ADVANCE SHEET HEADNOTE
October 31, 2022

2022 CO 50

No. 21SC79, *People v. Turner*; 21SC277, *People v. Cruse*—Sixth Amendment—Right to Public Trial—Partial Closure—Waiver.

In this opinion, which consolidates two cases, the supreme court concludes that all courtroom closures—whether total, meaning the exclusion of all individuals from the courtroom for some period, or partial, meaning the exclusion of one or more, but not all, individuals for some period—implicate the Sixth Amendment public trial right and the test established in *Waller v. Georgia*, 467 U.S. 39 (1984). There is no exclusion-for-cause exception. Although respectful of a trial court's authority to maintain order and safety in the courtroom, and the reality that *Waller* findings may need to be made after a disruptive individual has been removed, the supreme court holds that when the removal of a disruptive spectator constitutes a non-trivial closure, the closure must satisfy the *Waller* test. Although express findings are preferred, where a trial court fails to make them, a reviewing

court may review the record for clear error to determine if the closure order nonetheless satisfied the *Waller* test.

Here, the trial court's exclusion of a spectator, who is one of the co-defendant's wife and the other co-defendant's friend, from the majority of the trial based on her alleged harassment of the victim advocate and a prosecution witness constituted a non-trivial, partial closure. Although the trial court failed to expressly apply the *Waller* test, its findings and the record support the conclusion that the closure order was justified under *Waller* and didn't, therefore, violate defendants' Sixth Amendment public trial right. Accordingly, the supreme court affirms the portion of the court of appeals' judgments concluding that the exclusion constituted a non-trivial, partial closure and reverses the portion of the judgments reversing the convictions and remanding for a new trial. The court also remands the cases for further proceedings consistent with this opinion.

The concurring opinion agrees that defendants' public trial right wasn't violated here and agrees that the division's judgments reversing the convictions should be reversed. But it would hold that a trial court's removal of a disruptive spectator—an exclusion for cause—doesn't implicate the Sixth Amendment or the *Waller* test.

The dissent agrees with the majority that the exclusion here constitutes a non-trivial, partial closure that implicates the Sixth Amendment and the *Waller*

test. The dissent believes that the lack of express *Waller* findings should result in a reversal of defendants' convictions and a remand for a new trial. The dissent would therefore affirm the division's judgments.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2022 CO 50

Supreme Court Case No. 21SC79
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 17CA2294

Petitioner:

The People of the State of Colorado,

v.

Respondent:

Terrel Shameek Turner.

Judgment Affirmed in Part and
Reversed in Part
en banc
October 31, 2022

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Supreme Court Case No. 21SC277
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 18CA34

Petitioner:

The People of the State of Colorado,

v.

Respondent:

Christopher Nicholas Cruse.

Judgment Affirmed in Part and
Reversed in Part
en banc
October 31, 2022

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JUSTICE HOOD delivered the Opinion of the Court, in which **JUSTICE MÁRQUEZ**, **JUSTICE HART**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.
CHIEF JUSTICE BOATRIGHT concurred in the judgment.
JUSTICE GABRIEL dissented.

JUSTICE HOOD delivered the Opinion of the Court.

¶1 Terrel Turner and Christopher Cruse were jointly tried and convicted on charges related to the burglary of a marijuana dispensary. On the second day of trial, Yolanda Cruse, who is Mr. Cruse's wife and Mr. Turner's friend, was arrested and charged with several counts stemming from a hostile encounter she had with the victim advocate and a prosecution witness just outside the courtroom. The trial judge ordered that Mrs. Cruse be excluded from the courtroom for the remainder of trial.

¶2 On appeal, a division of the court of appeals concluded that Mrs. Cruse's exclusion was a non-trivial, partial courtroom closure that violated defendants' public trial right. *People v. Turner*, No. 17CA2294, ¶¶ 23–24 (Dec. 24, 2020); *People v. Cruse*, No. 18CA34, ¶ 14 (Mar. 11, 2021). The division reversed the convictions and remanded for a new trial. *Turner*, ¶ 35; *Cruse*, ¶ 15.

¶3 We agree with the division that the trial court's exclusion of Mrs. Cruse was a closure that implicated the Sixth Amendment. Under the circumstances of this case, however, a new trial is unwarranted. The record justifies the closure order.

I. Facts and Procedural History

¶4 On the third morning of defendants' trial, before the jury was brought into the courtroom, the prosecution informed the court that Mrs. Cruse had been arrested the day before "on harassment charges for an encounter with [the] victim

advocate out in the hallway outside the courtroom, as well as with [a prosecution witness]," and that she had a court appearance related to those charges scheduled for that morning. The prosecution continued, "[T]here will be a mandatory protection order in place that restrains Mrs. Cruse from having any contact with our victim advocate, and, obviously, our advocate will be in the courtroom, so Mrs. Cruse is not going to be allowed legally to be in the courtroom." Mr. Cruse objected on public trial grounds and asked that Mrs. Cruse be allowed to attend the trial. When the court asked Mr. Turner for his position, his attorney responded:

> [B]oth the co-defendant and the People have a lot more information than I do. I have access to the affidavit . . . [but] I just don't have any other information. . . . I can't access anything other than the fact that [Mrs. Cruse] was arrested. Until I have information, I have no position.

