A05-1534

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

Andre Francis Hall,

Appellant.

APPELLANT'S BRIEF

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A05-1534

STATE OF MINNESOTA

IN SUPREME COURT OF MINNESOTA

State of Minnesota,

Respondent,

vs. **APPELLANT'S BRIEF**

Andre Francis Hall,

Appellant.

PROCEDURAL HISTORY

1. October 5, 2004: Date of alleged offense.

2. October 6, 2004: Appellant charged in Hennepin County District Court with 1) murder in the first degree, Minn. Stat. § 609.185(a) (1); 2) murder in the second degree, Minn. Stat. § 609.19, subd. 1(1), and 3) prohibited person in possession of a firearm, Minn. Stat. § 624.713, subd. 1(b).

3. October 21, 2004: Grand jury returned indictment. Appellant indicted for first-degree murder, second-degree murder and felon in possession.

4. October 22, 2004: First appearance held; bail set at $750,000.

5 October 29, 2004: Appellant waived speedy trial.

6. February 10, 2005: Rasmussen hearing held.

7. March 4, 2005: Findings of Fact, Conclusions of Law and Order filed.

8. March 17, 2005: Jury trial commenced, the Honorable Patricia Karasov presiding.

9. March 23, 2005: Jury trial concluded. Appellant found guilty of first-degree murder, second-degree murder and felon in possession.

10. March 24, 2005: Hearing held.

11. May 4, 2005: Motion for new trial denied. Appellant sentenced to life in prison.

12. August 2, 2005: Notice of Appeal filed with the Clerk of Appellate Court.

13. October 6, 2005: Transcripts received at office of the State Public Defender.

LEGAL ISSUES

1. Did the trial court commit fundamental error by instructing the jury on transferred intent where there were no facts in the record to support that theory and submitting the instruction allowed the jury to reach a guilty verdict without finding every element of the offense of first-degree murder?

- Over defense counsel's objection, the trial court instructed the jury on transferred intent.

Most Apposite Authority: CRIMJIG 11.03; State v. Hough, 585 N.W.2d 393 (Minn. 1998) James v. State, 27 Wyo. 378, 196 P. 1045 (1921).

2. Did the trial court prejudice appellant's substantial rights where it constructively amended the indictment by submitting the wholly separate legal and factual theory of transferred intent to the jury near the close of trial?

- The trial court implicitly ruled in the negative.

Most Apposite Authority: Minn. R. Crim. P. 17.05; State v. Alexander, 290 N.W.2d 745 (Minn. 1980).

3. Did the trial court abuse its discretion by denying appellant's request for a Schwartz hearing?

- The trial court denied appellant's motion for a mistrial and request to question jurors.

Most Apposite Authority: State v. Church, 577 N.W.2d 715 (Minn. 1998); Schwartz v. Minneapolis Suburban Bus Co., 258 Minn. 325, 104 N.W 2d 301 (1960).

4. Did the trial court deny appellant's right to a public trial by closing the courtroom to all children?

- The trial court did not rule.

Most Apposite Authority: State v. Lindsey, 632 N.W.2d 652 (Minn. 2001).

STATEMENT OF THE CASE

In October 2004, the grand jury indicted appellant, Andre Francis Hall, for the first-degree premeditated murder of D[redacted] W[redacted]. The complaint and indictment alleged that appellant shot W[redacted] after appellant and W[redacted] argued at the Citgo station where W[redacted] worked. At the beginning of trial, the trial court announced that no children would be allowed in the courtroom during the trial.

During trial, members of appellant's family alleged that members of W[redacted]'s family were singing hymns near the jurors. Appellant's attorneys also informed the trial court that they had ridden an elevator with a juror after fearing that members of W[redacted]'s family would attempt to communicate with the juror on the elevator. The trial court revealed that, not only had her law clerk questioned a juror, but the juror had expressed concern that the appellant's attorneys had joined the juror in the elevator. The trial court refused to question the juror further about the incident, nor would the court inquire about the other allegation.

Shortly before closing arguments, the State argued that "it is possible that the defendant intended to kill someone other than Mr. W[redacted]" and requested a transferred intent instruction. Over defense counsel's objection, the trial court instructed the jury on transferred intent.

