STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1474

State of Minnesota,
Respondent,

vs.

Joseph Loren Allen Maine,
Appellant.

Filed June 8, 2020
Affirmed in part, reversed in part, and remanded
Reilly, Judge

Jackson County District Court
File No. 32-CR-18-181

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Sherry E. Haley, Jackson County Attorney, Jackson, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Smith, Tracy M., Judge; and Florey, Judge.

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

REILLY, Judge

In this direct appeal from final judgment, appellant challenges his convictions for first- and second-degree criminal sexual conduct. He argues that his convictions must be reversed because (1) the state failed to present sufficient evidence to corroborate the out-

of-court statement of the three-year-old victim, E.M.; (2) the district court abused its discretion when it excluded the statement made by E.M. during a forensic interview denying that anyone had touched his genital area; (3) the district court abused its discretion by denying appellant's motion for a new trial because a deliberating juror was biased and exposed other jurors to extrajudicial information about appellant's character and family reputation; (4) the interests of justice warrant a new trial; and (5) the district court violated appellant's right to a public trial when it questioned 18 potential jurors privately during voir dire. Finally, appellant argues that the district court erred by entering convictions for both first- and second-degree criminal sexual conduct because both charges were based on the same conduct with the same victim. We affirm in part, reverse in part, and remand to the district court.

FACTS

Appellant Joseph Loren Allen Maine and his mother provided daycare services for three-year-old E.M. and his two-year-old sister at the children's home.[1] When appellant's mother had to work at her other part-time job, appellant would watch the children alone.

One day in June 2018, E.M.'s grandmother stopped at the children's home on her way home from an appointment. Grandmother needed to use the bathroom, so she entered the house. Inside, grandmother saw appellant "laid out on the couch" with E.M. sitting in the corner of the couch. He looked scared, "like a deer in the headlight." Grandmother told the children she needed to use the bathroom. E.M. got up off the couch and asked

[1] These facts are from trial testimony.

grandmother if he could go to her house. Both children followed grandmother into the bathroom. E.M. then grabbed grandmother and put his head on her shoulder. He said, "Grandma, let me go with you. Please, let me go with you. I wanna go to your house . . . I don't want to be here." Grandmother texted the children's mother and told her that she was taking the children to her house.

Grandmother testified that later that afternoon, when the children were playing in the living room of her home, E.M. approached her and said, "Grandma, Joey sucked'd [sic] on my wiener." Grandmother responded with "what" and E.M. again said, "Joey sucked'd [sic] on my wiener." Grandmother told E.M. that he couldn't lie about this and asked if he was telling the truth. E.M. said, "yes" and then repeated what he had told her before. Grandmother asked E.M. when it had happened, and E.M. responded, "Today, when we were sleeping." Grandmother contacted E.M.'s mother, who called the police and took E.M. to the hospital for a sexual-assault exam. A doctor obtained oral, penile, and anal swabs from E.M.

A couple of days later, after speaking with grandmother, the Lakefield police chief went to appellant's apartment and spoke with him. When the police chief told appellant that E.M. had made a disclosure that "something happened between [appellant] and [E.M.]," and asked appellant what that disclosure might be, appellant explained that he had helped E.M. wipe after using the bathroom shortly before grandmother came to the house. When the police chief asked appellant if he would have an explanation for his DNA being on E.M.'s penis, appellant responded, "Uh uh. No." Pursuant to a search warrant, the police chief collected a DNA sample from appellant.

The police sent the sexual-assault kit from E.M.'s exam and appellant's DNA sample to the Minnesota Bureau of Criminal Apprehension (the BCA) lab for testing. A BCA analyst tested the penile swab for amylase, a "component of saliva," but the "penile swabs were negative for the presence of amylase." Even so, the analyst testified that just because the test was negative does "[n]ot necessarily" mean that saliva is not present because the "test does have a limit of detection," meaning the amylase could have been present in "very low levels, at a level which the test can't detect." The analyst explained that there is no way to know, based on the results, whether "there was no amylase present or if there was a low amount of amylase present."

