STATE OF MINNESOTA

IN SUPREME COURT

A21-0065

Pennington County Thissen, J.

Devon James Pulczinski,

Appellant,

vs. Filed: April 6, 2022
Office of Appellate Courts

State of Minnesota,

Respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, Saint Paul, Minnesota, for appellant.

Keith Ellison, Minnesota Attorney General, Peter Magnuson, Assistant Attorney General, Saint Paul, Minnesota; and

Seamus Duffy, Pennington County Attorney, Thief River Falls, Minnesota, for respondent.

S Y L L A B U S

1. The unobjected-to limitations that the district court placed on the presence of the public in the trial courtroom in response to the COVID-19 pandemic did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.

2. The district court did not abuse its discretion by denying appellant's motion for a hearing under Minn. R. Crim. P. 26.03, subd. 20(6), and *Schwartz v. Minneapolis Suburban Bus Co.*, 104 N.W.2d 301, 303 (Minn. 1960).

Affirmed.

O P I N I O N

THISSEN, Justice.

This case requires us to resolve two questions. First, is appellant Devon Pulczinski entitled to relief from his criminal convictions based on unobjected-to limitations that the district court placed on the presence of the public in the trial courtroom in response to the COVID-19 pandemic? Second, did the district court abuse its discretion by denying Pulczinski's motion for a hearing under *Schwartz v. Minneapolis Suburban Bus Co.*, 104 N.W.2d 301, 303 (Minn. 1960), and Minn. R. Crim. P. 26.03, subd. 20(6)? Because the unobjected-to limitations did not seriously affect the fairness, integrity, or public reputation of judicial proceedings, and because the district court did not abuse its discretion by denying a *Schwartz* hearing under Rule 26.03, subdivision 20(6), we affirm.

FACTS

A Pennington County grand jury indicted Pulczinski with first-degree murder in violation of Minn. Stat. § 609.185(a)(1) (2020); second-degree intentional murder in violation of Minn. Stat. § 609.19, subd. 1(1) (2020); and first-degree arson in violation of Minn. Stat. § 609.561, subd. 1 (2020), in connection with the death of A.E. Pulczinski pleaded not guilty and demanded a jury trial.

Pulczinski's jury trial was scheduled to start on April 13, 2020. But on March 13, 2020, Governor Tim Walz declared a peacetime emergency because of the COVID-19 pandemic. On March 20, the Chief Justice issued an order barring all district courts from beginning new jury trials before April 22, or until further order. Continuing Operations of

The Courts of the State of Minnesota Under a Statewide Peacetime Declaration of Emergency, No. ADM20-8001, Order at 3 (Minn. filed Mar. 20, 2020).

On May 15, 2020, the Chief Justice issued an Order Governing the Operations of the Minnesota Judicial Branch Under Emergency Executive Order Nos. 20-53, 20-56, ADM20-8001 (Minn. filed May 15, 2020). The Order noted that the Judicial Branch was entering a "transitional phase" to allow in-person proceedings. *Id.* at 1. The Order further required district courts to adhere to safety and exposure precautions laid out in the Judicial Branch COVID-19 Preparedness Plan. *Id.* at 2, 5–7.

Consistent with direction from the Judicial Council, each county was required to prepare a jury trial plan and have it approved before jury trials could be held. Pennington County submitted and received approval of its plan, and we take judicial notice of it. The Pennington County plan notes that it "takes into consideration the resources of the Ninth Judicial District and the capacity of our Judicial Center." The Pennington County plan also states that "[s]ocial distance markings have been made in the courtrooms and the jury room to ensure everyone maintains proper spacing of 6 feet distance (360 degrees) at all times." To ensure social distancing, the plan states that members of the public and/or media may observe court proceedings via interactive television capabilities (ITV) from either the other courtroom or the Pennington County boardroom, which is in the same building as the courtrooms. The plan also notes that both video/audio observation and audio only would be acceptable mediums.

Pennington County also submitted a Social Distancing Chart for Jury Trials (Jury Chart), which shows proposed seating arrangements for counsel, court staff, and jurors.

The Jury Chart marks 14 socially distanced circles in the courtroom gallery (the courtroom space where the public sits in nonpandemic times) for 12 jurors and 2 alternates.

Additionally, the Pennington County plan references a letter that all potential jurors would receive from the Chief Judge of Pennington County. In the letter, the Pennington County Chief Judge wrote: "Our goal is to protect the rule of law and gradually resume normal functions in our courts while at the same time protecting the health of our community members who are exercising and performing their duties, responsibilities, and rights in our courthouses." She also assured potential jurors that there would be ample space for social distancing, stating: "All of our courtrooms have been carefully mapped and marked to help us observe proper distancing during the trial. Once the courtroom has reached its maximum capacity consistent with safe distancing, no additional persons will be permitted to enter."

