STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2021AP1062-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RYAN L. BESSERT,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN LANGLADE COUNTY CIRCUIT COURT, THE HONORABLE JOHN B. RHODE, PRESIDING

# BRIEF OF PLAINTIFF-RESPONDENT

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## TABLE OF CONTENTS

Page

INTRODUCTION ..... 5

ISSUES PRESENTED ..... 6

STATEMENT ON ORAL ARGUMENT AND PUBLICATION ..... 6

STATEMENT OF THE CASE ..... 6

STANDARDS OF REVIEW ..... 14

ARGUMENT ..... 14

I. Bessert was not denied his right to confrontation when the circuit court permitted Alex's CCTV testimony, and any error was harmless. ..... 14

A. A defendant's right to face-to-face confrontation is not absolute, and Wis. Stat. § 972.11(2m)(a)'s limitation on the right is consistent with Supreme Court precedent. ..... 14

B. The circuit court properly allowed the CCTV accommodation, so no confrontation violation occurred. ..... 17

C. Any error is harmless. ..... 20

II. The circuit court appropriately remedied any violation of Bessert's public trial right. ..... 21

A. To avoid granting a windfall to an opportunistic defendant, courts must carefully fashion the remedy for an improper courtroom closure. ..... 21

B. Assuming that the courtroom closure here was not trivial, the circuit court's remedy was appropriate to the violation. ..... 22

CONCLUSION ..... 25

# TABLE OF AUTHORITIES

## Cases

*Cook v. Cook*,
208 Wis. 2d 166, 560 N.W.2d 246 (1997) ..... 19

*Coy v. Iowa,*
487 U.S. 1012 (1988) ..... 20

*In re Guardianship of Willa L.*,
2011 WI App 160, 338 Wis. 2d 114,
808 N.W.2d 155 ..... 16, 19

*Maryland v. Craig*,
497 U.S. 836 (1990) ..... 15, 18

*State v. Blalock*,
150 Wis. 2d 688, 442 N.W.2d 514 (Ct. App. 1989)..... 23

*State v. Coffee*,
2020 WI 1, 389 Wis. 2d 627, 937 N.W.2d 579..... 14

*State v. Cole*,
2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328..... 16, 19

*State v. Dyess*,
124 Wis. 2d 525, 370 N.W.2d 222 (1985) ..... 20

*State v. Ndina*,
2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612..... 14

*State v. Pettit*,
171 Wis. 2d 627, 492 N.W.2d 633 (Ct. App. 1992)..... 16

*State v. Pinno*,
2014 WI 74, 356 Wis. 2d 106,
850 N.W.2d 207 .....5, *passim*

*State v. Rhodes*,
2011 WI 73, 336 Wis. 2d 64, 799 N.W.2d 850..... 15, 18, 19

*State v. Roundtree*,
2021 WI 1, 395 Wis. 2d 94, 952 N.W.2d 765 ..... 16

*State v. Vanness*,
2007 WI App 195, 304 Wis. 2d 692,
738 N.W.2d 154 ..... 21, 24

*State v. Vogelsberg*,
2006 WI App 228, 297 Wis. 2d 519,
724 N.W.2d 649 ..... 14, 15

*United States v. Canady*,
126 F.3d 352 (2d Cir. 1997) ..... 21, 22, 23, 24

*Waller v. Georgia*,
467 U.S. 39 (1984) ..... 22, 23

**Statutes**

Wis. Stat. § 972.11(2m)(a)1.a. ..... 16

Wis. Stat. § 972.11(2m)(a)1.b. ..... 16

Wis. Stat. § 972.11(2m)(a)1.a.–b. ..... 18

## INTRODUCTION

Defendant-Appellant Ryan L. Bessert claims that his right to confrontation was violated when the circuit court allowed his 7-year-old daughter to testify via closed-circuit television (CCTV) about the pattern of sexual abuse that she endured from her father when she was just a toddler. Bessert now seeks to put his daughter—who's fear of her father prompted the CCTV accommodation—through another trial because he was denied physical, face-to-face confrontation pursuant to Wis. Stat. § 972.11(2m)(a).

Bessert neglects to mention that he was *acquitted* of the charges for which his young, traumatized daughter provided testimony for the State. His convictions were for sexually assaulting his daughter when she was merely an infant, and the State didn't rely on his daughter's testimony to prove those charges. Instead, it offered the testimony of Bessert's ex-girlfriend, who witnessed Bessert digitally penetrate his infant child on two occasions. So, even if the circuit court erred in allowing the CCTV accommodation (it didn't), the error was plainly harmless.