A second BCA analyst performed DNA testing on the oral, anal, and penile swabs. The results for the penile swabs revealed that there was a DNA mixture of two or more individuals, with an unidentified male DNA profile. The analyst tested the unidentified DNA profile against the known DNA sample from appellant, and found that the DNA from the penile swabs matched the known DNA sample taken from appellant.

In October 2018, the police chief spoke with appellant a second time. By that time, the police chief had received the results from the BCA. The police chief informed appellant that they had "found [appellant's] DNA where it shouldn't be." When the police chief asked appellant if what E.M. alleged had happened, appellant responded, "Kind of. I wouldn't do that I don't know why it went through my mind why I should try that because I." Appellant explained that he sometimes "blank[s] out" when he is stressed, and that he "kinda blanked out a little" that day. The police chief asked appellant if during the "blank

out time" he might have sucked on E.M.'s penis, to which appellant responded, "It's possible. But I wouldn't do it but when I blank out I don't remember anything I do."

Respondent State of Minnesota charged appellant with first-degree criminal sexual conduct and second-degree criminal sexual conduct. Before trial, the district court conducted a competency hearing; the judge questioned E.M. outside the presence of appellant. The district court determined that E.M. "does not have sufficient capabilities to narrate events that happened in the past" and that E.M. "does not know the difference between truth and falsehood." The district court concluded that E.M. was not competent to testify as a witness. The district court granted the state's motion to allow the admission of E.M's out-of-court statement to his grandmother. The district court determined that E.M.'s statement "contains sufficient indicia of reliability" and that evidence that appellant's DNA was found on E.M.'s penis "provides sufficient corroboration to satisfy the corroboration requirement."

The district court also granted the state's motion to exclude the videotape of the forensic interview with E.M. and prohibited the defense from eliciting testimony that E.M. did not disclose the abuse during that interview. Appellant had argued for admission of the forensic interview because: (1) during the interview E.M. denied appellant had inappropriately touched him, (2) the interview was reliable because E.M.'s mother witnessed the interview and it was on video, and (3) the forensic interview was reliable in the same way E.M.'s statement to his grandmother was reliable. The district court concluded that the forensic interview was inadmissible.

The district court conducted a three-day jury trial in March 2019. During voir dire, the 42 prospective jurors filled out questionnaires. The judge and both attorneys then met individually in chambers with 18 of the jurors to discuss their responses. The private questioning of jurors lasted around two hours. Appellant did not object to the district court questioning the prospective jurors in private. Following trial, the jury found appellant guilty of both first- and second-degree criminal sexual conduct.

In March 2019, appellant moved the district court for a *Schwartz* hearing[2] and for a new trial pursuant to Minn. R. Crim. P. 26.03, subd. 20(6) and 26.04, subd. 1(1), (3). The district court granted appellant's motion for a *Schwartz* hearing based on a post-trial conversation with a juror (juror A). At the *Schwartz* hearing, juror A testified about comments made by a juror (juror B) during deliberations. The district court determined there was no juror misconduct or irregularities in the jury proceedings. The district court denied appellant's motion for a new trial.

The district court sentenced appellant to 144 months' imprisonment and ten years of conditional release for the first-degree criminal sexual conduct conviction. The district court entered convictions for first- and second-degree criminal sexual conduct on the warrant of commitment. This appeal follows.

[2] A defendant may challenge a jury verdict through a *Schwartz* hearing where the district court inquires into whether improper considerations affected the jury's verdict. *Schwartz v. Mpls. Suburban Bus Co.*, 104 N.W.2d 301, 303 (Minn. 1960).

D E C I S I O N

I. The evidence is sufficient to sustain the verdicts of guilt.

Appellant argues that his convictions must be reversed because there is insufficient evidence corroborating the out-of-court accusation made by "the incompetent, non-testifying, three-year-old complainant," E.M.

Appellant first argues that E.M.'s accusation is not credible because the district court determined that E.M. was incompetent to testify. But the supreme court has stated that prior out-of-court statements by an incompetent witness are not per se unreliable. *State v. Edwards*, 485 N.W.2d 911, 916 (Minn. 1992) (citing *Idaho v. Wright*, 497 U.S. 805, 825, 110 S. Ct. 3139, 3151-52 (1990)). And, the district court, before admitting E.M.'s hearsay statements to his grandmother, determined that it was reliable because of the presence of appellant's DNA on E.M.'s penis.

