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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Milton Kimpson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

VICTOR M. POUGE,

APPELLANT

APPELLATE CASE NO. 2025-001677

INITIAL BRIEF OF APPELLANT

JESSICA M. SAXON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in granting the state's request to entirely close the courtroom during the testimony of state's witness Jamell Hyman in violation of Appellant's right to a public trial under both the state and federal constitutions?

STATEMENT OF THE CASE

Appellant was indicted in the April of 2025 term of the Richland County grand jury for the offenses of kidnapping, domestic violence first degree, possession of a weapon during the commission of a violent crime, possession with intent to distribute (PWID) marijuana, and possession of a firearm or ammunition by persons convicted of certain crimes. Tr. 7, l. 22 – 9, l. 19; (Indictments). The state called the case to trial on August 11, 2025, before the Honorable Milton G. Kimpson and a jury. Appellant was represented by Michael Laubshire; the state was represented by assistant solicitors Gabrielle Sharp and Jenny Desch. Tr. 1. After a four-day trial, the jury acquitted Appellant on the charges of kidnapping, domestic violence, and possession of a weapon during the commission of a violent crime, and the jury found him guilty of PWID marijuana and possession of a firearm by persons convicted of certain crimes. Tr. 467, l. 16 – 468, l. 14. Judge Kimpson sentenced Appellant to five (5) years, suspended to three (3) years of active time followed by two (2) years of probation, on the weapons charge and to a consecutive term of four (4) years, suspended to two (2) years of active time followed by two (2) years of probation, on the PWID charge. Appellant's aggregate sentence was nine (9) years, comprised of five (5) years active incarceration and four (4) years on probation. Tr. 486, ll. 10-22. This appeal follows.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). Whether the trial court erroneously closed a trail to the public is reviewed under an abuse of discretion. State v. Sinclair, 275 S.C. 608, 614, 274 S.E.2d 411, 414 (1981). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

ARGUMENT

The trial court erred in granting the state's request to entirely close the courtroom during the testimony of state's witness Jamell Hyman in violation of Appellant's right to a public trial under both the state and federal constitutions.

Relevant facts

On August 27, 2024, 9-1-1 received two calls regarding an alleged domestic incident at an apartment complex on Ross Street, in Columbia, SC. One call was from Alexis Watkins, the complainant, requesting an escort from law enforcement. However, during the call, Watkins canceled her request, expressly stating she did not need law enforcement. See State's Exhibit 2 (911 call) (on file with this Court). The second call to 9-1-1 was from Jamell Hyman, who informed police his "cousin"¹ was being held hostage by a man with a large gun at the same location. See State's Exhibit 1 (911 call) (on file with this Court). Deputy Nathan Rowley of the Richland County Sheriff's Department (RCSD) responded to the call, and he made contact with Hyman. While Rowley was speaking with Hyman, Watkins came out of the apartment. Deputy Rowley asked Watkins how she was because he did not realize that she was the complainant in the case. However, once he learned she was the complainant and after speaking further with Watkins, he determined "something had taken place." Tr. 301, ll. 18-25; Tr. 304, l. 18 – 307, l. 2.

Rowley radioed for back up, and once they arrived, he called Appellant on his cellphone. Appellant willingly exited his home and was detained by Rowley. Due to the claims that a weapon was used in the incident and a belief that narcotics were inside the apartment, Rowley

¹ Hyman did not know Watkins or Appellant. He testified that Watkins was his "people's people," and he went to help. Tr. 155, l. 24 – 156, l. 5; Tr. 178, ll. 21-23.

then requested a search warrant² for the residence. Tr. 308, l. 22-309, l. 4; Tr. 311, l. 11 – 313, l. 18. During the search of the apartment, law enforcement located various ammunition, an AK-style Draco pistol, various magazines, and 339.7 grams of a green, plant-like material that tested positive as marijuana. Tr. 317, l. 3 – 318, l. 19; Tr. 325, l. 20 – 327, l. 12; Tr. 384, ll. 7-24.