The jury convicted appellant of first-degree premeditated murder, second-degree murder and felon in possession of a firearm.

STATEMENT OF THE FACTS

During the evening of October 4, 2004, 18-year-old C[redacted] S[redacted] was on the bus to Brooklyn Park when she realized that her God-sister's ex-boyfriend, 17-year-old Andre Hall (appellant), was also on the bus. (T.305, 387)[1] C[redacted] overheard appellant offering to sell a handgun to a group of men. (T.389) She also noticed that appellant was drinking alcohol. (T.412) C[redacted] got off at her stop, and walked the three blocks to her apartment building. (T.390) Appellant followed her to the apartment. (T.391)

C[redacted]'s sister, P[redacted] S[redacted], and their God-sister, A[redacted] M[redacted], were at the apartment. (T.308) Three other men were visiting S[redacted]. (T.336) Appellant was drinking and displaying his gun to the men. M[redacted] told appellant to put it away so he placed it on top of the entertainment center. (T.313-14; 336-37) After the three men left the apartment, M[redacted] and appellant decided to walk to the nearby Citgo gas station. (T.315) M[redacted], who frequented the store, recognized D[redacted] W[redacted] as the manager on duty. W[redacted] stood in the glassed-encased booth. (T.317) W[redacted]'s friend, M[redacted] G[redacted], was also in the store. (T.317-18)

As M[redacted] and appellant went to pay for their items, appellant accused G[redacted] of eyeing M[redacted]. (T.321) An argument erupted between appellant and W[redacted]. W[redacted] came out of the booth to argue with appellant. (T.322) M[redacted] urged appellant to leave, but he ignored her. (T.322) Appellant challenged W[redacted] to a fight. (T.326) M[redacted] told W[redacted] that appellant was drunk. (T.376) M[redacted] decided that she had had enough and left the store. (T.322) W[redacted] locked the door and refused to let appellant pay for his

items. (T.362-63) Appellant again challenged W[redacted] to a fight. After appellant relinquished his items, W[redacted] let him leave the store. (T.364) G[redacted] heard appellant tell W[redacted] that the bullet proof glass would not save him. (T.361) As appellant left the store, G[redacted] and W[redacted] saw three men attack appellant. (T.364, Exhibit 5 at 1)[2] W[redacted] yelled to the group that they had five minutes to break it up before he called police. (T.365) G[redacted] saw appellant lying on the ground. (T.377) When everyone left, W[redacted] and G[redacted] returned to the store. (T.365)

Five minutes after M[redacted] returned to her apartment, appellant arrived, his face bloody and swollen. (T.323) Appellant yelled at M[redacted] that he had been jumped by a group of men. (T.323-24, 395) Appellant continued yelling and pacing, which made M[redacted] nervous. She called appellant's brother Manny. (T.324) She had called Manny before when appellant was agitated. M[redacted] handed the phone to appellant, but after a few seconds he threw the phone. (T.327) M[redacted] got another phone, but appellant also broke that phone. (T.327) Appellant grabbed his handgun and left the apartment. (T.327, 396) M[redacted] told C[redacted] to go and find appellant. (T.328) M[redacted] called Manny back and told him to come get appellant. (T.328) Shortly after C[redacted] left the apartment, M[redacted] heard a gunshot. After a pause, she heard several more gunshots. (T.329, 343)

Meanwhile, C[redacted] had arrived at the Citgo station, but appellant was not there (T.397) C[redacted] told W[redacted] that appellant had a gun, and warned him to be careful (T.399, 400) After C[redacted] left, W[redacted] called 9-1-1. (See Exhibit 5) The operator told

1. "T." refers to the trial transcript.
2. Exhibit 5 is a transcript of W[redacted]'s 9-1-1 call.