Still, appellant argues that the state did not provide sufficient evidence to corroborate E.M.'s out-of-court accusation. Appellant acknowledges that in Minnesota, "the testimony of a victim need not be corroborated" in cases involving criminal sexual conduct. Minn. Stat. § 609.347, subd. 1 (2018), but contends that because E.M. did not testify, the general rule does not apply to this case. It is true that "[t]he absence of corroboration in an individual case . . . may well call for a holding that there is insufficient evidence upon which a jury could find the defendant guilty beyond a reasonable doubt." *State v. Ani*, 257 N.W.2d 699, 700 (Minn. 1977) (discussing Minn. Stat. § 609.347, subd. 1); *see also State v. Myers*, 359 N.W.2d 604, 608 (Minn. 1984) ("Corroboration of an allegation of sexual abuse of a child is required only if the evidence otherwise adduced is

insufficient to sustain conviction."). When corroborating evidence is required, "[c]orroborating evidence must link or connect the defendant to the crime. It is not necessary that it establish a prima facie case of the defendant's guilt. It must point to the defendant's guilt in some substantial degree . . . [and] [c]orroborating evidence may be circumstantial or direct." *State v. Scruggs*, 421 N.W.2d 707, 713 (Minn. 1988) (discussing accomplice testimony (citations omitted)). "[Appellate courts] will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that a defendant was proven guilty of the charged offense." *Id.* We view the evidence in the light most favorable to the verdict and "will assume that the jury disbelieved any testimony in conflict with the result it reached." *Id.*

Here, there was sufficient evidence corroborating E.M.'s allegation to sustain appellant's convictions.[3] First, as noted above, there was DNA evidence corroborating E.M.'s statements to his grandmother. And while the penile swabs were negative for the presence of amylase, the BCA analysts testified that just because the test was negative does "[n]ot necessarily" mean that saliva is not present because the "test does have a limit of detection." And the amylase could have been present in "very low levels, at a level which the test can't detect." Second, appellant's DNA was found on E.M.'s penis. And even though the BCA analysts could not say with certainty how appellant's DNA got onto

[3] At trial, the state presented both direct and circumstantial evidence. The direct evidence includes the DNA evidence and E.M.'s statements. The circumstantial evidence includes E.M.'s strange behaviors the day of the incident and his change in behavior after the incident.

E.M.'s penis, it is significant that appellant's DNA was not found on any of the other samples taken from E.M., including the oral or anal swabs. Third, E.M.'s grandmother testified that E.M. acted strangely on the day of the incident. Grandmother described E.M. as looking scared, "like a deer in the headlight." She also testified that E.M. begged her to take him with her. Fourth, the state presented the recorded statements of appellant, in which appellant explained that he sometimes "blank[s] out" when he is stressed, that he "blanked out a little" the day of the incident, and that it was "possible" that he may have abused E.M. during the time he was "blanked out." Finally, E.M.'s mother testified to behavioral changes she observed in E.M. after the incident, including E.M. defecating in his pants despite being toilet trained and E.M. withdrawing from adult males after the incident. When the evidence is viewed as a whole, it points to appellant's guilt in a substantial degree. The evidence corroborating E.M.'s accusations is sufficient to sustain appellant's convictions.

II. The district court did not abuse its discretion when it excluded the videotape of E.M.'s forensic interview.

Appellant next argues that the district court committed reversible error when it excluded E.M.'s statements during a forensic interview in which E.M. denied that anyone had touched his genital area. Appellant contends that the jury needed to hear the evidence to assess the credibility and reliability of E.M.'s accusation, and excluding the evidence denied him the right to present a complete defense. This court will review a district court's evidentiary rulings "for abuse of discretion, even when, as here, the defendant claims that exclusion of evidence deprived him of his constitutional right to a meaningful opportunity

to present a complete defense." *State v. Zumberge*, 888 N.W.2d 688, 694 (Minn. 2017). And "[e]ven if an objection was made and a district court abused its discretion, we reverse only if the exclusion of evidence was not harmless beyond a reasonable doubt." *Id.* Harmless beyond a reasonable doubt means that "the reviewing court must be satisfied beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized, an average jury (i.e., a reasonable jury) would have reached the same verdict." *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994).