On August 12, 2020, the district court held a pretrial hearing. At the outset, the court noted, "[E]arlier today I met with counsel to go over some logistics of how to conduct a jury trial in the midst of a pandemic. So thank you, counsel, that was very productive." The lawyers made no response at that time.

The parties did have some discussion related to accommodating the public. During the August 12, pretrial hearing, defense counsel requested that witnesses who had finished testifying be allowed to watch the trial from the viewing rooms:

> Also, it would be my position since based on our prior discussions from today and the fact that there is going to be two rooms for the—or potentially two rooms for people to watch the trial, it would be that once all witnesses are done and they're released, then they could watch the trial if there is still a trial ongoing.

The prosecutor consented.

Later, after discussing other pretrial matters, the court asked, "Counsel, were there any other issues that either side would like to bring up here today?" In response, the prosecutor asked, "Do we need to put anything on the record regarding the public viewing? How things like that are going to be addressed?"

The district court then responded by describing on the record the protocols and how the courtroom would be set up differently because of the COVID-19 pandemic. This included safety and exposure precautions, like the need for social distancing. The court stated, "Mr. Pulczinski is entitled to a public trial, and so the way that counties and our state are conducting trials is by having public access in other places, not just the courtroom itself."

The district court explained that the jury would sit in the gallery six feet apart and that they were "going to take up that whole space and that is why we are not able to have members of the public in this particular courtroom." The court further explained that the public could watch the trial in Courtroom 1 and the Pennington County Board Room, both of which were equipped with ITV.

At the hearing, the district court explained that it had submitted a jury plan through two layers of state court administration so it could conduct trials in Pennington County. An acceptable plan required social distancing. The court added, "You can see we've got signs and tape and markers on the floor and a different configuration for how counsel is sitting, and this is all because of our pandemic and the social distancing requirements that we have

to follow." Additionally, the court talked about the need to accommodate Pulczinski's family and the victim's family.[1]

After describing the protocols, the court once again asked, "Counsel, any other matters that you would like to put on the record or you would like me to put on the record?" Defense counsel did not raise any objections to the trial restrictions; instead, he responded with a clarifying question about motions in limine and impeaching a witness.

At the end of the pretrial hearing, defense counsel noted his dissatisfaction with having to sit six feet away from his client. But he consented to the trial restriction because "given the pandemic, given the work everyone has done to get this trial going and given the fact that it's been about a year and a half since the allegations, we are comfortable with the approved distance between myself and my client." The court acknowledged defense

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[1] The following exchange occurred regarding the need to accommodate family in the separate viewing rooms:

> The Court: I've had extensive conversations with counsel for I know family, friends who'd like to come to these hearings, which is your right to do so. We don't have unlimited space and we do still have social distancing requirements in those [viewing] rooms, and so it's important that those be followed because we just don't have unlimited seating for everybody. *But I'm sure that if you are a family member in this case who have been talking with counsel, I expect that you still might have conversations about that.*
>
> Prosecutor: And just so the record is clear, we've talked about designating, you know, one place for victim's family and another place for defendant's family so that way there's access for both while social distancing, everything like that. And we understand that there is going to be conversations that need to be had about limited space and things like that.
>
> The Court: Correct.
>
> Prosecutor: And it is my understanding that the Court is going to allow, if you live in the same household, you can be closer together, but if you don't, you have to maintain the six feet of distance.
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> The Court: That's correct. Just like we're doing here today.

(Emphasis added.)

counsel's statements and remarked that the Pennington County jury plan included six feet of space between attorneys, clients, and even co-counsel.

The district court held voir dire from August 31 through September 3, 2020. On the first day, a potential juror was excused because she had possible COVID-19 symptoms. Later that day, the parties learned that an essential witness for the State was exposed to COVID-19. Because of health concerns, the parties discussed having the essential witness—a lead investigator—testify in the adjoining courtroom via ITV. Pulczinski consented on the record and waived his right to confront her in person.

But the next day, the parties agreed to postpone the trial for two weeks to accommodate the witness who had to quarantine. Defense counsel expressed his client's preference for in-person testimony. After discussion, the district court agreed to start the trial on September 14, 2020, so that the witness could "safely come into the courthouse and testify."

The parties then agreed to continue with jury selection. The district court allowed one additional alternate juror to be seated in case something unexpected happened or someone got COVID-19. Before the trial began, however, the court excused the additional alternate juror because "15 is one too many for how many we can socially distance safely inside the courtroom itself." Finally, because the trial date was postponed, the court held a hearing before the jurors were sworn in for trial duty to ensure that no juror had learned anything about the case over the two-week delay.

