

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0640**

State of Minnesota,
Respondent,

vs.

Jason Richard Montonye,
Appellant.

**Filed April 12, 2021
Reversed and remanded
Smith, Tracy M., Judge**

Stevens County District Court
File No. 75-CR-18-167

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

Aaron Jordan, Stevens County Attorney, Morris, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leah C. Graf, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Segal, Chief Judge; and
Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

In this direct appeal, appellant Jason Richard Montonye challenges his convictions for second-degree driving while impaired (DWI) and driving after cancellation as inimical to public safety. He argues that the district court (1) violated his right to a public trial by

closing the courtroom during a portion of voir dire, (2) erred by admitting a hearsay statement by Montonye's wife under the residual exception to the hearsay rule, and (3) erred by determining that the prosecutor was not a necessary witness after the prosecutor conducted a pretrial interview of Montonye's wife about the facts in the case with no one else present. Because we conclude that the district court closed the courtroom without justification in violation of Montonye's constitutional right to a public trial, we reverse and remand for a new trial on all counts.

FACTS

The following facts were established at the jury trial in this case. At around 5:30 a.m. on May 5, 2018, the Stevens County Sheriff's Office responded to a single-car roll-over crash on Highway 9. When officers arrived, the car was empty. The car was registered to Montonye's wife, and officers found Montonye's driver's license in the car. The officers learned that Montonye was at a nearby hospital.

Officers spoke to a homeowner who lived close to the scene. The homeowner told them that Montonye had knocked on his door at around 2:30 that morning. The homeowner told the officers that he noticed that Montonye was injured and that he smelled a "little alcohol" on Montonye. The homeowner said that he contacted Montonye's wife, who picked up Montonye about a half hour later.

Officers went to the hospital and questioned Montonye about the accident. Montonye explained that an unidentified third party was driving the car and that he was a passenger. He told officers that he would not disclose the name of the driver, explaining, "He can't get a DWI, neither can I." Montonye never identified the alleged driver. Officers

testified that they could smell alcohol in the hospital room, and, based on exigent circumstances, they took a warrantless blood sample from Montonye. Officers also took photos of Montonye's injuries. While blood appeared to be present on the driver's side air bag, no blood was found on the passenger side, and the passenger seatbelt was unused.

Officers spoke with Montonye's wife at the hospital. Montonye's wife did not testify at trial. But an officer testified that she told the officers that, after she picked Montonye up, they were home together until about 5:00 a.m., when she brought him to the hospital. The officer further testified that, when he asked Montonye's wife whether Montonye "had consumed any alcohol or drugs after the crash while she was with him[,] she said he did not."

Respondent State of Minnesota charged Montonye with two counts of second-degree DWI (operating a motor vehicle while under the influence of alcohol and operating a motor vehicle with an alcohol concentration over 0.08 at the time or within two hours of driving) and one count of driving after cancellation as inimical to public safety. The jury found Montonye guilty on all counts, and the district court entered convictions for driving with an alcohol concentration of 0.08 within two hours of diving and driving after cancellation charges.

Montonye appeals.

DECISION

Montonye raises three issues. We begin with his argument that he is entitled to a new trial because the district court infringed on his right to a public trial. Specifically, he

asserts that the district court violated his public-trial right when it conducted voir dire of one potential juror in chambers rather than in open court.

The United States and Minnesota Constitutions, with identical language, grant criminal defendants the right to a public trial: “In 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 applies during all phases of trial, including voir dire of prospective jurors. *Presley v. Georgia*, 558 U.S. 209, 213, 130 S. Ct. 721, 724 (2010); *State v. Brown*, 815 N.W.2d 609, 617 (Minn. 2012).

Despite the text of the Sixth Amendment, the right to a public trial is not absolute. *State v. Taylor*, 869 N.W.2d 1, 10 (Minn. 2015) (quotation omitted). The closure of a courtroom may be justified if (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 district court considers “reasonable alternatives to closing the proceeding,” and (4) the district court makes “findings adequate to support the closure.” *State v. Fageroos*, 531 N.W.2d 199, 201-02 (Minn. 1995) (alteration omitted) (quoting *Waller v. Georgia*, 467 U.S. 39, 48, 104 S. Ct. 2210, 2216 (1984)).¹

Whether a district court violated a defendant’s right to a public trial is a constitutional question that we review de novo. *See Brown*, 815 N.W.2d at 616. And if this constitutional right is violated, it “is considered a structural error that is not subject to a

¹ These factors are commonly called the *Waller* factors. Minnesota Rule of Criminal Procedure 26.02, subd. 4(4), governs the process a district court must follow when closing voir dire to the public and incorporates the *Waller* factors.

harmless error analysis.” *State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009) (citations omitted). Because structural errors call into question “the very accuracy and reliability of the trial process,” they generally require automatic reversal of a conviction. *State v. Brown*, 732 N.W.2d 625, 630 (Minn. 2007) (quotation omitted).²

A. A true closure occurred.

The state argues that Montonye’s right to a public trial was not implicated because a closure did not occur. Not all restrictions on access during a trial raise constitutional concerns— “[s]ome restrictions on access to the courtroom are so insignificant that they do not amount to a ‘true closure’ of the courtroom.” *Petersen*, 933 N.W.2d at 551 (quoting *Taylor*, 869 N.W.2d at 11-12). To determine whether a “true closure” occurred, courts look to several factors, including whether: (1) the courtroom was cleared of all spectators; (2) the proceedings remained open to the public and press; (3) there were periods where the public was absent; and (4) the defendant, the defendant’s family and friends, or other witnesses were excluded. *Id.* (citations omitted).