Bessert also seeks to put his daughter through another trial because the courthouse was closed during the five minutes it took for the circuit court to announce its verdicts in this case. The circuit court remedied the alleged public-trial-right violation by re-announcing its verdicts in open court. Although this remedy is in line with precedent, Bessert requests the windfall of a new trial. Because "courts must carefully fashion a remedy" in this context "to avoid granting a 'windfall' to an opportunistic defendant," this Court should affirm. *State v. Pinno*, 2014 WI 74, ¶ 46, 356 Wis. 2d 106, 850 N.W.2d 207.

## ISSUES PRESENTED

1. Was Bessert denied his right to confrontation when his daughter testified against him at trial via CCTV, and if so, was the error harmless?

This Court should hold that there was no constitutional violation and that any error was harmless.

2. Assuming Bessert was denied his right to a public trial when the courthouse was closed as the circuit court announced its verdicts, was the circuit court's remedy appropriate to the violation?

This Court should hold that re-announcing the verdicts in open court was the appropriate remedy for any constitutional violation.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

## STATEMENT OF THE CASE

### *The State charged Bessert for sexually abusing his young daughter.*

In February 2019, Sergeant Kyle Rustick of the Antigo Police Department investigated whether Bessert sexually assaulted his daughter, Alex.[1] (R. 1:5.) According to Bessert's ex-girlfriend, Bessert digitally penetrated Alex when Alex was just an infant. (R. 1:5.) The assaults occurred between November 2013 and January 2014, when Bessert was living at a house in the City of Antigo. (R. 1:5.)

[1] The State uses a pseudonym for the young victim in this case.

As part of Rustick's investigation, six-year-old Alex participated in a forensic interview in January 2019. (R. 1:6.) She reported additional instances of Bessert sexually abusing her when she was a 3-year-old toddler. (R. 1:6.) Those assaults occurred between 2015 and 2016, also in the City of Antigo. (R. 1:5–6.)

Rustick's investigation yielded a second witness who reported that Alex was "exhibiting sexualized behaviors, including doll play involving sexual behavior and trying to take off a boy child's pants." (R. 1:6.)

In March 2019, the State charged Bessert with numerous offenses. (R. 1.) More than half the counts consisted of child sexual assault and incest allegations covering the period between November 2013 and January 2014, when Alex was an infant. (R. 1:1–3.) The remaining charges concerned the assaults that occurred between 2015 and 2016, when Alex was a toddler. (R. 1:3–5.)

*The State asked to present Alex's trial testimony through CCTV.*

Before trial, the State filed a motion in limine seeking to introduce Alex's testimony via CCTV pursuant to Wis. Stat. § 972.11(2m)(a). (R. 48:1.) The motion noted that Alex "[was] afraid of the defendant and would not be able to adequately testify in the same room as him." (R. 48:1.) By written response, Bessert "reserve[d] the right to object to the State's request." (R. 49:1.) He argued that the State had "failed to provide sufficient evidence" to satisfy the statutory prerequisites for the CCTV accommodation. (R. 49:1.)

At a hearing on its motion, the State endeavored to meet its burden through the testimony of Tina Peschke, Alex's guardian. (R. 124:24–25.) Peschke testified that she had been Alex's guardian for six years, and that Alex lived with her. (R. 124:25.) When asked how Alex responded after having meetings with the district attorney's office, Peschke

answered, "She's scared. . . . [A]fter we go home at night [Alex] talks about it and then she has nightmares, real bad ones." (R. 124:25–26.) Alex's nightmares consisted of Bessert regaining custody of her or "slicing [Peschke's] throat." (R. 124:26.)

Peschke further reported instances of Alex wetting the bed and having angry outbursts since she started participating in trial preparations. (R. 124:27.) Peschke said that this was unusual behavior compared to other kids Alex's age. (R. 124:29–31.)

Peschke also explained that Alex no longer wanted to see Bessert. When asked whether Alex "express[ed] a concern about seeing" Bessert, Peschke answered, "She doesn't want to see him. She doesn't want to see her dad. No." (R. 124:28–29.) Peschke also talked about the last time Alex saw Bessert, roughly one year earlier. (R. 124:28, 36–37.) After that meeting, Alex came home and said that she no longer wanted to see him. (R. 124:36–37.)

Finally, Peschke testified that Alex had been seeing a counselor to work through her trauma. (R. 124:39.) However, Alex hadn't seen her counselor for months due to the counselor's maternity leave. (R. 124:39.) Her counselor had yet to execute a plan to address the "fallout from having to see her dad or testify at the trial." (R. 124:40.)