At trial, the State presented the following evidence. In March 2019, Pulczinski was living in an upper duplex in Thief River Falls. Pulczinski knew the victim because they were both part of the local drug scene and addicted to methamphetamine.

On March 22, 2019, the police executed a search warrant at Pulczinski's apartment. Pulczinski was not present during the search, but the police seized methamphetamine and drug paraphernalia. They also arrested three other people who were in the apartment.

Following the search, Pulczinski believed that people had stolen some of his things. He suspected that several individuals, including the victim, were involved in the thefts. Pulczinski told a friend that he wanted to get "payback" and "revenge" against them. He asked the friend to reach out to the victim so that he could meet up with the victim to "surprise her" and "take her stuff." On March 26, the night before the murder, the friend sent a message to the victim on Facebook.

The next day, on March 27, around 4:20 p.m., the victim's grandmother and great-aunt dropped off the victim at Pulczinski's apartment. The victim asked her grandmother and great-aunt to wait for her. They exchanged a few text messages because the grandmother and great-aunt were going to run some errands. When they got back, the grandmother sent a text message to the victim to let her know that they had returned. Although the grandmother's phone showed that the text message was read, the victim did not reply. The grandmother then sent the victim more text messages, but her phone indicated that those messages were not read. After waiting between 45 to 60 minutes, the grandmother got out of the car to get the victim.

When the grandmother got out of the car, she saw that Pulczinski's apartment was on fire. She ran to the duplex and called out for the victim, but there was no response. Firefighters responded to the fire and put out the flames. They found a body on the kitchen floor and a propane tank in the hallway. The body was later identified as the victim. She was found face down with a plastic bag around her head and cords around her neck. Her hands were also tied behind her back and her ankles were tied together. The medical examiner determined that she died from asphyxia due to the plastic bag. Initially, officers were unable to locate Pulczinski after the fire. They were suspicious of him because of the recent search warrant. Later that evening, law enforcement arrested Pulczinski with the help of two informants who were friends of Pulczinski. The two informants and law enforcement devised a plan whereby the informants would get Pulczinski into the car, after which law enforcement would stop the car and arrest Pulczinski. The plan worked, and later when Pulczinski was removed from the car, he said, "They had nothing to do with it. It was all me."

As part of the murder investigation, law enforcement also interviewed N.H., a friend of Pulczinski's, three different times. Over the course of the interviews, N.H.'s explanation of what happened evolved. During his third interview, N.H. admitted being in Pulczinski's apartment when the victim was killed. At trial, N.H. testified under protection of immunity and was subject to cross-examination. A partial fingerprint from a piece of electrical tape from the bag around the victim's head matched N.H.'s left ring finger.

N.H. testified that he and Pulczinski became friends through mixed martial arts training. He also testified that Pulczinski had contacted him because Pulczinski believed

that people had stolen some of his things and that "he had some asses he wanted kicked." Pulczinski then listed names, and N.H. responded that he wanted "nothing to do with the female, but any of the guys I'm game." According to N.H., he went over to Pulczinski's apartment on March 27. While they were hanging out, the victim came over. N.H. was upset to see the victim and followed Pulczinski into his bedroom and asked what was going on. Pulczinski ignored him. Pulczinski grabbed a few things from the bedroom, like cotton balls and Q-Tips, and N.H. thought Pulczinski was going to inject some methamphetamine. Pulczinski and the victim then argued. As the victim was about to leave, Pulczinski finally told her to "just do it," and the victim sat down to prepare a needle to inject Pulczinski with methamphetamine.

According to N.H., once the victim sat down, Pulczinski walked up behind her with an extension cord and wrapped it around her neck, choking her. The victim said she was sorry and pleaded to be let go. She was fighting back when Pulczinski pulled her into the kitchen. N.H. then said, "That's not working," and Pulczinski let go of the cord and used his arms to choke her instead. After about a minute, the victim was no longer moving.

According to N.H., Pulczinski then asked N.H. to hand him a bag. N.H. did not respond, and he did not see what happened next. He recalled that Pulczinski said, "We need to get out of here before we're charged with murder." As they left the apartment, N.H. looked back and saw the victim with a bag around her head and her hands and ankles bound.

Two other people testified that Pulczinski admitted to them that he had killed the victim. First, C.R., who had initially helped Pulczinski get away after the fire and lied to

the police about Pulczinski's involvement, testified that Pulczinski told him that Pulczinski killed the victim by tying a cord around her neck and choking her. The other person, one of the informants, testified that Pulczinski admitted killing someone because she had stolen from him. Pulczinski chose to testify. He implicated N.H. as the person who killed the victim. The jury found Pulczinski guilty as charged.

