for aiding and abetting second-degree criminal sexual conduct.

II. Petersen is entitled to a new trial on all counts based upon the district court's unjustified courtroom closure during voir dire.

The facts relevant to the district court's closure of the courtroom are as set forth in this court's prior opinion in this matter. *Petersen*, 933 N.W.2d at 548-49. In brief, the district court closed the courtroom in order to privately voir dire three prospective jurors who had expressed concerns about publicly sharing personal information. After the three identified jurors had been questioned, however, the district court failed to reopen the courtroom for the voir dire of an additional 25 prospective jurors. On appeal, this court held that a true closure of the courtroom had occurred, but that the record was insufficient to determine whether there was sufficient justification for it. *Id.* at 552-53. On remand,

the district court found that the closure of the courtroom was indeed unjustified, but declined to address the question of remedy.

Petersen appealed and now asks this court to reverse his convictions and order a new trial based upon the district court's unjustified closure of the courtroom. The state does not take issue with the district court's conclusion on remand that the closure was not justified, and agrees that Petersen is entitled to a new trial on that basis. Nevertheless, this court has an obligation to decide cases in accordance with the law notwithstanding the concessions or agreements of the parties. *See State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990). Accordingly, we independently review the district court's determination that the courtroom closure was unjustified.

The United States and Minnesota Constitutions guarantee the right to a public trial and protect both the accused and the public at large from unjustified closures of courtrooms. U.S. Const. amend. VI; Minn. Const. art. I, § 6; *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 2215 (1984). The right to a public trial has been extended to protect voir dire proceedings as well. *Presley v. Georgia*, 558 U.S. 209, 213, 130 S. Ct. 721, 724 (2010); *State v. Brown*, 815 N.W.2d 609, 617 (Minn. 2012).

The closure of a courtroom may be justified, however, 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).[1] Whether a defendant's right to a public trial has been violated is reviewed de novo. *State v. Taylor*, 869 N.W.2d 1, 10 (Minn. 2015).

The first step in this analysis is typically an evaluation of whether a "true closure" of the courtroom occurred such that an analysis of the *Waller* factors is required, or whether the restriction was so insignificant as to not actually implicate the public-trial right. *Id.* at 11. In this court's prior opinion in this matter, we concluded that the closure of the courtroom during a "significant portion of *voir dire* proceedings" constituted a "true closure" implicating Petersen's right to a public trial. *Petersen*, 933 N.W.2d at 552. Neither party petitioned for further review of this decision to the Minnesota Supreme Court, however, and so the question of whether a true closure occurred has become law of the case and is not before the court in the current appeal. *See State v. Bailey*, 732 N.W.2d 612, 623 (Minn. 2007) (applying the law-of-the-case doctrine in a criminal matter). The remaining issues to be resolved, thus, are whether the district court's closure was unjustified under the *Waller* factors and, if so, what remedy is required.

"Overriding Interest"

The first factor identified by *Waller* is whether the closure advanced an "overriding interest that is likely to be prejudiced" by a proceeding open to the public. *Fageroos*, 531 N.W.2d at 201 (quotation omitted). At the evidentiary hearing on remand, the judicial officer who presided at trial testified that the purpose of the closure was both to ensure the comfort and openness of the privately interviewed jurors, and to avoid tainting the

[1] These considerations are collectively referred to as the *Waller* factors.

remainder of the jury pool. Although these may have constituted "overriding interests" with regard to the first three potential jurors identified by the parties, there is no indication in the record that any of these concerns related specifically to any of the 25 other jurors questioned privately that day.[2] *See State v. Mahkuk*, 736 N.W.2d 675, 685 (Minn. 2007) (rejecting the protection of witnesses as an overriding state interest in the absence of any witness having been intimidated or threatened). Accordingly, lacking any specific reason to believe that the voir dire of the remainder of the prospective jurors implicated any such concerns, the closure of the courtroom for the entirety of voir dire cannot be said to have served an overriding interest with respect to them.

Breadth of the Closure

The second *Waller* factor is whether the closure was broader than necessary to protect the interest overriding the right to a public trial. *Fageroos*, 531 N.W.2d at 201. As noted above, because any legitimate interest in a full closure of the courtroom was not shown to have existed beyond the questioning of the first three prospective jurors, it follows that the district court's continued closure for the remainder of voir dire was therefore unnecessarily broad. In addition, any concerns regarding the tainting of the jury pool with the responses of other prospective jurors could have been eliminated simply by excluding only the other prospective jurors from the courtroom and not the public at large. The

[2] The United States Supreme Court has held that a prospective juror may have a valid privacy interest when "interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain," and that such circumstances may support in camera voir dire. *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 511-12, 104 S. Ct. 819, 825 (1984).

closure of the courtroom was therefore far broader than necessary to address any interest in the privacy of the first three prospective jurors.

Alternatives Considered

The third requirement for a justified closure of a courtroom is that the district court considered reasonable alternatives to closing the proceedings. *Id.* As the district court found in its order on remand:

> [T]he trial court did not consider alternatives to the closure because a motion to close the courtroom to the public was made, and there was no vociferous objection. There was specifically no consideration made to conduct an *in camera* inquiry to determine if courtroom closure was necessary. Nor did anyone within the courtroom ask prospective jurors if they preferred to speak without members of the public being present. Rather, they were, in almost all instances, advised that they were brought into a private setting.

Because these findings are supported not only by the transcript of the jury voir dire itself but also by the record of the evidentiary hearing, it is clear that no consideration was given to alternatives to closing the courtroom.

Adequate Findings

The final requirement for a constitutional courtroom closure under *Waller* is that findings are made by the district court sufficient to support the closure. *Id.* Here, the district court initially made no findings regarding the closure of the courtroom during voir dire, which precipitated this court's remand on direct appeal. *Petersen*, 933 N.W.2d at 552-53. And on remand, the district court made very detailed findings that the closure was in fact *un*justified. Accordingly, the record contains no findings which adequately support the closure of the courtroom in this case.

Remedy

Because the record of both the voir dire proceedings and the evidentiary hearing on remand establish that none of the *Waller* factors supported the district court's closure of the courtroom for the entirety of voir dire, we hold that such closure was unjustified and in violation of Petersen's constitutional right to a public trial. A violation of the 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), and generally requires the automatic reversal of a conviction, *State v. Brown*, 732 N.W.2d 625, 630 (Minn. 2007). We therefore reverse Petersen's convictions and sentences and remand for a new trial.

III. Petersen's claim that the jury's findings were not sufficient to support the aggravating factors justifying an upward sentencing departure is moot.

Petersen's final claim relates to the sufficiency of the jury's findings to support the upward sentencing departures imposed in this case. Because Petersen's sentencing claim is rendered moot by our reversal of his convictions and sentences, we decline to address it in this opinion.

Reversed and remanded.