A20-1638

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

Abraham Isaac Bell,

Appellant.

APPELLANT'S REPLY BRIEF

KEITH M. ELLISON
Minnesota State Attorney General
1800 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101

RON HOCEVAR
Scott County Attorney
TODD P. ZETTLER
Assistant County Attorney
Scott County Judicial Center
200 Fourth Avenue West
Room JC340
Shakopee, MN 55379-1220

ATTORNEYS FOR RESPONDENT

OFFICE OF THE MINNESOTA APPELLATE PUBLIC DEFENDER

REBECCA IRELAND
Assistance State Public Defender
License No. 0393076

540 Fairview Avenue North
Suite 300
St. Paul, MN 55104
(651) 219-4444

ATTORNEY FOR APPELLANT

A20-1638

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Respondent,

vs. **Appellant's Reply Brief**

Abraham Isaac Bell,

Appellant,

Appellant Abraham Bell submits the following reply to respondent's brief.

I. Bell has not waived his public-trial claim.

Respondent argues that Bell has waived his public-trial claim. The theory goes, incorrectly, that Bell's argument is that district court needed to use a two-way video and because Bell did not request two-way video at trial that he has waived a "two-way video argument." (Resp't Br. 7–8). This unfounded argument misconstrues Bell's claim. The Court of Appeals disregarded this waiver theory out of hand. This Court should do the same.

To be clear, Bell's claim of error is **not** that the district court must have used a two-way video.[1] Bell's argument was and remains that the public-viewing protocol the district court did use (one-way video viewing and a complete bar on public attendance in trial)

[1] And Bell surely does not concede that a two-way video is necessarily constitutionally sufficient.

violated his right to a public trial. Bell clearly objected to the protocol, vigorously moved the district court to allow a few of the public to attend trial, and elaborated the reasons *why* the viewing protocol was constitutionally inadequate. (Doc. No. 33). For one, it did not allow witnesses to see the public, a tenet of the public trial. (June 18, 2020 Tr. 25–26). On appeal, Bell maintains that this protocol did not provide a public trial and again explains why that is so; again, in part, because it failed to allow observation between the public and witnesses, a chief aspect of the public trial. There is no factual or legal support for respondent's assertion that Bell has relinquished a discussion of what kind of observation or public presence this protocol or other video feeds provides. *State v. Beaulieu*, 859 N.W.2d 275, 278 n.3 (Minn. 2015) (explaining that waiver means the "intentional relinquishment or abandonment of a known right") (quoting *United States v. Olano*, 507 U.S. 725, 733, 113 S. Ct. 1770, 1777 (1993)).

Indeed, Bell never asked for a two-way video. And why would he? He did not want any video instead of public attendance. He wanted to have his people present. As was his right, he made that specific request. This record does not foreclose any consideration on appeal about whether or on what grounds the video protocol the court used was improper—especially where Bell raised and argued that issue *in the district court*—and, relatedly, whether the kind of observation this video (or other videos) affords is sufficient or overly restrictive. In fact, it follows that this Court would demand such discussion in this case. There is no waiver of the issue. Bell's claim and related arguments are properly before this Court.

II. The court of appeals correctly concluded that the courtroom closure was not trivial. Respondent offers no legal grounds to conclude the contrary.

Respondent asks this Court to conclude that the court of appeals erred a matter of law in its threshold determination that the closure here was non-trivial. (Resp't Br. 9–11). Respondent advances this position without addressing a single *Lindsey* factor. *See State v. Lindsey*, 632 N.W. 2d 52, 660–61 (Minn. 2001) (holding that this Court considers four factors to determine whether a closure occurred). Application of these factors unquestionably indicates there was a true closure in this case.

While ignoring the *Lindsey* test and all other Minnesota closure precedent, respondent relies on nonbinding decisions regarding *virtual pretrial hearings* and Zoom. (Resp't Br. 10 citing in chief *Vasquez-Diaz* and *Huling*). These decisions are not helpful. Bell's pretrial hearings are not challenged. And the relevant proceeding was certainly not a virtual hearing. It was a jury trial in-person. *Vasquez-Diaz* does nothing to advance an understanding of the specific public-trial issue in this case, nor do respondent's other indiscriminate citations in support of this position. (*Id.* at 10–11.) More on-point, it strains credulity to equate the closure that occurred here with the types of restrictions that this Court has long considered trivial, such as merely locking the public *inside* the courtroom once closing arguments began, *State v. Silvernail*, 831 N.W.2d 594, 601 (Minn. 2013), or requiring public spectators to show an ID for entrance into the courtroom. *State v. Taylor*, 869 N.W.2d 1, 12 (Minn. 2015). Respondent's refusal to acknowledge these precedents while asking this Court to conclude the court of appeals erred must fail.

