STATE OF MINNESOTA

IN SUPREME COURT

A20-0779

Court of Appeals Anderson, J.

State of Minnesota,

Respondent,

vs.

Filed: July 6, 2022
Office of Appellate Courts

Rodney Donta Jackson,

Appellant.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant State Public Defender, Saint Paul, Minnesota, for appellant.

S Y L L A B U S

1. The appropriate remedy for a violation of a defendant's asserted right to a public trial during a post-trial *Schwartz* hearing is a remand for a new, public hearing involving the jurors who previously privately testified.

2. No exceptional circumstances exist to warrant using our inherent supervisory power over the district courts given the good-faith attempt by the district court to meet the applicable legal standard.

Affirmed.

O P I N I O N

ANDERSON, Justice.

This dispute concerns the proper remedy for a violation of a criminal defendant's asserted constitutional right to a public trial during part of a post-trial *Schwartz* hearing.[1] After a jury found appellant guilty of second-degree murder, one of the jurors provided feedback suggesting that she might have introduced extraneous information during deliberations. To assess the effect of this information on the verdict of the jury, the district court held a *Schwartz* hearing, which was divided into two parts because of scheduling conflicts of two jurors. To ensure the testimony of the first two jurors did not influence the remaining jurors, the court ordered the first part of the *Schwartz* hearing closed to the public. After all the jurors testified, the court found that the extraneous information did not impact the verdict. Concluding that the district court erred when it closed the first part of the *Schwartz* hearing to the public, the court of appeals remanded to the district court to

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[1] Named after *Schwartz v. Minneapolis Suburban Bus Co*., 104 N.W.2d 301 (Minn. 1960), "a *Schwartz* hearing is a procedure in which a district court may investigate alleged juror misconduct by summoning a juror for questioning about the alleged misconduct in the presence of counsel for both parties." *Martin v. State*, 969 N.W.2d 361, 363 n.1 (Minn. 2022). The constitutional guarantee to a public trial 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). But the right does not apply to "routine administrative proceedings" such as basic evidentiary rulings and matters traditionally addressed during bench conferences. *State v. Smith*, 876 N.W.2d 310, 329 (Minn. 2016). Our use of the phrase "asserted constitutional right" here reflects the fact that we have never considered the question of whether the public trial right attaches to a *Schwartz* hearing. For purposes of this appeal, we assume the right attaches to a *Schwartz* hearing because the parties do not contest this question of first impression. *See State v. Meger*, 901 N.W.2d 418, 422 n.4 (Minn. 2017) (assuming, without deciding, a point agreed upon by the parties).

have the two jurors who testified in private questioned again in a public hearing. Because the remand order of the court of appeals is appropriate, we affirm.

FACTS

On November 6, 2018, appellant Rodney Donta Jackson and his girlfriend drove to a gas station and convenience store in South Minneapolis. After parking, other vehicles blocked his car by parking in front of, and behind, Jackson's car. Jackson's girlfriend asked the occupants of the car parked in front, M.A. and a passenger, to move their car so that she and Jackson could leave. M.A. refused, and an altercation ensued. According to Jackson, M.A. and his passenger were rude and made violent threats. The passenger testified that Jackson repeatedly hit their car with his own vehicle and made violent threats. A bystander testified that he convinced M.A. and his passenger to disengage and go into the store but that Jackson's girlfriend started throwing objects. Jackson's girlfriend admitted throwing a container of Vaseline. The bystander arranged for the car behind Jackson to move, and Jackson and his girlfriend left the gas station. But after leaving, Jackson's girlfriend told Jackson that she wanted to retrieve something she had dropped. Jackson parked across the street and his girlfriend returned to the gas station. There, she threw a can at M.A.'s car. M.A. retaliated by throwing rocks at Jackson's girlfriend, who screamed and ran back to Jackson's car. Jackson heard the scream and saw his girlfriend running back to his car, pursued by M.A. Jackson, who had a valid permit to carry a handgun, drew his gun and fired a single shot at M.A. The shot struck M.A. in the head, killing him. Jackson and his girlfriend then drove away, ate at a restaurant, and went to see a movie. They were arrested leaving the movie theater.