¶5 The court concluded that Mrs. Cruse had "forfeited her right to be present in this trial[] because she has interfered with the orderly presentation of the evidence . . . [and] has directly contacted a witness and made aggressive statements." The court explained that it has "an obligation to [e]nsure a fair trial for all parties, and that includes [e]nsuring the safety of all participants in the trial, whether those participants are the defendants or the witnesses, counsel, and other people associated with the parties." The court then excluded Mrs. Cruse from the courtroom and the hallway outside the courtroom for the remainder of trial, but it

said she could see defendants "during breaks, away from this area of the courthouse."

¶6 Defendants' trial lasted six days, and the jury convicted both men on all counts.

¶7 On appeal, the division concluded that excluding Mrs. Cruse was an unjustified, partial closure of the courtroom that implicated defendants' Sixth Amendment right to a public trial. *Turner*, ¶ 23; *Cruse*, ¶ 14. The division further determined that the closure was not trivial and, in the absence of appropriate findings under *Waller v. Georgia*, 467 U.S. 39, 46–47 (1984), the closure violated defendants' public trial right. *Turner*, ¶¶ 23–27; *Cruse*, ¶ 14. Further concluding that the error was structural in nature and that remanding for additional findings would not be helpful, the division reversed defendants' convictions and remanded for a new trial. *Turner*, ¶ 35; *Cruse*, ¶ 15.

¶8 The prosecution petitioned this court for certiorari review, which we granted.[1]

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[1] We granted certiorari to review the following issues in *Turner*:

1. Whether the defendant waived the public trial claim he raised on appeal under *Stackhouse v. People*, 2015 CO 48, 386 P.3d 440, by affirmatively electing not to take a position on his co-defendant's public trial objection.

II. Analysis

¶9 We first discuss whether Mr. Turner waived his challenge to the trial court's alleged closure of the courtroom when he neither joined in Mr. Cruse's objection nor offered his own objection. After concluding he didn't waive his challenge, we discuss the constitutional right to a public trial and this court's recent adoption of a partial-closure standard. Based on the facts here, we conclude that Mrs. Cruse's exclusion from the trial was a non-trivial, partial closure of the courtroom that implicated the *Waller* test. Finally, because the trial court did not specifically

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2. Whether excluding the co-defendant's wife from the courtroom for cause constituted a "closure" of the courtroom implicating the Sixth Amendment right to a public trial.
3. [REFRAMED] Whether excluding the co-defendant's wife violated the defendant's Sixth Amendment right to a public trial if her exclusion was a "closure," and whether automatic reversal, rather than remand for further findings, is the appropriate remedy.

We granted certiorari to review the following issues in *Cruse*:

1. Whether excluding the defendant's wife from the courtroom for cause after she was subjected to a protection order for harassing trial participants constituted a "closure" implicating the right to a public trial.
2. Whether excluding the defendant's wife violated his right to a public trial, and if so, whether a remand for further findings is the appropriate remedy.

address the *Waller* test before ordering the closure, we discuss the adequacy of the court's findings.

A. Waiver

¶10 The prosecution contends that Mr. Turner waived the right to challenge the trial court's alleged closure on appeal. We disagree.

¶11 To preserve an issue for appellate review, the alleged error must affect a substantial right, and "a timely objection or motion to strike" must appear on the record "stating the specific ground of objection, if the specific ground was not apparent from the context." CRE 103(a)(1); *see* Crim. P. 52(a) ("Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.").

¶12 If a defendant fails to object to a known closure, he waives his right to a public trial and may not challenge the closure on appeal. *Stackhouse v. People*, 2015 CO 48, ¶¶ 8–15, 386 P.3d 440, 443–45; *see Phillips v. People*, 2019 CO 72, ¶ 16, 443 P.3d 1016, 1022 ("[W]aiver is a procedural bar to appellate review based on 'the *intentional* relinquishment of a *known* right or privilege.'" (quoting *People v. Rediger*, 2018 CO 32, ¶ 39, 416 P.3d 893, 902)). But "we 'do not presume acquiescence' in the loss of such rights; to the contrary, we 'indulge every reasonable presumption against waiver.'" *Phillips*, ¶ 16, 443 P.3d at 1022 (quoting *Rediger*, ¶ 39, 416 P.3d at 902); *accord People v. Curtis*, 681 P.2d 504, 514 (Colo. 1984).

¶13 Although there may be sound strategic reasons for waiving the right to a public trial in some instances, *see Stackhouse*, ¶ 15, 386 P.3d at 445, strategic choice does not appear to be what happened here. Mr. Turner's counsel knew of the right to a public trial, but he didn't know enough about the underlying incident to object to Mrs. Cruse's exclusion. So, there was no waiver because the failure to object wasn't an intentional relinquishment of the public trial right.

