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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1215**

State of Minnesota,
Respondent,

vs.

Joe Delannis Thomas,
Appellant.

**Filed July 23, 2012
Affirmed
Schellhas, Judge
Stauber, Judge, dissenting**

Hennepin County District Court
File No. 27-CR-10-28562

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Schellhas, Judge; and Muehlberg, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges his conviction of first-degree criminal sexual conduct, arguing that (1) the district court violated his Sixth Amendment right to a public trial by locking the courtroom doors during its jury charge and (2) the evidence was insufficient to sustain the verdict. Because the district court did not violate appellant's Sixth Amendment right to a public trial and the evidence is sufficient to sustain the verdict, we affirm.

FACTS

In the early morning of June 20, 2010, a resident of a Minneapolis apartment located above a bar heard a woman screaming and called 911. When police arrived, they found the woman, K.S., lying in the bar's parking lot, unconscious and naked from the waist down. Police also found a male, later identified as appellant Joe Delannis Thomas, hiding under a piece of plywood in the parking lot. Police ordered Thomas to come out, which he did, stating without prompting that the sex was consensual. Police arrested Thomas and facilitated K.S.'s transport to the Hennepin County Medical Center. A nurse examined K.S. and reported that K.S. had multiple injuries to the exterior of her vagina.

Respondent State of Minnesota charged Thomas with one count of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(e)(i) (2008) (use of "force or coercion to accomplish sexual penetration"), and one count of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(e)(ii) (2008) (mentally impaired or physically helpless victim). At a jury trial, K.S. testified that, on

the evening of June 19, she had gone to a bar with a group of friends from whom she had become separated at around 1:00 a.m. What she recalls about the sexual assault is that she regained consciousness, lying on her back in the bar's parking lot. A black male was hitting her and she yelled, "Please stop, you're hurting me." The male, who was attempting to remove her pants, yelled, "Shut up, b**ch," and hit her in the face, causing her to black out.

After closing arguments but before charging the jury, the district court asked his law clerk to close and lock the courtroom doors, stating "[t]hat's just tradition so that the instructions are not interrupted." At the time, no spectators were in the courtroom. The jury found Thomas guilty of first-degree force-or-coercion criminal sexual conduct and found him not guilty of first-degree helpless-victim criminal sexual conduct. The court sentenced Thomas to 144 months' imprisonment.

This appeal follows.

D E C I S I O N

I. Right to a Public Trial

As an initial matter, we address the state's argument that Thomas has waived this issue by failing to object at trial to the district court's actions. Generally, an appellate court will not consider arguments not raised in district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But a violation of the Sixth Amendment 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). A defendant need not timely object to preserve a structural error for appeal; instead, structural errors "require automatic reversal

because such errors call into question the very accuracy and reliability of the trial process.” *State v. Everson*, 749 N.W.2d 340, 347–48 (Minn. 2008) (quotation omitted); *see also State v. Brown*, 732 N.W.2d 625, 630 (Minn. 2007) (“Structural errors always invalidate a conviction whether or not a timely objection to the error was made.”). We therefore address Thomas’s Sixth Amendment argument despite his lack of objection at trial.

The Sixth Amendment protects an accused’s right to an open, public trial. U.S. Const. amend VI; *see also* Minn. Const. art. I, § 6 (same); *Waller v. Georgia*, 467 U.S. 39, 44–50, 104 S. Ct. 2210, 2214–17 (1984) (considering extent of right to public trial).

[T]he 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.

State v. Mahkuk, 736 N.W.2d 675, 684 (Minn. 2007) (quoting *Waller*, 467 U.S. at 46, 104 S. Ct. at 2215) (quotation omitted).

Before closing the courtroom to the public, a district court must apply the four-part test articulated in *Waller. Bobo*, 770 N.W.2d at 139. Under this test, a courtroom closure 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, 201–03 (Minn. 1995) (quotation omitted) (applying *Waller* test).

An appellate court considers de novo whether a defendant's right to a public trial has been violated. *Bobo*, 770 N.W.2d at 139. In this case, we must decide whether the district court's locking of the courtroom doors during its jury charge constituted a closure under the Sixth Amendment.

After the close of evidence, the district court stated: "It's now my duty to give written instructions. I am going to ask my law clerk to lock the courtroom doors. That's just tradition so that the instructions are not interrupted." At the time, the courtroom gallery was empty and the record reflects that no one attempted to enter the courtroom while the doors were locked. These circumstances are distinct from the courtroom-closure cases cited by Thomas. *See Mahkuk*, 736 N.W.2d at 683–85 (stating that district court's exclusion of gang members from courtroom gallery during lay-witness testimony constituted closure under the Sixth Amendment requiring *Waller* analysis); *State v. McRae*, 494 N.W.2d 252, 258–59 (Minn. 1992) (holding that closure of courtroom to spectators during minor complainant's testimony must comply with *Waller* test); *State v. Schmit*, 273 Minn. 78, 78, 139 N.W.2d 800, 802 (1966) (holding that "order excluding all spectators during the trial of a criminal case except members of the bar and press . . . constitutes a violation of defendant's right to a public trial").

