SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2500-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DARRYL M. MERRITT,

Defendant-Appellant.

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Argued November 9, 2022 – Decided February 3, 2023

Before Judges Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 17-12-1992.

Kevin S. Finckenauer, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Ashley Brooks, Assistant Deputy Public Defender, of counsel and on the briefs).

Shiraz I. Deen, Assistant Prosecutor, argued the cause for respondent (Bradley D. Billhimer, Ocean County Prosecutor, attorney; Samuel Mazarella, Chief Appellate Attorney, of counsel; Shiraz I. Deen, on the brief).

PER CURIAM

Defendant, Darryl M. Merritt, appeals from his jury trial convictions for multiple counts of controlled dangerous substances (CDS) offenses and obstruction of the administration of law. He contends the trial court committed several evidentiary errors that independently and cumulatively warrant reversal. Defendant also contends the trial court committed structural error by closing the courtroom during the testimony of a detective to protect her identity because she was working as an undercover officer at the time of the trial.

We focus on defendant's contention the courtroom was improperly closed to the public in violation of the principles set forth in Waller v. Georgia, 467 U.S. 39 (1984). After carefully reviewing the record in light of the governing case law, we conclude the trial court did not address all of the required findings enunciated in Waller, including, most notably, the requirement to consider alternatives to closing a courtroom to the public. Because this constitutes structural error, we are constrained to reverse defendant's convictions and remand for a new trial.

I.

In December 2017, defendant was charged by indictment with eleven counts of various second and third-degree CDS offenses (counts one through

eleven) and a single count of fourth-degree obstructing the administration of law or other governmental function (count fourteen).[1]

Prior to trial, the State moved to close the courtroom during the testimony of an undercover detective to protect her identity. The defense objected. The trial court did not convene an evidentiary hearing but heard oral argument on the motion. The following day, the court granted the State's motion, rendering an oral opinion. At that time, the State moved to dismiss counts one through five of the indictment.

In October 2019, the jury trial was conducted over the course of four days. The courtroom was closed for approximately one hour during the detective's testimony, which spanned forty-seven pages of trial transcript. The jury found defendant guilty on all remaining counts. On December 17, 2019, the trial judge imposed an aggregate twelve-year sentence with a six-year period of parole ineligibility.

Because we focus on the trial court's decision to close the courtroom during a portion of the trial, we need only briefly summarize the facts elicited at trial. The police executed a residential search warrant. They found eleven "bricks" of heroin in the bathroom from which defendant emerged. His driver's

[1] Counts twelve and thirteen of the indictment did not charge defendant.

license, a digital scale, a plastic bag containing cocaine, a quantity of small plastic bags, and part of a blender with cocaine residue were also found in the bedroom next to the bathroom.

Codefendant John Cameron testified defendant lived in the house and that the bedroom where the drugs and paraphernalia were found was defendant's bedroom. Cameron stated defendant paid rent in cash. Cameron produced no proof of a lease or rent payments.

The State presented two expert witnesses. Sergeant Casey Long of the Ocean County Prosecutor's Office Narcotics Strike Force testified as a narcotics distribution expert about how heroin and cocaine are packaged, the meaning of the terms "brick" and "bundle," and that mixing heroin and fentanyl is a common technique of distributors to increase potency and stretch dosage supplies. Joanne Maffei, a forensic chemist, testified that samples from the bricks seized from the bathroom tested positive for a mixture of heroin and fentanyl and the substance seized from the bedroom tested positive for cocaine.

Codefendant David Merritt, defendant's brother, testified for the defense and claimed defendant did not live at the house that was searched by police. He

averred defendant instead lived with their father in Neptune. David[2] claimed ownership of the heroin and cocaine found in the bathroom and the bedroom where defendant's driver's license was found. David testified the bedroom next to the bathroom was his, not defendant's. He claimed that defendant's driver's license was in the bedroom because he did not have his own license and had been borrowing defendant's license. Defendant's father also testified that defendant lived with him in Neptune.

Defendant raises the following contentions for our consideration:

> POINT I
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> THE STATE ELICITED TESTIMONY THAT DEFENDANT HAD BEEN CHARGED IN ANOTHER COUNTY WITH OBSTRUCTION, HAD ALLEGEDLY BEEN SELLING HEROIN OUT OF THE HOUSE WHERE THE DRUGS WERE FOUND, AND WAS ARRESTED WITH MARIJUANA. THE IMPROPER ADMISSION OF THESE OTHER BAD ACTS REQUIRES REVERSAL.
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> > A. TESTIMONY ABOUT [DEFENDANT]'S CRIMINAL CHARGE VIOLATED N.J.R.E. 404(B) AND WAS EXTREMELY HARMFUL. REVERSAL IS REQUIRED, ESPECIALLY GIVEN THE LACK OF AN ADEQUATE LIMITING INSTRUCTION.

[2] Because defendant and his brother share the same surname, we use the brother's first name to avoid confusion. We mean no disrespect in doing so.

1. THE PREJUDICIAL EVIDENCE OF THE CRIMINAL CHARGED VIOLATED N.J.R.E. 404(B) AND REQUIRES REVERSAL.

2. THE ISSUED INSTRUCTION ADDRESSING THE TESTIMONY ABOUT [DEFENDANT]'S CRIMINAL CHARGE WAS INADEQUATE AND INEFFECTIVE.

B. CAMERON'S TESTIMONY THAT [DEFENDANT] REGULARLY SOLD DRUGS FROM THE HOUSE VIOLATED N.J.R.E. 404(B). REVERSAL IS REQUIRED, PARTICULARLY GIVEN THE LACK OF LIMITING INSTRUCTION.

1. ADMISSION OF TESTIMONY ABOUT [DEFENDANT]'S ALLEGED HISTORY OF DRUG DEALING VIOLATED N.J.R.E. 404(B) AND REQUIRES REVERSAL.

2. THE COURT COMMITTED REVERSIBLE ERROR IN NOT PROVIDING ANY LIMITING INSTRUCTION WHATSOEVER ADDRESSING THE TESTIMONY ABOUT [DEFENDANT]'S HISTORY OF SELLING HEROIN.

C. TESTIMONY THAT A SMALL AMOUNT OF MARIJUANA WAS FOUND ON [DEFENDANT]'S PERSON AND THAT HE WAS INITIALLY CHARGED WITH MARIJUANA POSSESSION VIOLATED N.J.R.E. 404(B). THIS WARRANTED

REVERSAL, ESPECIALLY GIVEN THE LACK OF LIMITING INSTRUCTION.

1. ADMISSION OF EVIDENCE RELATING TO MARIJUANA POSSESSION WAS IMPROPER AND CONSTITUTED PLAIN ERROR.

2. THE COURT'S FAILURE TO ISSUE A LIMITING INSTRUCTION TO ADDRESS THE TESTIMONY ABOUT THE MARIJUANA FOUND ON [DEFENDANT]'S PERSON AND DISMISSED CHARGE REQUIRES REVERSAL.

D. THE COURT'S FAILURE TO ISSUE A LIMITING INSTRUCTION TO ADDRESS THE TESTIMONY ABOUT THE MARIJUANA FOUND ON [DEFENDANT]'S PERSON AND DISMISSED CHARGE REQUIRES REVERSAL.

POINT II

TESTIMONY AND ARGUMENT ABOUT THE DANGEROUSNESS OF DRUGS WAS IRRELEVANT AND HIGHLY PREJUDICIAL, REQUIRING REVERSAL.

POINT III

THE CUMULATIVE EFFECT OF THE ADMISSION OF IRRELEVANT AND HIGHLY PREJUDICIAL PROPENSITY AND INFLAMMATORY EVIDENCE REQUIRES REVERSAL.

POINT IV

[DEFENDANT]'S RIGHT TO A PUBLIC TRIAL WAS UNJUSTIFIABLY VIOLATED WHEN THE COURT CLOSED THE COURTROOM DURING THE TOTALITY OF [THE UNDERCOVER DETECTIVE]'S TESTIMONY, OVER DEFENDANT'S OBJECTION. A NEW TRIAL IS REQUIRED.

A. [DEFENDANT]'S RIGHT TO A PUBLIC TRIAL WAS UNJUSTIFIABLY VIOLATED BECAUSE: THE STATE DID NOT ESTABLISH AN OVERRIDING INTEREST IN CLOSURE; THE COURT FAILED TO EXPLORE REASONABLE ALTERNATIVES; THE CLOSURE WAS BROADER THAN NECESSARY; AND THE COURT DID NOT MAKE SUFFICIENT FACTUAL FINDINGS TO SUPPORT CLOSURE.

1. THE VAGUE AND UNSUPPORTED ASSERTION THAT CLOSURE WAS NECESSARY TO PROTECT THE UNDERCOVER OFFICER, WITHOUT ANY ADDITIONAL INFORMATION, FELL SHORT OF THE SPECIFIC AND CONCRETE OVERRIDING INTEREST THE STATE WAS REQUIRED TO ESTABLISH.