W that police would broadcast a description of appellant and someone would come to the Citgo. (Id.) G then helped W take the garbage out to the dumpster. (T.367) G saw appellant crossing the street, heading for the Citgo. According to G, W challenged appellant. G then saw appellant pull out his gun. He watched as hands went "back and forth." (T.369) Appellant waved the gun around, firing two rounds. One hit a car, another went wide of W. (T.371, 378) G saw appellant fire a third time, hitting W in the neck. (T.371) Appellant then turned and ran. G ran into the Citgo and called 9-1-1. (T.369, 373)When police arrived, they found G kneeling next to W, who was dead. (T.93-94)[3]

Meanwhile, M was waiting for C to return to the apartment. Appellant, then C, arrived at the apartment. (T.329-30) When M asked appellant what had happened, he kept talking about getting jumped. (T.331, 341) In the end, M, C and P left and went to a neighbor's apartment. (T.283, 332, 404) While M used the phone, P and C decided to go back to their apartment. (T.285, 404) They found appellant sitting on the bed, the apartment in disarray. When they asked him what happened, he said that he had shot "that nigger" in the neck, killing him. (T.287, 290, 406) Appellant told C that he did not want to go to jail. C did not want appellant to go to jail so she left with the gun. (T.408-07) C took the gun outside, but returned to the apartment when she saw police. (T. 293, 408) Appellant hid the gun under the mattress and changed his clothes. (T.409) A short time later, police arrested

3. At trial, the medical examiner testified that W's body had a total of 4-5 entrance wounds. (T.253)

appellant as he left the apartment. (T.132, 410) During a search of apartment, police recovered a .40 caliber hand gun. (T.157)

Appellant was indicted for first-degree murder, second-degree murder and felon in possession. Before trial the parties stipulated that appellant had been adjudicated of a felony and that his prior record would not come in at trial. (T.38-40) During opening statements, the defense conceded that appellant shot W[redacted], but argued that appellant was not guilty of first-degree murder because he did not plan the shooting. (T.60-61; 66-67)

At trial, P[redacted], C[redacted]e and M[redacted] all testified that appellant had been drinking the night of the shooting. (T.297, 412, 345) P[redacted] S[redacted] also testified that she told police that she though appellant's "mind state" was not right. (T.302-03) A[redacted] M[redacted] testified that after appellant was arrested, she told police he was drunk. (T.345) Evidence at trial established that appellant had a blood alcohol of .13 approximately three hours after the shooting. (T.86, 434, 452)

On March 23, 2005, the jury found appellant guilty of first-degree murder (premeditated), second-degree murder and felon in possession. (T.519) Appellant was sentenced to life in prison. (S.14)[4]

4. "S." refers to the sentencing transcript.

ARGUMENT

I.

THE TRIAL COURT'S TRANSFERRED INTENT INSTRUCTION, WHICH WAS NOT BASED ON FACTS DEVELOPED BY THE EVIDENCE, AND WHICH ALLOWED THE JURY TO REACH A GUILTY VERDICT ON PREMEDITATED MURDER WITHOUT FINDING EVERY ELEMENT OF THE OFFENSE, CONSTITUTED FUNDAMENTAL ERROR.

Appellant was indicted for the first-degree premeditated murder of D[redacted] W[redacted]. During a conference on jury instructions, the prosecutor requested that the trial court instruct the jury on transferred intent. (T.443-44) The prosecutor theorized that appellant could have intended to premeditate the killing of the three men who assaulted him, but killed D[redacted] W[redacted] instead. (T.445) Over defense counsel's objection, the trial court gave the transferred intent instruction. (T.444, 506) The trial court committed fundamental error when it instructed the jury that appellant could be found guilty of premeditated murder under the transferred intent theory. This court must reverse.

Under the classic formulation of Minnesota's common law doctrine of transferred intent, a defendant who shoots with the intent to kill a certain person but, because of bad aim, kills another, is subject to the same criminal liability that would have been imposed had he aimed true. State v. Hough, 585 N.W.2d 393, 395 n.1 (Minn. 1998). The doctrine has been applied in numerous Minnesota cases. See, e.g., State v. Ford, 539 N.W.2d 214 (Minn. 1995)(upholding attempted murder conviction using transferred intent when the intended victim died but the unintended victim did not); State v. Sutherlin, 396 N.W.2d 238 (Minn. 1986)(applying transferred intent to affirm conviction of defendant who intended to shoot

at a bar patron, but missed and killed a member of the band playing in the bar.)

