STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1217

Michael Jerome Buckanaga, Jr., petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed April 27, 2010
Affirmed
Shumaker, Judge

Becker County District Court
File No. 03-K7-07-237

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, Paul R. Kempainen, Assistant Attorney General, St. Paul, Minnesota; and

Michael Fritz, Becker County Attorney, Tammy L. Merkins, Assistant County Attorney, Detroit Lakes, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and Shumaker, Judge.

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

SHUMAKER, Judge

On appeal following a remand by this court for findings to support the district court's decision to close the courtroom during the testimony of the 14-year-old victim,

appellant argues that the district court violated his constitutional right to a public trial by failing to balance the interests at issue. Because the district court made adequate findings to support closure of the courtroom, we affirm.

FACTS

Appellant Michael Jerome Buckanaga Jr., at age 20, was charged with two counts of third-degree criminal sexual conduct against S.W., a 14-year-old girl, in December 2006.

At appellant's May 2007 jury trial, the state moved to close the courtroom to spectators during S.W.'s testimony. The district court granted the motion, noting that S.W. "seemed quite subdued and withdrawn and uncomfortable talking about the situation" and that "the nature of the crime . . . would be difficult for a juvenile or a young woman to discuss." The record did not show who was excluded from the courtroom and who was permitted to be present.

The jury convicted appellant of both charges, and he received a sentence of 117 months. Appellant appealed to this court, arguing, among other things, that the district court erred in granting the state's motion to close the courtroom during S.W.'s testimony. *State v. Buckanaga*, No. A07-1695, 2009 WL 233272, at *1 (Minn. App. Feb. 3, 2009).

In our decision in appellant's first appeal, we noted that

> (1) the [district] court did not appear to consider alternatives to closure; (2) it did not inquire as to the interests of parents or relatives; and (3) it did not appear to balance [appellant]'s constitutional right to a public trial against S.W.'s interest in closure. It also is not clear whether the [district] court allowed the public to object, but that might have occurred.

Id. at *3. We also expressed concern that the record "fail[ed] to show with evidentiary support the type and degree of potential psychological or emotional harm against which S.W. needed safeguarding through courtroom closure." *Id.* We remanded to the district court for an evidentiary hearing on the issue of closure. *Id.* at *5.

The district court held an evidentiary hearing in April 2009, at which the court stressed that the evidence would be limited to what was known at the time of trial.

S.W.'s aunt, with whom S.W. was living at the time of the incident and at the time of trial, testified that S.W. was "afraid" and "intimidated" by members of appellant's family who attended the trial. The aunt testified that it "would have been difficult" for S.W. to testify in an open courtroom. The aunt's preference at the time of trial was that the courtroom be closed.

According to her aunt, S.W. had been happy, outgoing, and a good student before the incident. At the time of trial, S.W.'s mental health was "deteriorating": she was not sleeping, disliked being alone, was afraid to travel to school by herself, cried frequently, and was performing poorly in school. S.W. was seeing a psychologist and had been prescribed medication. During the trial, S.W. took an overdose of antihistamine. She wrote notes expressing her fear and "how she wanted to end her life." The content of the notes "got worse" as the time approached for S.W. to testify.

The aunt also testified that S.W. received a phone call from appellant's girlfriend before the trial ended. The aunt did not know exactly what appellant's girlfriend said to S.W., but she testified that S.W. became "very, very scared."