Before trial, the district court granted the state's motion to exclude the video of the forensic interview of E.M. Appellant argued that the video should be admitted because during the interview E.M. denied that appellant had inappropriately touched him. Though unclear, appellant appears to have argued that because E.M.'s mother witnessed the interview and because it was on video, it was reliable and admissible. Appellant indicated he would introduce the video when mother testified. Appellant also argued that "as much as [grandmother's] statement that [E.M.] . . . told her that [appellant] touched him come[s] in . . . the same should apply to . . . [E.M.'s] statement that he did not touch him." Though also unclear, the district court appears to have concluded, after viewing the video of the interview, that it was inadmissible because E.M.'s mother was not present when E.M. made the statements during the interview, and she could not lay proper foundation for its introduction. Appellant asserted no alternative grounds for admission of the forensic interview into evidence.

No matter the reasons advanced for its admissibility and the district court's reasons for excluding it, even assuming the forensic interview was admissible and the district court

abused its discretion in not admitting it, this court will only reverse "if the exclusion of evidence was not harmless beyond a reasonable doubt." *Zumberge*, 888 N.W.2d at 694. We conclude that the district court's exclusion of the forensic interview, even if in error (which we do not think it was), was harmless beyond a reasonable doubt.

The relevant portion of the interview includes the following exchange between E.M. and the forensic interviewer, B.S.:

> BS: . . . does someone touch this part on you? Or has someone tried to touch this part on you?[4]
> EM: Mmm-uh. You don't.
> BS: You don't. Does someone touch this part on you? Or has someone tried to touch this part on you?
> EM: Mmm-uh.
> BS: Does someone ask you to do touching, like, to this part? Or does someone make you do touching to this part?
> EM: Mmm-uh.
> BS: Mmm. Does someone ask you to do touching to this part? Or does someone make you do touching to this part? Okay. Have you seen other people, like, do touching? Like to private parts?
> EM: Mmm-uh. Mmm, mmm, mmm, mmm.
> BS: Okay. Okay.

From our review of the video, E.M. never explicitly denied that appellant had sexually abused him during the interview as appellant contends he did. And E.M.'s responses to the interviewer's questions about inappropriate touching are vague given that he neither agreed nor denied that appellant had touched him in those areas. So E.M.'s responses during the interview have little probative value, if any.

[4] The forensic interviewer points to her own genital area as well as her buttocks area when asking E.M. whether someone has touched or tried to touch those areas on E.M.

We conclude that had the district court admitted the forensic interview into evidence, the jury still would have reached the same verdict given E.M.'s vague responses during the forensic interview and the strength of the evidence presented by the state, which included evidence of E.M.'s unprompted and spontaneous disclosure of the abuse to his grandmother, grandmother's testimony about E.M.'s strange behaviors on the day of the incident, and the DNA evidence found on E.M.'s penis. *See Zumberge*, 888 N.W.2d at 697 (noting that appellate court "may consider the strength of each party's evidence when determining whether admitting excluded evidence would have led to a different result"). The district court's exclusion of the forensic interview was harmless beyond a reasonable doubt.

III. Allegations of juror bias and exposure to extrajudicial information do not warrant a new trial.

Appellant contends that the district court abused its discretion when it denied his motion for a new trial because juror B was biased and because juror B exposed other jurors to extrajudicial information. We disagree.