These cases illustrate that, under the transferred intent theory, the perpetrator's intent to kill a specific victim transfers to the unintended victim. But, in order for transferred intent to apply, it must be shown that the accused intended to commit a crime and did commit the crime, however, against an unintended victim. Here, it is clear that there was no unintended victim and, thus, no evidence to support a theory of transferred intent. Appellant was indicted for the murder of D[redacted] W[redacted]. During the State's opening statement, the prosecutor argued that the State would prove that appellant premeditated the murder of D[redacted] W[redacted]. (T.59) At the conference on instructions, the State requested that the trial court give CRIMJIG 11.03, the transferred intent instruction.[5] The State argued for the first time its alternate theory that W[redacted] was not the intended target:

> Your Honor, the murder in the first degree statute, as reflected in JIG 11.02, does state that it is with the intent to kill a specific person or another. And the instruction that I'm requesting, in addition to what the Court has prepared, is JIG 11.03, which I believe is designed exactly for this type of case where it is possible that the Defendant intended to kill someone other than Mr. W[redacted], but Mr. W[redacted] was the person who was shot and killed.
>
> And, so, I am simply asking that the Court instruct the jurors based on, primarily, the testimony and evidence that was solicited by Defense counsel from Ms. M[redacted] yesterday afternoon.

(T.445) The prosecutor was apparently referring to A[redacted] M[redacted]'s acknowledgment that

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5 CRIMJIG 11.03 provides: "If defendant acted with premeditation and with the intent to cause the death of _____ (a person other than the deceased), the element of premeditation and intent to kill is satisfied, even though defendant did not intent to kill ____.

appellant did not mention W[redacted] when he came back from the Citgo, but expressed anger that he had been assaulted. (T.341) Over defense counsel's objection, the trial court gave the jury the transferred intent instruction. (T.444, 506)

Jury instructions should be confined to the issues in the case and the facts developed by the evidence. See State v. Ruud, 259 N.W.2d 567, 578 (Minn. 1977)("a party is entitled to an instruction on his theory of the case if there is evidence to support it.") Here, there was no factual support for a transferred intent instruction. First, there is no evidence that appellant premeditated the murder of his three attackers The prosecutor's assertion that appellant intended to kill the three, and premeditated their murder, was based on pure speculation. The record is completely devoid of evidence to support that theory. Second, assuming for the moment that there was sufficient circumstantial evidence to support the conclusion that appellant planned to kill the three men, that fact scenario does not implicate transferred intent. Transferred intent contemplates providing proportionate punishment of criminal offenses and preventing increased difficulty in prosecuting criminal for the harm inflicted on bystanders. Harrison v. State, 855 A.2d 1220, 1236-37 (Md. 2004)(citation omitted) (emphasis added). The State's theory of the case was that appellant intended to kill W[redacted]. The State never alleged that the killing was unintentional, or that W[redacted] was a mere bystander. In fact, there was no evidence that the appellant's three assailants were anywhere near the Citgo during the shooting. The State improperly used the theory of transferred intent to provide the jury an alternative means of finding appellant guilty of premeditation, without having to prove that element.

In James v. State, 27 Wyo. 378, 196 P.1045 (1921), the Wyoming Supreme Court reversed a conviction for first-degree murder where the jury was instructed on transferred intent. The Court reasoned that, because State's theory was that the defendant intended to kill the decedent, and there was no evidence to support an inference that he intended to shoot anyone else, the instruction on transferred intent was erroneous:

> It is conceded that this instruction was not comfortable to the theory of either the state or the defendant, and not based upon the facts proved. It was the state's theory that defendant fired the shot with the intention to do just what he did; that is, to kill Lena Posey. It was the defendant's theory that the shooting was accidental, with no intention at all. There was but one shot, and there was no evidence that it was fired at Lizzie Newman, or that Lizzie Newman could have been seen by defendant at that time...[.]
>
> It is error to give an instruction which, though abstractly correct, is not based on the evidence. (citation omitted) It is true that the error may not always be harmful, but in this case, if the instruction in question was considered by the jury at all, as we must presume it was, the result was probably prejudicial...The evidence descriptive of the previous relations of the parties made a much stronger showing of malice on the part of defendant toward Lizzie Newman than toward Lena Posey, whom he killed, and therefore it would seem that the jury were much more likely to find that the fatal act was done with premeditation, if directed toward the former than if directed toward the latter. In such circumstances an instruction from the court, indicating that there was evidence from which they might find that the homicide was the result of an attempt to kill Lizzie Newman, may have been the important consideration in determining adversely to defendant the question of the presence or absence of premeditated malice.

