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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Ave. Denver, CO 80203 Appeal; Gilpin District Court; Honorable Todd Vriesman; and Case Number 2017CR12	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant MICHELLE RE NAE BIALAS	
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OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

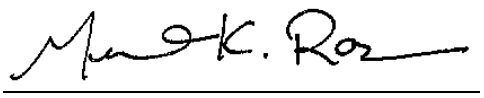
This brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 7,567 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(a)(7)(A).

For each issue raised by the Defendant-Appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.



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INTRODUCTION

During the Covid-19 pandemic in Colorado, trial courts had to adapt criminal proceedings to keep parties, participants, and the public safe. The right to a public trial was weighed against the requirements of social distancing. Many courts resolved this tension by live-streaming proceedings, including criminal trials, to overflow courtrooms where the public could watch while maintaining a safe distance from others.

But when the judge at Ms. Bialas's trial concluded that the public had to leave the courtroom, it wasn't due to fears of spreading the coronavirus. The court removed all the spectators in the gallery, including Ms. Bialas's family members, because jurors had overheard the alleged victim's family speaking about the case.

Although the public could watch the proceedings on WebEx, the trial court's exclusion of Ms. Bialas's family members constituted a partial closure of the courtroom. This is so because banning a defendant's supporters from in-person attendance implicates the interests protected by the public-trial right—in particular, ensuring that judges and prosecutors discharge their duties responsibly and treat the defendant fairly.

Because the trial court closed Ms. Bialas's courtroom without applying the *Waller* factors, the court violated her right to a public trial, requiring reversal.

STATEMENT OF THE ISSUES PRESENTED

I. Whether the trial court violated Ms. Bialas's constitutional right to a public trial by closing the courtroom to Ms. Bialas's family.

II. Whether the trial court erred by limiting Ms. Bialas's presentation of impeachment evidence when it ruled that if Ms. Bialas testified that the alleged victim had hit her in the past, it would open the door to evidence of Ms. Bialas's previous threats and actions against the alleged victim.

III. Whether Ms. Bialas is entitled to a hearing to request a waiver of surcharges, fees, and costs.

STATEMENT OF THE CASE

In 2017, the State charged Michelle Bialas with attempted first-degree murder, first-degree assault, second-degree assault, first-degree burglary, and violation of a protection order (VPO). (CF p 14) A jury found Ms. Bialas guilty of first-degree assault, second-degree assault, burglary, and VPO. (CF p 89) A division of the Court of Appeals reversed Ms. Bialas's convictions based on errors made during voir dire. *People v. Bialas*, Case No. 17CA1841 (Colo. App. Dec. 17, 2020) (not published).

The State retried Ms. Bialas in 2021 for count 3: first-degree assault, § 18-3-202(1)(a), C.R.S. (F3); count 4: second-degree assault, §§ 18-3-203(1)(b),

(2)(b.5), C.R.S. (F3); count 5: first-degree burglary, § 18-4-202(1), C.R.S. (F3); and count 6: VPO, § 18-6-803.5(1)(a), C.R.S. (M1). (CF p 377) The jury found her guilty of only second-degree assault and VPO. (CF p 411) The court sentenced her to 12 years in the Department of Corrections. (CF p 470)

STATEMENT OF THE FACTS

On a snowy afternoon in January, Michelle Bialas drove up the road to her house and parked in the driveway. (TR 7/14/21 p 63:24-64:20) Ms. Bialas and her longtime boyfriend, James Bynum, had built the house by hand up in the mountains of Gilpin County. (Id. p 29:17-30:17) They had been together for close to 20 years, and although Ms. Bialas had purchased the land herself decades before, she had added Mr. Bynum to the deed when she refinanced the house in 2014. (Id. p 30:20-31:13)

Ms. Bialas knew that she should not be at her house that afternoon. Mr. Bynum had taken out a protection order on December 15, 2016, prohibiting her from setting foot on the property. (Id. p 24:24-26:2; EX 88) Although Ms. Bialas didn't know it, Mr. Bynum had also transferred title of the house into his name alone. (TR 7/14/21 p 61:23-25) Back in 2005, Ms. Bialas had written a quitclaim deed that would give Mr. Bynum full ownership of the house, with the understanding that he would file it if she passed away before him. (Id. p 27:3-19, 28:15-21) He filed a

copy of this quitclaim deed without her permission on December 21, 2016. (TR 7/13/21 p 60:1-12)

Ms. Bialas missed her family: she was depressed and homesick, and she wanted to see her pets—dogs and cats that the couple shared. (Id. p 39:19-22; TR 7/14/21 p 24:9-14, 70:14-71:1) Ms. Bialas parked her car in front of the house within view of the front of the home, including the windows to the master bedroom, bathroom, and kitchen. (7/14/21 p 64:21-65:1) She took three pulls from a bottle of vodka to warm her stomach and calm her nerves, and then she walked through the snow to the front door and knocked. (Id. 66:3-10, 74:3-9)

Ms. Bialas testified that when Mr. Bynum opened the door, he was on the phone with police, telling them, "She is here right now. She is attacking me; she is attacking me; come right away." (Id. p 66:12-20) Ms. Bialas was dismayed and knew that she was in trouble. She walked back to her car, drove it a short way down the driveway, and hid in the passenger foot well, waiting for the police to come. (Id. p 66:22-68:2) Ms. Bialas never went into the house. (Id. p 66:24-25)