After the jury returned its verdict, Pulczinski learned that Juror #8 was Facebook friends with the victim's stepmother, two of her brothers, two of her uncles, and her godparents. Two of Juror #8's sons were also Facebook friends with both of the victim's brothers. Further, based on publicly available information, Pulczinski cited five examples to show that not only was Juror #8 Facebook friends with the victim's family members, but also interacted with them: (1) An uncle of the victim "liked" a photo that Juror #8 posted of her former husband on May 9, 2015; (2) Juror #8 "liked" a photo of one of the victim's brothers on April 28, 2016, and another photo the brother posted on July 18, 2016; (3) the victim's stepmother "liked" a photo of Juror #8's wedding on October 12, 2018, and commented, "Congratulations!"; (4) one of Juror #8's sons "liked" a photo of the victim and her brothers that one of her brothers posted on March 31, 2019—4 days after the victim had died; and (5) an uncle of the victim "liked" a wedding photo that Juror #8 posted on May 12, 2019. Notably, none of the Facebook friends were witnesses or otherwise identified to the jurors in the jury questionnaire, and none of the Facebook friends had the same last name as the victim.

Based on this information, Pulczinski moved the district court to conduct a *Schwartz* hearing to explore whether Juror #8 lied during the voir dire by failing to disclose her

Facebook friendships with the victim's family. The district court denied the motion. The district court reasoned: "Where was she dishonest? Because the names that you throw out from Facebook were not names on the questionnaire and they weren't called as witnesses." Further, the district court stated that "voir dire is a process for attorneys to inquire, to get information about the qualifications of the juror. If you don't ask, if you don't follow-up, you can't blame the juror for that."[2]

ANALYSIS

I.

A.

We begin with the question of whether Pulczinski is entitled to relief based on the unobjected-to limitations the district court placed on the presence of the public in the trial courtroom in response to the COVID-19 pandemic.[3] According to Pulczinski, the unobjected-to limitations violated his constitutional right to a public trial. *See* U.S. Const. amend VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."); *see also* Minn. Const. art. I, § 6 (same).

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[2] The voir dire discloses that three other persons who served as jurors had connections to people in this case. The husband of one of the jurors coached Pulczinski in football and the juror testified that she knew Pulczinski's mother. Another juror was friends with Pulczinski's uncle. And the children of another juror knew the victim.

[3] There is no record of Pulczinski objecting to the restrictions. At oral argument, Pulczinski suggested that he may have objected to the restrictions at pretrial hearings held before the August 2020 hearing at which the district court explained the COVID-19 protocols for the trial. Those earlier hearings were held on the record on January 3, 2020, and March 2, 2020. We have reviewed the transcripts of those hearings and did not see any objection, a result that is not surprising because the hearings were held before the COVID-19 health crisis became apparent.

"When a defendant fails to object at trial, the forfeiture doctrine generally precludes appellate relief."[4] *State v. Lilienthal*, 889 N.W.2d 780, 784–85 (Minn. 2017); *see also State v. Beaulieu*, 859 N.W.2d 275, 278 (Minn. 2015) (stating that a right may be forfeited by "the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it" (quoting *United States v. Olano*, 507 U.S. 725, 731 (1993))). The forfeiture doctrine plays a vital role in the criminal justice system because it encourages defendants to object while before the district court so that "any errors can be corrected before their full impact is realized." *Beaulieu*, 859 N.W.2d at 279 (citation omitted) (internal quotation marks omitted). But because a rigid and undeviating application of the forfeiture doctrine would be out of harmony with the rules of fundamental justice, Rule 31.02 provides appellate courts "a limited power to correct errors that were forfeited." *Beaulieu*, 859 N.W.2d at 279 (citation omitted) (internal quotation marks omitted); *see Olano*, 507 U.S. at 731. This limited power is known as the plain-error doctrine. *Beaulieu*, 859 N.W.2d at 279.

Under the plain-error doctrine, a defendant must establish (1) an error, (2) that is plain, and (3) that affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998); *Johnson v. United States*, 520 U.S. 461, 466–67 (1997). When the

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[4] Pulczinski argues that his right to a public trial cannot be forfeited because public trials help uphold First Amendment rights. He contends that the public has a constitutionally mandated right of access to a criminal trial, and a criminal defendant cannot unilaterally exclude the public or the press from a trial. The public's right to access under the First Amendment is not at issue here. Pulczinski forfeited *his* ability to appeal an issue under the Sixth Amendment. Whether a different person—member of the press or public—had the right to assert the closure violated his or her First Amendment rights is not at issue here.

defendant satisfies these requirements, an appellate court may correct the error *only* when it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001); *Johnson*, 520 U.S. at 467.