After Peschke's testimony, Bessert objected to the CCTV accommodation, arguing, "the state has not met [its] burden . . . in showing that [Alex] is going to shut down and not be able to reasonably communicate, or that she's going to be suffering from serious emotional distress." (R. 124:50–51.) Defense counsel reiterated, "my client has a constitutional right to confront the witnesses . . . and the state has not made the showing here that [Alex] is going to not be able to reasonably communicate." (R. 124:52.) Counsel never challenged the constitutionality of Wis. Stat. § 972.11(2m). (R.

124.) Rather, he noted that "everyone says and everyone agrees it has survived constitutional muster." (R. 124:60.)

The circuit court held that the State met its statutory burden for the CCTV accommodation. (R. 124:68–69.) Noting that Peschke had "a lot of credibility," the court found "that forcing [Alex] to testify in the presence of her father . . . will result in her suffering serious emotional distress" such that "she could not reasonably communicate effectively" during the trial. (R. 124:63, 68–69.) It further found that "video testimony . . . is necessary to minimize the trauma to [Alex] and to provide a setting that is more amenable to securing [Alex's] uninhibited and truthful testimony." (R. 124:69.)

*At trial, Bessert's ex-girlfriend said she saw two instances of him sexually assaulting his infant daughter, and Alex testified to numerous assaults when she was a toddler.*

The matter proceeded to a court trial.

To prove the assaults that occurred when Alex was an infant, the State called Amanda Howard, Bessert's ex-girlfriend. (R. 128:28–30.) She lived with Bessert when Alex was still a baby, and Alex slept in their bedroom. (R. 128:31–34.) "Once or twice in the bedroom," Howard witnessed Bessert "insert[ ] his finger into [Alex's] vagina" while he was changing her diaper. (R. 128:34.) This lasted "[a] couple minutes," and Bessert would be moving his hand at the time. (R. 128:35.) Howard described Bessert's facial expression as "excited"—"like a kid opening up a Christmas present." (R. 128:36.) Afterward, Bessert wanted to "[p]ut his finger into" Howard's vagina. (R. 128:37.)

Howard also witnessed a sexual assault in the bathroom of the couple's shared apartment. (R. 128:38.) Bessert was taking a bath and asked one of his kids to retrieve Alex. (R. 128:38.) Bessert began washing Alex in the tub, and he eventually "put his finger in [Alex's] vagina" and started moving his hand back and forth. (R. 128:39.) Per Howard,

Bessert appeared excited during the roughly 10-minute encounter. (R. 128:39.)

Howard told the court that she "froze" when she witnessed these assaults. (R. 128:40.) She was "[m]ad, angry, [and] sad," but she didn't do anything because she "didn't know what to do. [She] had flashbacks [to] what happened to [her] when [she] was a child." (R. 128:40.) Howard testified that she was scared to be in court but wanted "justice" for Alex. (R. 128:43.)

To prove the assaults that occurred when Alex was a toddler, the State called seven-year-old Alex via CCTV.[2] (R. 128:105–08.) Alex began her testimony by saying that when she woke up that morning, Bessert was "under the blankets" in her bed. (R. 128:110.) She said she tried "to run away because he was doing the bad stuff." (R. 128:110.)

When asked what she liked to do with her dad, Alex answered, "I only liked to play with him but when he did the bad stuff I didn't like it because when we played on the slide in the backyard I used to play on it." (R. 128:110–11.) By "bad stuff," Alex meant "[w]hen [Bessert] was touching [her] private" with his hand. (R. 128:111.) Alex explained that she did not like this and told Bessert to "please stop a lot of times." (R. 128:112.) Alex couldn't remember how old she was when Bessert first assaulted her this way, but she knew she was living with him. (R. 128:112, 117.) Per Alex, Bessert touched her private "two times." (R. 128:112.)

Bessert also forced Alex to touch his private. (R. 128:113–14.) According to Alex, said she didn't want to and "washed [her] hands after." (R. 128:114.)

Alex further testified that Bessert "touched his private in [her] private." (R. 128:114.) She described how he was in

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[2] The State also relied upon Alex's forensic interview, which the circuit court viewed before trial. (R. 128:133–34.)

bed and "grabbed [her] and pulled [her] on the bed." (R. 128:114.) Alex first said that her clothes were on during this assault, but she later testified, "I'm pretty sure I had underwear on, but I don't really know. But I'm pretty sure I was naked." (R. 128:115.) She thought it happened "in the morning." (R. 128:115.) Alex said that Bessert touched his private with her private "two times." (R. 128:115–16.)