Mr. Bynum called 911, and when first responders arrived, they found him in his bathroom, bleeding heavily from a cut on the back of his head. (TR 7/13/21 p 39:5-12, 90:2-5) He told the officers and medical staff that he did not see Ms. Bialas after she knocked on the door, and he opened it thinking that maybe someone

had dropped off a package. (Id. p 32:24-33:5) He said that she had reached behind him with something sharp, cut him, and yelled, "you Mother Fucker." (Id. p 33:20-34:9) Mr. Bynum also said that she had chased him through the house until he locked her out of the bathroom and called 911. (Id. p 34-35)

Police officers found Ms. Bialas in her car, pulled her out, and arrested her. There was no blood in her car, on her hands, or anywhere on her clothing, jewelry, or boots. (Id. p 159:19-22, 173-182) Law enforcement never found the sharp object that cut Mr. Bynum. (Id. 211:20-212:13, 216:16-17)

Ms. Bialas maintains that she is innocent of the attack, as she did throughout both trials.

SUMMARY OF THE ARGUMENT

I. Public Trial. Criminal defendant have the right to a public trial under the U.S. and Colorado constitutions. When a trial court excludes members of the public from the courtroom—effectuating either a complete or partial closure—the court must make findings under *Waller v. Georgia* to justify the infringement on the public-trial right.

Ms. Bialas testified during her case in chief. During a break in her direct examination, some members of the public sitting in the gallery discussed aspects of Ms. Bialas's previous trial within earshot of jurors. The trial court ruled that all

members of the public were "banned" from the courtroom for the rest of the trial, including Ms. Bialas's family members, who were not implicated in the improper statements. The court reasoned that those excluded from the gallery could watch the proceedings via WebEx in a room across the hall. Defense counsel objected.

The exclusion of Ms. Bialas's family members from in-person attendance at her trial was a partial closure that required the trial court to make findings and balance its interest in closing the courtroom against Ms. Bialas's public-trial right. The court did not make such findings, thereby violating Ms. Bialas's right to a public trial, requiring reversal.

II. Impeachment Evidence. Criminal defendants have the constitutional rights to present a defense and to a fair trial. Exclusion of relevant and competent defense evidence implicates both of these rights.

The trial court ruled that if Ms. Bialas testified that Mr. Bynum had hit her in the past—offered to rebut his testimony that he would never hit her—then it would open the door to prosecution evidence that she had made threats and assaulted Mr. Bynum previously. By attaching a consequence to Ms. Bialas's presentation of relevant impeachment evidence, the trial court abused its discretion and violated Ms. Bialas's constitutional rights, requiring reversal.

III. Surcharges and Costs. The trial court erroneously assessed surcharges, fees, and court costs. Ms. Bialas asks for a remand to demonstrate her indigence and request waiver of these charges.

ARGUMENT

I. The trial court violated Ms. Bialas's constitutional right to a public trial by closing the courtroom to her family.

When considering a claim that a defendant's public-trial right was violated, appellate courts should first determine whether the claim of error was preserved at trial. *See Stackhouse v. People*, 2015 CO 48, ¶ 9 (defendant waives public-trial right by failing to object to closure). Courts then consider the question of whether there was a closure implicating the right to a public trial. *See People v. Jones*, 2020 CO 45, ¶ 22 (complete and partial closures); *People v. Lujan*, 2020 CO 26, ¶ 19 (trivial closures). If there was a closure, appellate courts look to whether the trial court made pre-closure *Waller* findings sufficient to justify it. *Jones*, ¶ 27. Where a closure was not justified, the remedy is reversal. *Id.* ¶ 51.

A. Standard of review and preservation.

A trial court's decision to close the courtroom is a mixed question of law and fact. *Jones*, ¶ 14. Whether, and to what extent, a trial judge closed a courtroom is a question of law reviewed de novo. *Id.*; *Stackhouse*, ¶ 4.

Defense counsel objected when the trial court removed Ms. Bialas's family members from the courtroom. (TR 7/14/21 p 55:3-10, 56:2-10)

B. Facts.

Ms. Bialas's jury trial took place in July 2021, during the Covid-19 pandemic. At a pretrial conference, the trial court explained how they would accommodate social distancing in the courtroom. (TR 6/25/21 p 13-15) The court would reserve the back row for spectators, including relatives, who wanted to watch the trial in person. (Id. p 14:18-23; TR 7/14/21 p 57:13-21) The proceedings would also be broadcast to another room in the courthouse via WebEx. (TR 6/25/21 p 14:23-15:6) The court asked defense counsel whether he had issues with any of the "mechanics" of trying the case this way, and defense counsel agreed to all of the court's proposed Covid-19 procedures. (Id. p 17:19-18:1)

Voir dire occupied the first day of trial, and the second day consisted of the prosecution's entire presentation of evidence. (TR 7/12/21, 7/13/21) The prosecution rested at the beginning of the third day, and Ms. Bialas chose to testify in her own defense. (TR 7/14/21 p 22:22, 23:1)

After Ms. Bialas had been on the stand for a short while, the court and the parties had a lengthy bench conference to discuss her testimony about the various quitclaim deeds to her property. (Id. p 31:15-39:7) Bench conferences were held

outside of the courtroom in the hallway so that the jury could remain socially distanced in the courtroom. (TR 6/25/21 p 15:11-23) When the parties re-entered the courtroom, a juror passed a note to the judge that read, "Your Honor, the spectators behind me were discussing the history of this case and we could hear them." (TR 7/14/21 p 39:21-23) The court promptly ordered all of the spectators to leave the courtroom, explaining that they could see the broadcast of the proceedings across the hall. (Id. p 39:8-14) Then the court asked the jurors to leave the courtroom as well. (Id. p 39:15-20) The court made a record that the people sitting behind the jurors were members of the Bynum and Bialas families. (Id. p 40:1-2)