¶14 In the absence of a waiver, a defendant may still forfeit an error through inaction. *Phillips*, ¶ 17, 443 P.3d at 1022 ("[W]hereas waiver requires 'intent,' forfeiture occurs 'through neglect.'" (quoting *United States v. Carrasco-Salazar*, 494 F.3d 1270, 1272 (10th Cir. 2007))). Forfeiture is "the failure to make the timely assertion of a right," and forfeited errors may be reviewed only for plain error on appeal. *Id.* at ¶¶ 17–18, 443 P.3d at 1022 (quoting *Rediger*, ¶ 40, 416 P.3d at 902); *see also People v. Miller*, 113 P.3d 743, 750 (Colo. 2005) (explaining that plain errors are those that are obvious, substantial, and "so undermine[] the fundamental fairness of the trial itself so as to cast serious doubt on the reliability of the judgment of conviction" (quoting *People v. Sepulveda*, 65 P.3d 1002, 1006 (Colo. 2003))). By contrast, errors preserved by contemporaneous objection are reviewed for harmless error on appeal. *See Hagos v. People*, 2012 CO 63, ¶ 12, 288 P.3d 116, 119 (explaining that harmless error requires reversal only "if the error

'substantially influenced the verdict or affected the fairness of the trial proceedings'" (quoting *Tevlin v. People,* 715 P.2d 338, 342 (Colo. 1986))).

¶15 Regardless of whether we review the alleged public trial violation in Mr. Turner's case for plain error, based on Mr. Turner's failure to object contemporaneously, or for harmless error, by imputing his co-defendant's objection to him,[2] we conclude that the trial court's ruling here doesn't warrant reversal.

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[2] Imbedded here is a subsidiary question about whether a defendant's objection alone can preserve an issue for appellate review for a co-defendant. We have not addressed this issue before, and jurisdictions across the country are divided. Some jurisdictions have adopted a strict approach, requiring that each defendant either personally object or expressly join a co-defendant's objection to preserve an issue for their appeal. *E.g.*, *State v. Hillard*, 491 P.3d 1223, 1233 (Kan. 2021); *Linnon v. Commonwealth*, 752 S.E.2d 822, 828 (Va. 2014); *Billings v. State*, 745 S.E.2d 583, 590 (Ga. 2013); *State v. Frazier*, 164 P.3d 1, 10 (N.M. 2007); *Williams v. State*, 85 A.3d 367, 378–79 (Md. Ct. Spec. App. 2014); *Hinojosa v. State*, 433 S.W.3d 742, 761 (Tex. App. 2014). This approach recognizes that defendants may not be similarly situated and may have different strategic reasons for objecting or not objecting to a given issue. *See, e.g.*, *Hillard*, 491 P.3d at 1233.

Other jurisdictions allow one defendant's objection to preserve the issue for all co-defendants, at least in some circumstances. *E.g.*, *Howard v. Gonzales*, 658 F.2d 352, 355–56 (5th Cir. 1981); *Williams v. United States*, 966 A.2d 844, 847 (D.C. 2009). This approach considers the general purpose objections serve—to alert the court to possible errors, to give the court a meaningful opportunity to correct or prevent the error, and to protect the fairness of the trial. *See, e.g.*, *Williams*, 966 A.2d at 847–48 ("[T]he plain error rule is not meant to be 'punitive'; instead its purpose is to allow the trial judge 'fully to consider issues and thereby avoid potential error, and to afford prosecutors the opportunity to present evidence on the issue raised.' . . . Because the judge was given full opportunity to weigh the

B. Closure

¶16 "Both the United States and the Colorado Constitutions guarantee criminal defendants the right to a public trial." *People v. Jones*, 2020 CO 45, ¶ 15, 464 P.3d 735, 739 (quoting *People v. Hassen*, 2015 CO 49, ¶ 7, 351 P.3d 418, 420); *see* U.S. Const. amends. VI, XIV; Colo. Const. art. II, § 16.

¶17 As we explained in *Jones*, a public trial protects the rights of criminal defendants and the general public. ¶¶ 16–18, 464 P.3d at 739–40. Not only does a public trial enhance the actual and perceived fairness of a criminal trial—an essential component for public confidence in the judicial system—a public trial also reminds "the prosecutor and judge of their responsibility to the accused and the importance of their functions, . . . encourage[s] witnesses to come forward, . . . [and] discourage[s] perjury." *People v. Lujan*, 2020 CO 26, ¶¶ 13–16, 461 P.3d 494, 498 (quoting *Peterson v. Williams*, 85 F.3d 39, 43 (2d Cir. 1996)); *see Press-Enter. Co. v. Superior Ct.*, 464 U.S. 501, 508 (1984).

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constitutional objection, and the prosecution a full chance to argue for admissibility, justice would not be served by holding [the defendant] to near-forfeiture of the claim in circumstances where we see no plausible tactic behind his attorney's silence." (citation omitted) (quoting *Williams v. United States,* 382 A.2d 1, 7 n.12 (D.C. 1978))); *United States v. Brown*, 562 F.2d 1144, 1147 n.1 (9th Cir. 1977). Because we need not pick a side in this debate to resolve the case before us, we save this issue for another day.

¶18 But the right to a public trial is not absolute. Where the court determines that the balance of interests weighs against a public trial, the court may close the courtroom. *Jones*, ¶ 20, 464 P.3d at 740. The closure may be total, meaning the exclusion of "all persons from the courtroom for some period," or it may be partial, meaning the exclusion of "one or more, but not all, individuals for some period." *United States v. Simmons*, 797 F.3d 409, 413 (6th Cir. 2015); *see State v. Rolfe*, 851 N.W.2d 897, 902–03 (S.D. 2014) ("Whether a closure is total or partial . . . depends not on how long a trial is closed, but rather who is excluded during the period of time in question." (quoting *United States v. Thompson*, 713 F.3d 388, 395 (8th Cir. 2013))).