Prior to the start of testimony, the state requested that the trial court close the courtroom during the testimony of Hyman over defense counsel's objection. Hyman was incarcerated at Alvin S. Glenn Detention Center (ASGDC) on an unrelated charge at the time of trial, and he had "concerns that this individual may know people at the jail and comprised testimony in an open courtroom, that somebody could easily get him," as there was not a lot of concern for safety at the jail. Tr. 110, l. 9 – 111, l. 6. No specific threats of any kind had been made against or received by Hyman; it was simply that "at the ASGDC it is very easy for anybody to walk up to anybody and cause physical harm without a whole lot of notice," that assaults happened frequently at ASGDC, and that Hyman was assigned to a gang dorm. Tr. 111, ll. 9-15.

Defense counsel explained that Appellant did not know Hyman, had not spoken to him, written to him, or had any communication with him during the pendency of the case. Hyman's fears were based on non-credible threats; while the jail was dangerous, part of the danger laid in the fact that Hyman was likely gang affiliated, and thus in a gang dorm. Defense counsel continued:

² Rowley admitted on the stand during cross-examination that the search warrant contained misleading and/or false information that was presented to the issuing magistrate. In particular, the warrant alleged Watkins "ran out of the apartment and told [police] that she had been struck a number of times and was being held with a gun" when in fact, Watkins had not run out of the apartment but exited so calmly that Rowley had not recognized she was the complainant. Watkins also neither told police that Appellant struck her nor stated that Appellant held her with a gun. Tr. 342, l. 18 – 344, l. 17. Despite this, trial counsel did not move to suppress the fruits of the search warrant.

There is an irrational fear that they're presenting because my client hasn't done anything to try and locate this guy, stop him from testifying, or as they put it, quote, unquote, kill. He has no interest in doing any of that and hasn't done any of that. This is a public court, he's entitled to a fair public trial. He's on trial for a significant portion of his life. Well, at least the part that counts, anyway, and his family is here, and they're going to be pushed out of the courtroom when a very important testimony is going to be presented against their son, brother, boyfriend, cousin, it's just not fair.

Tr. 111, l. 21 – 112, l. 16. The state countered that the Sixth Amendment guaranteed the right to cross-examination, not the right to a public forum, and that it was not unreasonable to request that the witness be able to testify to the jury without anyone present in the gallery. The state argued:

We try to be public as much as possible, to be transparent, but there's no guarantee that it's a public -- it's in the discretion of the Court, and we're just asking for some deference. Whether he intends to harm or not is not the State's allegation. It's the rational fear of someone who understands the system and is just asking to be able to testify with his attorney present, with the jury, with the defendant, with the necessary people in the courtroom, but the rest of the courtroom, we're asking to step out during this presentation.

Tr. 113, ll. 3-25. Defense counsel stated that he understood and sympathized with how dangerous jail can be, but he stressed that Appellant had done nothing to make Hyman's existence in ASGDC more or less dangerous. Defense counsel continued:

I was under the impression, of course, I don't have it right in front of me, but I thought our state and federal constitution both protected to a public trial. I thought that was a protective right that we had. I may have misspoke it, but I believe that was in there when I read it, and that's what we're asking.

Tr. 114, ll. 2-18. The court initially denied the state's motion to close the courtroom for the testimony of Hyman. Tr. 114, ll. 19-20. After issuing the ruling, the state continued to argue the point, stating that if Hyman refused to testify that it would be "incredibly hampering" to the

state's case and questioned whether it was fair that Hyman would rather be held in contempt of court than face a public courtroom. Tr. 114, ll. 21-25. The court responded:

Well, we'll see, and if I threaten to hold, I tell him I'm going to hold him in contempt, we'll go from there. While I understand this idea that there's retaliation, *I don't have a specific threat, I don't have anything.* The reason I asked how long the defense has known that this witness may be called, *it's been some period of time, and clearly, nothing has happened to this -- other than the normal instances of problems within the jail, nothing has happened that we're aware of, specifically because he may be called by a witness in this trial.* Now, if you tell me something otherwise, that would be different.