The court brought in five jurors for individual in camera questioning. (Id. p 41-53, 54:1-8) The juror who wrote the note said that he heard spectators talking about a previous trial, a guilty verdict, and their belief that the current trial was biased in favor of Ms. Bialas. (Id. p 42:18-43:13) Defense counsel made a record that the comments came from the Bynum family, not the Bialas family, and the prosecutor seemed to agree. (Id. p 46:6-15; accord id. p 59:6-10 (juror stated that the spectators in question "were here for Jim [Bynum]"))

Neither party requested a mistrial based on what the jurors had heard, but defense counsel asked the court to allow Ms. Bialas's family to return to the courtroom. (Id. p 55:1-4) He offered to speak with her family members about

maintaining absolute silence and argued, "I think it violates Ms. Bialas' right to a public trial to have her family removed from the courtroom when the people who were making these statements were not her family." (Id. p 54:4-10)

The trial court denied defense counsel's request:

> Okay, well, I'm not making that finding. *All spectators will be banned from the courtroom for the rest of the day and they can be across the hall and watch the proceedings via WebEx just like anybody else*, but I'm not going to now inquire from each one of the spectators who is at fault. It is my province to govern what [is] happening here in the courtroom and something has happened which is not proper – partly because of the pandemic reasons that we have jurors and the spectators (inaudible) – and I'm not going to sit around and try and determine who is at fault for making comments or not. *The best, easiest, and uniform r[u]le is that there will be no further spectators for the rest of the trial in the courtroom.*

(Id. p 55:11-22 (emphases added))

Defense counsel objected to the closure, citing the Sixth Amendment of the United States Constitution, Article II of Section 16 of the Colorado Constitution, and Ms. Bialas's right to a public trial. (Id. p 56:2-10) The prosecutor stated that she had no objection to Ms. Bialas's family being present in the courtroom, as they had behaved appropriately. (Id. p 56:18-20) But the court reiterated that it was invoking a "uniform rule":

> *I'm not going to have any further spectators.* I am not going to take sides as to who it is or what spectators get

> special preference over other spectators here. All spectators for the rest of the trial will be in the virtual courtroom, which is right across the lobby.

(Id. p 57:8-12 (emphasis added))

After her family members were excluded from the courtroom, Ms. Bialas continued her testimony for another 35 pages of trial transcript, including the rest of her direct examination and all of cross-examination and re-direct. (Id. p 61-97) After she concluded, the trial court read the jury instructions and both parties gave closing arguments before the jury began deliberations. (Id. p 98-154)

C. The constitutional right to a public trial.

The United States and Colorado constitutions guarantee criminal defendants the right to a public trial. U.S. Const. amends. VI, XIV; Colo. Const. art. II, § 16; *Waller v. Georgia*, 467 U.S. 39, 46 (1984); *People v. Jones*, 2020 CO 45, ¶ 15.

The right to a public trial exists "for the benefit of the accused" and serves four fundamental interests in our justice system: "1) 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." *Jones*, ¶¶ 16-17, 38; *Waller*, 467 U.S. at 46.

The public trial right is not absolute: it may yield to competing interests, including the defendant's right to a fair trial and the government's interest in

inhibiting disclosure of sensitive information. *Waller*, 467 U.S. at 45. However, there is a "presumption of openness" such that closures "will be rare," and "the balance of interests must be struck with special care." *Id*. The public-trial right "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.*; *People v. Hassen*, 2015 CO 49, ¶ 8.

Colorado courts have recognized three types of closures: complete, partial, and trivial. *Jones*, ¶¶ 22-27; *People v. Lujan*, 2020 CO 26, ¶ 23. Before ordering a complete or partial closure, "the trial court must consider the *Waller* factors": "(1) the party seeking to close the proceeding 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) the trial court must make findings adequate to support the closure." *Jones*, ¶¶ 21, 27 (internal punctuation omitted); *Waller*, 467 U.S. at 48. Courts are "obligated to take *every reasonable measure* to accommodate public attendance at criminal trials." *People v. Hassen*, 2015 CO 49, ¶ 9 (quoting *Presley v. Georgia*, 558 U.S. 209, 215 (2010), emphasis in *Hassen*).

A defendant may affirmatively waive his public-trial right by choosing not to object to a known closure. *Stackhouse v. People*, 2015 CO 48, ¶ 9.

D. Removing Ms. Bialas's family members from the courtroom was a partial closure, despite the availability of WebEx viewing in a separate room.

The trial court reasoned that banning Ms. Bialas's family members from the courtroom was not a closure because they could watch the proceedings in a room across the hall via WebEx livestreaming. (TR 7/14/21 p 55:11, 57:11-12; see also CF p 338 (trial court's order denying Ms. Bialas's motion to proceed in forma pauperis on appeal, reasoning that denial of a public trial was not an issue stated in good faith because the trial was viewable remotely via WebEx))

But excluding the public from in-person attendance while providing a video feed constitutes a partial closure, and the trial court was obligated to make findings under *Waller* before banning the public. Because the court failed to do so, it violated Ms. Bialas's constitutional right to a public trial.