¶19 To justify a closure—whether total or partial—without violating a defendant's right to a public trial, the following requirements, known as the *Waller* test, must be met:

> (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, 464 P.3d at 740 (alteration in original) (quoting *Hassen*, ¶ 9, 351 P.3d at 421); *see Waller*, 467 U.S. at 48. Because a trial court's decision to close the courtroom presents a mixed question of law and fact, *Jones*, ¶ 14, 464 P.3d at 739, we review the court's legal conclusions de novo and its findings of fact for clear

error, *see People v. Ferguson*, 227 P.3d 510, 512–13 (Colo. 2010); *In re Estate of Owens*, 2017 COA 53, ¶ 39, 413 P.3d 255, 264. Under the clear error standard, a trial court's "factual findings are 'binding unless so clearly erroneous as not to find support in the record.'" *Melssen v. Auto-Owners Ins. Co.*, 2012 COA 102, ¶ 16, 285 P.3d 328, 333 (quoting *Lyon v. Amoco Prod. Co.*, 923 P.2d 350, 353 (Colo. App. 1996)).

¶20 Here, the prosecutor told the court that Mrs. Cruse had been arrested and requested that she be excluded from the courtroom for the remainder of the trial. After considering the record, the arguments of counsel, and its role to ensure both the safety of the trial participants and the fairness and integrity of the trial proceedings, the court ordered that Mrs. Cruse not be permitted in the courtroom or in the hallway outside the courtroom for the remainder of trial. At no point did the court mention the *Waller* test or expressly consider it.

¶21 The prosecution contends that the trial court's exclusion of Mrs. Cruse was not a closure but merely an exercise of the court's discretion to maintain order and decorum within the courtroom. We disagree.

¶22 Without question, "[i]t is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country [and that] [t]he flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated." *Illinois v. Allen*, 397 U.S. 337, 343 (1970). So, "trial judges confronted with disruptive,

contumacious, stubbornly defiant defendants [or spectators] must be given sufficient discretion to meet the circumstances of each case." *Id.*

¶23 But the exclusion of even a single individual from the courtroom, regardless of the reason for the exclusion, constitutes a partial closure that implicates the Sixth Amendment and the *Waller* test. *Commonwealth v. Caldwell*, 945 N.E.2d 313, 325 & n.15 (Mass. 2011); *see also, e.g.*, *Tucker v. Superintendent Graterford SCI*, 677 F. App'x 768, 771, 775–76 (3d Cir. 2017) (concluding that removal of disruptive spectators is a partial closure subject to the *Waller* test); *United States v. Laureano-Perez*, 797 F.3d 45, 76–77 (1st Cir. 2015) (applying a modified *Waller* test to a partial closure based on courtroom disruption). Exempting exclusions "for cause" would leave trial courts guessing where cause ends and the public trial right begins.

¶24 Even so, the prosecution argues that courts shouldn't be forced to examine the *Waller* factors when simply excluding a disruptive spectator from the courtroom "for cause." This argument seems to presume, at least in part, that exclusions "for cause" don't really fit under *Waller*. But the *Waller* test is flexible enough to account for courtroom disruptions. *See People v. Jones*, 750 N.E.2d 524, 529–30 (N.Y. 2001) ("*Waller* already contemplates a balancing of competing interests in closure decisions. . . . Trial courts are called upon to ensure that the closure is no broader than necessary and to consider alternatives to closure suggested by the parties. The breadth of the closure request therefore will always

be measured against the risk of prejudice to the asserted overriding interest."). And by providing a framework for trial courts to consider every time a person is excluded from the courtroom, the *Waller* test facilitates more consistent application of the Sixth Amendment, minimizes the influence of a judge's personal bias, and creates a better record for appellate review. *See* Kristin Saetveit, Note, *Close Calls: Defining Courtroom Closures Under the Sixth Amendment*, 68 Stan. L. Rev. 897, 923, 926–28 (2016) ("Each *Waller* prong represents an important consideration that, in combination with the others, provides a comprehensive analysis for determining whether closure is warranted."); Stephen E. Smith, *The Right to A Public Trial and Closing the Courtroom to Disruptive Spectators*, 93 Wash. U. L. Rev. 235, 242–45 (2015) ("A blanket rule excluding 'disruptive' spectators ignores human nature and eliminates any *locus poenitentiae* for those court spectators. . . . It is hard to imagine a criminal case resulting in anything other than emotional pain for the accused's [or the alleged victim's] family, and it is unreasonable to expect the family not to give a voice to that emotional pain. . . . Without the rigor of *Waller* review, a trial judge may simply point to any response or reaction, declare the responsible parties 'non-peaceable,' and exclude them from future proceedings.").

¶25 Controlling the courtroom and making an adequate record are not mutually exclusive. Of course, "where a judge is addressing an immediate threat to the safety or decorum of the court room, the required findings may need to be delayed

until order is restored, the court room secured, and the judge has an adequate opportunity to gather the relevant facts." *Caldwell*, 945 N.E.2d at 325 n.15; *see also Presley v. Georgia*, 558 U.S. 209, 215 (2010) (stating that the *Waller* test applies to closure decisions based on "threats of improper communications with jurors or safety concerns"). But when the proceedings have already been disrupted, requiring the court to briefly explain its reasoning and the breadth of its closure order to guarantee the public trial right isn't an unreasonable burden. To the extent that this is less efficient than some might prefer, the same can be said of the trial process generally. In short, that argument proves too much.