In *State v. Brown*, decided after this case was submitted, the Minnesota Supreme Court analyzed whether a defendant's Sixth Amendment right to a public trial was implicated when the district court locked the doors to the courtroom after closing arguments for the duration of the jury instructions. ___ N.W.2d ___, ___, 2012 WL 2529435, at *5–6 (Minn. July 3, 2012). The district court noted on the record that

anyone present in the courtroom when the instructions began were “welcome to stay,” but that no one would be allowed to enter or leave the courtroom during the jury instructions. *Id.* at *3. The supreme court held that the district court’s actions did not violate the defendant’s right to a public trial, noting that “the courtroom was never cleared of all spectators, and the judge in fact told the people in the courtroom that they were ‘welcome to stay.’” *Id.* at *6. The supreme court noted that “[t]he trial remained open to the public and press already in the courtroom and the [district] court never ordered the removal of any member of the public, the press, or the defendant’s family.” *Id.* The supreme court also noted that “the jury instructions did not comprise a proportionately large portion of the trial proceedings.” *Id.*

The supreme court’s holding in *Brown* instructs us in this case. Just as in *Brown*, the district court locked the courtroom doors after closing argument for the duration of the jury instructions. After ordering the doors locked, the district court stated: “If someone wants to leave the courtroom[,] there is nobody back there right now so—okay.” As such, just as in *Brown*, no one was actually removed from the courtroom. And the jury instructions did not comprise a large portion of the trial proceedings, covering only 15 pages in more than 1,200 pages of transcript. We therefore conclude under *Brown* that Thomas’s Sixth Amendment right to a public trial was not violated.

II. Sufficiency of the Evidence

Thomas argues that the evidence is legally insufficient to support his conviction because the record does not establish sexual penetration beyond a reasonable doubt. A conviction based on circumstantial evidence receives “heightened scrutiny” on appellate

review. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). Appellate courts apply a two-step test to evaluate the sufficiency of the circumstantial evidence supporting a defendant’s conviction. *State v. Andersen*, 784 N.W.2d 320, 329–30 (Minn. 2010). First, we “identify the circumstances proved.” *Id.* at 329 (quotation omitted). At this first step, “we defer . . . to the jury’s acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the [s]tate.” *Id.* (quotation omitted). Second, we “examine independently the reasonableness of all inferences that might be drawn from the circumstances proved,” including “inferences consistent with a hypothesis other than guilt.” *Id.* (quotation omitted). At this second step, “we give no deference to the fact finder’s choice between reasonable inferences.” *Id.* at 329–30 (quotation omitted). Circumstantial evidence supporting a conviction must be “consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Id.* at 330. “Circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt.” *Al-Naseer*, 788 N.W.2d at 473 (quotation omitted).

The first step of this heightened-scrutiny analysis requires us to “identify the circumstances proved.” *Andersen*, 784 N.W.2d at 329 (quotation omitted). The circumstances proved in this case are (1) police found K.S. lying on the ground in a bar parking lot naked from the waist down; (2) police found Thomas nearby hiding under a piece of plywood in the parking lot; (3) when ordered to come out from underneath the plywood, Thomas stated, “It’s not what it looks like, it was consensual sex”; (4) K.S.

sustained injuries to the exterior of her vagina; and (5) access to the areas where K.S. sustained the injuries required passage through the labia majora and labia minora.

The second step in the analysis requires this court to decide whether the circumstances proved are consistent with the hypothesis that Thomas is guilty and, whether the circumstances proved are inconsistent on the whole with any reasonable hypothesis of innocence. *State v. Hawes*, 801 N.W.2d 659, 669 (Minn. 2011). Thomas argues that, given the lack of semen, seminal fluid, or blood, reasonable inferences other than guilt may be drawn. Specifically, Thomas argues that the circumstances are consistent with an inference that while he and K.S. were engaged in sexual activity, penetration never occurred. But none of Thomas's suggested inferences is reasonable when the circumstances proved are considered as a whole. He admitted to engaging in sexual activity with K.S., and K.S.'s injuries were consistent with penetration. *See* Minn. Stat. § 609.341, subd. 12 (2008) (defining sexual penetration as including "any intrusion *however slight* into the genital . . . opening" (emphasis added)). Considering the circumstances as a whole, we conclude that the evidence is sufficient to sustain the jury's verdict.

Affirmed.

STAUBER, Judge (dissenting)

While I agree with the majority that the evidence is sufficient to sustain the jury's guilty verdict, I respectfully dissent from the majority's conclusion that the district court's actions did not implicate appellant's Sixth Amendment right to a public trial. Here the district court closed and locked the courtroom, stating: "It's now my duty to give written instructions. I am going to ask my law clerk to lock the courtroom doors. That's just tradition so that the instructions are not interrupted."

The majority holds that the district court's actions do not constitute a closure. But as expressed by the dissent in *State v. Brown*, "the act of locking the doors to the courtroom is *by definition* a 'closed' courtroom—it makes it *impossible* for the public to enter or leave." __ N.W.2d __, __, 2012 WL 2529435, at *15 (Minn. July 3, 2012) (Meyer, J., dissenting) (emphasis added). Here, any person passing by the courtroom doors during the reading of the jury instructions would have found them locked and would have therefore been unable to enter the courtroom. The exclusion would include family and friends of the appellant, the press, students, and interested citizens generally. As explained by the United States Supreme Court—and cited both by our own supreme court and the majority today—a criminal defendant enjoys the right to a public trial so 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).

By locking the courtroom doors, the district court prevented any such "interested spectators" from being present during the jury instructions. I find the district court's

rationale strange indeed. In my many years of practicing law I have often wandered into courtrooms while waiting for my case to be called, or to watch a particular proceeding of interest, or for no particular reason. I have never found courtroom doors locked.

I therefore believe that the district court's locking of the courtroom doors constituted a courtroom closure for the purposes of the Sixth Amendment. And because the district court did not make the requisite findings under *Waller* and its progeny, Appellant's constitutional right to a public trial was violated. I would therefore remand the case for an evidentiary hearing and findings under *Waller*. See *State v. Biebinger*, 585 N.W.2d 384, 385 (Minn. 1989) (stating that "the appropriate initial remedy" after a closure without necessary findings "is a remand for an evidentiary hearing, not retrial").