1. Federal courts have held that excluding the public from attending trials in person, even with video streaming available, is at least a partial closure.

During the pandemic, trial courts across the nation faced Sixth Amendment challenges to procedures that limited, rather than precluded, public access; the courts characterized these restrictions as a "partial closure." *See* 6 Wayne R. LaFave et al., Criminal Procedure § 24.1(b) & n.28.30 (4th ed. 2021) (compiling cases); *United States v. Allen*, 34 F.4th 789, 796 (9th Cir. 2022) ("[T]he 'public trial' guaranteed

by the Sixth Amendment is impaired by a rule that precludes the public from observing a trial in person . . . .").

In *United States v. Babichenko*, 508 F. Supp. 3d 774, 778 (D. Idaho 2020), the district court limited in-person trial attendance and provided a separate viewing room with a live video and audio feed. The court treated this procedure as a partial courtroom closure, noting that other district courts had likewise deemed spectator limitations and separate viewing rooms as justifiable partial closures. *Id.* at 778-79 (compiling cases). While *Babichenko* concluded that the partial closure was necessary and made findings to support it, the court did "not take the decision to partially close defendants' trial proceedings lightly"; it committed to considering whether to allow a limited number of spectators into the courtroom if circumstances changed. *Id.* at 780-81. The court even took the additional measure of setting up a camera *in the viewing room* so that a video feed of the room showing members of the press and public would be displayed *in the courtroom*—to remind those involved in the trial that the public was watching. *Id.* at 776.

In *United States v. Richards*, 2:19-CR-353-RAH, 2020 WL 5219537, at *2 (M.D. Ala. Sept. 1, 2020), the district court allowed the defendant's family members to observe the proceedings in person while it streamed live video and audio of the trial to a viewing room; the court decided that this was a partial closure of the trial.

It made findings under *Waller* to justify the closure. *Id.*; *accord United States v. Fortson*, 2:18-CR-416-WKW, 2020 WL 4589710, at *2 (M.D. Ala. Aug. 10, 2020).

In *United States v. Sapalasan*, 318CR00130TMBMMS, 2021 WL 2080011, at *1 (D. Alaska May 24, 2021), the district court ruled that a partial closure was necessary due to Covid-19 and that it was justified under *Waller*. Only the parties, jury, witnesses, and court staff were allowed in the courtroom, while members of the public and press could view a live video feed in another room. *Id.*

The district court in Ohio ordered that only venire members could be inside the courtroom during voir dire due to social distancing requirements; following voir dire, half of the gallery would be open for the public, and live video and audio would be streamed to a nearby room for those who couldn't fit in the courtroom. *United States v. Johnson*, 1:21CR123, 2021 WL 3011933, at *1-2 (N.D. Ohio July 16, 2021). The court wanted to "allow for numerous family members and the media to view the trial proceedings" in the gallery. Again, the court viewed this procedure as a justifiable partial closure and applied the *Waller* factors. *Id.* at *2; *accord United States v. Donziger*, 11-CV-691 (LAK), 2020 WL 4747532, at *3-4 (S.D.N.Y. Aug. 17, 2020) (issuing nearly identical pretrial order); *see also State v. Boder*, A21-0216, 2022 WL 588757, at *5 (Minn. Ct. App. Feb. 28, 2022), *review granted in part* (May

17, 2022) (applying *Waller* to procedure where audience watched trial from a separate room via video feed and holding that closure was justified).[1]

Relatedly, in *United States v. Allen*, 34 F.4th 789, 797 (9th Cir. 2022), the appellate court held that the district court's decision to exclude in-person spectators and allow only *audio* access to the trial was a total, not partial, courtroom closure and that it was not justified under *Waller*. The court reversed the defendant's conviction. *Id.* at 800-01.

> *2. Under U.S. Supreme Court and Colorado precedent, removing the public, including Ms. Bialas's family members, during her testimony and providing WebEx viewing should be considered a partial closure.*

By preventing Ms. Bialas's family members from watching her trial in person, the trial court implicated the interests protected by the public-trial right: allowing the public to see that the accused is "fairly dealt with" and not unjustly condemned; ensuring that judges and prosecutors discharge their duties responsibly; encouraging witnesses to come forward; and discouraging perjury. *Waller v. Georgia*, 467 U.S. 39, 46 (1984); *People v. Jones*, 2020 CO 45, ¶ 38. Therefore, the court's action should be considered a partial courtroom closure.

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[1] Undersigned counsel notifies this Court that the *Boder* opinion is unpublished and non-precedential. Counsel provides this citation as persuasive authority only, given that there are few published cases addressing whether excluding spectators while providing a live video feed constitutes a courtroom closure.

It is highly significant that the closure affected Ms. Bialas's family: "in evaluating a defendant's right to a public trial, courts emphasize the important role the presence of a defendant's family plays in ensuring a fair trial." *Jones*, ¶ 41. In particular, the presence of family at trial reminds the trial participants of their duty to treat the defendant fairly. *Id*. The presence of interested spectators, including family, "may keep [the defendant's] triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller*, 467 U.S. at 46; *Jones*, ¶ 16; *cf. United States v. Rivera*, 682 F.3d 1223, 1236 (9th Cir. 2012) (presence of family at sentencing reminds the court of the wider impact of the sentence and confirms defendant's community connections and support).