The State charged Jackson with first-degree premeditated murder under Minn. Stat. § 609.185(a)(1) (2020), and second-degree intentional murder under Minn. Stat. § 609.19, subd. 1(1) (2020). The trial occurred between October 21 and November 1, 2019. The State presented eyewitness testimony and security camera footage of the incident. Jackson admitted to firing the shot that killed M.A. But Jackson testified that he saw M.A. holding a gun and claimed that he fired in self-defense. No other witnesses reported seeing M.A. armed, no weapon was found on the scene, and no witnesses reported seeing anyone touching M.A.'s body or removing anything from the scene.

The district court instructed the jury on the elements of a self-defense claim, including that "the judgment of the defendant as to the gravity of the peril to which he or another is exposed must have been reasonable under the circumstances" and that "there was no reasonable possibility of retreat to avoid the danger." The jury found Jackson guilty of second-degree intentional murder and not guilty of first-degree premeditated murder.

At the request of the district court, the jurors provided post-trial anonymous written feedback regarding their experience as jurors. One juror stated that the State should have "[p]resented info on conceal [and] carry—responsibility of self-defense. Should have explained what [Jackson] would have learned in conceal and carry class regarding MN law about <u>obligation</u> to retreat. This jury was going for self defense and not guilty before I shared what's taught in permit class." Jackson moved for a post-trial *Schwartz* hearing based on the statements made by the juror, arguing that the statements were extraneous information that could have prejudiced the jury.

The district court granted Jackson's motion from the bench on November 26, 2019, and scheduled a *Schwartz* hearing for January 17, 2020. The court cautioned Jackson and the State not to contact the jurors to avoid potentially influencing the testimony. And the court noted that members of the press were present in the courtroom and asked that no reporting on the hearing occur, also to avoid influencing the jurors who would testify.

On December 16, 2019, the district court told the parties that, despite the court's request, a local newspaper had published a story about the potential juror misconduct and at least one juror reported reading the story. Further, the court had learned that two of the jurors would be out of the country on the day of the January 17, 2020 hearing: one would be on a week-long vacation and the other was working abroad from early January 2020 until the middle of May 2020. Rather than delay the hearing for over 5 months, the court proposed dividing the hearing into two parts so that the jurors who would be out of the country could be questioned before they left.

Jackson's attorney objected to the proposed division, arguing that the jurors who testified later would be influenced by the earlier testimony. The State suggested that the district court order the jurors not to follow the matter in the media to avoid influencing the later testimony. Jackson's attorney argued that the court did not have the authority to do so. According to Jackson's attorney, the court should simply enforce the subpoenas and proceed with the originally planned hearing date, thereby forcing the two jurors to cancel their trips abroad.

The district court overruled the objection and divided the *Schwartz* hearing into two parts. The court scheduled the first hearing on December 31, 2019, to receive testimony

from the two jurors who were going abroad. The remaining jurors would still testify on January 17, 2020. To prevent the testimony of the first two jurors from influencing the testimony of the remaining jurors, the court ordered the December 31 hearing closed to the public. The court noted that under the Supreme Court of the United States decision in *Waller v. Georgia*, a defendant's right to a public trial may be outweighed when there is (1) an overriding interest in the closure, (2) the closure is narrowly tailored, (3) the court considers and rejects reasonable alternatives, and (4) the court makes sufficient findings on the record to justify the closure. 467 U.S. 39, 48 (1984). Applying *Waller* to the facts here, the court first found that the closure was justified by an overriding interest in the fairness of the proceeding, and second, that the closure was no broader than necessary because the January hearing involving the 10 remaining jurors would still be open to the public. Third, the court considered and rejected alternatives to the closure, including asking the media not to report on the December hearing, waiting until all the jurors would be available, and enforcing the subpoenas notwithstanding the conflicting plans of the jurors. The court also scheduled a hearing for December 27, 2019, to give the public and the media an opportunity to object to the closure if they desired. No record exists of the December 27 hearing, though it appears that no members of the public or the media attended.