Tr. 115, ll. 1-11 (emphasis added). The state informed the court that Hyman refused to testify. While that occurred, a courtroom deputy informed the court of possible issues with cellphones in the gallery. The deputy stated that law enforcement was requesting that all cellphones be placed on the bench, as they had to have several people turn them off multiple times, and the deputy believed that people were trying to take pictures in the courtroom. Tr. 122, l. 17 – 123, l. 24. Defense counsel requested to cross-examine the deputy regarding the purported picture taking because recording anything in the courtroom was problematic. Tr. 124, ll. 20-25. The following exchange then occurred:

THE COURT: I clearly agree with that, but I believe I've got a bigger concern. All right, we're going to ask that phones be collected if people want to come in. I'm going to leave the defendant's phone, but my bigger concern is the potential threat to this witness. We're going to get started. *Defense, I'm very sorry, but I'm going to reconsider allowing the public in during the testimony of this inmate. My fear is that if pictures of this guy, and that they will show up within 10 minutes down in Alvin S. Glenn.* So we're going to go forward, we'll try to get started if we can, but *I would like the phones collected, whenever I do, let the public in.*

MR. LAUBSHIRE: Yes, Judge. So I'm clear, the Defendant's family is gonna be allowed in but their phones will be taken?

THE COURT: I'm sorry?

MR. LAUBSHIRE: The Defendant's family will be allowed in, but their phones will be taken? Is that your ruling?

THE COURT: That is correct, *but for this inmate witness, I'm gonna keep everybody out while he testifies, of course, except the Defendant and you, obviously.*

MR. LAUBSHIRE: Yes, Judge.

THE COURT: What bothers me, again, the State's evidence was just kind of ambiguous, but *when I hear that everybody in the public wants to take pictures, that's a different story.* Even if I take away the phone, they're taking pictures for a reason, and in my mind, I'm drawing an inference. Yes, sir?

MR. LAUBSHIRE: He doesn't have any credible evidence that anyone took a single photograph of anything in this courtroom. As a matter of fact, he was never here to even take the photographs. He's just saying he believes they may take photographs. I never heard any evidence that he said they were prepared or getting ready to take photographs. They were on their phones. That's the only evidence that he presented. I'm not sure where this is coming - - this is as arbitrary as they are, we believe they may take photos, not they did and we know this is happening. He can't point to a single person that was taken them, sure, they were all the phones.

THE COURT: I will allow you to cross-examine the witness.

Tr. 125, l. 2 – 126, l. 17 (emphasis added). The deputy was placed under oath, and he testified that he believed it was Appellant's significant other who accessed her phone. He stated that he misspoke by saying that they were taking photographs – he believed they were, but he could only definitively say they were on their phones as he did not have a view of the screen. The deputy acknowledged that the individual powered down the phone when instructed to do so, and she could have been doing “anything” on her phone. Tr. 128, ll. 1-21. The deputy confirmed that no specific concerns had been raised about the goings-on in the courtroom. He further confirmed that he only noticed Appellant's significant other on her phone early on and then later noticed others on their phones during a break in the court session. Tr. 130, l. 5 – 131, l. 4. The court

then ruled, “[o]ut of an abundance of caution, we're going to have this -- we're going to get started, but when this first witness, the inmate testifies, the public is out of courtroom.” Tr. 131, ll. 13-16.

After the 9-1-1 custodian testified, the state requested a recess to re-address the witness issue. Tr. 149, ll. 9-12. The jury was then excused for a break, and Hyman was brought into the courtroom. The court explained that it had granted the state’s motion to close the courtroom for his testimony and that he instructed the courtroom deputies to keep everyone out other than the complainant, Appellant, and the respective lawyers. Hyman was on the stand when the jury re-entered the courtroom for his testimony. Tr. 149, l. 15 – 151, l. 23.

Discussion

Both the United States Constitution and the South Carolina Constitution guarantee a criminal defendant the right to a public trial. The South Carolina Constitution provides a criminal defendant a stronger guarantee to a public trial than that found in the federal constitution, as our state constitution has an additional provision declaring “All courts shall be public”. S.C. Const. art. I, § 9. This right is a bedrock principle of our legal system, and any closure of a public courtroom “must be closely scrutinized to assure there is no impermissible infringement of the right.” State v. Sinclair, 275 S.C. 608, 274 S.E.2d 411 (1981). In the present case, the trial court erroneously closed the courtroom “out of an abundance of caution.” The court’s reasoning was not supported by any findings explaining the balancing of interests, the need for closure, or any alternatives to closure. This was an abuse of discretion that resulted in reversible error.