Because family members serve as a reminder to treat the defendant fairly, the exclusion of a defendant's relatives implicates Sixth Amendment values more directly than the exclusion of the public in general. *Rivera*, 682 F.3d at 1232; *accord Longus v. State*, 7 A.3d 64, 75 (Md. 2010) ("[T]he defendant's family and friends are the people who have the strongest interest or concern in the handling of the defendant's trial and their attendance perhaps best serves the purpose of the Sixth Amendment guarantee."); *Tinsley v. United States*, 868 A.2d 867, 873 (D.C. 2005) ("Of all members of the public, a criminal defendant's family and friends are the people most likely to be interested in, and concerned about, the defendant's

treatment and fate, so it is precisely their attendance at trial that may best serve the purposes of the Sixth Amendment public trial guarantee."); *Judd v. Haley*, 250 F.3d 1308, 1315 (11th Cir. 2001) ("When access to the courtroom is retained by some spectators (such as representatives of the press or the defendant's family members), we have found that the impact of the closure is not as great, and not as deserving of such a rigorous level of constitutional scrutiny.").

Here, the trial court partially closed the courtroom when it banned spectators because at that point, the public wasn't truly "free to attend." *See Jones*, ¶ 19. Family members could watch the proceedings from across the hall, but the impact of their presence on the trial participants and on the jury was completely lost. Unlike in *Babichenko*, there was no camera pointed at the viewing public that broadcast to the participants in the courtroom. 508 F. Supp. 3d 776. The trial court explained that two cameras were running in the courtroom: one on the lawyers and one on the witness. (TR 7/14/21 p 57:1-4) When a witness was testifying, the spectators across the hall could not see the *judge*, nor could they see the *jury*. *See Allen*, 34 F.4th at 796 ("[A]ny failure to make the judge, counsel, defendant and jury subject to the public's eye (as well as its ear) undermines confidence in the proceedings."). Nor could the public see the prosecution's video exhibit, which was shown on an

electronic screen, because the screen was pointed only toward the jury box. (TR 6/25/21 p 11:23-12:1; EX 94)

When considering the balance of factors determining whether a courtroom was closed, courts cannot "minimize the importance of a criminal defendant's interest in the attendance and support of family and friends. *To say the least, this support is ineffective in absentia*." *United States v. Agosto-Vega*, 617 F.3d 541, 548 (1st Cir. 2010) (emphasis added). Because the trial court's action in banning spectators impinged on the constitutional public-trial guarantee, the court effected a partial closure.

E. By failing to apply the *Waller* factors before excluding Ms. Bialas's family members, the trial court violated Ms. Bialas's public-trial right, requiring reversal.

When defense counsel objected to the trial court's barring of Ms. Bialas's family from the courtroom, she asserted her Sixth Amendment right to a public trial. (TR 7/14/21 p 56:2-10) Up to this point, counsel had assented to the partial closure, and therefore waived any objection, but the exclusion of family was a greater infringement on Ms. Bialas's public-trial right than she was willing to bear. Accordingly, the trial court was required to justify the closure under *Waller*, and its failure to do so is reversible error.

1. The trial court abandoned its affirmative duty to accommodate public attendance when it closed the courtroom.

As appellate courts have emphasized repeatedly, "trial courts are obligated to take *every reasonable measure* to accommodate public attendance at criminal trials." *People v. Jones*, 2020 CO 45, ¶ 21; *People v. Hassen*, 2015 CO 49, ¶ 9; *Presley v. Georgia*, 558 U.S. 209, 215 (2010).

To justify even a partial courtroom closure, the court "must consider" the *Waller* factors:

> (1) "the 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,"
>
> (4) "and it must make findings adequate to support the closure."

Waller v. Georgia, 467 U.S. 39, 46-48 (1984); *Jones*, ¶¶ 21, 27.

The trial court said very little to explain why it banned spectators from the courtroom. (TR 7/14/21 p 55:11-22) Presumably, the overriding interest it sought to protect was courtroom decorum or the threat of improper communications with

jurors.[2] *See Jones*, ¶ 94 (Boatright, J., dissenting); *Presley*, 558 U.S. at 215. Indeed, a trial court's order intended to control a disruption might not be considered a "closure" at all—"so long as the courtroom is not cleared and those people who comply with neutral rules regarding decorum and disruption are permitted to remain." *State v. Martinez*, 956 N.W.2d 772, 785-86 (N.D. 2021); *id.* at 786 ("An order specifically excluding the defendant's friends and family may constitute a closure and thus require adequate justification in pre-closure findings.").

Assuming arguendo that the court's statements satisfy the first *Waller* factor, they fail the second: the closure was broader than necessary because it swept up Ms. Bialas's family members, who, as defense counsel and the prosecutor agreed, were not involved in the disruption.

The court's explanation also failed the third factor because the court did not consider alternatives to barring spectators from the remainder of Ms. Bialas's trial. *See Presley*, 558 U.S. at 214 (trial courts must sua sponte consider alternatives to closure). There was space available in the courtroom for Ms. Bialas's family; if the court feared that they would be disruptive, the court could have admonished them.

[2] To be clear, the public health crisis caused by Covid-19 was not the reason that the trial court cleared the courtroom. The back row of the gallery had been open to the public during the trial. Absent the inappropriate statements made by Mr. Bynum's family, we can assume that the trial court would have allowed spectators to attend the rest of trial.

See Agosto-Vega, 617 F.3d at 547 (excluding defendant's family from voir dire where there was space available was reversible error).

