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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1461**

State of Minnesota,
Respondent,

vs.

Willie Henry McDaniel,
Appellant.

**Filed June 27, 2011
Affirmed
Minge, Judge**

Ramsey County District Court
File No. 62-K6-08-001140

Lori Swanson, Attorney General, St. Paul, Minnesota;

John J. Choi, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Minge, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

MINGE, Judge

This is appellant's second appeal. Earlier, he challenged his conviction for first-degree assault arguing, inter alia, that the partial closure of the courtroom during a

witness's testimony violated his constitutional right to a public trial. We remanded for findings. In this subsequent appeal, we conclude that the district court's findings are sufficient to support the partial closure and affirm.

FACTS

Appellant Willie McDaniel was charged with first-degree assault and attempted murder in connection with the shooting of D.A. During McDaniel's trial, the prosecutor requested that McDaniel's sisters be excluded from the courtroom during the testimony of a witness, C.S., because she had told the witness coordinator that she had received some threatening phone calls from relatives of McDaniel. Over defense counsel's objection, the district court granted the prosecutor's request and excluded the sisters. At the conclusion of McDaniel's trial, the jury found him guilty of first-degree assault and did not reach a verdict on the charge of attempted murder.

McDaniel previously appealed alleging, among other issues, that his constitutional right to a public trial was violated. *State v. McDaniel*, A08-2261, 2010 WL 606380, *3 (Minn. App. 2010) (*McDaniel I*). In his first appeal, this court concluded that the district court had "not made adequate factual findings to support closure of the courtroom" and remanded for such findings. *Id.* at *4.

On remand, the district court conducted a hearing on the partial closure, made findings, and concluded that the partial closure was justified. McDaniel appeals.

DECISION

The only issue in this case is whether the partial closure of the courtroom violated McDaniel's constitutional right to a public trial. "Questions of constitutional law are

reviewed de novo.” *State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009). The right to a public trial is guaranteed by the constitutions of both the United States and Minnesota. U.S. Const. amends. VI, XIV; Minn. Const. art. I, § 6. “[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) (quotations and citations omitted), *quoted in State v. Mahkuk*, 736 N.W.2d 675, 684 (Minn. 2007).

The right to a public trial “is not absolute and may ‘give way in certain cases to other rights or interests.’” *Bobo*, 770 N.W.2d at 139 (quoting *Waller*, 467 U.S. at 45, 104 S. Ct. at 2215). To close a proceeding, a party 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*, 467 U.S. at 48, 104 S. Ct. at 2216; *see also State v. Fageroos*, 531 N.W.2d 199, 201-03 (Minn. 1995) (adopting the *Waller* standard). We do not apply different tests to complete versus partial closures. *Mahkuk*, 736 N.W.2d at 685. *But see Garcia v. Bertsch*, 470 F.3d 748, 752-53 (8th Cir. 2006) (applying a less demanding substantial-reason test to partial closures).

On remand, the district court identified several factors that supported its decision to exclude McDaniel’s sisters from a brief portion of the six-day trial. The district court primarily considered intimidation of witness C.S. In addition, the district court referenced the overall tension in the courtroom during the trial and several incidents that

had occurred before the exclusion, including an outburst leading to a spectator being removed, gang signs carved into the front of a pew, and a juror being contacted by a member of the gallery during a break. The district court also addressed the *Waller* standard, finding that there was an overriding interest in protecting C.S. from intimidation and encouraging her truthful testimony, that the exclusion of two sisters was not broader than necessary, and that it was the least restrictive available alternative for conducting a fair trial.

McDaniel argues that the prosecutor's assertions that witness C.S. was intimidated were not sufficient evidence to justify the partial closure of the courtroom. We note that in *Bobo*, the supreme court upheld the complete closure of the courtroom during a witness's testimony because of the testimony of a police officer that a witness refused to testify because he was afraid of gang members who were in the courtroom. 770 N.W.2d at 140. We acknowledge that in *Mahkuk*, the court noted that "[t]he prosecutor's assertions, however, are not evidence" and concluded that the *Waller* standard had not been met given the "absen[ce of] evidence in the record and adequate findings by the [district] court." *Mahkuk*, 736 N.W.2d at 685. Unlike *Mahkuk*, here there was some evidence of intimidation. During redirect examination of C.S., the prosecutor asked if she had been threatened in any way. C.S. replied, "I haven't been threatened but I got a call that I believe was a threat." The prosecutor followed up:

Prosecutor: Okay. You said you found that phone call threatening. Is that right?

Smith: Yes.

Prosecutor: Were you threatened?

Smith: No.

We also note that despite her claims that she was not threatened, C.S.'s trial testimony about McDaniel's activity was more favorable to McDaniel than her initial statement to law enforcement. One potential inference from this change in statements is that the phone calls affected C.S.'s testimony.

We recognize that C.S.'s testimony was given after the district court ordered the sisters excluded from the courtroom. This means that posttruling information is being used to support the decision to partially close the trial. However, the remedy for deficiency in findings is to remand for an evidentiary hearing. *Fageroos*, 531 N.W.2d at 203. On remand, the state is permitted to supplement the record to show that closure was necessary. *Id.* Given that the state is permitted to supplement the record, trial circumstances, including testimony after the closure, may be considered in evaluating the partial closure.

We conclude that the findings of the district court on remand satisfy the *Waller* standard.

Affirmed.

Dated: