STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2261

State of Minnesota,
Respondent,

vs.

Willie Henry McDaniel,
Appellant.

Filed February 23, 2010
Affirmed in part and remanded
Stauber, Judge

Ramsey County District Court
File No. 62K608001140

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Marie Wolf, Interim Chief Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Kalitowski, Judge; and Hudson, Judge.

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

STAUBER, Judge

On direct appeal from his conviction of first-degree assault, appellant argues that the district court denied his constitutional right to a public trial, failed to instruct the jury

that a certain witness was an accomplice, and erroneously admitted evidence that one of the state's witnesses had been threatened. Because the district court was not required to instruct the jury that a certain witness was an accomplice and because the district court did not abuse its discretion by admitting evidence of a threat made to a witness, we affirm in part. But we remand for appropriate findings on the issue of closure of the courtroom.

FACTS

Appellant Willie Henry McDaniel was tried for first-degree assault and attempted second-degree murder, arising from a shooting that occurred on November 13, 2006.[1]

D.A., the victim, testified that he drove his then-girlfriend, J.S.C., to her sister's apartment building on the evening of November 13, 2006. J.S.C. exited the car and went into the building; D.A. stayed in the car. The driver's side window of the car was open, and the passenger-side window was rolled up. Two men, whom D.A. did not know, approached. One of the men, later identified by D.A. as appellant, came to the driver's side of the car. The other man tried to open the passenger-side door but failed.

Appellant pointed a black .45-caliber handgun at D.A., asked D.A. about J.S.C., and told D.A. to exit the car. D.A. attempted to hit the gun out of appellant's hand and then reached for the gear shift and put the car in drive. As D.A. moved to do so, the man on the passenger side of the car told appellant that D.A. was reaching for something. Appellant then shot D.A. twice; one bullet severed D.A.'s spinal cord.

[1] Appellant was also charged with possession of a firearm by an ineligible person. The possession charge was severed.

D.A., who had put the car in drive, heard a third gunshot as the car moved forward. Though he could not control his legs, D.A. eventually managed to place the car in park using his arms. D.A. gave a detailed description of appellant to law enforcement and later identified appellant from a photo lineup.

C.C. testified that he was the man who approached the passenger side of D.A.'s car. According to C.C., appellant approached the driver's side of the car, drew a black .45-caliber handgun, and told D.A. to get out of the car. C.C. was familiar with the gun because he had used it to commit armed robbery in Illinois the day before D.A. was shot.[2] C.C. attempted to open the passenger door and enter the car. C.C. saw D.A. reach for something, and appellant reacted by firing two shots. The car "rolled off" slowly, and appellant and C.C. ran up the street together. Later that night, appellant, C.C., and several other people drove to Illinois.

On cross-examination, C.C. stated that he "wouldn't have minded taking the [prison] time for [appellant]" for the shooting. According to C.C, he was raised by appellant's family and considers appellant to be his brother. C.C. also stated that, at some point, he had been willing to enter a guilty plea in this matter. C.C. was never charged with shooting D.A.

J.S.C. testified that upon her arrival at her sister's apartment building, she saw appellant in a crowd that had gathered in the parking lot. When J.S.C. approached appellant, he said that he had "almost" shot her. Appellant carried a black handgun. J.S.C. walked away and went upstairs to her sister's apartment. While there, J.S.C. heard

[2] At the time of trial, C.C. was serving a prison sentence for the Illinois robbery.

two gunshots. She looked out the window and saw D.A. driving away and appellant walking in the opposite direction with a gun in his hands.

J.C.C., the sister of J.S.C., also testified. Through her second-floor window, J.C.C. saw appellant standing next to D.A.'s car on the driver's side and C.C. standing on the passenger side. J.C.C. heard two gunshots. She went to the window and saw appellant fire a third shot "in the air." D.A.'s car drove away, and appellant and C.C. ran in the opposite direction.

The state called C.S., one of the people who traveled to Illinois with appellant and C.C. after the shooting, to testify. Before C.S. took the stand, and out of the presence of the jury, the prosecutor requested that appellant's sisters be excluded from the courtroom during C.S.'s testimony because they had allegedly made threatening phone calls to her. Appellant objected. The district court ruled:

> [I]t sounds like a credible concern. I am not suggesting at all that [appellant] is engineering this or supporting it in any way. . . . I think he has gone to some pains here to do what he can to make sure his family behaves properly in the courtroom and he has been successful. . . .
>
> On the other hand, [C.S.], to the extent that there is any merit to these claims[,] . . . is already putting herself in some jeopardy, perhaps, by testifying at all. And I think she is making a fair request under the circumstances. So I will exclude [appellant's] sisters from the courtroom during this testimony. The gist of the testimony can be reported to them and they will be allowed to return to the courtroom right after [C.S.]'s testimony.