Despite limitations on in-person seating that the pandemic has made necessary, other courts have gone to great lengths to ensure that a defendant's family members, at the very least, can be present in the courtroom. *See United States v. Richards*, 2:19-CR-353-RAH, 2020 WL 5219537, at *1 (M.D. Ala. Sept. 1, 2020) (closing jury selection and trial to in-person spectators "except for the Defendant's family members"); *United States v. Trimarco*, 17-CR-583 (JMA), 2020 WL 5211051, at *2 (E.D.N.Y. Sept. 1, 2020) (offering defendant's father a reserved, isolated seat in the courtroom "to accommodate his concerns so that he can be present for the trial").

Finally, the trial court's statements failed the fourth *Waller* factor because the court made no findings as to why Ms. Bialas's family members had to be removed, and there was no record that showed any cause for this exclusion. *See Jones*, ¶ 35. Accordingly, by banning Ms. Bialas's family from the courtroom without making findings and satisfying *Waller*, the trial court effected an unjustified partial closure. *Id.* ¶ 36.

2. The closure was not trivial.

In *People v. Lujan*, 2020 CO 26, ¶ 23, the supreme court held that some courtroom closures are so trivial that they do not implicate the public-trial right. The court's decision to ban spectators in this case is not one of them.

Courts consider the totality of the circumstances when assessing triviality, including "the duration of the closure, the substance of the proceedings that occurred during the closure, whether the proceedings were later memorialized in open court or placed on the record, whether the closure was intentional, and whether the closure was total or partial." *Id.* ¶ 19.

Here, spectators were banned from the courtroom in the middle of Ms. Bialas's testimony; they were excluded throughout her cross-examination and redirect, as well as the reading of the jury instructions and closing arguments. (TR 7/14/21 p 61-153) The closure was also intentional. *See Jones*, ¶ 40 ("[I]ntentional closures during more significant, and less fleeting, testimony are generally considered not trivial because of their potential to affect the fairness of the proceedings."). Additionally, as in *Jones*, ¶ 41, and *Hassen*, ¶ 12, the closure in this case excluded the defendant's family members. It therefore cannot be considered trivial.

3. The violation of Ms. Bialas's public-trial right was structural error.

Because Ms. Bialas preserved her objection to the courtroom closure, if this Court concludes that she was erroneously deprived of her right to a public trial, it is structural error. *Hassen*, ¶ 7; *Jones*, ¶ 51 (reversing defendant's conviction "because the trial court violated Jones's right to a public trial by excluding Jones's parents from the proceedings without first justifying that decision under *Waller*").

Ms. Bialas asks this Court to reverse her convictions.

II. The trial court erred by limiting Ms. Bialas's presentation of impeachment evidence when it ruled that if Ms. Bialas testified that the alleged victim had hit her in the past, it would open the door to evidence of Ms. Bialas's previous threats and actions against the alleged victim.

A. Standard of review and preservation.

Appellate courts review a trial court's interpretation of the law governing the admissibility of evidence de novo and review the determination of whether a party opened the door to otherwise inadmissible evidence for abuse of discretion. *People v. Johnson*, 2021 CO 35, ¶¶ 15-16. "[W]here constitutional rights are concerned, law application is a matter for de novo appellate review." *People v. Ortega*, 370 P.3d 181, 184 (Colo. App. 2015) (internal punctuation omitted).

Defense counsel objected to the trial court's ruling, citing Ms. Bialas's constitutional rights to due process and a fair trial. (TR 7/14/21 p 17:9-18:8)

B. Facts.

During Mr. Bynum's testimony, the prosecutor asked him why, since he was bigger than Ms. Bialas, he chose to run away from her instead of going "after her." (TR 7/13/21 p 35:25-36:3) Mr. Bynum responded:

> I couldn't attack her. I couldn't hurt her. *I just couldn't bring myself to do that – you know, hit women; especially a woman you have been with for 20 years.* She had already inflicted damage right in the door so I just stayed away from her. She couldn't do any more. It wasn't necessary to hit her for any reason.

(Id. p 36:4-9 (emphasis added))

After the jury was excused for the day, defense counsel notified the court that he believed that Mr. Bynum opened the door to evidence that he had, in fact, hit Ms. Bialas in the past. (Id. p 254:15-255:6) Counsel wanted to correct the false impression that Mr. Bynum had created. The trial court told defense counsel to consider how he would present that evidence and that he would consider the matter overnight. (Id. p 255:7-256:1)

Defense counsel asked for a ruling the next morning. (TR 7/14/21 p 9:19-10:9) Counsel maintained that the evidence Mr. Bynum gave was misleading because he had assaulted Ms. Bialas before. He explained that he could ask Ms. Bialas one specific question—"has he hit you in the past?"—and then move on, and he argued that this would not open the door to other-act evidence about Ms. Bialas.