The divided *Schwartz* hearing occurred as scheduled, with all 12 jurors testifying over the two separately scheduled days. The court asked each juror three questions: (1) whether they recalled discussing conceal-and-carry permits or the requirements to obtain a conceal-and-carry permit; (2) if yes, what specifically they recalled; and

(3) additional clarification about context, length of discussion, and the number of jurors involved. On December 31, the juror who provided the initial feedback that precipitated the *Schwartz* hearing testified that she discussed what Jackson would have learned in his conceal-and-carry-permit classes. She testified that she told the other jurors: "You don't kill somebody because you're mad because they trash[] talked you or did something to you. It would be because you feel like your life is absolutely threatened and you didn't have any other option." The juror testified that this discussion came up only once. The other juror testifying on December 31 separately testified that the jury discussed the requirements for a conceal-and-carry permit and that "[t]o have a gun, you must know that if you shoot it, you are responsible for it." The juror said the discussion was not long.

The remaining 10 jurors testified individually, in public, on January 17, 2020. Each juror testified outside the presence of the others. All 10 jurors testified that permit-to-carry classes were discussed during deliberation. One juror estimated that the discussion "couldn't have been longer than an hour." The remaining jurors recalled the discussion as being brief, describing it as "not long," "in passing," taking a "[c]ouple minutes," or lasting "five or ten minutes." Several jurors, although not asked to do so, stated that this discussion did not affect the verdicts. After the hearings concluded, the court denied Jackson's motion for a new trial, finding that "the extraneous information was not unduly prejudicial but was merely a recitation of the law of self-defense."

The court of appeals concluded that closing the first part of the hearing to the public violated Jackson's right to a public trial. *State v. Jackson*, 964 N.W.2d 659, 666 (Minn. App. 2021). The court did not consider the first *Waller* factor—whether there was an

overriding interest in the closure—as it found that the other elements were not established. *Id*. The court held that the closure was overbroad as the stated concern was media exposure, but the district court excluded everyone from the hearing and not just the press. *Id*. And the court held that the district court failed to consider "the most reasonable alternative": instructing the jurors to "vigilantly ignore" reporting on the case. *Id*. But the court held that a new trial was not the appropriate remedy as it would be disproportionate to the violation. *Id*. at 667. Rather, the court remanded the case "to conduct a new *Schwartz* hearing involving the first two jurors" who had testified in private. *Id*. The court also noted that if, at the second hearing, the two jurors testified "in a manner materially different from their original, private testimony," the district court should also conduct an additional *Schwartz* hearing involving the other 10 jurors. *Id*. Jackson petitioned for review of the appropriate remedy for the asserted violation of the asserted constitutional right, and we granted review.

ANALYSIS

Both the United States and Minnesota Constitutions provide that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial." U.S. Const. amend. VI; Minn. Const. art. I, § 6. The right to a public trial originated in the English common law and has been variously attributed as a reaction to the excesses of the Spanish Inquisition, the English Court of Star Chamber's secret interrogations, and the French monarchy's lettres de cachet (royal decrees ordering that a subject be exiled or imprisoned without defense or appeal). *In re Oliver*, 333 U.S. 257, 268–69 (1948).

The constitutional guarantee to a public trial 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). But the right does not apply to "routine administrative proceedings" such as basic evidentiary rulings and matters traditionally addressed during bench conferences. *State v. Smith*, 876 N.W.2d 310, 329 (Minn. 2016). We have never considered the question of whether the public trial right attaches to *Schwartz* hearings. Because the parties do not contest this question of first impression, and because neither party petitioned this court for review of the issue, we assume without deciding that the public trial right attaches to a *Schwartz* hearing.[2] *See State v. Meger*, 901 N.W.2d 418, 422 n.4 (Minn. 2017) (assuming, without deciding, a point agreed upon by the parties).

Jackson asserts that the only appropriate remedy for a violation of his asserted right to a public trial during a post-trial *Schwartz* hearing is a new trial—or at least a new *Schwartz* hearing with all 12 jurors present—because a *Schwartz* hearing is a "substantive part of a trial." In the alternative, he urges us to grant a new trial using our inherent supervisory authority over the district courts.

I.