Sergeant Rustick also testified for the State about his investigation. (R. 128:128–29.) He established that Bessert had custody of Alex from November 2013 through the end of the year. (R. 128:130.) They lived on Graham Avenue in the City of Antigo.[3] (R. 128:131.) Bessert also had custody of Alex from November 2015 to June 2016. (R. 128:131.)

In addressing his investigation, Sergeant Rustick discussed his interview with Howard. (R. 128:132.) At the time, Howard had no clue why Rustick wanted to speak with her. (R. 128:132–33.) He didn't mention anything about a sexual assault and asked whether she noticed anything unusual when she lived with Bessert. (R. 128:133.) That's when Howard brought up the assaults of Alex. (R. 128:133.)

On cross-examination, Sergeant Rustick acknowledged that there were inconsistencies between Alex's forensic interview and her trial testimony. (R. 128:137–38.)

Bessert's defense consisted of testimony from his mother and daughter, both of whom implied that they never witnessed an assault. (R. 128:143–156.) Bessert also testified that he never assaulted Alex. (R. 128:167–77.)

During closing arguments, the State made clear that it was relying on Howard's testimony to establish the assaults that occurred when Alex was an infant, and Alex's testimony to prove the crimes that happened when she was a toddler.

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[3] This was the address where Amanda Howard witnessed the sexual assaults of infant Alex. (R. 128:31–38.)

(R. 128:184.) Conceding that Howard testified to at most two instances of sexual assault, the prosecutor asked the court to find Bessert guilty of counts one through four of the Information, two counts of sexual assault and two counts of incest.[4] (R. 128:188.) The State further requested guilty verdicts on 11 charges pertaining to when Alex was a toddler. (R. 8:5–7; 128:188.)

In his closing argument, defense counsel agreed that Howard and Alex were testifying to separate events. He said, "I submit that it's impossible for [Alex] to recall things that happened in 2013, 2014, when she was just a year, a year and a half old." (R. 128:189.) Counsel continued, "Amanda Howard does not corroborate what [Alex] testified to. Amanda Howard testified to other things, other incidents that are distinct from what it seems like [Alex] is testifying to." (R. 128:189.)

The court then took a short recess to deliberate. (R. 128:194.) It went back on the record and found Bessert guilty of counts one through four, covering sexual assault and incest when Alex was an infant. (R. 128:195.) The court acquitted Bessert on the remaining charges. (R. 128:195.)

*Before sentencing, Bessert filed a motion for a new trial because the courthouse was closed when the circuit court announced its verdicts.*

Before sentencing, Bessert filed a motion for a new trial based on a claimed violation of his right to a public trial. (R. 98.) His motion alleged that the courthouse was "closed to the public from 4:30 p.m. until the conclusion of trial at 5:00 p.m." (R. 98:2.) Bessert submitted that the "closure was not at the request of any party," that "the defense was not aware the

[4] Counts one and three charged first-degree sexual assault of a child between November 2013 and January 2014, when Alex was an infant. (R. 8:1.) Counts two and four were the corresponding incest charges. (R. 8:1–2.)

courthouse doors automatically locked until after trial was concluded," and that the "verdict portion of trial is the focal point of a criminal trial and cannot be considered trivial." (R. 98:2.)

At a hearing on the motion, the parties stipulated that the courthouse closed at 4:30 p.m. on the day of Bessert's trial. (R. 129:3.) The circuit court then took judicial notice of the following:

> CCAP minutes prepared by the clerk from the conclusion of the trial said that we adjourned at approximately 4:30 p.m., reconvened at approximately 4:56 and then adjourned in finality at approximately 5:00 p.m. So there was only approximately according to that four or five minutes when we were on the record where the door was locked. During that time the Court came back from deliberations, stated that it had reviewed it's notes from the trial, reviewed the applicable jury instructions, announced the verdicts on all 26 counts, revoked bond, and ordered a PSI.

(R. 129:3–4.) The court reiterated, "I have taken judicial notice of that. That's not my testimony. That's in the CCAP record." (R. 129:4.) Defense counsel agreed that the court was "taking judicial notice properly." (R. 129:4.)

"[O]ut of an abundance of caution," the circuit court then re-announced its verdicts in open court. (R. 129:5.) Nevertheless, Bessert insisted that he was entitled to a new trial. (R. 129:5–6.) The State argued that the appropriate remedy for a violation of Bessert's public trial right was to re-announce the verdicts in open court. (R. 129:12.) The court agreed that re-announcing its verdicts was the appropriate remedy. (R. 129:15–16.)

Bessert appeals.