¶26 Therefore, excluding Mrs. Cruse from the courtroom for the remainder of trial was a partial closure under *Waller*. But was it a partial closure that violated the Sixth Amendment public trial right?

C. Triviality

¶27 The prosecution next argues that, even if excluding Mrs. Cruse was a closure, the closure didn't violate defendants' public trial right because it was trivial. Again, we disagree.

¶28 Under the triviality exception, a court must consider the totality of the circumstances surrounding the closure to determine "whether the closure implicated the protections and values of the Sixth Amendment." *Lujan*, ¶ 24, 461 P.3d at 500 (quoting *Kelly v. State*, 6 A.3d 396, 406 (Md. Ct. Spec. App. 2010));

see also id., ¶¶ 16–23, 461 P.3d at 498–99 (explaining that courts should consider such factors as "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").

¶29 Considering the totality of the circumstances here, we first observe that Mrs. Cruse is Mr. Cruse's wife and Mr. Turner's close friend. And though the trial remained open to anyone other than Mrs. Cruse who wished to attend, thereby protecting such Sixth Amendment values as discouraging perjury and reminding the judge and prosecutor of their duties, this court has recognized the unique role and heightened importance defendants' family members' and friends' presence plays in protecting the right to a fair trial. *Jones*, ¶ 41, 464 P.3d at 744 ("[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." (quoting *Longus v. State*, 7 A.3d 64, 75 (Md. 2010))).

¶30 Additionally, the duration of the partial closure and the substance of the proceedings during the closure were significant. The closure excluded Mrs. Cruse from four of the six days of trial, which included the testimony of fourteen of the prosecution's eighteen witnesses, the testimony of the sole defense witness, and

closing arguments. This type of intentional closure during "more significant, and less fleeting, testimony [is] generally considered not trivial because of [its] potential to affect the fairness of the proceedings." *Id.*

¶31 Finally, we consider the circumstances that led to the closure; namely, Mrs. Cruse's harassment of a prosecution witness and the victim advocate during the trial. Although Mrs. Cruse had been arrested by the time the trial court entered its closure order, it appears that no orders or judgments had yet been entered in her case at that time. Still, all the parties seemed to accept that a restraining order preventing contact with the victim advocate was likely and imminent.[3] With this understanding, the trial court had to balance Mrs. Cruse's right to be present under defendants' broad public trial right against the likelihood that her presence could violate a court order, cause future disruptions or witness intimidation, and interfere with the fair presentation of evidence. On balance, the trial court

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[3] Section 18-1-1001(1), C.R.S. (2022), instructs courts to enter "a mandatory protection order against any person charged with a criminal violation of any of the provisions of this title 18 . . . . Such order restrains the person charged from harassing, molesting, intimidating, retaliating against, or tampering with any witness to or victim of the acts charged." Subsection (3) of that statute further provides that, for certain enumerated crimes, the court may modify the protection order to include various provisions prohibiting contact between the accused and the victim or any witnesses to the crime. The crimes of tampering with, retaliation against, and intimidation of a witness or a victim are included in that list. § 24-4.1-302(1)(ee), (ee.3), (ff), C.R.S. (2022).

concluded that the public trial right must give way "to [e]nsure a fair trial for all parties, . . . includ[ing] . . . the safety of all participants in the trial."

¶32 In summary, the trial court's order excluding Mrs. Cruse from the courtroom constituted a non-trivial, partial closure of the courtroom, which implicated defendants' Sixth Amendment public trial right and the *Waller* test. Because the trial court didn't expressly consider the *Waller* test, we must now determine whether the closure was constitutional.

D. No Error

¶33 While the trial court failed to reference the *Waller* test, we see no violation of defendants' Sixth Amendment public trial right.

¶34 A trial court violates a defendant's public trial right when the "defendant objects to a closure and the court does not satisfy the four factors of the *Waller* test." *Stackhouse*, ¶ 7, 386 P.3d at 442. Such a violation constitutes structural error because it affects the basic framework within which the trial occurs. *Jones*, ¶ 45, 464 P.3d at 745. Structural error "require[s] automatic reversal without individualized analysis of how the error impairs the reliability of the judgment of conviction." *Hagos*, ¶ 10, 288 P.3d at 119; *accord Stackhouse*, ¶ 7, 386 P.3d at 442.

¶35 But structural error doesn't flow simply from the trial court's failure to employ the precise language found in *Waller*. After all, we typically gauge compliance by substance, not form. And while the *Waller* court expressed some

reluctance to consider certain "post hoc assertion[s]" by the Georgia Supreme Court, it said nothing to foreclose appellate review when the trial court overlooks a particular incantation. 467 U.S. at 49 n.8.

