STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1628

Omar Kwabena Walford, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed August 22, 2022
Reversed and remanded
Jesson, Judge

Ramsey County District Court
File No. 62-CR-17-8690

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

John Choi, Ramsey County Attorney, Alexandra Meyer, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Jesson, Presiding Judge; Reyes, Judge; and Wheelock, Judge.

NONPRECEDENTIAL OPINION

JESSON, Judge

After participating in jury selection, pretrial motions, and opening statements, self-represented appellant Omar Kwabena Walford fell silent. He refused to respond to the district court in any way. Walford sat through the testimony of the first witness and the

introduction of evidence. Silence. The court, dismissing the jury, questioned Walford. Silence. After persistently attempting to engage Walford, the court then removed him from the courtroom, finding his behavior disruptive. The trial continued, and the jury found Walford guilty. Walford now argues that the court violated his Sixth Amendment right to be present at his own trial. Because silence—even disrespectful silence—is not disruptive enough to justify a defendant's removal from court, we reverse and remand for a new trial.

FACTS

Respondent State of Minnesota charged Walford with two felony counts of violating a domestic-abuse no-contact order on two separate days by calling the protected party from within a county jail.[1] The matter proceeded to trial, which was originally set for March 2018. But Walford's trial did not occur until February 2019.[2]

When trial began, Walford represented himself. He participated in jury selection and was present without incident for the first full day of trial. On the second day, with the jury impaneled, Walford delivered an opening statement. Walford asked the jury "to pay close attention to the evidence" and argued that the jury would see that he was "not guilty of the charges for the lack of proof of evidence from the State."

[1] The state originally charged Walford with four felonies, alleging that his two calls violated both the no-contact order and a separate order for protection. Just before trial, the state dismissed the charges related to violating the order for protection and proceeded on the charges related to violating the no-contact order alone.

[2] The district court had to continue Walford's trial multiple times because he refused transport from jail, discharged his public defender, and then finally stated his intent to represent himself and waived his right to counsel.

But during the direct examination of the state's first witness, a 911-call-center worker, Walford stopped participating. He did not respond when the district court asked him if he had any objection to the state playing a recording of a 911 call to the jury. And when the state finished examining the witness, Walford refused to answer the court regarding whether he wanted to cross-examine the witness.

The district court then excused the jury from the courtroom. The following exchange occurred:

> THE COURT: Mr. Walford, there's been a couple of instances where I've asked you a direct question, whether or not you have an objection or would like to cross, and you have been nonresponsive. I have removed the jury from the courtroom so that we can have a conversation. You have asked repeatedly to represent yourself. You have said you do not want advisory counsel. You have told me on several occasions that you think you can represent yourself. I determined that that was a valid and knowing waiver. Are you trying to obstruct this trial or simply have nothing to say, or are you refusing to cooperate?
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> THE DEFENDANT: (No response.)
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> THE COURT: Mr. Walford, I expect a response.
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> THE DEFENDANT: (No response.)
>
> THE COURT: Mr. Walford, I expect you to respond.
>
> THE DEFENDANT: (No response.)

After attempting for several minutes to get a response from Walford, the district court directed deputies in the courtroom to look at Walford to ensure that he was not

experiencing a medical issue. Walford did not respond to the deputies, who then stood him up at the district court's request. The court again attempted to speak to Walford:

> THE COURT: The record will reflect that Mr. Walford stood, was swaying, and is now sitting back down. I'm not trying to ignore what's going on with you, Mr. Walford, but I don't know if you're voluntarily behaving this way or if there's something else going on. Would you please communicate with me?
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> THE DEFENDANT: (No response.)
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> THE COURT: Mr. Walford.
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> THE DEFENDANT: (No response.)
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> THE COURT: Mr. Walford.
>
> THE DEFENDANT: (No response.)
>
> THE COURT: What is the problem?
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> THE DEFENDANT: (No response.)
>
> THE COURT: Mr. Walford, I know you didn't want to do this trial. You've delayed it for a good two years. We are now in the middle of trial. Is there anything you want to say?
>
> THE DEFENDANT: (No response.)

After observing that Walford appeared to be oriented and not in need of medical assistance, the district court directed deputies to remove him from the courtroom. Later, the district court ordered the deputies to bring Walford back into the courtroom.[3] They handcuffed Walford when they did so because the prosecutor stated that Walford had been

[3] After being removed, Walford changed from his court clothes back into his jail uniform and told deputies that he did not want to return to court. The deputies brought him back into the courtroom at the district court's direction.

"staring" in a threatening way and "muttering under his breath" while she played the 911 call for the jury. When Walford again refused to respond to any questions, the court ordered him removed for the duration of trial, finding that his behavior was disruptive to the proceeding.

The trial proceeded in Walford's absence. The jury found him guilty of both counts of violating the no-contact order. The district court sentenced Walford to two terms of imprisonment of twelve months and one day, consecutive both to one another and to the prison sentence that Walford was currently serving.

Walford petitioned for postconviction relief, arguing that the district court violated his Sixth Amendment right to be present at trial and challenging the district court's evidentiary rulings and jury instructions. The postconviction court denied Walford's petition.