James v. State, 196 P. at 1046-47. See also State v. DeSantos, 553 P.2d 1265 (N.M. 1976)(Giving transferred intent instruction, which was not based on facts developed by the evidence, constituted fundamental error).

The jury found appellant guilty of premeditated murder, having as an essential element an intent to kill and the planning of the killing. By submitting the doctrine of

transferred intent as a basis for the first-degree murder conviction, the jury had yet another theory upon which to find appellant guilty of first-degree murder. See Ford v. State, 625 A.2d. 984, 999 (Md. 1993), *superseded by statute as stated in* Robinson v. State, 728 A.2d 698 (Md. 1999)("The doctrine sets up a fiction that should not be employed to multiply criminal liability, but to prevent a defendant who has committed all the elements (albeit not on the same victim) of the crime from escaping responsibility for that crime.") The transferred intent instruction allowed the jury to convict appellant without finding the mental state toward D[redacted] W[redacted] required by the first-degree murder statute. It cannot be determined from the verdict whether the jury relied on the transferred intent instruction to convict him, or whether it reached the verdict through a finding that appellant premeditated W[redacted]'s murder.

Moreover, the prosecutor, in closing argument, told the jury that they did not have to find that appellant had the specific intent, or acted with premeditation, if they believed appellant intended to kill his three attackers:

> If Andre Hall acted with premeditation and with intent to cause the death of another, the element of premeditation and intent to kill is satisfied even though Andre Hall did not intend to kill D[redacted] W[redacted]. This instruction enables you to consider evidence solicited by the Defense by A[redacted] M[redacted]. And that was some suggestion that the Defendant retrieved his handgun and left the apartment, not with the intention to kill D[redacted] W[redacted], but to kill those unidentified men who jumped him after leaving the gas station.
>
> Either way, ladies and gentlemen, as the instruction reads, if he left with that intent and was thinking about it before he actually acted, even though the ultimate target was D[redacted] W[redacted], premeditation -- the element of premeditation is satisfied.

(T.474) Compare Bello v. State, 547 So.2d 914 (Fla. 1989)(improper transferred intent

instruction although erroneous, not prejudicial where theory not argued to the jury).

Though erroneous, the mistaken instruction may not require a new trial if the error was harmless. An error in jury instructions is not harmless and a new trial should be granted if it cannot be said beyond a reasonable doubt that the error had no significant impact on the verdict. State v. Pendleton, 567 N.W.2d 265, 270 (Minn. 1997). But where an erroneous instruction allows the jury to reach a guilty verdict without finding every element of the offense, this Court has reversed a defendant's conviction. See State v. Kuhnau, 622 N.W.2d 552, 558 (Minn. 2001). As in Kuhnau, harmless error is inapplicable because the instruction possibly relieved the State of its burden to prove every element of the offense. And it is impossible to determine the theory on which the jury reached its verdict of guilty. Consequently, this Court must reverse appellant's convictions and grant him a new trial.

II.

APPELLANT WAS DENIED HIS FEDERAL AND STATE CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW WHERE THE TRIAL COURT PERMITTED THE STATE TO CONSTRUCTIVELY AMEND THE INDICTMENT BY ARGUING THAT APPELLANT WAS GUILTY OF FIRST-DEGREE PREMEDITATED MURDER UNDER THE THEORY OF TRANSFERRED INTENT.

Appellant was indicted for the first-degree murder of D[redacted] W[redacted]. Appellant proceeded to trial, cross-examined witnesses, and called defense witnesses to testify. Before closing arguments, the State requested a transferred intent instruction, thereby providing the jury an additional means by which to convict appellant of first-degree murder. The trial court gave the instruction, over defense counsel's objection. The State constructively amended the indictment when it was permitted to argue the additional theory that appellant intended to murder three unidentified men, but killed W[redacted] instead. As a result of the amendment, appellant had no chance to defend against the State's last-minute theory. Moreover, the State's alternate theory broadened the bases upon which the jury could find appellant guilty. As a result, appellant's convictions must be reversed.