² The state argues that, because Montonye did not object to the closure at trial, we should apply a plain-error standard of review and not reverse Montonye’s convictions unless the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. The state cites *State v. Benton*, a right-to-public-trial case where the supreme court applied an invited-error standard of review when defense counsel “actively sought” closure of the courtroom and the defendant confirmed that he wanted the courtroom to be closed. 858 N.W.2d 535, 540 (Minn. 2015). But, here, Montonye did not actively seek the closure. Thus, we review Montonye’s claimed structural error *de novo*. *See State v. Petersen*, 933 N.W.2d 545, 551 (Minn. App. 2019) (applying *de novo* review to an unobjected-to closing of voir dire and explaining that violation of the constitutional right to a public trial is structural error).

Here, during voir dire, when prospective jurors were being interviewed in a group setting in the courtroom, Juror W. disclosed that he had been in an accident involving a drunk driver. He explained that the accident had injured him and that he had been “pretty upset” at how the situation was handled. Still, Juror W. said that he did not think the prior incident would influence his ability to be fair and impartial. During this questioning, the district court stated, “I don’t want to get into too much details in front of everybody about what happened. I wonder whether we should ask him questions separate and apart from the other jurors. Counsel?” The state replied, “Perhaps,” and Montonye’s counsel remained silent. A few minutes later, the district court allowed the rest of the prospective jurors to take a break and said to Juror W., “I guess we could—yeah, we could take you in my office, my chambers, just ask you a little more detail about what’s going on and how you feel, what your experiences might have been” Counsel thereafter conducted voir dire of Juror W. with the judge in chambers. Proceedings were held off the record for about half an hour, and no record was made of the in-chambers voir dire.

The state argues that a “true closure” did not occur because only one juror was individually questioned for a short period of time. He contrasts the case with *Petersen*, where we concluded that a true closure occurred when the courtroom was closed for approximately five to six hours of individualized questioning of prospective jurors. 933 N.W.2d at 551. While it is true that *Petersen* involved a more substantial closure of the courtroom, it does not preclude the in-chambers voir dire here from being a true closure. And, as we noted in *Petersen*, cases in which restrictions have been deemed not to be true closures “generally have involved the limited exclusion of certain identified persons while

persons already present in the courtroom were allowed to remain.” *Id.* at 552 (citing *State v. Zornes*, 831 N.W.2d 609, 620-21 (Minn. 2013) (concluding that removing the victim’s brother, who was on the witness list, from the courtroom was not a true closure); *Brown*, 815 N.W.2d at 617-18 (concluding that locking the courtroom doors during jury instructions was not a true closure); *State v. Lindsey*, 632 N.W.2d 652, 660-61 (Minn. 2001) (concluding that removing two minor children was not a true closure); *State v. Hicks*, 837 N.W.2d 51, 61-62 (Minn. App. 2013) (concluding that closures for administrative proceedings typically held in chambers but conducted in the courtroom were not true closures)).

Montonye argues that applying the relevant factors yields the conclusion that a true closure occurred here. We agree. While the district court did not clear the courtroom of spectators, the courtroom proceeding of voir dire took place away from the courtroom, in chambers, where spectators had no access. *See Petersen*, 933 N.W.2d at 552 (concluding that the “complete exclusion” of spectators from voir dire constituted a true closure). The proceeding was not open to the public or the press, and both were absent. *See id.* And, although it is unclear from the record whether Montonye, the defendant, was present, it is clear that Montonye’s family and friends and other witnesses were excluded. *See id.* Thus, the in-chambers questioning of Juror W. was a true closure.

B. The closure was not justified.

The next question in determining whether Montonye’s Sixth Amendment right to a public trial was violated is whether the closure was justified under the *Waller* factors.

We note first that the district court did not satisfy the fourth *Waller* factor—specifically, it did not make findings adequate to support the closure. *See Fageroos*, 531 N.W.2d at 201-02; *see also* Minn. R. Crim. P. 26.02, subd. 4(4)(f). In general, in a courtroom-closure case, if a remand to the district court for additional findings “on whether there was a specific basis for closure” could remedy the improper closure, “then the initial remedy is a remand, not a retrial.” *State v. McRae*, 494 N.W.2d 252, 260 (Minn. 1992); *see also Petersen*, 933 N.W.2d at 553 (remanding for the district court to make findings concerning whether a closure was justified). On the record here, however, remanding for additional findings is unwarranted because two of the *Waller* factors cannot be met.

In deciding to conduct in-chambers voir dire of Juror W., the district court stated that it did not “want to get into too much details in front of everybody about what happened” during Juror W.’s accident with a drunk driver and questioned whether voir dire of Juror W. should occur “separate and apart from the other jurors.” The district court’s expressed concern reasonably fits within the first *Waller* factor—that the closure would advance an overriding interest that would be otherwise prejudiced. *See Fageroos*, 531 N.W.2d at 201-02. The interest was that other jurors not be biased by Juror W.’s description of his negative experience.

But the record provides no basis to find that the second and third *Waller* factors were met—namely, that the closure was no broader than necessary and that there were no reasonable alternatives to the closure. *See id.* It is clear on this record that the district court could have protected the interest of not letting Juror W.’s experience bias the other prospective jurors by excusing them from the courtroom and individually questioning Juror

W. in open court. Because, on this record, the *Waller* factors cannot be satisfied, the appropriate remedy for the courtroom closure is a new trial and not a remand for additional findings.

Because Montonye's constitutional right to a public trial was violated, we reverse his convictions and remand this case to the district court for a new trial on all counts. Because our resolution of Montonye's courtroom-closure argument is dispositive, we do not address the merits of his other two arguments claiming trial error.

Reversed and remanded.