A. Juror Bias

First, appellant contends that the district court abused its discretion when it denied his motion for a new trial because juror B was biased. Both the United States and Minnesota Constitutions guarantee the right to trial by an impartial jury. U.S. Const. amend. VI; Minn. Const. art. 1, § 6. On a written motion of a defendant, a district court may grant a new trial based on juror misconduct. Minn. R. Crim. P. 26.04, subd. 1(1). The moving party bears the burden of proving actual bias at the *Schwartz* hearing. *State v.*

Evans, 756 N.W.2d 854, 870 (Minn. 2008). Actual bias is "a state of mind on the part of the juror, in reference to the case or to either party, which would prevent the juror from trying the issue impartially and without prejudice to the substantial rights of either party." *Id.* (citation omitted). "A finding by a district court of the presence or absence of bias is based upon determinations of demeanor and credibility and, thus, entitled to deference." *Id.* (quotation and citation omitted). "A [district] court's decision to deny a motion for a new trial on the basis of jury misconduct will not be overturned absent an abuse of discretion." *State v. Kelley*, 517 N.W.2d 905, 910 (Minn. 1994). However, actual bias is a question of fact that the district court is in the best position to evaluate, and we review the district court's factual findings for clear error. *Evans*, 756 N.W.2d at 870.

Here, following the jury trial and verdict, appellant's counsel spoke with juror A. Based on that conversation, appellant filed a motion for a *Schwartz* hearing, which the district court granted. At the *Schwartz* hearing, the district court questioned juror A, who testified that juror B said "he had seen the Defendant around town reading. So, he knew he was smart." Juror A testified that juror B also said "he knew [appellant's] mother in high school . . . and that [appellant] may not come from a good family." Based on Juror A's testimony, the district court determined there was no juror misconduct or irregularities in the jury proceedings and denied appellant's motion for a new trial.

Appellant contends that the district court abused its discretion when it denied his motion for a new trial because juror B was biased. But except for the testimony of juror A, who testified about juror B's comments during deliberations, appellant did not call juror B to testify or offer any other evidence to prove that juror B's observations of appellant or

his thoughts on appellant's family resulted in bias. As a result, we discern no error in the district court's determination that there was no juror misconduct because we conclude that appellant did not meet his burden of proving that juror B was biased. *See id*. ("At a *Schwartz* hearing, the moving party bears the burden of demonstrating actual bias."). The district court did not abuse its discretion when it denied appellant's motion for a new trial based on juror bias.

B. Exposure to Extrajudicial Information

Appellant also argues that a new trial is warranted because juror B "contaminated" the other jurors by sharing extrajudicial information during deliberations. "The exposure of a jury to potentially prejudicial material creates a problem of constitutional magnitude, because it deprives a defendant of the right to an impartial jury and the right to confront and cross-examine the source of the material." *State v. Cox*, 322 N.W.2d 555, 558 (Minn. 1982). "Unless the piercing effect of this extrinsic material is only skin deep and without prejudice to the anatomy of the trial, we must apply a constitutional salve." *Id.* (citation and internal quotations omitted). The state must show beyond a reasonable doubt that the error did not contribute to the verdict obtained. *Id.*[5] "The proper procedure for reviewing

[5] The state contends that this standard only applies when "statements of a *court official* about the merits of a criminal case raise a rebuttable presumption of prejudice." The state is correct that the supreme court used this standard under those circumstances in *Cox*, 322 N.W.2d at 558. However, in that case, the supreme court also noted that following the United States Supreme Court decision in *Parker v. Gladden*, 385 U.S. 363, 87 S. Ct. 468 (1966), the leading case involving improper communications between a court official and the jury, "[s]ubsequent decisions have analyzed the impact of outside influences on criminal trials in a similar fashion regardless whether the source is 'pervasive adverse prejudicial publicity,' the 'ill-chosen remarks of a bailiff,' or information introduced into the jury room by a participating juror." *Cox*, 322 N.W.2d at 558. Moreover, as noted by

a jury verdict is to determine from juror testimony what outside influences were improperly brought to bear upon the jury and then estimate their probable effect on a hypothetical average jury." *Id.* at 559. The relevant factors to be considered include "the nature and source of the prejudicial matter, the number of jurors exposed to the influence, the weight of evidence properly before the jury, and the likelihood that curative measures were effective in reducing the prejudice." *Id.*