## STANDARDS OF REVIEW

"Whether an action by the circuit court violated a criminal defendant's right to confront an adverse witness is a question of constitutional fact." *State v. Vogelsberg*, 2006 WI App 228, ¶ 3, 297 Wis. 2d 519, 724 N.W.2d 649. This Court upholds the circuit court's findings of fact unless they are clearly erroneous, but it independently applies the law to the facts. *Id.*

This Court independently decides whether an error is harmless. *State v. Coffee*, 2020 WI 1, ¶ 17, 389 Wis. 2d 627, 937 N.W.2d 579.

Whether a defendant was denied his right to a public trial also presents a question of constitutional fact, subject to the two-part standard identified above. *State v. Ndina*, 2009 WI 21, ¶ 45, 315 Wis. 2d 653, 761 N.W.2d 612.

The State has not identified a binding case that establishes the standard by which this Court reviews a circuit court's remedy for a public-trial-right violation. Because courts are charged with fashioning a remedy that is "appropriate" to the violation, *see Pinno*, 356 Wis. 2d 106, ¶ 46, the State contends that this Court should review the circuit court's decision for an erroneous exercise of discretion.

## ARGUMENT

### I. Bessert was not denied his right to confrontation when the circuit court permitted Alex's CCTV testimony, and any error was harmless.

#### A. A defendant's right to face-to-face confrontation is not absolute, and Wis. Stat. § 972.11(2m)(a)'s limitation on the right is consistent with Supreme Court precedent.

Both the federal and state constitutions afford criminal defendants the right to confront the witnesses against them.

*Vogelsberg*, 297 Wis. 2d 519, ¶ 4.[5] But a defendant's right to "physical, face-to-face confrontation" under the Sixth Amendment's Confrontation Clause is not absolute. *Maryland v. Craig*, 497 U.S. 836, 850 (1990). A court may limit this right to confrontation where "necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id.*; *accord State v. Rhodes*, 2011 WI 73, ¶ 34, 336 Wis. 2d 64, 799 N.W.2d 850. The protection of the physical and psychological well-being of children subjected to the judicial process represents one important public policy concern. *Rhodes*, 336 Wis. 2d 64, ¶¶ 34–36.

In *Craig*, the Supreme Court held that a child could testify through CCTV if the circuit court makes case specific findings that: (1) the procedure is necessary to protect the child's welfare; (2) the child would be traumatized by the defendant's presence, and not just by the proceedings generally; and (3) the distress that the child will suffer testifying in the defendant's presence "is more than *de minimis*, *i.e.,* more than mere nervousness or excitement or some reluctance to testify." *Craig*, 497 U.S. at 855–56 (citations and internal quotation marks omitted).

Wisconsin Stat. § 972.11(2m)(a) incorporates *Craig's* requirements and authorizes a circuit court to take a child witness's testimony through CCTV. If the child has not attained the age of 12, the circuit court may allow this procedure if it makes two findings. First, "That the presence of the defendant during the taking of the child's testimony will result in the child suffering serious emotional distress such

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[5] The Wisconsin Supreme Court has observed that the right to confrontation under Art. 1, Sec. 7 of the Wisconsin Constitution is generally coterminous with United States Constitution's Sixth Amendment's right to confrontation. *State v. Rhodes*, 2011 WI 73, ¶ 28, 336 Wis. 2d 64, 799 N.W.2d 850. It has applied the United States Supreme Court's precedent in its analysis of the clauses. *Id.*

that the child cannot reasonably communicate." Wis. Stat. § 972.11(2m)(a)1.a. Second, "That taking the testimony" by CCTV "is necessary to minimize the trauma to the child of testifying in the courtroom setting and to provide a setting more amenable to securing the child witness's uninhibited, truthful testimony." Wis. Stat. § 972.11(2m)(a)1.b.

In arguing that he was denied his right to confrontation in this case, Bessert claims he's waging an as-applied constitutional challenge to Wis. Stat. § 972.11(2m)(a). (Bessert's Br. 9.) But fairly understood, his argument is that the State didn't satisfy the statutory prerequisites for the CCTV accommodation, so the circuit court deprived him of his right to confrontation by allowing Alex to testify remotely. (Bessert's Br. 13–14.) Indeed, that's the only argument he made at the circuit court. (R. 49:1; 124:50–60.)

Any as-applied constitutional challenge to section 972.11(2m) is forfeited because it was not raised at the circuit court. *See State v. Cole*, 2003 WI 112, ¶ 46, 264 Wis. 2d 520, 665 N.W.2d 328 (stating that an as-applied constitutional challenge may be waived or forfeited); *In re Guardianship of Willa L.*, 2011 WI App 160, ¶ 25, 338 Wis. 2d 114, 808 N.W.2d 155 (the fundamental forfeiture inquiry is "whether particular arguments have been preserved, not . . . whether general issues were raised before the circuit court.").