Our analysis of the fairness, integrity, or public reputation of judicial proceedings does not focus on whether the alleged error affected the outcome resulting in harm to the defendant in the particular case. Rather, we ask whether failing to correct the error would have an impact beyond the current case by causing the public to seriously question whether our court system has integrity and generally offers accused persons a fair trial. *See State v. Bustos*, 861 N.W.2d 655, 663–64 (Minn. 2015) (explaining that a plain error affecting a defendant's substantial rights warrants reversal only when the error must be addressed to ensure the fairness, integrity, or public reputation of judicial proceedings); *Olano*, 507 U.S. at 736–37; *Johnson*, 520 U.S. at 470 (assessing whether reversal of the conviction would expose the judicial process to public ridicule after assuming that the defendant's substantial rights were harmed); *see also State v. Benton*, 858 N.W.2d 535, 540–41 (Minn. 2015) (noting that the judicial process would be "thwarted" if the defendant who requested the courtroom closure could now seek "a second bite at the apple").

In summary, appellate courts have a limited discretionary power to grant relief based on an unobjected-to error, which may be exercised only when a plain error affected a particular defendant's substantial rights *and* a failure to correct the error would have an impact beyond the current case by causing the public to seriously question the fairness and integrity of our judicial system. In section I.C., we address whether we may grant Pulczinski any relief to correct the forfeited error under the plain-error doctrine. But first,

we turn in section I.B. to Pulczinski's argument that regardless of his failure to object, he is entitled to automatic reversal of his conviction because he alleges a violation of a structural error.

B.

Pulczinski argues that because a violation of the right to a public trial is a structural error, he is entitled to an automatic reversal of his conviction regardless of his failure to object to the closure. We disagree. For the reasons stated below, we hold that our rule that we will not exercise our discretion to grant relief for an unobjected-to error unless the error seriously affected the fairness, integrity, or public reputation of judicial proceeding applies when a defendant fails to object to a courtroom closure.

We have never addressed the precise question of whether an automatic reversal is required when a district court closes a courtroom in violation of a defendant's right to a public trial, but the defendant failed to object to the closure.[5] But our decision in *Benton*—a case of unpreserved invited error—provides strong direction for our analysis in this case.

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[5] "[I]n the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to 'automatic reversal' regardless of the error's actual 'effect on the outcome.' " *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910 (2017) (quoting *Neder v. United States*, 527 U.S. 1, 7 (1999)). Thus, Pulczinski would be entitled to automatic reversal of his conviction *regardless* of the error's actual effect on the outcome of the case, if he had objected to the limitations on who could be present in the trial courtroom *and* we further determined that this was a structural error that failed to satisfy the standard for when such closure is justified. That standard was set forth in *Waller v. Georgia*, 467 U.S. 37, 47–48 (1984), and adopted by this court in *State v. Fageroos*:

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives

In *Benton*, we considered a situation where a defendant *requested* closure and then claimed on appeal that the closure violated his right to a public trial. 858 N.W.2d at 539–40. We recognized that a violation of the right to a public trial is a form of structural error. *Id.* at 540 n.1. But we did not automatically reverse. Rather, drawing on plain error precedents, we concluded that the closure must seriously affect the fairness, integrity, or public reputation of judicial proceedings and, concluding that it did not, we declined to exercise our discretion to grant relief to correct the claimed error. *Id*. at 540–41.[6] We did not reach the substantive question of whether, under the standard established in *Waller*, *see supra* n.5, the closure in fact violated the defendant's right to a public trial. We did not

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> to closing the proceeding, and it must make findings adequate to support the closure.

531 N.W.2d 199, 201–02 (Minn. 1995) (quoting *Waller*, 467 U.S. at 48) (alteration in *Fageroos*). But based on our resolution of the case, we need not reach the issue of whether the district court's directive placing limitations on public presence in the trial courtroom was justified under the *Waller* test. Further, even under the *Waller* standard, a defendant is not always entitled to a new trial. The remedy for denying a defendant's right to a public trial "should be appropriate to the violation, and a retrial is not required if a remand will remedy the violation." *State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009); *see Waller*, 467 U.S. at 50 (remanding a case for a public suppression hearing when the closure of the previous suppression hearing violated the defendant's right to a public trial and holding that if the same evidence were suppressed at the new hearing, there would be no new trial).

[6] We reasoned that "Benton requested the courtroom closures because he believed they would benefit his defense, yet now he seeks a second bite at the apple because he did not receive the result he wanted." *Benton*, 858 N.W.2d at 541. We further observed that the closures were not unlimited, but instead were restricted to the aspects of the trial that warranted closure. *Id*. "Under these circumstances, 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*. (citing *United States v. Cotton*, 535 U.S. 625, 634 (2002)).

decide whether the district court erred by granting the courtroom closure requests. *Benton*, 858 N.W.2d at 540.