"It is ancient doctrine of both the common law and of our constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him." State v. DeVerney, 592 N.W 2d 837, 845 (Minn. 1999)(citations omitted.) Although the federal constitution does not require that a defendant be charged by indictment, it does require that a defendant be provided sufficient notice of the charges in some manner. Combs v. Tennessee, 530 F 2d 695 (6th Cir. 1976). The due process clause of the Fourteenth Amendment mandates that whatever charging method the State employs,

that method must give the criminal defendant fair notice of the charges against him to permit adequate preparation of his defense. See Minn. Const. art. I, § 7.

The purpose of restricting the prosecution to the charges included in either the complaint or indictment is to provide the defendant with notice and a fair opportunity to prepare a defense. State v. Clark, 134 N.W.2d 857, 867 (Minn. 1965). As the Supreme Court has stated: "Were the prosecutor able to request an instruction on an offense whose elements were not charged in the indictment, this right to notice would be placed in jeopardy." Schmuck v. U.S., 489 U.S. 705, 718 (1989); Combs, 530 F.2d at 698 ("Such definiteness and certainty are required as will enable a presumptively innocent man to prepare for trial.").

Minnesota R. Crim. P. 17.05 provides that an indictment may be amended under the following conditions:

> The court may permit an indictment or complaint to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

Prior to trial, a court is "relatively free" to permit amendments that charge additional offenses. State v. Bluhm, 460 N.W.2d 22, 24 (Minn. 1990). After trial has commenced and jeopardy has attached, the trial court may not allow any amendment of an indictment which charges an additional or different offense or which prejudices that defendant's substantial rights. State v. Smith, 313 N.W.2d 429, 430 (Minn. 1981). The policies behind Rule 17.05 are to protect against confusing the jury, violating due process notions of timely notice, and adversely affecting the trial tactics of the defense. State v. Alexander, 290 N.W.2d 745, 748

(Minn. 1980).

In this case, while the indictment was never amended pursuant to rule 17.05, the jury instruction on transferred intent resulted in constructive amendment of the indictment. A constructive amendment to an indictment occurs when "either the government (usually during its presentation of the evidence and/or its argument), the court (usually through its instructions to the jury), or both, broadens the possible bases for conviction beyond those presented by the grand jury." U.S. v. Floresca, 38 F.3d 706, 710 (4th Cir. 1994).

Here, the State introduced a completely separate legal and factual theory of the case: that appellant intended and premeditated the killing of three unidentified men because they assaulted him, but unintentionally killed W[redacted] instead. The indictment contained no language indicating liability via transferred intent, nor was there any mention of the three unidentified assailants. Instead, the complaint, which was later dismissed, and the subsequent indictment alleged that appellant intentionally shot and killed D[redacted] W[redacted]. It was not alleged that appellant intended to kill the three men who assaulted him and, inadvertently, killed D[redacted] W[redacted]. Consequently, appellant had no notice, either from the prosecution's opening statement, nor from any evidence presented during the trial, that the State would premise appellant's guilt on transferred intent via the attempted premeditated murder of the his three assailants.

The trial court's instruction on transferred intent resulted in the constructive amendment of the indictment which substantially prejudiced appellant's rights. Because appellant did not know until the close of trial that he would face an allegation that he meant

to kill three mystery men, but killed W[redacted] instead, he had not opportunity to defend against the State's case. Moreover, the jury was allowed to return a guilty verdict for first-degree murder upon finding that appellant premeditated the murder of W[redacted] <u>or</u> his unidentified assailants. This resulted in a broadening of the bases for appellant's conviction and appellant's convictions must be reversed.

III.

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S REQUEST FOR A SCHWARTZ HEARING WHERE APPELLANT BROUGHT FORTH ALLEGATIONS THAT THE DECEDENT'S FAMILY WAS SINGING "PRAISE SONGS" AROUND JURORS, AND WHERE A JUROR EXPRESSED DISAPPROVAL THAT DEFENSE COUNSEL SHARED AN ELEVATOR WITH THE JUROR.