Jannette Ryker testified for the state. Ryker, a mental-health worker, is trained to make psychological diagnoses, and she was qualified as an expert. Although Ryker did not begin working with S.W. until after the trial, she did speak with S.W. about whether S.W. would have been able to testify during the trial. S.W. told Ryker that she was afraid of appellant and his family and "of any repercussions that could come to [her] from testifying." S.W. had been told that appellant's family was violent "and that it was going to be hard on her if she testified." S.W. also told Ryker that she was hypervigilant, had difficulty sleeping, and cried frequently at the time of trial. Ryker believed that S.W. "was in a state of terror going into the trial" and "was absolutely terrified." Based on what S.W. told her during six therapy sessions, Ryker testified that S.W. met the diagnostic criteria for posttraumatic stress disorder (PTSD) at the time of trial; specifically, Ryker noted that S.W. was hypervigilant, had an exaggerated startle response, and suffered flashbacks. Ryker stated her opinion that S.W. "would have shut down entirely and not been able to testify had she had to face an open courtroom." Ryker also opined that testifying in an open courtroom "would have further terrorized . . . [and] traumatized" S.W.

Sixteen-year-old S.W. testified at the hearing that she had wanted the courtroom closed. She testified that she was afraid of appellant and his family, having been told that his family was violent. She testified that it would have been difficult for her to talk about the incident if other people were in the courtroom. She testified that her academic performance had suffered dramatically, that she had difficulty being alone, and that she

refused to travel to school alone. Before S.W. testified at the trial, appellant's girlfriend called S.W. and "kept asking" if S.W. had told police the truth.

Appellant testified that he did not want the courtroom to be closed because he believed that S.W. "would have told the truth" if his family and others had been in the courtroom.

Appellant's cousin testified that he attended appellant's trial and did not remember the courtroom being closed.

Appellant's girlfriend testified that she attended the trial and was not allowed in the courtroom for S.W.'s testimony. The girlfriend testified that she was not asked if she objected to the closure but would have objected had she been asked. The girlfriend admitted calling S.W. but denied threatening her. The girlfriend testified that she wanted to know if S.W. was telling the truth and told S.W. that lying would "really . . . mess up someone's life and a lot of lives."

After the hearing, the district court made findings of fact regarding the closure of the courtroom during S.W.'s testimony. The court found that the incident was "particularly traumatic" to S.W. because of her age and the "forcible nature" of appellant's conduct, and that S.W. feared for her safety and had been told that appellant's family was violent. Between the date of the incident and trial, S.W.'s grades were adversely affected; she could not sleep; she cried frequently; she had difficulty being alone; and she was afraid to go to school alone. The court found that appellant's girlfriend called S.W. before the trial in "an effort to influence S.W.'s testimony." During the trial, S.W. had suicidal thoughts and found it difficult to talk about the

incident even with her family. The court noted Ryker's opinions that S.W. was suffering from PTSD at the time of trial and found that requiring S.W. to testify in open court "would have caused her to suffer significant harm and would have seriously traumatized her." The court also noted that S.W. "continues to be traumatized by this event, as was evident by her demeanor, reluctance, and subdued manner during [the] evidentiary hearing." Upon these findings, the court concluded that closure was necessary to safeguard S.W.'s physical and psychological well-being.

The district court clarified that the courtroom was closed to spectators, "which primarily consisted of the family of [appellant]." One support person for S.W. was allowed to remain in the courtroom. *See* Minn. Stat. § 631.046 (2006) (authorizing presence of support person for minor prosecuting witness). The courtroom was reopened to spectators after S.W.'s testimony.

The court also found that there was no media interest in the trial and that no objections were made when the court inquired as to whether anyone objected to closure. The court noted that, based on the testimony of appellant's cousin, the closure of the courtroom "had a minimal effect on at least some of [appellant]'s family and supporters." The court concluded that the closure "was limited in nature and was no broader than necessary to protect S.W." and that "[t]here was no other reasonable alternative to closure, there being no other facilities available to accommodate the need for closure and at the same time protecting [appellant]'s right to a public trial."

This second appeal followed.

D E C I S I O N

Appellant argues that the district court failed to make adequate findings to support closure of the courtroom during S.W.'s testimony. We disagree.