It then became apparent that the district court, the prosecutor, and appellant's trial counsel did not know which, if any, of the spectators were appellant's sisters.

Appellant's trial counsel proposed that the public be allowed to return to the courtroom and that appellant tell his sisters that they would need to leave the courtroom during C.S.'s testimony. The district court and the prosecutor agreed to this, and the public was allowed into the courtroom. The following exchange took place:

> The Court: [Appellant] is going to ask his sisters to leave for this next witness. Since we don't know who the sisters are, he is going to have to do that for us. . . .
> Appellant: You all heard [the district court]. I am not making you all leave. I am not making you all leave, everyone.
> The Court: That would be it? The other ladies here are not sisters of the defendant; correct?
> Woman: I'm a cousin.
> The Court: Cousin?
> Appellant: I am not making you all leave.
> The Court: That's good, [appellant]. Thanks. I think we have accomplished what we want to do here. . . . Let's get the jury back in here.

C.S. then testified that she was among the crowd in the parking lot on the night of the shooting. Appellant and C.C. were also there. C.S. heard one or two gunshots. She, appellant, C.C., and two other people got into her car and eventually drove to Illinois. C.S. testified that she had been under the influence of alcohol, marijuana, and ecstasy on the night of the shooting. She denied telling police that she had seen appellant with a gun after the shooting and denied that appellant had told her he shot D.A.

On redirect, the prosecutor asked C.S. about her cross-examination testimony that she had told police she did not want to be involved in the investigation of the shooting. Over appellant's objections, C.S. denied that anyone had told her to change her story, not to remember certain things, or not to testify. C.S. testified that she received a phone call

two or three weeks before trial and that she interpreted the call as a threat. She denied feeling threatened and stated that she did not remember certain things merely because she did not remember them.

Sergeant James Gray of the St. Paul Police Department testified that he had spoken to C.S. about the shooting in April 2008. According to Sergeant Gray, C.S. told him that she saw appellant carrying a large black handgun after the shooting. C.S. also told the officer that appellant had admitted shooting D.A.

Sergeant Shay Shackle of the St. Paul Police Department testified that the passenger door of D.A.'s car could not be opened from the outside, that the car's windows were intact after the shooting, and that bullet holes in the car's interior were consistent with a bullet entering through the open driver's side window.

Stephanie Eckerman, a former Minnesota Bureau of Criminal Apprehension forensic scientist and firearms examiner, testified that the two recovered bullets—one from D.A.'s body and one from the car—had been fired from the same .45-caliber gun.

Appellant presented no evidence.

The jury convicted appellant of first-degree assault but was unable to reach a unanimous decision on the charge of attempted second-degree murder. Appellant was sentenced to 189 months in prison. This appeal follows.

D E C I S I O N

I.

Appellant argues that his sisters were excluded from the courtroom during the testimony of C.S. and that their exclusion violated his constitutional right to a public trial.

We review questions of constitutional law de novo. *State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009). "The right to a public trial is guaranteed by the United States and Minnesota Constitutions." *Id.* (citing U.S. Const. amend. VI; Minn. Const. art. I, § 6). But this right "is not absolute and may 'give way in certain cases to other rights or interests.'" *Id.* (quoting *Waller v. Georgia*, 467 U.S. 39, 45, 104 S. Ct. 2210, 2215 (1984)). For proceedings to be closed, *Waller* requires that: (1) a party must advance an overriding interest that is likely to be prejudiced; (2) the closure must be no broader than necessary to protect that interest; (3) the district court must consider reasonable alternatives to closure; and (4) the district court must make findings adequate to support the closure. 467 U.S. at 48, 104 S. Ct. at 2216. Minnesota courts apply the *Waller* test to both full and partial closures of a courtroom. *State v. Mahkuk*, 736 N.W.2d 675, 685 (Minn. 2007).

"The threshold question in analyzing whether a criminal defendant has been deprived of the right to a public trial is whether there has been a 'closure' of the courtroom." *State v. Cross*, 771 N.W.2d 879, 882 (Minn. App. 2009), *review denied* (Minn. Nov. 24, 2009). The record indicates that appellant's sisters were excluded from the courtroom:

Appellant:	You all heard [the district court]. I am not making you all leave. I am not making you all leave, everyone.
The Court:	That would be it? The other ladies here are not sisters of the defendant; correct?
Woman:	I'm a cousin.
The Court:	Cousin?
Appellant:	I am not making you all leave.

The Court: That's good, [appellant]. Thanks. I think we have accomplished what we want to do here.