The appropriate remedy for a violation of the rights of a criminal defendant is a legal question, which we review de novo. *Wheeler v. State*, 909 N.W.2d 558, 567 (Minn. 2018). When a defendant's right to a public trial is violated, structural error has occurred and the

[2] We also assume without deciding that the district court's decision to close the first part of the *Schwartz* hearing to the public was overbroad because the State does not challenge the analysis by the court of appeals of the *Waller* factors.

violation is not subject to a harmless error analysis. *State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009). But the remedy "should be appropriate to the violation, and a retrial is not required if a remand will remedy the violation." *Id.*

We have not previously addressed the circumstances in which a remand is an appropriate remedy rather than a new trial. It is generally recognized, however, that in certain circumstances, the " 'do over' can be limited to the specific proceeding that was affected by the closure." Jocelyn Simonson, *The Criminal Court Audience in A Post-Trial World*, 127 Harv. L. Rev. 2173, 2221 (2014). And other courts have observed that when the public trial right violation occurs during an "easily separable part of a trial," the appropriate remedy is a remand of the case to redo only the portion that was improperly closed to the public. *State v. Wise*, 288 P.3d 1113, 1122 (Wash. 2012).

The two most instructive decisions concerning the appropriate remedy for a public trial right violation are the Supreme Court of the United States decisions in *Waller v. Georgia*, 467 U.S. 39, 49–50 (1984), and *Presley v. Georgia*, 558 U.S. 209 (2010). In *Waller*, the district court closed a pretrial suppression hearing to the public. 467 U.S. 41–42. Although the *Waller* Court held that this closure was unconstitutional, the Court did not order a new trial. *Id*. at 48–50. Rather, it held that a "new trial need be held only if a new, public suppression hearing results in the suppression of material evidence not suppressed at the first trial, or in some other material change in the positions of the parties." *Id*. at 50. Otherwise, a new trial would be a "windfall" to the defendant. *Id*.

But the *Presley* Court reversed a conviction due to a public trial violation during voir dire without limiting the scope of relief on remand to the district court. 558 U.S. at

216. The Court did not discuss the specific remedy and remanded for "further proceedings not inconsistent with this opinion." *Id*. But unlike in *Waller*, the *Presley* Court did not state that the remedy should be limited in any way. *Id*. The Georgia state courts then ordered a new trial, not merely conducting voir dire again. *See Presley v. State*, 706 S.E.2d 103, 104 (Ga. Ct. App. 2011). Other courts since *Presley* have also held that a violation of a defendant's right to a public trial due to an improper courtroom closure during voir dire requires a new trial, not merely a substituted voir dire process on remand. *E.g.*, *United States v. Gupta*, 699 F.3d 682, 690 (2d Cir. 2012); *United States v. Agosto-Vega*, 617 F.3d 541, 547–48 (1st Cir. 2010).

Jackson argues that a post-trial *Schwartz* hearing is analogous to voir dire because both proceedings involve questioning jurors under oath and implicate the validity of the jury's verdict by attempting to prevent or address juror bias. He therefore argues that we should remand for a new trial in accordance with *Presley*. For the reasons that follow, we conclude that a post-trial *Schwartz* hearing is more analogous to a suppression hearing than voir dire.

Post-trial *Schwartz* hearings, pretrial suppression hearings, and voir dire all involve questioning individuals under oath. But unlike voir dire, the purpose of *Schwartz* and suppression hearings is to build a record of past facts relevant to limited and discrete issues—whether misconduct occurred during jury deliberations and whether the government engaged in conduct that requires the suppression of evidence, respectively. *Martin v. State*, 969 N.W.2d 361, 363 n.1 (Minn. 2022); *State ex rel. Rasmussen v. Tahash*, 141 N.W.2d 3, 13–14 (Minn. 1965). Also, unlike voir dire, *Schwartz* and suppression

hearings are standalone proceedings that can easily be separated from the rest of the trial.[3] The inseparable nature of voir dire has been recognized by other courts. For example, in *Wise* the Supreme Court of Washington wrote, "we cannot reasonably order a 'redo' of voir dire to remedy the public trial right violation that occurred here. The jury would necessarily be differently composed, and it is impossible to speculate as to the impact of that on [the defendant's] trial." 288 P.3d at 1122. But there is no reason why we cannot order a repetition of a post-trial *Schwartz* hearing, especially when the participants and the questions are fixed, the jurors are each questioned separately from the others, and the jury has already deliberated and returned its verdict.