We review questions of constitutional law de novo. *State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009). But we review the district court's factual findings for clear error. *State v. Critt*, 554 N.W.2d 93, 95 (Minn. App. 1996), *review denied* (Minn. Nov. 20, 1996). If a criminal defendant's right to a public trial has been violated, the error is considered a structural error that is not subject to harmless-error analysis. *Bobo*, 770 N.W.2d at 139.

For criminal-sexual-conduct cases in which the victim is under 18 years of age, the district court "may exclude the public from the courtroom during the victim's testimony . . . upon a showing that closure is necessary to protect a witness or ensure fairness in the trial." Minn. Stat. § 631.045 (2006). But whether closure is proper is ultimately a constitutional question. *State v. Fageroos*, 531 N.W.2d 199, 201 (Minn. 1995); *see* U.S. Const. amend. VI (providing that all criminal defendants have the right to a public trial); Minn. Const. art. I, § 6 (same).

The right to a public trial "may give way in certain cases to other rights or interests." *Waller v. Georgia*, 467 U.S. 39, 45, 104 S. Ct. 2210, 2215 (1984). Closure is justified where the party seeking closure advances an overriding interest that is likely to be prejudiced, where the closure is no broader than necessary to protect that interest, where the district court considers reasonable alternatives to closure, and where the district

court makes adequate findings to support the closure. *Fageroos*, 531 N.W.2d at 201 (quotation and citation omitted).

"One recognized 'overriding interest' is safeguarding the physical and psychological well-being of a minor." *Id.* at 202. But this compelling interest

> does not justify closure of the courtroom each and every time a minor testifies. On the contrary, a case-by-case determination must be made by the [district] court, a determination that is made upon the consideration of several factors. Factors to be considered . . . include the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives.

Id. (quotation and citations omitted).

S.W.'s interests in closure

Appellant argues that S.W.'s interests in having the courtroom closed "were no different than those present in every case of this type." In our decision of appellant's first appeal, we expressed a similar concern:

> [T]he record fails to show with evidentiary support the type and degree of potential psychological or emotional harm against which S.W. needed safeguarding through courtroom closure. Rather, the factors upon which the [district] court relied in granting the motion . . . were the ordinary concerns virtually any sex-crime victim—juvenile or adult—likely would have about testifying in public. Being reluctant to discuss the incident, especially in the presence of strangers; having difficulty relating the information; being nervous; not wanting to look back at the trauma, perhaps hoping to forget it altogether, are common characteristics of sex-crime victims. It seems that the caselaw contemplates something more than ordinary victim reactions before closure is justified.

Buckanaga, 2009 WL 233272, at *3. But the district court's findings after the evidentiary hearing show that S.W. was not merely reluctant or nervous. The district court found that (1) S.W. received a phone call intended to influence her testimony; (2) S.W. had suicidal thoughts during the trial; (3) S.W. feared for her safety; and (4) the expert witness opined that S.W. was suffering from PTSD at the time of trial, that S.W. was unable to testify in an open courtroom, and that requiring S.W. to do so would have caused her "to suffer significant harm and would have seriously traumatized her." We conclude that the district court's findings are adequate to support closure of the courtroom to safeguard S.W.'s physical and psychological well-being.

Appellant makes several challenges to the factual findings regarding the testimony of the expert witness. First, appellant characterizes much of Ryker's testimony as mere speculation, including the diagnosis of PTSD and Ryker's opinion that S.W. would have "shut down" in open court. But appellant neither presented nor pointed to any evidence to contradict Ryker's opinions. Furthermore, we note that expert testimony about the potential effects that testifying in open court might have on a witness inherently involves some amount of uncertainty, but is reliably predictive if reasonably supported, as it was here. The district court's findings as to the substance of Ryker's testimony are not clearly erroneous.