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and *public* trial....” U.S. Const. amend. VI (emphasis added); In re Oliver, 333 U.S. 257, 273 (1948) (right

to public trial is incorporated onto the states by the Fourteenth Amendment). Article I, Section 14 of the South Carolina Constitution also guarantees a criminal defendant a “speedy and public trial.” “This protection is for the benefit of the accused, so the public may see that he is dealt with fairly, and the public’s presence may keep his triers aware of the importance of their functions.” State v. Bell, 293 S.C. 391, 397, 360 S.E.2d 706, 709 (1987). Of course, “the right to an open trial may give way in certain cases to other rights or interests, such as the defendant’s right to a fair trial or the government’s interest in inhibiting disclosure of sensitive information.” Waller v. Georgia, 467 U.S. 39, 45 (1984). “Such circumstances will be *rare*, however, and the balance of interests must be struck with special care.” Id. (emphasis added). Indeed, “[t]he requirement of openness of criminal proceedings can be overcome *only* by a finding that closure is necessary to preserve higher values.” Bell at 397, 360 S.E.2d at 709 *citing* Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (emphasis added). To that end, the trial court must ensure that the closure is “no broader than necessary,” and the trial court “must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.” Waller at 48. The trial court’s duty to consider alternatives to closure is absolute, even if the accused does not offer any alternatives to closure. Presley v. Georgia, 558 U.S. 209, 214 (2010).

Our Supreme Court has stated, “Judicial proceedings and court records are presumptively open to the public under the common law, the First Amendment of the federal constitution, and [article I, section 9 of] the state constitution.” State v. Price, 441 S.C. 423, 440, 895 S.E.2d 633, 641–42 (2023) *citing* Ex parte Cap. U-Drive-It, Inc., 369 S.C. 1, 10, 630 S.E.2d 464, 469 (2006). Our appellate courts “have strictly applied this constitutional requirement that courts be open to the public and the press” holding that the “decision of a judge to close any proceeding must be

supported by findings which explain the balancing of interests and the need for closure of the proceeding.” *Id. citing Ex parte Columbia Newspapers, Inc.*, 286 S.C. 116, 119, 333 S.E.2d 337, 338 (1985). The erroneous closing of the courtroom is a structural error, meaning it is not subjected to harmless error analysis. *See, e.g., State v. Lee-Grigg*, 374 S.C. 388, 412, 649 S.E.2d 41, 53 (Ct. App. 2007) *citing Arizona v. Fulminante*, 499 U.S. 279 (1991) and *Waller v. Georgia*, 467 U.S. 39 (1984).

The court wholly failed in its duties to balance the interests of the parties and to consider alternatives to closure. The record in this matter reflects that the court did not perform the balancing test required by *Waller*, but it instead ultimately closed the courtroom out of an abundance of caution. The ruling by the trial court did not balance the interests of Appellant, the state, and Hyman. Furthermore, had the court conducted the proper balancing test, it would have realized the state’s reasons for closing the courtroom were not compelling. As was made apparent to the trial court, Appellant never contacted Hyman, and there were no credible threats against his safety. That he was incarcerated and that *the state* was unable to ensure his safety in jail was an issue wholly separate and apart from anything to do with Appellant and his right to a public trial. As our Supreme Court noted in *State v. Price*:

[T]he criminal justice system confronts situations on a regular basis in which confidential informants, cooperating codefendants, and other witnesses provide information that will put their lives or safety at risk when their cooperation is discovered by those implicated...We are confident that to the extent any such concern for the safety of a cooperating inmate arises in the future, the State, counsel for the inmate, and the circuit court may effectively deal with that *concern without sealing any portion of the record*.

Price at 444-445, 895 S.E.2d at 644, FN 13 (emphasis added). The Supreme Court recognized that a cooperating inmate may feel concern, but such concern was not grounds to seal a record. It follows that such a ground would not be sufficient to exclude all members of the public and the

defendant's family from the courtroom during the testimony of a necessary state's witness in violation of a defendant's right to a public trial.

In State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974) and State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987), our Supreme Court considered whether the trial court's closure of the courtroom infringed upon the defendant's Sixth Amendment right to a public trial. In Gee, the state moved to close the courtroom during the testimony of a confidential informant, and the trial court granted the request. On appeal, our Supreme Court found no abuse of discretion because closure was necessary to protect and safeguard the life of the witness. Gee at 384-385, 204 S.E.2d at 731-732. In Bell, the trial court would not permit movement in or out of the courtroom during testimony of any witness. Our Supreme Court found the trial court's order did not apply to a specific person or group of persons or to specific testimony. Anyone could be in the courtroom; they simply could not move about the courtroom during testimony. This was considered a limitation on the public's access to a criminal trial. As such, it was not subjected to the same constitutional scrutiny as a full closure and was not an abuse of discretion in that case. Bell at 396-97, 360 S.E.2d at 709.