The fact that the defendant in *Benton* affirmatively requested the structural error and Pulczinski did not (he simply did not object) does not change the analysis. The rationale for our decision in *Benton* was that a denial-of-public-trial-right structural error remains subject to state procedural rules on forfeited claims. *Id.* at 540 n.1; *see Weaver*, 137 S. Ct. at 1910 (recognizing that the fact that an error is structural does not carry "talismanic significance as a doctrinal matter"). As we discussed in the prior section, we may not exercise our discretionary power to grant relief based on an unobjected-to error unless the error seriously affects the fairness, integrity, or public reputation of judicial proceedings such that a failure to correct the error would have an impact beyond the current case by causing the public to seriously question the fairness and integrity of our judicial system. Accordingly, whether the error is affirmatively invited or simply unobjected to, we will not exercise our discretion to grant relief to correct the unpreserved public-trial-right structural error unless the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.[7]

Pulczinski's argument to the contrary conflates two distinct concepts. On the one hand, the reason we automatically reverse for objected-to structural errors is that such errors affect the framework within which the trial proceeds such that the error defies

[7] In the analysis of whether, in a particular case, a trial closure seriously affected the fairness, integrity, or public reputation of judicial proceedings, the fact that a defendant requested a trial closure may weigh differently than a situation where the State requested, or (as here) the district court ordered, the closure and the defendant failed to object.

analysis for harmless error. *Weaver*, 137 S. Ct. at 1907–08. Stated another way, structural error demands reversal because harm to the defendant is irrelevant, either because we protect the right for reasons independent of preventing harm to the defendant, the harm flowing from the violation of the right is simply too hard to measure, or the violation of the right always results in fundamental unfairness. *Id.* at 1908.

On the other hand, as discussed above, our forfeiture jurisprudence (which is a preliminary inquiry regarding our power to grant relief) has a different purpose, including encouraging parties to raise errors before the district court when the district court can cure any potential error and avoid any resulting harm. *See Weaver*, 137 S. Ct. at 1912. Accordingly, the default rule is that an unobjected-to error is forfeited and can be a source of relief only when the claimed error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *State v. Epps*, 964 N.W.2d 419, 422 (Minn. 2021); *see Olano*, 507 U.S. at 732. This inquiry into the effect of the error on the fairness, integrity, or public reputation of judicial proceedings is not concerned with whether an error caused harm to the particular defendant.[8] The *Weaver* Court observed that "[a]n error can count

[8] We are not saying that, under the plain-error doctrine, harm is not relevant. We are saying that harm to the defendant is not relevant to the ultimate question of whether the error seriously affected the fairness, integrity, or public reputation of a judicial proceeding. It is true that under the plain-error rule, even when the error seriously affects the fairness, integrity, or public reputation of judicial proceedings, we cannot exercise our discretion to grant relief to correct an unpreserved claim unless the error was plain and it affected the defendant's substantial rights. *Epps*, 964 N.W.2d at 422–23; *see* Minn. R. Crim. P. 31 (distinguishing between harmless error and plain error); *see also Olano*, 507 U.S. at 736 (noting that the discretion to consider an unpreserved error under Fed. R. Crim. P. 52 should be employed only in those circumstances where a miscarriage of justice would otherwise result). But nothing in our jurisprudence requires that we address whether an

as structural even if the error does not lead to fundamental unfairness in every case." 137 S. Ct. at 1908.

More pertinent to this case, the *Weaver* Court determined that, "while the public-trial right is important for fundamental reasons, in some cases an unlawful closure might take place and yet the trial still will be fundamentally fair from the defendant's standpoint." *Id*. at 1910; *see generally* Zachary L. Henderson, *A Comprehensive Consideration of the Structural-Error Doctrine*, 85 Mo. L. Rev. 965, 1005–06 (Fall 2020).[9] Unlike some other

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error occurred, that the error was plain, and that the error affected the defendant's substantial rights before we determine that the asserted error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. Stated more succinctly, harm to the defendant matters in the plain error analysis, but we need not reach the question of individual harm if we conclude that the asserted error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.

We also observe that Pulczinski is correct on one important part of his argument. Because structural errors defy analysis for harm, we assume that structural errors are harmful when we apply the plain-error test to structural errors. Of course, there is no need to consider whether we have the power to grant relief when there is no error, so the error element of the plain-error rule applies even in cases of claimed structural error. And we leave for another day the question of whether the defendant must prove that an error was plain before we can exercise our discretion to grant relief to correct an unobjected-to structural error. But once again, even if we assumed that the denial of the right to a public trial substantially harmed Pulczinski, we still will not exercise our discretion to consider an unpreserved error unless we further conclude that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Epps*, 964 N.W.2d at 422.