Second, appellant argues that no evidence was presented as to any "specific psychological problems" that would have affected S.W. had she testified in open court. But the district court found that S.W. would have suffered "significant harm" and would have been "seriously traumatized" by testifying in open court. These findings—along

with the findings as to S.W.'s suicidal thoughts, the phone call from appellant's girlfriend, and the PTSD diagnosis—adequately address our concern that the "type and degree of potential psychological or emotional harm" to S.W. have evidentiary support. *See id.*

Third, appellant appears to challenge as clearly erroneous the district court's finding that Ryker testified that S.W. would have suffered "significant harm" and been "seriously traumatized." Appellant is correct that Ryker did not use these phrases in her testimony. But Ryker did opine that testifying in an open courtroom "would have further terrorized . . . [and] traumatized" S.W. Additionally, Ryker testified that S.W. would have "shut down entirely" in an open courtroom. The district court's finding is not clearly erroneous.

Fourth, appellant asserts that closure of the courtroom did not ameliorate any psychological problems suffered by S.W. because S.W. "continues to be traumatized by the alleged crime." But the fact that S.W. is still traumatized by the incident does not mean that closing the courtroom failed to protect her from an exacerbation of the trauma caused by the crimes. Appellant's argument is without merit.

Balancing of interests

In our decision in appellant's first appeal, we noted that the district court "did not appear to balance [appellant]'s constitutional right to a public trial against S.W.'s interest in closure." *Buckanaga*, 2009 WL 233272, at *3. Appellant now argues that the district court failed to balance these interests on remand. We disagree.

The district court acknowledged that it was required to balance S.W.'s interest in closure with appellant's right to a public trial. The court sought to protect appellant's right to a public trial by closing the courtroom only for S.W.'s testimony and by considering reasonable alternatives to closure. The court noted that there were no reasonable alternatives to closure, that no member of the public objected, that there was no media interest in the trial, and that "the limited exclusion had a minimal effect on at least some of [appellant]'s family and supporters." We conclude that the district court did balance S.W.'s interest against appellant's interest.

We also note that appellant's argument that the presence of his family would have caused S.W. to tell the truth is contradicted by the record, which shows that S.W. likely would have been unable to testify at all in the presence of his family. Thus, no evidence would have been offered through S.W., and there possibly would have been no opportunity for meaningful cross-examination.

Alternatives to closure

In our decision in appellant's first appeal, we noted that the district court "did not appear to consider alternatives to closure." *Id.* After the evidentiary hearing on remand, the district court found: "There was no other reasonable alternative to closure, there being no other facilities available to accommodate the need for closure and at the same time protecting [appellant]'s right to a public trial."

Appellant contends that the district court could have excluded only appellant's family members, rather than closing the courtroom to all spectators. But Ryker testified that S.W. would be harmed by testifying in open court; Ryker did not testify that harm to

S.W. would occur only if she were to testify in front of appellant's family members. Further, appellant's suggested form of closure would not exclude appellant's girlfriend, who had attempted to influence S.W.'s testimony.

Appellant also challenges as clearly erroneous the district court's finding that the closure order "primarily" excluded members of appellant's family because no evidence was presented as to the identities of persons excluded from the courtroom. But in light of Ryker's testimony that the harm to S.W. would occur through testifying in front of the general public, it is unclear how this alleged error prejudiced appellant. *See* Minn. R. Crim. P. 31.01 ("Any error that does not affect substantial rights must be disregarded.").

Finally, appellant argues that the district court's finding that there were "no other facilities available to accommodate the need for closure and at the same time protect[] [appellant]'s right to a public trial" is clearly erroneous because there was no evidence presented about what kind of facilities were available during appellant's trial. Although the availability of courtroom facilities and technology is within the knowledge of the district court, "[c]riminal cases are not normally the appropriate setting for judicial notice." *State v. Pierson*, 368 N.W.2d 427, 434 (Minn. App. 1985). But appellant did not argue at trial or at the evidentiary hearing on remand that any alternative facilities were available; appellant does not proffer any feasible alternatives to closure; and the court only closed the courtroom during S.W.'s testimony. Appellant has failed to demonstrate that the district court's findings are inadequate to support closure of the courtroom.

Affirmed.