Here, the nature and source of the alleged prejudicial matter were statements made by juror B during deliberations. According to juror A, juror B made a statement that he had observed appellant reading and that he believed appellant was smart. Juror B also expressed his belief that appellant may not have come from a good family. Juror A indicated that she and a few other jurors challenged juror B on these comments, saying that juror B's opinions were merely "speculation." These comments did not come from a court official, which the United States Supreme Court has concluded "beyond question carries great weight with a jury." *Gladden*, 385 U.S. at 365, 87 S. Ct. at 470. It also does not

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appellant, the supreme court, in *State v. Jaros*, explained that the *Cox* standard did not apply because "Jaros does not contend that the jury was exposed to potentially prejudicial material outside of the trial process." 932 N.W.2d 466, 473 (Minn. 2019). The supreme court also explained that the standard did not apply because "the essence of a violation of a person's Sixth Amendment right to an impartial jury is that the jury is affected by information or interference outside the ordinary course of the trial (e.g., the bias of a particular juror, adverse publicity, statements by nonwitnesses)." *Id.* Thus, we conclude that the standard articulated in *Cox* applies not only to cases where a court official makes statements about the merits of a case, but to situations where a defendant's Sixth Amendment right to an impartial jury is implicated. *See State v. Crisler*, 285 N.W.2d 679, 682 (Minn. 1979) ("Before a federal constitutional error can be held harmless, the party benefiting from the error must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.").

appear that juror B made the comments in the context of expressing his beliefs or attitude about whether appellant was guilty of the crime. These factors support a determination that juror B's comments would have little effect on the average jury.

Next, it is unclear from the record how many jurors were exposed to the influence of juror B's comments. Juror A indicated at least "a few" other jurors responded to juror B's comments about appellant reading and being smart, but because it is unclear from the record how many jurors were exposed, this factor is neutral.

We now turn to the weight of the evidence properly before the jury. There was testimony from E.M.'s grandmother about E.M.'s unprompted statements that appellant "suck[ed] on [his] wiener." In addition there was testimony from grandmother that E.M. acted strangely when she went into the house and that he begged her to take him with her. Finally, appellant's DNA was found on E.M.'s penis. The weight of the evidence here favors a finding that juror B's comments would have little effect on the average jury.

Finally, with respect to curative measures, the district court gave general jury instructions, including an opening instruction directing the jurors to "limit" themselves to what they hear and see in the courtroom. Yet, unlike *Cox* when the court after learning of the bailiff's misconduct during trial, had the opportunity to ameliorate it through voir dire and instruction, the alleged misconduct here was not brought to the district court's attention until after the trial, so no instructions were given in direct response to juror B's comments. 322 N.W.2d at 560. Because the instruction occurred at the beginning of a three-day trial and did not occur directly in response to juror B's comments, we conclude that this factor weighs only slightly in favor of a finding that juror B's comments would have little effect

on the average jury. Based on the foregoing analysis, we conclude that juror B's comments would have little effect on the average jury and that juror B's alleged misconduct does not warrant reversal here.

IV. A new trial in the interests of justice is not warranted.

Appellant contends that even if this court were to conclude that the evidence is "technically sufficient," and that he otherwise received a trial "free of reversible error," this court should grant him a new trial in the interests of justice. The supreme court has granted new trials where it "entertains grave doubt as to a defendant's guilt" and the "interests of justice require that there be a new trial." *State v. Johnson*, 152 N.W.2d 529, 533 (Minn. 1967).

Appellant relies on *State v. Anderson*, 137 N.W.2d 781 (Minn. 1965) to support his argument. In that case, the supreme court reversed Anderson's conviction and granted him a new trial in the interests of justice because the corroboration was "deficient," and the clerk of court "wept openly in the presence of the jury." *Id.* at 784. Because we conclude that the corroborating evidence here was sufficient to sustain appellant's conviction and that the district court did not abuse its discretion by denying appellant's request for a new trial based on juror bias and misconduct, we decline to grant appellant a new trial in the interests of justice.