Bell's trial was closed. There is nothing trivial in that. The court of appeals had no trouble determining that a true closure occurred. So too should this Court reach that conclusion.

III. Respondent fails to apply *Waller* in full, and respondent's central argument under *Waller* is waived as unsupported by any facts in the record.

Turning now to the issue for which this Court granted review—whether the court of appeals erred in its determination under *Waller*—respondent fails to make a case under that legal framework. Respondent acknowledges the four *Waller* factors but only applies the third factor. (Resp't Br. 12–14). *See State v. Fageroos*, 531 N.W.2d 199, 201 (adopting *Waller*, requiring that a closure satisfy *four* conditions to meet the requirements of the Sixth Amendment). Neither of respondent's two arguments under the third factor reveal that the district court considered reasonable alternatives before deciding on its one-way video protocol.

First, respondent insists that the record proves the district court considered alternatives to its decided-upon protocol because the court denied Bell's motion asking for one or two people in attendance and commented "if I had another 100 feet, I might be able to do that." (Resp't Br. 12, 13). The court's response does nothing to show that the court actually entertained following an alternative approach. If respondent's logic were adopted it would follow that anytime an objection to a closure objection is made, the court would satisfy the third *Waller* requirement merely by denying the objection, since the objection itself suggests an alternative approach. Respondent cites no legal authority to support his theory that such "consideration" is the type contemplated under the third *Waller* factor.

Respondent's other argument lacks record citation and, fatally, is wholly unsupported by any facts in the record. There, respondent supposes: "The alternatives were considered at the time the court applied for and received permission from the Minnesota Judicial Council to hold trial in the midst of the pandemic." (Resp't Br. 13). This unsubstantiated contention is waived and must be discarded. *See State v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003) (waiving arguments raised that were "unsupported by any facts in the record").

Respondent would like this Court to simply conclude that the closure "was justified by the deadly pandemic." (Resp't Br. 11). But this Court's task is to apply *Waller* to the closure that occurred in this case. That application will reveal that Bell's closure was not justified.

IV. Respondent misplaces the relevance of what other courts were doing during the pandemic.

Respondent dismisses the relevance of other courts' pandemic protocols. (Resp't Br. 15 "The Chauvin trial was extraordinary;" *id.* 16 "No court has held that a two-way video is required by *Waller*.").

Bell cites to what other courts were doing during the pandemic because those practices are instructive, in part, *because* this is unchartered legal territory without any governing caselaw and, furthermore, such consideration bears directly on the second *Waller* factor—whether less restrictive means existed to meet the public-health needs of the pandemic. (Appl't Br. 17–18). Whether such means were used by other courts no

doubt informs whether the closure here was narrowly tailored. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (the court will examine methods other jurisdictions used to reduce spread of COVID-19 to evaluate whether a challenged restriction on a constitutional right is no broader than necessary). The decisions of other courts support the conclusion that the closure and restrictions here were simply overly broad.

V. Respondent conflates the preparation needed for the pilot program with meeting constitutional requirements. The preparation for trial is no substitute for the demands of *Waller*.

Rather than applying *Waller* to the record, respondent defends the closure of Bell's trial based on the planning and preparation it took to resume trials in Minnesota. This is a red herring.

No one disputes there were steps involved in reopening the courts. Indeed, courts partially re-opened and there was a pilot program. All courts had to follow the MJB Preparedness Plan. The court here used a pilot checklist. The court needed a sanitation plan. The court used physical barriers. COVID-19 was and is very serious. All of this is so and was acknowledged in Bell's brief. (Appl't Br. 28). Critically, though, these steps do not resolve or alter the Sixth Amendment inquiry before this Court. Respondent cannot cite to a single aspect of these planning steps that settle any of the requirements under *Waller* in Bell's case. And none is apparent.

The court's level of preparation for trial is neither a substitute for the constitutional protections Bell enjoys nor is it evidence that those protections were vindicated. For these reasons and those set out in Bell's principal brief, this Court must reverse.

Dated: December 27, 2022

Respectfully submitted,

OFFICE OF THE MINNESOTA
APPELLATE PUBLIC DEFENDER

Rebecca Ireland
Assistant State Public Defender
License No. 0393076
540 Fairview Avenue North, Suite 300
St. Paul, MN 55104
(651) 219-4444

ATTORNEY FOR APPELLANT