Appellant's case is wholly distinguishable from Gee and Bell. Unlike Gee, here, the state offered no compelling reason, such as protecting the life and identity of a confidential witness, to close the courtroom. There were no threats made against Hyman by Appellant; indeed, there was no evidence of any threats against Hyman. Hyman simply felt unsafe in ASGDC, and Appellant had no control over Hyman's safety at the jail. There was no overriding interest of the state or Hyman sufficient to infringe upon Appellant's rights to a public trial under both the United States and South Carolina Constitutions

Unlike Bell, the court's order closing the courtroom targeted all members of the public, including Appellant's family and friends, and specifically excluded everyone from the totality of the testimony of Hyman. This was not a limitation on the right to a public trial but a total infringement of the right during a significant witness. The trial court's decision in this case cannot withstand the strict constitutional scrutiny required in courtroom closure cases as the court did not balance the interest of the parties and did not give sufficient findings that closure was *necessary*. See Ex Parte Columbia Newspapers, Inc., 286 S.C. 116, 333 S.E.2d 337 (1985) (Judge's conclusory statement that opening the proceedings to the public would have an adverse effect upon the chances of rehabilitation of the juveniles was not sufficient); Press-Enterprise v. Superior Court, 464 U.S. 501 (1984) (presumption of openness may be overcome only by an overriding interest...that interest must be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered).

Critically, there were numerous other alternatives to closure that could have been considered. The trial court initially denied the state's motion to close the courtroom and only reconsidered the matter due to a concern that photographs could be taken. However, the court remedied that concern by having cellphones collected from the gallery. The judge ordered that once the public was let into the courtroom, cellphones would be collected, thus there was no possibility any photograph of Hyman could have been taken by anyone in the gallery. Additionally, if Hyman and the state had concerns about the safety of Hyman in ASGDC, Hyman could have been moved to a different jail or to a secure location within ASGDC. The state could have chosen to dismiss the gun charges³ or offered Hyman a plea so that he would not

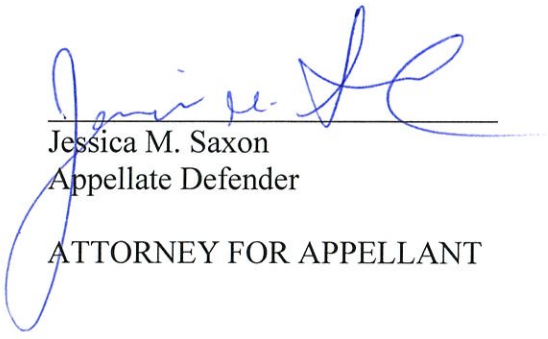
³ Notably, it appears that the state did indeed dismiss the gun charges against Hyman on August 12, 2025, the day he testified against Appellant. Richland County Public Index case no(s): 2025GS4004477 and 4478.

have been incarcerated during trial. The court erred in failing to consider any of the alternatives to closure. Presley v. Georgia, 558 U.S. 209, 214 (Trial courts are required to consider alternatives to closure even when they are not offered by the parties).

Waller requires a trial court to balance the interest of the parties, the necessity of the closure, and the alternatives to closure *before* ordering that a courtroom be closed for any portion of a criminal defendant's trial. The trial court did not undertake any of these required steps before infringing upon Appellant's rights under the South Carolina and United States Constitutions to a public trial. The record reveals no balancing of the interests of the parties and no findings to support that closure was necessary. The record is also devoid of evidence that the trial court considered alternatives to closure. This was structural error not amenable to harmless error analysis. *See generally, State v. Lee-Grigg*, 374 S.C. 388, 412, 649 S.E.2d 41, 53–54 (Ct. App. 2007) (The Fulminante court identified the following examples of structural defects not subject to harmless error analysis...the right to public trial, Waller v. Georgia, 467 U.S. 39 (1984)).

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reversed and remand his convictions and sentence back to the Court of General Sessions of Richland County for a new trial.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of October, 2026.