V. The case is remanded to determine whether appellant's right to a public trial was violated.

Appellant argues that the district court violated his right to a public trial when it and the attorneys conducted voir dire with 18 of the 42 potential jurors individually and in

private without making case-specific findings showing that excluding the public was necessary. Both the United States and Minnesota Constitutions guarantee a criminal defendant the right to a public trial. U.S. Const. amends. VI, XIV; Minn. Const. art. I, § 6. "[T]he public trial guarantee applies to all phases of trial, including pretrial suppression hearings and jury voir dire." *State v. Brown*, 815 N.W.2d 609, 617 (Minn. 2012). Yet a defendant's right to a public trial is not absolute and

> may give way when: (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 court has considered reasonable alternatives to closing the hearing; and (4) the court make[s] findings adequate to support the closure.

State v. Mahkuk, 736 N.W.2d 675, 684-85 (Minn. 2007) (quotations omitted) (citing *Waller v. Georgia*, 467 U.S. 39, 48, 104 S. Ct. 2210, 2216 (1984)).

A. Standard of Review

The parties disagree which standard of review applies. Appellant contends that this court must apply the de novo standard of review, while the state argues that because appellant did not object to the courtroom closure during voir dire, this court reviews the closure for plain error.

Generally, whether a defendant's right to a public trial has been violated is a constitutional question appellate courts review de novo. *Brown*, 815 N.W.2d at 616. And "[t]he unconstitutional denial of a defendant's 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). "Structural errors require automatic reversal because such errors

call into question the very accuracy and reliability of the trial process." *State v. Brown*, 732 N.W.2d 625, 630 (Minn. 2007) (citation omitted). And, whether or not a timely objection was made, "[s]tructural errors always invalidate a conviction." *Id.*

The state, however, points to *State v. Benton*, 858 N.W.2d 535, 540 (Minn. 2015), arguing that this case is more like *Benton* than to those cases in which appellate courts applied the de novo standard of review because here "the record is clear that Appellant did not make any objections to the closure . . . though there were several opportunities . . . to have done so."

Benton dealt with two courtroom closures requested by Benton. *Id.* at 540. The supreme court noted as a general rule that "a party cannot assert on appeal an error that he invited or that could have been prevented at the district court." *Id*. (citation omitted). However, the supreme court also noted that the invited-error doctrine "does not require us to turn a blind eye to errors that seriously affect the fairness, integrity or public reputation of judicial proceedings." *Id.* Nonetheless, the supreme court determined that Benton "did not just consent to the closures: he actively sought them." *Id.* The supreme court determined that under the circumstances, Benton had no right to relief because "allowing Benton to request courtroom closures at trial and then receive relief on appeal would *thwart* the fairness, integrity, and public reputation of judicial proceedings." *Id.* at 541 (emphasis in original).

This court, in our recent *State v. Petersen* opinion addressed *Benton* in a footnote in response to the state's claim that "Petersen's counsel affirmatively agreed to the courtroom closure." 933 N.W.2d 545, 551 n.2 (Minn. App. 2019). We noted that it is an open

question whether unpreserved structural errors lead to automatic reversal of a conviction. *Id.* And we also noted that in the *Benton* decision, the supreme court applied the invited-error doctrine "and by extension the plain-error test" when the defendant "actively sought" closure of the courtroom. *Id.* We explained that "[t]he *Benton* opinion indicates that, in Minnesota, appellate review of a challenge to a courtroom closure is not foreclosed by a defendant's failure to object," and concluded that we would consider "Petersen's argument . . . despite his trial attorney's equivocal objection and arguable acquiescence to the courtroom closure." *Id.*

Here, the record reveals, and appellant concedes, that he made no objection on the record to the district court questioning jurors in private about their questionnaire responses. However, as noted by appellant, nothing in the record suggests that appellant "actively sought" questioning of jurors in private. Thus, despite the state's contention that this case is more similar to *Benton*, in which Benton "actively sought" closure of the courtroom two times, we conclude this case is more like *Petersen*, in which there was "equivocal objection and arguable acquiescence to the courtroom closure." *Id.* Accordingly, we apply the de novo standard of review. *Id.* at 551.

B. Courtroom Closure

Appellant contends that his case must be remanded for an evidentiary hearing and findings regarding the courtroom closure. We agree.