2. THE TRIAL COURT DID NOT CONSIDER REASONABLE ALTERNATIVES TO CLOSURE, SUCH AS THE USE OF A SCREEN OR A PARTIAL CLOSURE, AND CLOSURE

WAS A BROADER REMEDY THAN NECESSARY.

3. THE COURT DID NOT ENGAGE IN THE PROPER ANALYSIS (IT APPLIED THE WRONG TEST) OR MAKE FINDINGS ADEQUATE TO SUPPORT CLOSURE.

B. THIS COURT SHOULD NOT APPLY THE TRIVIALITY EXCEPTION TO THE WALLER TEST HERE. BUT EVEN IF IT DOES, THE CLOSURE WAS NOT TRIVIAL BECAUSE IT WAS COMPLETE, INTENTIONAL, AND OCCURRED DURING A CRITICAL PART OF THE TRIAL.

II.

The right to a public trial is enshrined in the Sixth Amendment to the Constitution of the United States. Waller, 467 U.S. at 44. Article I, Paragraph 10 of the New Jersey Constitution affords the same right. State v. Cuccio, 350 N.J. Super. 248, 260 (App. Div. 2002). "The requirement of a public trial is for the benefit of the accused . . . ." Waller, 467 U.S. at 46 (quoting Gannett Co. v. DePasquale, 443 U.S. 368, 380 (1979)). This guarantee is also a right belonging to the public secured by the First Amendment to the Constitution of the United States and Article 1, Paragraph 6 of the New Jersey Constitution. Cuccio, 350 N.J. Super. at 260 (citing Press-Enterprise Co. v. Superior Ct. of California, 464 U.S. 501 (1984)).

The right to a public trial is not absolute, although there is a "presumption of openness." Press-Enterprise, 464 U.S. at 510. In rare instances, the right to an open trial may give way to overriding, competing interests. Waller, 467 U.S. at 45. However, "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." Presley v. Georgia, 558 U.S 209, 215 (2010). Before a court may justifiably close a courtroom:

> [(1)] [T]he party seeking to close the hearing 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 trial court must consider reasonable alternatives to closing the proceeding, and [(4)] it must make findings adequate to support the closure.
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> [Waller, 467 U.S. at 48.]

Furthermore, the party seeking to close the courtroom to the public must put forward specific, concrete evidence of the overriding interest and the threat posed by an open courtroom. Presley, 558 U.S. at 215 (citing Press-Enterprise, 464 U.S. at 510); Cuccio, 350 N.J. Super. at 260–61. Speculative or generic harms will not justify closure. Presley, 558 U.S. at 215.

We accept as axiomatic that the physical safety of a law enforcement officer, or of any witness for that matter, may constitute an overriding interest that must be considered in determining whether to overcome the presumption of

open public trials. So far as we are aware, there are no published precedents in New Jersey discussing whether and in what circumstances a courtroom may be closed to protect a police witness who, at the time of trial, is serving as an undercover officer. Other jurisdictions, however, have considered this question, establishing strict rules to safeguard the constitutional right to an open public trial.

In State v. Hassen, for example, the Colorado Supreme Court addressed whether it was permissible for the trial court to close the courtroom while two undercover officers offered testimony. 351 P.3d 418, 421–22 (Colo. 2015). The Court determined the closure was reversible error. Ibid.

The issue has also been raised in several published decisions arising from New York state and federal courts. See e.g., People v. Echevarria, 989 N.E.2d 9, 15–21 (N.Y. 2013); Jones v. Henderson, 683 F. Supp. 917, 923 (E.D.N.Y. 1988); Okonkwo v. Lacy, 895 F. Supp. 571, 573 (S.D.N.Y. 1995); Ip v. Henderson, 710 F. Supp. 915, 918 (S.D.N.Y. 1989). In that jurisdiction, trial courts convene in camera hearings to elicit testimony to determine whether the prosecutor has satisfied its burden of proving that closing a courtroom is necessary. See Okonkwo, 895 F. Supp. at 573 (citing People v. Hinton, 286 N.E.2d 265 (N.Y. 1972)). Furthermore, the prosecutor must demonstrate a

"substantial probability" that the officer's safety will be prejudiced unless the courtroom is closed. Echevarria, 989 N.E.2d at 16. Put another way, "the mere possibility that this safety interest might be compromised by open-court testimony does not justify abridgement of a defendant's constitutional right to a public trial." Id. at 12 (quoting People v. Ramos, 685 N.E.2d 492, 496 (N.Y. 1997)). Rather, the prosecutor must demonstrate a specific nexus between officer safety and open-court testimony in each case. Id. at 16; see also People v Martinez, 624 N.E.2d 1027, 1031 (N.Y. 1993) (holding a "perfunctory" showing of "speculative danger" is insufficient and "would in effect sanction a rule of per se closure for undercover officers"); Ip, 710 F. Supp. at 919 (finding trial judge erred in "rel[ying] on the witness's assertion that he feared for his life, rather than considering the individual circumstances of the case, to determine if the danger to this particular witness was grave enough to warrant the extreme measure of closing the courtroom").

New York courts have also found courtroom closure improper where the prosecutor failed to show a sufficient geographic nexus between where the officer was working undercover and where the defendant was arrested or the trial was held. See Martinez, 624 N.E.2d at 1031 (officer's testimony that he generally feared for his safety and continued to work "in the Bronx area" without

greater specificity did not warrant closure); Vidal v. Williams, 31 F.3d 67, 69 (2d Cir. 1994) (finding it unlikely that defendant's family would encounter undercover officer even though his family lived in the Bronx and undercover officer worked in the Bronx, noting that borough is a large area). Cf. People v. Rodriguez, 163 A.D.3d 437, 437–38 (N.Y. App. Div. 2018) (courtroom closure justified based on fact that officer had received threats and had distinctive appearance, in addition to a very specific geographic nexus); Moss v. Colvin, 845 F.3d 516, 520–21 (2d Cir. 2017) (finding government had satisfied its burden where it established that undercover officer "continued to work in the area of the arrest, had received numerous threats in the past, had encountered suspects in the courthouse, and had taken steps to protect his identity when entering courthouses").

III.

Here, the trial court made detailed findings concerning four "values" discussed in Waller, referring to (1) the need to ensure a fair trial; (2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; (3) to encourage witnesses to come forward; and (4) to discourage perjury. See Gibbons v. Savage 555 F3d 112, 121 (2d Cir. 2009) (enumerating these four values derived from Waller).

First, the court determined that closure of the courtroom during the undercover officer's testimony would not deprive defendant of a fair trial. The court reasoned that defendant would remain in the courtroom, have the right to cross-examine the witness, and would be able to participate in his own defense. The court "weigh[ed] heavily" the State's interest in ensuring "the personal safety of the witness in this instant matter and in other investigative matters in which that operative is involved."

Second, the court recounted the efforts made by the court and the prosecutor in recognition of their responsibility to the accused. The court outlined its review of legal authority, noting its reliance on Peterson v. Williams, 85 F.3d 39 (2d Cir. 1996),[3] in which the court permitted closure of the courtroom during the testimony of active undercover officer. The court also recognized

[3] The trial court's reliance on Peterson is misplaced. In that case, the prosecutor moved to close the courtroom for the testimony of two undercover officers, one still actively engaged in ongoing investigations, the other a former undercover officer who was no longer serving in that role. Peterson, 85 F.3d at 41. The defendant did not object, and the trial judge granted the State's motion as to the active undercover officer but denied the State's request to close the courtroom for the other officer's testimony. Ibid. Inadvertently, the courtroom was not reopened when the officer completed his testimony. Ibid. The defendant in his habeas corpus petition argued that the inadvertent "continuing closure, after [the officer] testified, breached the Constitution." Id. at 42. The Circuit Court concluded that in these "unique" circumstances, the brief inadvertent closure of the courtroom, while "unjustified," "was too trivial to amount to a violation of the [Sixth] Amendment." Ibid.

that the closure protocol proposed by the prosecutor would not engender negative connotations about defendant.

Third, the court was not persuaded that the lack of public access would discourage witnesses from coming. The court noted that there was no argument or evidence presented as to this issue. Fourth, the court was satisfied that cross-examination by effective counsel was an effective tool to discourage perjury.

Finding the interests, or "values," weighing in favor of the State, the court granted the State's application to close the courtroom during the testimony of the undercover officer.

IV.

Although the trial court thoughtfully balanced some of the competing interests, it did not complete the analytical task prescribed in Waller. First, the trial court assumed the officer's life would be endangered based on what is, essentially, a generic risk.[4] Cf. Martinez, 624 N.E.2d at 1031 ("speculative

[4] The assistant prosecutor's certification in support of the motion to close the courtroom states:

> As of this submission, [the detective] is involved in three active investigations in an undercover capacity. Allowing her to be facially- or physically-identified by subjects of pending investigations, potential subjects of pending investigations, future subjects of

danger" is insufficient). The court made no findings, for example, regarding where the officer was working undercover. The State's certification did not suggest the officer had been threatened.