[9] Our analysis is specifically limited to a particular type of structural error: a violation of the right to a public trial. We do not decide today whether other types of structural errors may require automatic reversal even when those errors are unpreserved at trial. For instance, the *Weaver* Court noted that some errors are deemed structural because the error "always results in fundamental unfairness." 137 S. Ct. at 1908 (identifying the right to an attorney in a criminal proceeding and the right to a reasonable doubt instruction as examples); *see also State v. Brown*, 732 N.W.2d 625, 630 (Minn. 2007) (stating in dicta that inclusion of a biased juror was structural error that required automatic reversal even after the defendant's lawyer failed to challenge the juror for cause or exercise a peremptory

forms of structural error, "the right to a public trial is not an absolute right" and may "give way in certain cases to other rights or interests." *State v. Fageroos*, 531 N.W.2d 199, 201 (Minn. 1995) (citation omitted).

Accordingly, we will not exercise our discretion to grant relief for an unobjected-to courtroom closure unless the allegedly erroneous closure seriously affected the fairness, integrity, or public reputation of judicial proceedings. Consequently, even if we assumed that the unobjected-to limitations that the district court placed on the public's presence in the trial courtroom amounted to an error that was plain and that affected Pulczinski's substantial rights, we will not grant relief to correct the error unless our failure to do so will cause the public to seriously question the fairness and integrity of our judicial system. It is to that question that we now turn.

C.

No one contests that the serious health concerns presented by the COVID-19 pandemic generally justified adjustments to trial procedures, including reconfiguring courtrooms and limiting the number of persons allowed in courtrooms to accommodate the need for physical distancing and to assuage concerns of potential jurors without whom no jury trial could be held. The protocols adopted by the district court in this case were carefully considered and reviewed within Pennington County and by state court

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strike). To the extent that the broad language we used in dicta in *Brown*—that "[s]tructural errors always invalidate a conviction whether or not a timely objection to the error was made"—has persuasive value, it is limited to the context of the structural error at issue in that particular case. 732 N.W.2d at 630; *see State v. Little*, 851 N.W.2d 878, 889 n.3 (Minn. 2014) (Stras, J., dissenting) ("It is an open question in Minnesota whether unpreserved structural errors lead to the automatic reversal of a conviction.")

administration. Moreover, the protocols allowed the trial to proceed without further extended delays. U.S. Const. amend. VI (stating that "the accused shall enjoy the right to a *speedy* and public trial" (emphasis added)); Minn. Const. art. 1 § 6 (same).

Although Pulczinski asserts that he was personally prejudiced by the lack of a two-way video feed between the trial courtroom and the viewing rooms in the courthouse and by the exclusion of a few members of his family from the courtroom, he makes no argument that a failure to correct those errors will seriously affect the fairness, integrity, or public reputation of judicial proceedings generally. We perceive no reason why a failure to correct the alleged error will cause the public to seriously question the fairness and integrity of our judicial system. Accordingly, we may not exercise our limited discretion under the plain-error doctrine[10] to grant the relief that Pulczinski requests based on the unobjected-

[10] The State asserts that Pulczinski consented to the limitations that the district court placed on public access to the trial and thus, the invited-error doctrine applies rather than the plain-error doctrine. Pulczinski disagrees that he consented to the restrictions placed on public access to the trial courtroom. Accordingly, Pulczinski argues that, if his structural error argument discussed in Part I.B. fails, the plain-error doctrine applies. We need not resolve the issue of whether Pulczinski consented to the limitations. For the reasons already stated, we conclude that any claimed error in limiting public presence in the trial courtroom did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. Accordingly, even under Pulczinski's preferred plain-error standard, we do not have discretion to grant the relief he seeks. Moreover, Pulczinski's claim would fail for the same reason under the invited-error doctrine. We have not always been clear about the concept of "invited error" and the circumstances under which appellate courts may grant relief for unpreserved errors. Unpreserved error may fall into several categories: errors where an objection was not made, errors that a party invited by an affirmative act, and errors to which a party consented. "Invited error" includes the second and third types of unpreserved error. It is a species of estoppel, *Majerus v. Guelsow*, 113 N.W.2d 450, 457 (Minn. 1962), rather than a pure forfeiture doctrine. Over time, we have variously suggested three different rules: (1) that a litigant is not entitled to any relief for errors he invited, *see Majerus*, 113 N.W.2d at 457; *State v. Weigold*, 160 N.W.2d 577, 579–80

to limitations that, in response to the COVID-19 pandemic, the district court placed on the presence of the public in the courtroom during the trial.