At some point during appellant's trial, his attorneys rode the elevator with a juror. The attorneys informed the trial court about the incident. The juror later told the trial court's clerk that the juror believed the attorneys' conduct was inappropriate. The attorneys also told the trial court that members of appellant's family alleged that members of the decedent's family were singing hymns in front of jurors. The trial court denied the defense request for a Schwartz hearing By doing so, the trial court abused its discretion. Remand for such a hearing is required.

Criminal defendants have a constitutionally protected right to a fair trial by an impartial jury. State v. Bowles, 530 N W.2d 521, 536 (Minn. 1995). In Schwartz v. Minneapolis Suburban Bus Co., this Court established a method for inquiring into allegations of misconduct involving the jury In Schwartz, the Court held that in cases where jury impartiality was brought into question,

> rather than permit or encourage the promiscuous interrogation of jurors by the defeated litigant, we think that the better practice would be to bring the matter to the attention of the trial court, and, if it appears that the facts justify so doing, the trial court may then summon the juror before him and permit an examination in the presence of counsel for all interested parties and the trial judge under proper safeguards. A record then could be made which could be presented to this court if any doubt existed about the correctness of the trial court's ruling after such hearing

258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960). The Rules of Criminal Procedure have

adopted this procedure for criminal cases. See Minn. R. Crim. P. 26.03, subd. 19(6).

To obtain a Schwartz hearing, the defendant must present prima facie evidence which, standing alone and unchallenged, would warrant the conclusion that misconduct occurred. State v. Church, 577 N.W.2d 715, 721 (Minn. 1998); State v. Larson, 281 N.W.2d 481, 484 (Minn. 1979). The decision whether to grant a Schwartz hearing is generally left to the discretion of the trial court. Id. But this Court has also stated repeatedly that trial courts should be liberal in granting Schwartz hearings. Larson, 281 N.W.2d at 484; Zimmerman, v. Witte Transportation Co., 259 N.W.2d 260, 263 (Minn. 1977); Olberg v. Minneapolis Gas Co., 291 Minn. 334, 343, 191 N.W.2d 418, 424 (1971).

In this case, during the presentation of the defense case, one of appellant's attorneys brought an incident to the trial court's attention. Defense counsel informed the court that, while waiting for the elevator, she saw members of the decedent's family at the elevator with a juror. Counsel became suspicious when family members did not take other elevators. The defense attorney decided to get on the elevator with the juror to prevent family members from talking to the juror. (T.438) The attorneys later brought the incident to the trial court's attention. Instead of questioning jurors herself, the trial judge's law clerk questioned jurors regarding the incident. (T.438) Apparently, a juror expressed concern that the attorneys got on the elevator (T.439) Defense counsel brought a motion for a mistrial, citing possible bias arising from the "elevator incident." (T.439) Defense counsel also told the trial court that members of appellant's family alleged that decedent's family members were singing "praise songs" around jurors. (T.440) Defense counsel requested that the trial court

question jurors regarding the incident, which the trial court declined to do. (T.440) The trial court concluded that because neither her law clerk, nor the bailiffs, heard inappropriate comments or songs, there was no basis to question jurors. The trial court also denied the motion for a mistrial. (T.441)

Appellant met his burden, and established a prima facie case of misconduct. First, it is undisputed that a juror or jurors had contact in the elevator with the defense attorneys. The incident obviously made an impression because jurors mentioned it to the trial court after the verdict was delivered. (T.525) Furthermore, the juror apparently expressed concern at the appropriateness of the attorneys' actions. (T.439) As to the second incident, the trial court's inquiry was insufficient. Although the bailiffs and law clerk may not have heard any comments or songs, that fact alone does not address the issue of whether any jurors may have heard the songs.