Moreover, Bessert's purported constitutional challenge is undeveloped because he does not address the threshold question of what level of scrutiny applies. *See State v. Roundtree*, 2021 WI 1, ¶¶ 25–37, 395 Wis. 2d 94, 952 N.W.2d 765. This Court need not consider undeveloped arguments. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

For these reasons, the State addresses whether the circuit court erred in allowing the CCTV accommodation under Wis. Stat. § 972.11(2m).

### B. The circuit court properly allowed the CCTV accommodation, so no confrontation violation occurred.

At the evidentiary hearing on the State's motion for the CCTV accommodation, the circuit court found that (1) "forcing [Alex] to testify in the presence of her father . . . will result in her suffering serious emotional distress" such that "she could not reasonably communicate effectively" during the trial, and (2) "video testimony . . . is necessary to minimize the trauma to [Alex] and to provide a setting that is more amenable to securing [Alex's] uninhibited and truthful testimony." (R. 124:68–69.) These findings are not clearly erroneous.

The evidence showed that Alex was experiencing "real bad" nightmares after her meetings with the district attorney's office. (R. 124:25–26.) Those nightmares involved Bessert regaining custody of Alex, or Bessert slicing Alex's guardian's throat. (R. 124:26.) Since participating in trial preparations, Alex also had problems wetting the bed and she displayed angry outbursts toward other children. (R. 124:27.) This behavior was unusual compared to other kids her age. (R. 124:29–31.)

In no uncertain terms, Alex's guardian testified that Alex was scared to see her father. (R. 124:29.) The last time Alex saw Bessert, she made clear that she didn't want to see him again. (R. 124:36–37.)

Although Alex received counseling to work through her trauma, she had not had counseling in months. (R. 124:39.) This meant that there was no plan to help Alex cope with the stress of seeing her father and testifying at trial.[6] (R. 124:39–40.)

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[6] Bessert claims that there was a plan. (Bessert's Br. 14.) This statement relies on an incomplete reading of the testimony adduced at the evidentiary hearing. (R. 124:39–40.)

In short, the undisputed evidence established that Alex was not only terrified of her father, but that she was experiencing numerous behavioral issues as a result. This evidence supports the circuit court's findings that (1) testifying in Bessert's presence would cause Alex to suffer serious emotional distress such that she could not reasonably communicate, and (2) testifying via CCTV was necessary to minimize that trauma and provide a setting more amenable to securing her truthful testimony. Thus, the court properly allowed the State to present Alex's testimony via CCTV. *See* Wis. Stat. § 972.11(2m)(a)1.a.–b. It follows that there was no confrontation violation. *See Craig*, 497 U.S. at 850; *see also Rhodes*, 336 Wis. 2d 64, ¶ 34.

Bessert disagrees, though he concedes that the circuit court "made a meticulous record." (Bessert's Br. 13.) He argues, "[T]here is nothing in the record which supports the finding [that Alex] would not [have been] able to communicate" at a trial in his physical presence. (Bessert's Br. 14.) To support his argument, he highlights statements that the court made *before* hearing testimony at the evidentiary hearing. (Bessert's Br. 14.) That is, the court commented that after watching Alex's forensic interview, it did not "immediately perceive that . . . there's no way she could testify in front of her father." (R. 124:23.) But the court said that it would "keep an open mind" and "might be convinced" otherwise after hearing the State's evidence. (R. 124:23.)

That's exactly what happened. After hearing that Alex was terrified of her father and suffered from numerous behavioral issues as a result, the court made the necessary statutory findings. It's inaccurate to say that "nothing in the record" supports the conclusion that Alex wouldn't have been able to reasonably communicate in the physical presence of her father when the evidence plainly connected her fear, bed wetting, and angry outbursts to her father. (Bessert's Br. 14.)

Bessert has not established that the court's findings are clearly erroneous.

Bessert alternatively argues, "The Finding that [Alex] Would Suffer Serious Emotional Distress Violates the Presumption Every Defendant is Presumed Innocent Until Proven Guilty." (Bessert's Br. 15.) This seems to be a different as-applied constitutional challenge than the one he claims to advance earlier in his brief. (Bessert's Br. 9, 15.) Suffice it to say, the argument is both forfeited and undeveloped for the reasons addressed above.