¶36 On the contrary, "the *Waller* Court prescribed no particular format to which a trial judge must adhere to satisfy the findings requirement, and . . . nothing in *Waller* . . . require[s] a reviewing court to evaluate the trial judge's closure order *solely* on the basis of the explicit factual findings." *Bell v. Jarvis*, 236 F.3d 149, 172 (4th Cir. 2000); *accord Lujan*, ¶ 16, 461 P.3d at 498 (holding that "even if a trial court fails to make the necessary findings under *Waller*, the Sixth Amendment is not necessarily violated 'every time the public is excluded from the courtroom'" (quoting *Peterson*, 85 F.3d at 40)); *Tinsley v. United States*, 868 A.2d 867, 877–80 (D.C. 2005) (concluding the *Waller* test was satisfied where the record supported the closure despite the lack of express or comprehensive findings on each factor); *State v. Ndina*, 761 N.W.2d 612, 635 (Wis. 2009) (same). Ultimately, a trial court need only make "findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Davis v. Reynolds,* 890 F.2d 1105, 1109 (10th Cir. 1989) (quoting *Waller*, 467 U.S. at 45); *accord United States v. Galloway*, 937 F.2d 542, 546 (10th Cir. 1991).

¶37 As a reminder, *Waller* requires that:

> (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, 464 P.3d at 740 (alteration in original) (quoting *Hassen*, ¶ 9, 351 P.3d at 421); *see Waller*, 467 U.S. at 48.

¶38 Here, the prosecutor explained that Mrs. Cruse had been arrested the day before "on harassment charges for an encounter with [the] victim advocate [and a prosecution witness] . . . in the hallway outside the courtroom." The prosecutor further explained that Mrs. Cruse had her initial court appearance that morning, that a mandatory protection order would be in place, and that he expected the order to include a no-contact provision prohibiting Mrs. Cruse from being in the courtroom at the same time as the victim advocate. Mr. Cruse objected to his wife's exclusion on public trial grounds. After reading the affidavit filed in Mrs. Cruse's case, the trial court concluded that there was probable cause for her arrest and that any mandatory protection order issued would likely include a no-contact provision and would be appropriate. The court then summarized Mrs. Cruse's conduct and explained that she had "interfered with the orderly presentation of evidence," and so, to fulfill its obligation of "[e]nsuring the safety of all participants in the trial," the court ordered that Mrs. Cruse wouldn't be permitted in the courtroom for the remainder of trial. The court later clarified that it was excluding Mrs. Cruse from the courtroom and from the hallway directly outside

the courtroom, but, recognizing that "she wants to be here for Mr. Cruse's trial," it didn't exclude Mrs. Cruse from the entire courthouse and said she would be able to see defendants "during breaks, away from this area of the courthouse."

¶39 The prosecutor also asked the court to post a deputy near the entrance of the courtroom as a precautionary measure to prevent any additional incidents. The court said it would consider the request, but there is no evidence in the record that a deputy was ever posted.

¶40 We conclude that the record and the court's findings here are adequate to support the closure order under *Waller* without the need to remand for further findings.

¶41 As to the first *Waller* factor, the prosecution advanced the overriding interest of the safety of the victim advocate and witnesses.[4] *See Simmons*, 797 F.3d at 414 ("Unsurprisingly, courts have also recognized that the need to protect the safety of witnesses and to prevent intimidation satisfies the higher 'overriding interest' requirement in the standard *Waller* test."). And the trial court agreed, explaining

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[4] Many jurisdictions have considered whether the "overriding interest" standard is necessary in partial closure cases or whether a lesser standard—"substantial reason"—is more appropriate. *See Jones*, ¶¶ 24–26, 464 P.3d at 741 (collecting cases and explaining the competing views on this issue). But because ensuring the safety of trial participants satisfies the "overriding interest" standard, we need not resolve that issue today.

that it was excluding Mrs. Cruse based on her own behavior and to ensure both the safety of all trial participants and the orderly presentation of evidence. The court's factual determination that Mrs. Cruse's alleged behavior threatened the integrity of the trial and the safety of the participants is not clearly erroneous. So, the first factor is satisfied.

¶42 Regarding the second factor, the trial court's findings support the conclusion that the closure was no broader than necessary because the closure was limited to the one individual whose presence risked the fairness and integrity of trial—Mrs. Cruse. Mrs. Cruse allegedly harassed a witness and the victim advocate just outside the courtroom. Although we don't have any further details about the encounter, such behavior shows the kind of "flagrant disregard" for the "elementary standards of proper conduct" that a trial court should not have to tolerate. *See Allen*, 397 U.S. at 343.

¶43 The division admonished the trial court for not exploring whether Mrs. Cruse "posed a similar threat to other witnesses," whether her presence would cause a similar disruption in the courtroom, or whether anyone else was affected by the encounter. *Turner*, ¶ 31. But a trial court shouldn't have to wonder whether a party who has allegedly exhibited such volatility might do so again in a way that could endanger or distract other trial participants. And it is of little consequence that the encounter occurred in the hallway just outside the courtroom

rather than in the courtroom itself. The same concerns exist. *See, e.g.*, *Tinsley*, 868 A.2d at 877–80 (applying a modified *Waller* test to justify the partial closure related to spectators who had previously threatened a witness against testifying); *Woods v. Kuhlmann*, 977 F.2d 74, 76–78 (2d Cir. 1992) (same). So, the record demonstrates that *Waller*'s second factor is satisfied.

¶44 As to the third factor, though nothing in the record indicates that the court considered any reasonable alternatives to the partial closure, given the context, there likely weren't reasonable alternatives available. No one disputed that a mandatory protection order would go into effect that morning and that it was likely to include a no-contact provision, at least as to the victim advocate. The victim advocate occupies a special role during trial, as the person tasked with providing support to an alleged victim, and who, barring any sequestration orders, typically remains in the courtroom throughout trial. § 16-10-401, C.R.S. (2022); § 16-5-301(3), C.R.S. (2022). So, it wouldn't have been reasonable to exclude the victim advocate to accommodate Mrs. Cruse's presence when, based on the record we have, the victim advocate hadn't done anything to disrupt the trial.