Walford appeals.

DECISION

Walford appeared for trial, participated initially, and then withdrew completely and refused to respond to the district court's questions. Disrespectful to the court and jury? Yes. Walford's silence was disrespectful. But that is the not the question before us.

The question is whether Walford engaged in conduct that was so disruptive and disorderly that trial could not continue in his presence. *Illinois v. Allen*, 397 U.S. 337, 343-44 (1970). That is the legal standard that must be met before a defendant may be removed from their own trial. *Id.* at 343. This standard is demanding because the Sixth Amendment to the United States Constitution guarantees the right of a criminal defendant

to be present in the courtroom at every stage of trial. *Id.* at 338. And the Minnesota Rules of Criminal Procedure separately require the defendant's presence at all stages of trial.[4] Minn. R. Crim. P. 26.03, subd. 1(1).

We review a district court's decision to proceed with a trial outside of a defendant's presence for an abuse of discretion. *State v. Gillam*, 629 N.W.2d 440, 450 (Minn. 2001). To determine whether that occurred here, we turn to United States and Minnesota precedent for guidance.

We begin with the seminal case of *Illinois v. Allen*. In *Allen*, the defendant began to "argue with the judge in a most abusive and disrespectful manner" after the judge asked the defendant to restrict the scope of his questions for potential jurors. 397 U.S. at 339 (quotation omitted). The defendant threatened the judge, tore up his attorney's files, and threw the papers on the courtroom floor. *Id.* at 340. After this display, the judge warned the defendant that he would be removed upon another outburst. *Id.* The defendant continued to talk back and was removed for jury selection. *Id.* The judge gave the defendant another chance to be present at trial after a break, but the defendant persisted in his disruptive behavior and declared his intention to prevent the trial from occurring. *Id.* at 340-41. The judge then excluded the defendant from the trial until he agreed to conduct himself properly. *Id.* at 341. The Supreme Court held that the district court acted within its discretion by doing so. *Id.* at 347.

[4] In alignment with *Allen*, the rule further provides that a trial may proceed to verdict without the defendant's presence if the "defendant, after warning, engages in conduct that justifies expulsion from the courtroom because it disrupts the trial or hearing." Minn. R. Crim. P. 26.03, subd. 1(2)2.

Similarly, the Minnesota Supreme Court has upheld the removal of defendants based upon disruptive conduct. In *Gillam*, the defendant—wheelchair bound due to an injury—was removed from the courtroom after he threatened to throw a medical-waste bag at deputies. 629 N.W.2d at 443, 447. The district court gave the defendant another chance to be present at trial. *Id.* at 447. But upon his return, the defendant cursed at the judge, made obscene gestures in the presence of the jury, and was removed again. *Id.* at 447-48. The court allowed the defendant to be present on the first day of trial but removed him for the duration of trial after he disrupted the state's opening argument.[5] *Id.* The Minnesota Supreme Court affirmed the district court's removal of the defendant based on his disruptive conduct. *Id.* at 451-52; *see also State v. Kluck*, 217 N.W.2d 202, 204-05, 207 (Minn. 1974) (affirming removal of defendant who declared his intention to prevent a pretrial hearing from occurring).

Here, by contrast, Walford's silence was not disruptive to the trial itself.[6] In fact, part of the trial (testimony of the first witness and related exhibits) continued unimpeded despite Walford's silence. Simply put, as with the first witness, the trial likely could have continued to its completion with no word from Walford whatsoever. And then he would have been present for his trial. Further, had Walford remained in the courtroom, he could

[5] After the removal, the district court placed a speakerphone on the witness stand so that the defendant could still listen to the trial from outside the courtroom. *Id.* at 448.

[6] The state contends that Walford's failure to respond to the court was disruptive under *State v. Martin*, 555 N.W.2d 899, 901 (Minn. 1996). But the *Martin* court analyzed whether the defendant's silence—*while testifying*—showed *contempt* of court, not disruptive conduct. *Id. Martin* does not govern the situation before us.

have decided to participate later on. Because Walford's silence did not disrupt the trial itself, Walford did not engage in conduct justifying his expulsion from the courtroom. Accordingly—although the district court was placed in a difficult situation— removing Walford violated his Sixth Amendment right to be present at his trial.

Still, the state argues that Walford's removal was justified because he chose not to return to trial after his initial removal, effectively waiving his right to be present. The state points to the fact that Walford changed out of his jail clothes and told deputies he did not want to return to court. Certainly, a defendant may waive their right to be present at trial. But conduct *after* removal cannot constitute waiver of this constitutional right. *See Gillam*, 629 N.W.2d at 451 (concluding that a defendant who appeared at trial and was later removed did not waive his right to be present but was excluded based on conduct). And the district court explicitly stated that Walford's removal was due to his disruptive behavior. Because Walford appeared and was removed, his removal must be justified under *Allen*. Or not at all.