(Id. p 10:16-11:3, 12:1-15) The prosecutor contended that if defense counsel asked this question, it would open the door to recalling Mr. Bynum, who would testify that he did not hit her in the past and that she was the one who threatened and assaulted him. (Id. p 11:14-23)

The trial court reasoned that this was a difficult situation because excluding this evidence would be "excluding some of the truth." (Id. p 13:8-13) The court ruled that if Ms. Bialas testified that Mr. Bynum's statement wasn't truthful, it would open the door "to their past relationships." (Id. p 14:11-15) This would include threats Ms. Bialas may have made to Mr. Bynum and incidents related to the protection order. (Id. p 16:3-7) The court did not believe it would be fair to the prosecution for Ms. Bialas to answer just the one question and move on. (Id. p 14:16-15:3)

Defense counsel asked whether the court's ruling meant that if Ms. Bialas testified to either a general or specific act that Mr. Bynum committed against her to rebut his assertion that he would never hit her, the prosecutor could present evidence of any prior threats that Ms. Bialas made toward Mr. Bynum and any alleged violence from Ms. Bialas toward Mr. Bynum, both through cross-examination of Ms. Bialas and through rebuttal witnesses. (Id. p 16:14-17:8) The trial court said yes.

Defense counsel objected on the basis of Ms. Bialas's rights to due process and a fair trial, maintaining that he should be allowed to present this evidence without consequences because Mr. Bynum opened the door. (Id. p 17:9-18:8)

During Ms. Bialas's case, defense counsel did not elicit evidence that Mr. Bynum had hit Ms. Bialas in the past. (See id. p 23-96)

C. The trial court's ruling that if Ms. Bialas testified that Mr. Bynum hit her in the past, it would open the door to the history of their relationship chilled Ms. Bialas's ability to impeach the alleged victim's testimony.

An erroneous evidentiary ruling can rise to the level of constitutional error where it deprived the defendant of a meaningful opportunity to present a complete defense. *People v. Osorio-Bahena*, 2013 COA 55, ¶ 17. U.S. const. amends. VI, XIV; Colo. const. art II, § 18, 25. Exclusion of relevant and competent defense evidence implicates the defendant's right to present a defense and ultimately the right to a fair trial. *People v. Pronovost*, 773 P.2d 555, 558 (Colo. 1989).

"The concept of 'opening the door' represents an effort by courts to prevent one party in a criminal trial from gaining and maintaining an unfair advantage by the selective presentation of facts that, without being elaborated or placed in context, create an incorrect or misleading impression." *Golob v. People*, 180 P.3d 1006, 1012 (Colo. 2008); *People v. Montoya*, 2022 COA 55, ¶ 27. Although not codified in the Rules of Evidence, the doctrine gives parties the right to explain or rebut any adverse

inferences injected into the case by the opposing party. *People v. Melillo*, 25 P.3d 769, 775 (Colo. 2001); *People v. Cohen*, 2019 COA 38, ¶ 26.

A party may open the door to otherwise inadmissible evidence by eliciting incomplete evidence on a subject, and once the door is opened, the opponent may inquire into the otherwise inadmissible matter. *People v. Heredia-Cobos*, 2017 COA 130, ¶ 20.

"The concept of 'opening the door' isn't unlimited," however. *Cohen*, ¶ 23. The *Cohen* court addressed to what extent an attorney-defendant had opened the door to admission of otherwise inadmissible hearsay evidence (complaints that her clients had filed with OARC). *Id.* ¶¶ 19-29. In opening statement, defense counsel had implied that the OARC investigations began after the defendant's child's father sent "an inflammatory letter" to regulation counsel. *Id.* ¶ 22.

Cohen explained that the opening-the-door doctrine "doesn't give an opponent unbridled license to introduce otherwise inadmissible evidence into trial." *Id.* ¶ 23 (internal quotation mark omitted). Importantly, the doctrine "can be used only to *prevent* prejudice; it can't be used as an excuse to *inject* prejudice into the case." *Id.* (emphases added). Otherwise inadmissible evidence can come in only to the extent necessary to rebut adverse assumptions or to fix an incorrect or misleading impression. *Id.* ¶ 26.

Here, the trial court correctly ruled that Mr. Bynum's testimony that he would never hit Ms. Bialas opened the door to Ms. Bialas's correction of his misleading impression. But the trial court erred when it attached conditions to Ms. Bialas's presentation of the evidence. The court forced Ms. Bialas to choose between properly impeaching the testimony of her accuser and excluding evidence of her prior threats and actions toward Mr. Bynum—evidence that would have improperly injected prejudice into the case.

Ms. Bialas's predicament was similar to *People v. Johnson*, 2021 CO 35, ¶¶ 5, 7, where the trial court ruled that if Johnson introduced evidence that an alternate suspect tested positive for gunshot residue (GSR), then the prosecution could introduce evidence that Johnson had also tested positive, which the court had previously suppressed. Johnson elected not to inquire about the GSR test, and he was convicted of first-degree murder. *Id.* ¶ 8. The supreme court held that this was reversible error because the door to inadmissible evidence is not necessarily opened when a defendant offers truthful, albeit potentially incomplete, evidence. *Id.* ¶ 14. The "effect of the trial court's ruling was to chill Johnson's presentation of truthful and favorable evidence" and presented him with a Hobson's choice between keeping out damaging evidence and fully developing his defense. *Id.* ¶ 35.

"When, prior to the defendant's presentation of evidence, the trial court erroneously rules on an evidentiary matter and thereby causes the defendant to refrain from presenting a defense, the ruling can cast an impermissible chill on the defendant's freedom of decision." *People v. Kreiter*, 782 P.2d 803, 805 (Colo. App. 1988) (internal quotation mark omitted).

A defendant "necessarily states a violation of his constitutional right to present a defense by demonstrating that a reasonable jury might have received a significantly different impression of a witness's credibility" had the court not curtailed impeachment. *Krutsinger v. People*, 219 P.3d 1054, 1061 (Colo. 2009). Thus, the trial court's erroneous ruling violated Ms. Bialas's constitutional right to present a defense. See *id.*; *Johnson*, ¶ 35.