¶45 Although the division suggested the trial court might have considered whether the victim advocate and Mrs. Cruse could have alternated being in the courtroom, *Turner*, ¶ 31, that option fails to address what Mrs. Cruse's intermittent

presence might have meant for other trial participants. Jury trials are fragile enough without loose cannons.

¶46 Nor would it have been reasonable to provide some sort of remote viewing or listening option for Mrs. Cruse because, even assuming that was possible, letting Mrs. Cruse follow along outside the presence of the judge and jury would not have served to "keep [defendants'] triers keenly alive to a sense of their responsibility and to the importance of their functions." *See Waller*, 467 U.S. at 46 (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979)).

¶47 In addressing *Waller*'s fourth and final factor, we conclude that the record and the trial court's findings support the partial-closure order.

III. Conclusion

¶48 We affirm in part and reverse in part the judgments of the court of appeals. We affirm the portion of the judgments concluding that Mrs. Cruse's exclusion constituted a non-trivial, partial closure, and we reverse the portion of the judgments reversing the convictions and remanding for a new trial. We remand the cases for further proceedings consistent with this opinion.

CHIEF JUSTICE BOATRIGHT concurred in the judgment.

JUSTICE GABRIEL dissented.

CHIEF JUSTICE BOATRIGHT, concurring in the judgment.

¶49 Trial judges must have the authority to control the courtroom, especially when it comes to safety. In my view, there is a difference between a courtroom closure and a trial court's exclusion of specific spectators due to their inappropriate behavior. When trial judges exclude people from the courtroom for their own conduct, that exclusion is not a closure that implicates the Sixth Amendment or *Waller v. Georgia*, 467 U.S. 39 (1984). Rather, judges in these instances are merely exercising their discretion to ensure the safety, fairness, and efficiency of the trial. Therefore, although I agree that a new trial is unwarranted, I believe we should review this type of exclusion for an abuse of discretion and not require courts to apply the *Waller* factors in these situations.

¶50 Criminal defendants are guaranteed the right to a public trial under both the United States and the Colorado Constitutions. *People v. Jones*, 2020 CO 45, ¶ 15, 464 P.3d 735, 739. This important right protects the accused by ensuring "that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller*, 467 U.S. at 46 (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979)). To protect this right, a trial court must only order a closure in rare circumstances where "the balance of interests must be struck with special care." *Jones*, ¶ 21, 464 P.3d at 740 (quoting

People v. Hassen, 2015 CO 49, ¶ 8, 351 P.3d 418, 421). To preserve the balance of interests, such a closure must be justified by examining the *Waller* factors. *Id.*

¶51 At the same time, the right to a public trial "has always been interpreted as being subject to the trial judge's power to keep order in the courtroom." *Cosentino v. Kelly*, 102 F.3d 71, 73 (2d Cir. 1996) (per curiam) (quoting *United States ex rel. Orlando v. Fay*, 350 F.2d 967, 971 (2d Cir. 1965)); *United States v. Hernandez*, 608 F.2d 741, 747 (9th Cir. 1979). Where the public trial right runs up against the need to deter indecorous behavior, a judge *must* have the discretion to keep order in the court. Such discretion is necessary because "[i]t is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country." *Illinois v. Allen*, 397 U.S. 337, 343 (1970). And because the "power to control the proceedings must include the power to remove distracting spectators," it does not constitute a Sixth Amendment closure when a court exercises its discretion to exclude a spectator for cause, as happened in this case. *State v. Lormor*, 257 P.3d 624, 629 (Wash. 2011).

¶52 Under the majority's holding—which in my view blurs the distinction between an exclusion for cause and a partial closure—trial courts must make *Waller* findings each and every time they exclude disruptive spectators. In my opinion, this is unnecessary and impractical.

¶53 A trial judge must ensure the efficiency and safety of a trial. As part of that responsibility, a judge must retain the discretion to remove distracting spectators in order to maintain courtroom decorum, or else their power is meaningless. *Id.* Such discretion still serves the purposes of the public trial right: namely, "to ensure a fair trial," "to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions," "to encourage witnesses to come forward," and "to discourage perjury." *See People v. Lujan*, 2020 CO 26, ¶ 14, 461 P.3d 494, 498 (quoting *Peterson v. Williams*, 85 F.3d 39, 43 (2d Cir. 1996)).

¶54 But it would be impractical for a trial judge to stop proceedings each time there was a disruption to make *Waller* findings. In my experience, these situations happen very quickly. As a result, the judge must make instantaneous decisions to protect the safety of the trial participants. Take, for example, a woman yelling threats across the courtroom at a witness. Almost instantaneously, the judge must take control of the situation, secure the safety of the witness and other trial participants, and at the same time ensure the defendant receives a fair trial. But in accordance with today's holding, the judge must stop the proceedings, make sure that everyone is safe, and then take time to go through the *Waller* factors. This is unrealistic and unnecessary. There are just some circumstances that require immediate action and clearly do not implicate a defendant's right to a public trial.