In *Petersen*, prospective jurors were asked to complete written questionnaires, asking whether they or someone they knew had ever been the victim of physical or sexual abuse or another crime. *Id.* at 548. The district court closed the courtroom, citing "the

confidentiality issues," and the parties questioned jurors outside the presence of other jurors. *Id.* at 549. The district court kept the courtroom closed throughout the remainder of voir dire, while the parties' attorneys questioned 28 of the 46 prospective jurors. *Id.* On appeal, Petersen argued that the district court erred by closing the courtroom during the individualized questioning of jurors during voir dire because the closure violated his right to a public trial. *Id.* This court indicated that the "threshold question" in such a case is

> whether there was a "true closure" of the courtroom, which depends on several factors: (1) whether the courtroom was cleared of all spectators; (2) whether the trial remained open to the public and press; (3) whether there were periods where members of the public were absent; and (4) whether the defendant, defendant's family or friends, or any witnesses were excluded.

Id. at 551. After reviewing the factors, this court determined that given the "complete exclusion of the public during all individualized questioning of prospective jurors, which was a significant portion of voir dire proceedings, the courtroom closure in this case was a true closure." *Id.* at 552. Regarding Petersen's argument that the district court erred in closing the courtroom, we noted that our ability to determine whether the courtroom closure was justified "was significantly hindered by the fact that the district court did not make findings concerning the reasons for closing the courtroom." *Id*. We concluded that we could not determine whether the closure of the courtroom was justified because the district court did not make findings "relevant to the first, second, and third *Waller* requirements," and determined that the remedy was a "remand to the district court for an evidentiary hearing and findings concerning the closure." *Id.*

Here, we conclude that a true closure occurred. Individual jurors were questioned "in a separate room" where only the juror, the judge, and the attorneys were present. The private questioning of jurors lasted about two hours and during that time, the courtroom was not open to the public or the press, to appellant or any of appellant's friends or family, or to any other witnesses.

Next, just like in *Petersen* it is unclear whether the closure of the courtroom was justified because the district court did not make any findings on the reasons for closing the courtroom. *Id.* at 552. Here, because the district court did "not make findings concerning the reasons for closing the courtroom, the necessary breadth of the closure, and the existence or absence or reasonable alternatives to closure," we conclude that "a remand to the district court for an evidentiary hearing and findings concerning the closure" is the appropriate remedy. *Id.* at 552-53; *see also State v. McRae*, 494 N.W.2d 252, 260 (Minn. 1992) (noting that the "remedy should be appropriate to the violation . . . [and] [i]f a remand for a hearing on whether there was a specific basis for closure might remedy the violation of closing the trial without an adequate showing of the need for closure, then the initial remedy is a remand, not a retrial").

VI. Appellant's conviction for second-degree criminal sexual conduct must be vacated.

The parties agree and we conclude, that the district court erroneously entered convictions for both first- and second-degree criminal sexual conduct and that appellant's conviction for second-degree criminal sexual conduct must be vacated.

"Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2018). An "included offense" is "a crime necessarily proved if the crime charged were proved." *Id.*, subd. 1(4). When a defendant is convicted on more than one charge for the same act, the district court should "adjudicate formally and impose sentence on one count only." *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984). We "look to the official judgment of conviction in the district court file as conclusive evidence of whether an offense has been formally adjudicated." *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) (quotations omitted). Whether the district court erred in adjudicating multiple convictions is a question of law, which we review de novo. *State v. Ferguson*, 729 N.W.2d 604, 618 (Minn. App. 2007), *review denied* (Minn. June 19, 2007).

Here, the jury found appellant guilty of both first-degree criminal sexual conduct and second-degree criminal sexual conduct, and the warrant of commitment shows that the district court entered convictions for both offenses. Second-degree criminal sexual conduct is a lesser included offense of first-degree criminal sexual conduct. *State v. Kobow*, 466 N.W.2d 747, 753 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991). Because the district court erroneously entered convictions for first- and second-degree criminal sexual conduct, we reverse and remand to the district court with instructions to vacate appellant's adjudication of guilt with respect to the second-degree criminal sexual conduct charge, leaving the finding of guilt intact.

Affirmed in part, reversed in part, and remanded.