Although the district court did acknowledge the threats to C.S., it did not specifically address any *Waller* factors. After a thorough review of the record, we conclude that the district court has not made adequate factual findings to support closure of the courtroom. We therefore remand to the district court for findings addressing each of the *Waller* closure factors.[3] *See Bobo*, 770 N.W.2d at 139 (stating that a retrial is not required if a remand will remedy the violation of the right to a public trial).

II.

Appellant argues that C.C. was an accomplice as a matter of law and that the district court failed to instruct the jury to this effect. We disagree.

A district court's refusal to give a requested jury instruction will not be reversed absent an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). The district court must give an accomplice-testimony instruction if a witness testifying against the criminal defendant could reasonably be considered an accomplice. *State v. Evans*, 756 N.W.2d 854, 877 (Minn. 2008). But where a criminal defendant specifically argues at trial that one of the state's witnesses actually committed the offense, no accomplice-testimony instruction is required with regard to that witness. *Id.* In such a situation, the witness is an alternative perpetrator and not an accomplice. *State v. Swanson*, 707 N.W.2d 645, 653 (Minn. 2006).

[3] The state appears to challenge the *Waller* requirements. But we are without authority to change the law. *Lake George Park, L.L.C. v. IBM Mid-Am. Employees Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1998), *review denied* (Minn. June 17, 1998).

Here, appellant specifically argued to the jury that C.C., not appellant, was the shooter. The district court therefore was not required to instruct the jury that C.C. was an accomplice, and its refusal to do so was not an abuse of discretion.

III.

Appellant argues that the district court erred by allowing the prosecutor to question C.S. about whether she had been threatened. We disagree.

This court reviews the evidentiary rulings of the district court under an abuse-of-discretion standard. *Bernhardt v. State*, 684 N.W.2d 465, 474 (Minn. 2004). If the district court has erred in admitting evidence, this court determines whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict. *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994).

By asking C.S. if she had been threatened, the prosecutor was impeaching C.S.'s testimony by seeking evidence to explain why C.S.'s trial testimony was different from statements she had made to police. Threats made by third parties "may have some probative value in repairing a credibility problem with a witness." *State v. Clifton*, 701 N.W.2d 793, 797 (Minn. 2005). But evidence of threats to a witness must be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Id.* (quotation omitted). The supreme court has noted that such evidence "may be extremely prejudicial [because] . . . the jury may wrongly assume that the defendant made the threats or that the associates of the defendant did so at the defendant's behest." *Id.* (quotation omitted). Because of this concern, "[e]ven when evidence of threats is admissible, . . . the [district] court must still

provide safeguards including cautionary instructions to prevent the evidence from being misused." *Id.* (quotation omitted).

Here, the district court instructed the jury that "[e]vidence of any prior inconsistent statement or conduct [by a witness] should be considered only to test the believability and weight of the witnesses' testimony." We presume that the jury followed this instruction. *See State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002). We conclude that this instruction was a sufficient safeguard against any possible unfair prejudice that could have resulted from C.S.'s testimony about the alleged threat. *See Clifton*, 701 N.W.2d at 797–98 (concluding that sufficient safeguards had been provided against unfair prejudice that might result from witness testifying about being assaulted by defendant's brother, where jury was instructed that the testimony was being admitted for the limited purpose of assessing the witness's credibility).

Even if we were to conclude that sufficient safeguards were not provided, any error in admitting evidence of the alleged threat toward C.S. without those safeguards is subject to a harmless-error analysis. *See Post*, 512 N.W.2d at 102 n.2. In completing this analysis, the inquiry is "whether the jury's verdict is surely unattributable to [the error]." *State v. King*, 622 N.W.2d 800, 811 (Minn. 2001) (quotation omitted). We consider "the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, and whether the defense effectively countered it." *Townsend v. State*, 646 N.W.2d 218, 223 (Minn. 2002).

We conclude that there is no reasonable possibility that the verdict might have been more favorable to appellant without C.S.'s testimony about the alleged threat. The

prosecutor inquired as to whether C.S. had been threatened only after she stated on cross-examination that she had told police she "didn't really want to be involved with anything." C.S.'s testimony was not highly persuasive; she denied that the phone call had affected her testimony, and she did not say who had made the call. The alleged threat was not mentioned in closing argument. Furthermore, strong evidence of appellant's guilt was presented to the jury. D.A. and C.C. both saw appellant shoot D.A. J.C.C. saw appellant fire the gun into the air immediately after she heard two gunshots. Sergeant Gray testified that C.S. told him that appellant had admitted shooting D.A. And the physical evidence is consistent with a single shooter firing through the driver's side window of D.A.'s car, which is where several witnesses placed appellant.

Affirmed in part and remanded.