II.

We next consider whether the district court committed reversible error when it denied Pulczinski's motion for a *Schwartz* hearing[11] to determine whether Juror #8 gave false answers on voir dire that concealed prejudice or bias toward one of the parties. We review a refusal to grant a *Schwartz* hearing for an abuse of discretion. *State v. Mings*, 289 N.W.2d 497, 498 (Minn. 1980).

A *Schwartz* hearing provides a party an opportunity to impeach a verdict due to juror misconduct or bias. A verdict may be impeached by testimony establishing that a juror

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(Minn. 1968); (2) that we assess whether we have discretion to grant relief for all categories of unpreserved errors (invited errors, consented-to errors, and unobjected-to errors) under the plain error doctrine, *see State v. Everson*, 749 N.W.2d 340, 348–49 (Minn. 2008); *State v. Carridine*, 812 N.W.2d 130, 142 (Minn. 2012); *State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007); *State v. Giese*, 561 N.W.2d 152, 159 (Minn. 1997); and (3) that we may grant relief for invited errors that seriously affect the fairness, integrity, or public reputation of judicial proceedings, *State v. Benton*, 858 N.W.2d 535, 539 (Minn. 2015). The older, first formulation is not the law in Minnesota. The requirement that the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings before we may exercise our discretion to grant relief applies under both the second and third rule of law. We leave for another day to more fully address the parameters of, and relationship between, the second and third rules of law.

[11] A *Schwartz* hearing is named for our decision in *Schwartz v. Minneapolis Suburban Bus Co.*, 104 N.W.2d 301 (Minn. 1960), now codified in Minn. R. Crim. P. 26.03, subd. 20(6). That rule provides that

> [a] defendant may move the court for a hearing to impeach the verdict. Juror affidavits are not admissible to impeach a verdict. At an impeachment hearing, jurors must be examined under oath and their testimony recorded. Minnesota Rule of Evidence 606(b) governs the admissibility of evidence at an impeachment hearing.

Minn. R. Crim. P. 26.03, subd. 20(6).

gave false answers during voir dire that concealed prejudice or bias toward one of the parties. *See* Minn. R. Crim. P. 26.03, subd. 20(6) (incorporating Minn. R. Evid. 606(b)). Although a *Schwartz* hearing should be liberally granted, *State v. Benedict*, 397 N.W.2d 337, 339 (Minn. 1986), a district court need not hold one unless the party seeking review first establishes a prima facie case of juror misconduct or bias. "To establish a prima facie case, a defendant must submit sufficient evidence, which, standing alone and unchallenged, would warrant the conclusion of jury misconduct." *State v. Larson*, 281 N.W.2d 481, 484 (Minn. 1979).

We conclude that the district court did not abuse its discretion by denying Pulczinski a *Schwartz* hearing because Pulczinski failed to submit sufficient evidence, which, standing alone and unchallenged, warranted the conclusion that Juror #8 gave false answers during voir dire that concealed prejudice or bias toward one of the parties. None of Juror #8's Facebook friends were listed as witnesses in the case.[12] None of Juror #8's Facebook friends shared a last name with the victim. Additionally, Juror #8 had not affirmatively interacted with any of the identified Facebook friends for several years before voir dire. The only interaction between Juror #8 and one of the Facebook friends that occurred close to the time of the murder was when an uncle of the victim (with a different last name) "liked" a wedding photo that Juror #8 posted on May 12, 2019. Moreover, Pulczinski

[12] During voir dire questioning, Juror #8 indicated that she knew some of the potential witnesses identified by the parties. The State questioned her about her relationship with those witnesses.

never asked Juror #8 on voir dire any questions that would have elicited information that Juror #8 knew she had a connection with the victim's family.

The facts here are like those in *Benedict*, 397 N.W.2d at 338. In *Benedict*, we upheld a district court's denial of a *Schwartz* hearing because "defense counsel did not ask the sort of clear question that, absent a lack of credibility on the juror's part, necessarily would have elicited the disclosure of the sort of information that [was] withheld." *Id.* at 340. We stated that, under those circumstances, there was not a "sufficient showing that the juror in question lied." *Id.* The proper remedy for teasing out potential juror bias during voir dire is for lawyers to ask probing questions of the jurors during voir dire.

In sum, Pulczinski failed to produce evidence that standing alone and unchallenged, would warrant a conclusion that Juror #8 answered questions falsely during voir dire. Consequently, we conclude that the district court did not abuse its discretion by denying Pulczinski's request for a *Schwartz* hearing.

CONCLUSION

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

Affirmed.