Nor did the court take into account that the officer participated in the execution of the search warrant, apparently without taking precautions to conceal her identity. We note in this regard that defendant was aware of the officer's identity and thus could reveal it to family members or other associates regardless of whether the courtroom was closed. Closing the courtroom, in other words, provided no assurance that the officer's identity would not be revealed to others. We are not persuaded in these circumstances that the trial court made findings "adequate to support the closure." Waller, 467 U.S. at 48.

Most notably, the court did not consider "reasonable alternatives to closing the proceeding" as explicitly required by Waller. Ibid. For example, the competing values might have been reconciled by having the detective wear a disguise or testify behind a screen that would block the view of the witness

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> investigations, or their confederates, associates or friends, would indisputably present a critical danger to her, law enforcement involved in operations with her, confidential informants involved in operations with pending investigations, future subjects of investigations, and their confederates, associates or friends.

stand from the gallery. So too, electronic technology is available to disguise a witness's voice.

We deem the trial court's failure to consider alternatives to closure to be fatal to the State's argument on appeal. We stress that the United States Supreme Court was unequivocal in holding that "the trial court must consider reasonable alternatives to closing the proceeding." Ibid. That circumstance is not merely a factor to be considered as part of a totality-of-the-circumstances test. While trial courts must be afforded some latitude in deciding whether alternatives are reasonable, the failure to consider alternatives before closing a courtroom means the trial court could not have made findings adequate to support the closure.

We thus conclude the trial court's ruling constitutes a violation of defendant's Sixth Amendment and Article I, Paragraph 10 right to an open public trial. The required remedy for that structural error is a new trial. The United States Supreme Court made clear that a defendant is not required to prove specific prejudice in order to obtain relief for a violation of his or her Sixth Amendment public trial guarantee. Id. at 49–50. Violations of this right, in other words, are not subject to harmless error analysis. Id. at 49 n.9 ("[A] requirement that prejudice be shown 'would in most cases deprive [the defendant] of the [public-trial] guarantee, for it would be difficult to envisage a

case in which he would have evidence available of specific injury.'" (internal citation omitted)). Rather, the violation of the Sixth Amendment right to a public trial constitutes structural error. Ibid.; see also Weaver v. Massachusetts, 137 S. Ct. 1899, 1902–03 (2017); Neder v. United States, 527 U.S. 1, 8–9 (1999).

Finally, we reject the State's argument that the courtroom closure in this instance was too trivial to warrant reversing defendant's conviction and awarding a new trial. In State v. Venable, we acknowledged that "some exclusions from the courtroom are 'too trivial' to constitute denial of the defendant's right to a public trial" because the values underpinning the right were not sufficiently implicated. 411 N.J. Super. 458, 463–64 (App. Div. 2010). To determine whether the closure impinged upon those values in a non-trivial way, New Jersey courts look to a number of relevant circumstances, including: whether the closure was inadvertent; if it occurred during a critical part of trial—such as during testimony as compared to jury selection; how long the closure lasted; whether it was a complete or partial closure; whether spectators were actually excluded; whether the defendant objected; and whether there was any curative action taken by the court. Cuccio, 350 N.J. Super. at 268 (citing

Peterson, 85 F.3d at 39–44). See also Venable, 411 N.J. Super. at 465–66; Gibbons, 555 F.3d at 121.

In Venable, we concluded the exclusion of family members from jury selection was trivial because the courtroom was closed only to family members, the defendants did not object, and there was no evidence that potential spectators had actually been excluded from the courtroom. 411 N.J. Super. at 466–67. In contrast, in Cuccio, we rejected the State's argument that the closure was too trivial to implicate the defendant's constitutional right to a public trial because the closure was intentional, excluded all spectators, and lasted for a substantial period of time. 350 N.J. Super. at 268.

Here, the closure clearly was not a trivial encroachment on the right to a public trial. It was not inadvertent, but rather intentional on the State's motion; defendant objected to the closure; the courtroom was closed to the entire public; two spectators were excluded as a result of the closure; it occurred during the testimony of an important witness—the officer who had found defendant's license in the bedroom; and the closure lasted through the course of extended, critical testimony.

In these circumstances, we are constrained to reverse defendant's convictions and remand for a new trial. Because all but one of defendant's trial

error contentions were raised for the first time on appeal, we need not address them because they are unlikely to recur or will prompt an objection that will allow the trial court to make a ruling. None of the evidentiary issues raised by defendant on appeal require that we give guidance on remand.

Reversed and remanded for a new trial. We do not retain jurisdiction.