In this case, the trial court's error was an abuse of discretion that requires reversal. Because Ms. Bialas preserved this issue with a contemporaneous objection and because the issue implicates Ms. Bialas's constitutional rights to present a complete defense and to a fair trial, this Court should review for constitutional harmless error. *Johnson*, ¶¶ 36-36. Under this standard, the error requires reversal unless this Court "is able to declare a belief that the error was harmless beyond a reasonable doubt." *Id.* ¶ 17 (internal punctuation omitted). The State has the burden to prove the error was harmless. *Id*.

Had defense counsel been able to show the jury that Mr. Bynum was untruthful when he claimed that he "couldn't bring [himself]" to hit a woman he had been with for 20 years, the jurors may have developed a significantly different impression of his credibility. The case against Ms. Bialas turned on whether the jury believed his account that Ms. Bialas attacked him, or whether they believed Ms. Bialas's testimony that she left the house when Mr. Bynum answered the door while calling 911. Given that the jury's decision came down to a credibility assessment, the damage done by attaching a price to Ms. Bialas's presentation of evidence cannot be deemed harmless. Ms. Bialas asks this Court to reverse her convictions.

III. Whether Ms. Bialas is entitled to a hearing to request a waiver of surcharges, fees, and costs.

A. Preservation and standard of review.

The trial court did not address surcharges, costs, or fees at sentencing. (See TR 9/3/21) The mittimus shows $604.50 assessed against Ms. Bialas but gives no explanation. (CF p 470) The Gilpin County District Court Data Access website indicates that Ms. Bialas's accounts receivable balance is currently $605.17, as she has paid $4.33 towards the Victim Compensation Fund:

	Amount Owed	Amount Paid	Outstanding Balance
Address Confidentiality Fund	$28.00	$0.00	$28.00
Collections Cost Recovery	$5.00	$0.00	$5.00
Court Costs	$35.00	$0.00	$35.00
Court Security Cash Fund	$5.00	$0.00	$5.00
Drug Standardized Assessment	$45.00	$0.00	$45.00
Genetic Testing Surcharge	$2.50	$0.00	$2.50
Public Defender Accounts Receivable Code	$25.00	$0.00	$25.00
Restorative Justice Surcharge	$10.00	$0.00	$10.00
Time Payment Annual Fee	$25.00	$0.00	$25.00
Time Payment Fee	$25.00	$0.00	$25.00
Victim Compensation Fund	$163.00	$4.33	$158.67
Victim's Assistance Fund	$241.00	$0.00	$241.00
Accounts Receivable Balance	$609.50	$4.33	$605.17

(Colorado Courts Data Access website, Gilpin County Case No. 17CR12)[3]

Courts review de novo whether a sentence was authorized by law. *Waddell v. People*, 2020 CO 39, ¶ 10. Trial courts have discretion to waive or suspend fines, fees, surcharges, and costs where the court finds that the defendant cannot pay the

[3] *See People v. Linares-Guzman*, 195 P.3d 1130, 1135-37 (Colo. App. 2008) (courts may take judicial notice of the contents of records in related proceedings).

assessed amount. Chief Justice Directive 85-31 (amended Aug. 2011); *People v. Thames*, 2019 COA 124, ¶ 77.

B. The trial court erred by assessing surcharges, costs, and fees.

1. Surcharges.

By statute, each of the surcharges assessed against Ms. Bialas may be waived based on her financial status. *Id.*

The court added surcharges for victim's assistance, § 24-4.2-104(1)(a)(I), C.R.S.; victim compensation, § 24-4.1-119(1)(a), C.R.S.; genetic testing, § 24-33.5-415.6(1), C.R.S.; and restorative justice, § 18-25-101(1), C.R.S.—all outside of Ms. Bialas's presence and without giving her an opportunity to object. *See Waddell*, ¶ 5. The remedy is a remand to allow Ms. Bialas to request a waiver. *Id.* ¶ 28; *Yeadon v. People*, 2020 CO 38, ¶ 15 (remand to give defendant an opportunity to request waiver of drug offender surcharge); *People v. Ehlebracht*, 2020 COA 132, ¶ 47.

2. Court costs and fees.

Ms. Bialas has been assessed for the address confidentiality fund, collections cost recovery, court costs, court security cash fund, drug standardized assessment, and public defender accounts receivable in the amount of $143.00. She has been assessed time payment fees twice for a total of $50.

Ms. Bialas asks for a remand to demonstrate her indigence and to request that all of these costs be waived.

CONCLUSION

Because the trial court violated Ms. Bialas's constitutional right to a public trial, she respectfully asks this Court to reverse her convictions. Because the trial court's erroneous evidentiary ruling prejudiced Ms. Bialas's ability to present a defense and receive a fair trial, she asks this Court to reverse. And because the trial court assessed costs, fees, and surcharges without giving Ms. Bialas an opportunity to ask for a waiver, she asks this Court to remand for a hearing.

MEGAN A. RING
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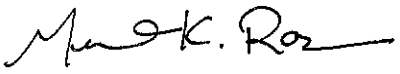

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CERTIFICATE OF SERVICE

I certify that, on July 5, 2022, a copy of this Opening Brief was electronically served through Colorado Courts E-Filing on Jillian J. Price of the Attorney General's office through their AG Criminal Appeals account.

K. Root