Finally, the State notes Bessert's insistence that *Craig* is no longer good law, as well as his heavy criticism of this Court for "sav[ing] *Craig*" in *Vogelsberg*. (Bessert's Br. 15–22.) Since he's not claiming that Wis. Stat. § 972.11(2m)(a)—which is patterned after *Craig*—is facially unconstitutional, it's not clear to the State how this argument fits into his overall position in this case.[7] But the bottom line is that Bessert's theory that *Craig* has been implicitly overruled is just that: his theory. This Court's decision rejecting the same argument in *Vogelsberg* is binding precedent. *See Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997) ("[O]nly the supreme court . . . has the power to overrule, modify or withdraw language from a published opinion of the court of appeals."). And notably, our supreme court has cited favorably to *Craig* since *Vogelsberg* was decided. *See Rhodes*, 336 Wis. 2d 64, ¶ 34.

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[7] A defendant cannot forfeit a facial constitutional challenge to a statute because it involves a court's subject matter jurisdiction. *See State v. Cole*, 2003 WI 112, ¶ 46, 264 Wis. 2d 520, 665 N.W.2d 328. Since Bessert isn't advancing a facial constitutional challenge (Bessert's Br. 9), this argument is also forfeited because he didn't raise it at the circuit court. *See In re Guardianship of Willa L.*, 2011 WI App 160, ¶ 25, 338 Wis. 2d 114, 808 N.W.2d 155.

For the above reasons, Bessert was not denied his right to confrontation.

### C. Any error is harmless.

The harmless error rule applies to Confrontation Clause violations. *Coy v. Iowa,* 487 U.S. 1012, 1021 (1988). It's the State's burden to show "that there is no reasonable possibility that the error contributed to the conviction." *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). That's not a difficult task here.

As discussed, Bessert was convicted of four charges concerning his sexual assaults of Alex when she was an infant. (R. 8:1–2; 128:195.) Everyone agrees that Alex didn't testify about the assaults that occurred when she was an infant. (R. 128:184, 189.) Rather, Amanda Howard provided that evidence. (R. 128:31–39.) Consistent with Howard's testimony that she witnessed two sexual assaults of infant Alex, and consistent with the prosecutor's closing argument, the circuit court found Bessert guilty of counts one through four of the Information. (R. 8:1–2; 128:31–39, 188, 195.) On the remaining charges pertaining to when Alex was a toddler—the charges for which Alex provided testimony for the State—Bessert was acquitted. (R. 8:5–7; 128:195.) Thus, there is no reasonable possibility that any error in allowing the CCTV accommodation contributed to Bessert's convictions. Any error is therefore harmless. *See Dyess*, 124 Wis. 2d at 543.

## II. The circuit court appropriately remedied any violation of Bessert's public trial right.

### A. To avoid granting a windfall to an opportunistic defendant, courts must carefully fashion the remedy for an improper courtroom closure.

Defendants have a constitutional right to a public trial. *State v. Vanness*, 2007 WI App 195, ¶ 7, 304 Wis. 2d 692, 738 N.W.2d 154. The right to a public trial "advances four core values." *Pinno*, 356 Wis. 2d 106, ¶ 42. Those are: "(1) to ensure a fair trial; (2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; (3) to encourage witnesses to come forward; and (4) to discourage perjury." *Id.* (citation omitted).

The Second Circuit has held that the right applies when the factfinder announces its verdict, *Vanness*, 304 Wis. 2d 692, ¶ 12 (citing *United States v. Canady*, 126 F.3d 352, 364 (2d Cir. 1997)), just as the public trial right extends to suppression hearings and voir dire, *see Pinno*, 356 Wis. 2d 106.

But "the fact remains that the right is not absolute." *Pinno*, 356 Wis. 2d 106, ¶ 44. If an unjustified closure is trivial, no constitutional violation occurs. *Vanness*, 304 Wis. 2d 692, ¶ 9. "Federal courts of appeals have held closures are trivial where the core values of the Sixth Amendment have not been violated." *Id.* ¶ 11. And our supreme court has supported the proposition that "[T]he public-trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats. The guarantee will already have been met, for the 'public' will be present in the form of those persons who did gain admission." *Pinno*, 356 Wis. 2d 106, ¶ 44 (citation omitted). "When deprivation of the public trial right is an

error, however, the Supreme Court has said that the error is structural—that it defies harmless error analysis." *Id.* ¶ 47.

Importantly, "'the remedy should be appropriate to the violation' to prevent defendants from taking advantage of the error." *Pinno*, 356 Wis. 2d 106, ¶ 46 (citing *Waller v. Georgia*, 467 U.S. 39, 50 (1984)). For example, when the violation occurs at a suppression hearing, the appropriate remedy is a new suppression hearing. *See id.* Likewise, where the violation occurs when the factfinder announces its verdict, the appropriate remedy is to re-announce the verdict in open court. *See Canady*, 126 F.3d at 364 (remedy is for the trial court to announce its decision in open court).