Having concluded that a post-trial *Schwartz* hearing is more analogous to a pretrial suppression hearing, we now conclude that the appropriate remedy is a remand to conduct a public *Schwartz* hearing rather than a new trial. Not only is our conclusion consistent with *Waller*, 467 U.S. at 49–50, it provides a proportionate remedy for the error here, which only implicated brief testimony from 2 of the 12 jurors.

Jackson argues that even if the appropriate remedy is a remand for a public *Schwartz* hearing rather than a new trial, the district court should be required to conduct the new *Schwartz* hearing with all 12 jurors. Jackson analogizes to *Waller*, where the Supreme Court ordered a redo of an entire suppression hearing and not just the portions that had

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[3] Although we do not reach the issue, we note that the Ninth Circuit held that sentencing hearings are likewise separable standalone hearings in *United States v. Rivera*, 682 F.3d 1223, 1236–37 (9th Cir. 2012). The Ninth Circuit therefore held that the remedy for an improper courtroom closure during sentencing is to redo only the sentencing hearing. *Id*.

been closed to the public. 467 U.S. at 50. But the district court in *Waller* closed the *entire* suppression hearing to the public; there was no difference between "the part of the hearing that was closed to the public" and "the entire hearing." Jackson has not shown why it would be necessary to repeat the testimony from the 10 unaffected jurors, especially when the focus of a *Schwartz* hearing is not a juror's particular mental process, but the "probable effect [of the extraneous information] on a hypothetical average jury." *State v. Cox*, 322 N.W.2d 555, 559 (Minn. 1982). Here, the public trial violation affected only the brief testimony of two jurors. Absent any other indication of misconduct, it would be disproportionate to repeat the testimony of the other 10 jurors who have already testified properly and in public. If the two jurors testify in a manner that is materially different from how they testified in the original proceeding, then the district court should conduct a new, public *Schwartz* hearing involving the remaining 10 jurors.

II.

In the alternative, Jackson argues that we should use our supervisory power over the district courts to order a new trial because the district courts have repeatedly ignored our directives regarding courtroom closures. Citing *State v. Brown*, 815 N.W.2d 609, 618 (Minn. 2012), Jackson observes that we have repeatedly urged that courtroom closures be done "carefully and sparingly." He then asserts that the district courts have not listened, citing to the dissenting opinions in *State v. Silvernail*, 831 N.W.2d 594, 607 (Minn. 2013) (Anderson, Paul H., J., dissenting), and *State v. Taylor*, 869 N.W.2d 1, 23 (Minn. 2015) (Page, J., dissenting).

We have the power to grant necessary relief arising from our supervisory power over the district courts. *State v. Beecroft*, 813 N.W.2d 814, 846 (Minn. 2012). Even when we would not usually grant a new trial, we can reverse "prophylactically or in the interests of justice." *State v. Salitros*, 499 N.W.2d 815, 820 (Minn. 1993). But such relief is limited to exceptional circumstances. *Beecroft*, 813 N.W.2d at 846. For example, in *Salitros*, the closing argument of the prosecution included a call for the jury to convict the defendant to teach him a "lesson" in accountability, despite our prior opinions directly criticizing such arguments. 499 N.W.2d at 819–20. Even though we could not say that the error was prejudicial to the defendant, we reversed to "ma[ke] it clear to prosecutors who persist in employing such tactics that we retain the option of reversing prophylactically." *Id*. at 820; *see also State v. Cabrera*, 700 N.W.2d 469, 475 (Minn. 2005) (reversing a conviction due to a prosecutor's "improper injection" of race as an issue at trial after we had issued prior warnings that such statements must be scrupulously avoided).

Having reviewed the record, we conclude that Jackson's case does not involve exceptional circumstances. The district court was not on explicit notice that the Sixth Amendment applied to *Schwartz* hearings because we have never addressed the issue, and prior to this dispute neither had the court of appeals. Still, the district court made a good-faith effort to apply the *Waller* factors, making findings, and developing a record. Indeed, the primary fault identified by the court of appeals was the failure to consider ordering the jurors to avoid media coverage of the hearing, an alternative that Jackson's attorney had argued was not a possibility.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.