Next, the state contends that Walford's conduct at previous hearings justified the district court's decision to remove him from trial. Walford was in fact disruptive at a proceeding seven weeks earlier, decrying the proceedings as a "circus," talking over the judge, and ultimately screaming at the district court. But no precedent supports the argument that the district court was permitted to rely on Walford's past conduct to evaluate whether to remove him from trial. The *Gillam* court affirmed the defendant's removal based on his conduct during trial. *Id.* at 452. It considered Gillam's past behavior, but only to conclude that the district court did not err by not allowing him to return following

the second exclusion. *Id.* Accordingly, we must evaluate whether Walford's removal was justified based on his conduct at the time of trial alone.

Finally, the state asserts that Walford's self-represented status made his conduct more disruptive and justified his removal.[7] But Walford being self-represented cuts the other way because his exclusion resulted in him having no representation at all, unlike the defendants in *Allen* and *Gillam*. And Walford's removal effectively punishes Walford for exercising another constitutional right—the right to represent himself in court.[8] *Holt v. State*, 772 N.W.2d 470, 478 (Minn. 2009). Because Walford's removal prevented him from presenting any defense to the jury, the state has not demonstrated that the district court acted within its discretion when removing Walford from trial.

Having determined that the district court abused its discretion by removing Walford from the trial, we must next consider whether that error requires reversal. *State v. Kuhlmann*, 806 N.W.2d 844, 850 (Minn. 2011). We generally review most constitutional errors for harmless error, meaning that if the defendant establishes an error, the state must show that the error was harmless beyond a reasonable doubt. *Id.* "An error is harmless beyond a reasonable doubt if the jury's verdict was surely unattributable to the

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[7] The state relies on a case in which two co-defendants, who fired their attorneys on the day of trial and refused to participate, waived their right to be present by their conduct. *State v. Worthy*, 583 N.W.2d 270, 274 (Minn. 1998). But the defendants in *Worthy* left the courtroom of their own volition, instead of being removed like Walford. *Id.* *Worthy* is inapposite.

[8] The Minnesota Supreme Court stated, in a different context, that a conviction following the denial of a defendant's right to self-representation must be reversed. *State v. Bey*, 975 N.W.2d 511, 520-21 (Minn. 2022).

error." *State v. McInnis*, 962 N.W.2d 874, 886 (Minn. 2021) (quotation omitted). If an error is harmless, we will affirm the conviction. *Id.* at 890. But if the error is structural—as Walford asserts—reversal of the conviction is required. *Kuhlmann*, 806 N.W.2d at 851.

Our precedent has not addressed whether the exclusion from trial of a self-represented defendant is reviewed for harmless error or structural error.[9] But we need not decide here whether Walford's exclusion was a structural error because, assuming the lower standard applies, we conclude that the error was not harmless beyond a reasonable doubt.

Here, the district court's expulsion of Walford—a self-represented individual—rendered him entirely unrepresented for the balance of trial.[10] A verdict reached when a jury hears only the state's evidence after the defendant's removal cannot be said to be "surely unattributable" to the error in conducting the trial in Walford's absence. The defendants in *Allen* and *Gillam* both were represented by counsel even though they were

[9] Although the Minnesota Supreme Court observed that "an error in continuing with a trial in the defendant's absence . . . is subject to harmless error analysis," it made that statement in context of a represented defendant's voluntary absence, not the involuntary removal of a self-represented defendant. *State v. Finnegan*, 784 N.W.2d 243, 251 n.6 (Minn. 2010).

[10] In a federal case involving disruptive conduct, the Second Circuit observed that a trial judge who is faced with a defendant who engages in misconduct and insists upon self-representation is "placed on the horns of a serious dilemma." *Davis v. Grant*, 532 F.3d 132, 143 (2d Cir. 2008). The *Davis* court expressed a preference for appointing standby counsel before a self-represented defendant is removed because otherwise the defendant has no ability to present witnesses or cross-examine adverse witnesses, question potential jury members, or present an opening or closing statement. *Id.* And we observe that under the Minnesota Rules of Criminal Procedure, a district court "may appoint advisory counsel" over the objection of a party "because of concerns about the fairness of the process." Minn. R. Crim. P. 5.04, subd. 2.

removed from court.[11] 397 U.S. at 341; 629 N.W.2d at 448. Because Walford could have begun participating again, the effects of the wrongful removal are impossible to measure here. Given this impossibility, the state cannot meet its burden of showing that the error was harmless beyond a reasonable doubt.

In sum, the only conceivably disruptive conduct at trial in which Walford engaged was remaining silent. Although this silence was disrespectful, the trial could have proceeded despite it. The district court abused its discretion by removing Walford on this basis, leaving him entirely unrepresented. And because the state has not shown that Walford's removal was harmless beyond a reasonable doubt, we reverse and remand for a new trial.[12] *State v. Cassidy*, 567 N.W.2d 707, 710-11 (Minn. 1997).

Reversed and remanded.

[11] The defendant in *Gillam* requested to represent himself during trial, but the court appointed his former attorney as standby counsel and allowed the defendant to listen to the trial via speakerphone. 629 N.W.2d at 448.

[12] Because we reverse and remand for a new trial on this issue, we do not reach the other claims Walford raised in his appellate and pro se briefs, including challenges to the district court's evidentiary rulings, its jury instructions, and the effectiveness of the assistance offered by Walford's counsel prior to Walford's decision to represent himself.