Why? Because a new trial in the above circumstances would constitute a windfall for the defendant, which is not in the public interest. *See Pinno*, 356 Wis. 2d 106, ¶ 46; *accord Canady*, 126 F.3d at 364. "Thus . . . in the event of an improper courtroom closure, courts must carefully fashion a remedy to avoid granting a 'windfall' to an opportunistic defendant." *Pinno*, 356 Wis. 2d 106, ¶ 46.

### B. Assuming that the courtroom closure here was not trivial, the circuit court's remedy was appropriate to the violation.

It's undisputed that the courthouse was closed at 4:30 p.m. on the day of Bessert's court trial. (R. 129:3.) His trial concluded at approximately 5:00 p.m. (R. 129:3.) During this half-hour window, the court was off the record for about 26 minutes. (R. 129:3.) It was on the record for roughly "four or five minutes" to announce its verdicts. (R. 129:3–4.)

At the hearing on Bessert's motion for a new trial, the State questioned whether these facts amounted to a constitutional violation. (R. 129:11.) Noting the four core values that the public trial right advances, the prosecutor commented, "None of those four [values were] effected [sic] by the" 4-minute reading of the verdicts "in a closed courtroom."

(R. 129:11.) The prosecutor continued, "And quite frankly it wasn't completely closed because members of the public, including members of the public that are here today, were still here during that time."[8] (R. 129:11.) Acknowledging the *Canady* decision, the State ultimately contended that the circuit court appropriately remedied any violation by re-announcing its verdicts in open court. (R. 129:11–12.)

The State continues to question whether Bessert has proved a violation of his right to a public trial. Unlike in *Canady*, where there was *no* proceeding covering the announcement of the verdict, *see Canady*, 126 F.3d at 363–64, here the court announced its verdicts during a trial with "numerous people" in the gallery, (R. 129:15). This appears to be a significant distinction when considering the four core values that the public trial right advances and given some of our supreme court's statements on the topic. *See Pinno*, 356 Wis. 2d 106, ¶¶ 42, 44.

Nevertheless, holding that the circuit court appropriately remedied any constitutional violation provides the narrowest grounds to affirm. *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (stating that appellate courts should decide cases on the narrowest grounds).

By re-announcing its verdicts in open court (R. 129:5), the circuit court correctly heeded the supreme court's instruction that "courts must carefully fashion a remedy to avoid granting a 'windfall' to an opportunistic defendant." *Pinno*, 356 Wis. 2d 106, ¶ 46. The court's remedy is also consistent with Supreme Court precedent. *Compare Waller*, 467 U.S. at 50 (the remedy for a public trial violation at a suppression hearing is a new suppression hearing in open

[8] The circuit court also noted that "there were numerous people" in the courtroom during the reading of the verdicts. (R. 129:15.)

court). Even Bessert's preferred case, *Canady*, says that re-announcing the verdicts is the appropriate remedy for any constitutional violation here.[9] *See Canady*, 126 F.3d at 364; (Bessert's Br. 23–25.)

Bessert asks this Court to ignore that aspect of *Canady*, while at the same time finding that the decision is persuasive enough to "Conclusively Demonstrate[ ]" a constitutional violation. (Bessert's Br. 23–25.) He argues, "Conducting a new trial based on what amounts to a violation may certainly seem like a windfall for Mr. Bessert, but it is the minimum required to maintain faith in our system of justice." (Bessert's Br. 25.)

But precedent shows it's the opposite: forcing a young incest victim to go through another trial because the courthouse was closed during the five minutes it took for the court to announce its verdicts is neither required nor in the public interest. *See Pinno*, 356 Wis. 2d 106, ¶ 46.

For the above reasons, the circuit court appropriately remedied any constitutional violation.

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[9] To the extent that Bessert also relies on *Vanness* (Bessert's Br. 25), that case is inapposite. There, unlike here, the parties were still presenting their cases to the jury when the courthouse closure occurred. *State v. Vanness*, 2007 WI App 195, ¶ 4, 304 Wis. 2d 692, 738 N.W.2d 154. So, *Vanness* does not establish the appropriate remedy for the purported violation in this case.

## CONCLUSION

This Court should affirm Bessert's convictions.

Dated this 18th day of November 2021.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,622 words.

Dated this 18th day of November 2021.

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## CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 18th day of November 2021.

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