If this court remands appellant's case for a Schwartz hearing, appellant is entitled to have the hearing conducted by a different judge. After the jury returned the verdict, the trial court and law clerk spoke with jurors, on the record, about the case and the jurors' experience. While it is appropriate for a judge to thank jurors for their service, or even take feedback on improving other jurors' experience, the judge must take pains to maintain the appearance of neutrality. Here, the trial court discussed details of the case with jurors, including her own theory regarding the identity of the three men who assaulted appellant. (T.522) Although the trial court's actions do not demonstrate any actual bias or partiality, the appearance of neutrality has been compromised. This Court has held that the mere

appearance of partiality warrants concern. See State v. Greer, 635 N.W.2d 82, 94 (Minn. 2001). In addition, the trial court's law clerk would be a potential witness at the Schwartz hearing. In order to maintain the appearance of neutrality, a remand for a Schwartz hearing, before a different judge, is required under the facts of this case.

IV.

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO A PUBLIC TRIAL WHEN IT DECLARED BEFORE TRIAL THAT CHILDREN WERE NOT ALLOWED IN THE COURTROOM.

Shortly before trial, the trial court announced the rules of the courtroom in open court:

> And at this time, for the spectators in the courtroom, and I'm going to have both attorneys advise any people they feel may come to court, that there's no sleeping in this courtroom, there's no talking, there's no emotional outburst or gestures, no children are allowed, no hats, no food or beverages. And there's not to be any discussion of this case in this courthouse, because there's a lot of people who are potential jurors and witnesses in this case and we want to make sure that nobody's influenced by anything they may hear or see in this courtroom and outside of this courtroom. Anyone that creates a disturbance during the trial will be asked to leave and will not be allowed in.

(T.11) The trial court's blanket exclusion of all children from the courtroom violated appellant's right to a public trial and his convictions must be reversed.

Both the federal and Minnesota constitutions provide that "[i]n all criminal prosecutions the accused shall enjoy the right to a . . . public trial." U.S. Cons. amend. VI; Minn. Cons. art. I, § 6 This public-trial right protects many interests. The United States Supreme Court has explained:

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his tiers keenly alive to a sense of their responsibility and to the importance of their functions.

Waller v. Georgia, 467 U.S. 39, 46 (1984) (citations and internal quotation marks omitted). Moreover, "[i]n addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury."

Id.

To protect these values, the Supreme Court has established the following rules for when a criminal trial may be closed without violating the public trial guarantee:

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

Waller, 467 U.S. at 48. Citing Waller, this Court in State v. Lindsey held that Minn. Stat. § 631.04, which automatically excluded minors from attending criminal trials, "unconstitutionally encroache[d] upon a judicial function in violation of the separation of powers doctrine." 632 N.W.2d 652, 659 (Minn. 2001). The Court distinguished between a partial closing—excluding only minors—and a complete closing of the trial to the general public, holding that, without more, the exclusion of two minor children did not implicate "the values sought to be protected by a public trial right." Id. at 661. Here, there was no reason given for closing the trial to all children and it is impossible to know whether the values protected by the public trial right—having witnesses come forward or to prevent perjury—were implicated because minors may have been dissuaded from attending the trial by the court's order.

That is, prejudice would be an almost insurmountable burden in this case. Appellant, however, must have recourse for the court's error and, under the circumstances here, this court must reverse appellant's conviction and order a new trial in the interests of justice. See State v. Ware, 498 N.W.2d 454 (Minn. 1993)(new trial granted in interest of

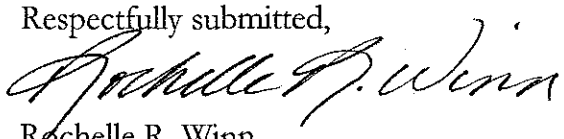
justice where, in addition to other errors, spectators removed from courtroom during polling of jury); Waller, 467 U.S. 39 (1984)(no prejudice need be shown where Sixth Amendment right to public trial violated.) As our Supreme Court has noted, albeit in a slightly different context, "[j]ustice is a process, not simply a result." State v. Lefthand, 488 N.W.2d 799, 802 (Minn. 1992).

CONCLUSION

For the reasons stated above, appellant requests that this court reverse his convictions and remand for a new trial. In the alternative, appellant request that the court remand his case for a Schwartz hearing.

Dated: December 5, 2005

Respectfully submitted,



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