¶55 The judge in my example should be able to order the woman to leave the courtroom without going through an unnecessary test, especially one requiring the court to consider reasonable alternatives.[1] Such a pause would slow down judicial efficiency and do nothing to protect the safety of the participants. Because judges need to be able to make quick decisions of safety, fairness, and efficiency, "it would make little sense to engage in a . . . *Waller* analysis every time an unruly spectator is ejected from the courtroom." *Lormor*, 257 P.3d at 629.

¶56 This case illustrates my point. It's obvious from the facts here that the trial court should have excluded Mrs. Cruse. Even from our 10,000-foot view, I agree with the majority that we can readily determine that her "presence risked the fairness and integrity of [the] trial" and that "there likely weren't reasonable alternatives available." Maj. op. ¶¶ 42, 44. If we can easily see as much from the

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[1] The majority seemingly recognizes the time pressures involved in such situations when it states that "the required findings may need to be delayed until order is restored, the court room secured, and the judge has an adequate opportunity to gather the relevant facts." Maj. op. ¶ 25 (quoting *Commonwealth v. Caldwell*, 945 N.E.2d 313, 325 n.15 (Mass. 2011)). Nevertheless, in the majority's view, the court must spend valuable time to gather additional information regarding reasonable alternatives before resuming trial.

In other words, should the public, the jury, the witnesses, and court personnel all be delayed while the court explores the feasibility of live streaming the trial for a person who threatened a witness? To me, the answer is clearly no. It seems, though, that a trial court may need to consider such alternatives in order to comply with today's holding.

record, it makes little sense to say that the *trial court*, while watching the situation unfold in real time, needed to investigate reasonable alternatives and then apply *Waller*—all while ensuring its courtroom remained safe.

¶57 Accordingly, the exclusion of a disruptive spectator is *not* a closure, but "a matter of courtroom operations, where the trial court judge possesses broad discretion." *Lormor*, 257 P.3d at 629. For instance, in *Cosentino*, "bedlam ensued" when the jury reached a guilty verdict—the defendants' family "began yelling, screaming, and crying aloud" in the gallery, forcing the court to call a recess while officers struggled to hold them back. 102 F.3d at 72. As could be expected, this chaos caused the jury to "fall[] apart"; several jurors changed their verdicts, and ultimately the court declared a mistrial. *Id.*

¶58 Seeking to avoid further mayhem, the court barred some of the family members who caused the chaos during the first trial from the retrial. *Id.* at 72–73. The Second Circuit affirmed, concluding that *Waller* does not apply to such circumstances. *Id.* at 73 (citing *Waller*, 467 U.S. at 48). Instead, *Waller* "governs the closing of the courtroom *to peaceable individuals or to the public at large*." *Id.* (emphasis added). It is inapposite when a court excludes spectators due to their own inappropriate behavior. *Id.*; *see also State v. Caldwell*, 803 N.W.2d 373, 390 (Minn. 2011) (concluding that it was within court's discretion to bar spectator after she "repeatedly disrupted court proceedings" without considering *Waller*);

Shepard v. Artuz, No. 99 CIV.1912 (DC), 2000 WL 423519, at *2, *4–5 (S.D.N.Y. Apr. 19, 2000) (concluding that *Waller* did not apply when court barred spectator who made "slashing motions across her throat" towards witness).

¶59 This case is *Cosentino* in every way that matters. Like the family members there, Mrs. Cruse demonstrated a "flagrant disregard" for "elementary standards of proper conduct" when she threatened trial participants on the courtroom's doorstep. *Cosentino*, 102 F.3d at 73 (quoting *Allen*, 397 U.S. at 343). Once she violated those standards, it was within the trial court's discretion to bar her from the room and keep the peace. If the rule were otherwise, aggrieved spectators like Mrs. Cruse could derail trial by threatening witnesses, intimidating jurors, or otherwise disrupting the orderly conduct of criminal proceedings. Clearly, the majority does not disagree that a trial court *can* remove people who disrupt these proceedings. The majority and I only disagree on what findings the trial court needs to make before doing so, and the standard by which appellate courts should review those findings.

¶60 Undoubtedly, a trial judge cannot exclude spectators without making findings. In so doing, there is still accountability in these decisions; the trial court "should, of course, exercise caution in removing a spectator, making sure to articulate the reasons on the record." *Lormor*, 257 P.3d at 629. But in some instances, the trial court's reasoning will be obvious, such as when a spectator

commits a crime or flashes gang signs in the gallery. In other instances, more factual findings must be put on the record to explain the court's reasoning for the exclusion. Either way, the trial court's decision should be reviewed for abuse of discretion to determine if the exclusion was "manifestly arbitrary, unreasonable, unfair, or based on an erroneous understanding of the law." *People v. Gutierrez*, 2018 CO 75, ¶ 11, 432 P.3d 579, 581.

¶61 As such, exclusions for cause remain reviewable. I recognize the concern that, without some findings, "a trial judge may simply point to any response or reaction, declare the responsible parties 'non-peaceable,' and exclude them from future proceedings." Stephen E. Smith, *The Right to a Public Trial and Closing the Courtroom to Disruptive Spectators*, 93 Wash. U. L. Rev. 235, 243 (2015); *accord* Maj. op. ¶ 24. But if a trial court excluded a spectator for a gasp or similar reaction, that decision would be reviewed for an abuse of discretion—i.e., whether it was "manifestly arbitrary, unreasonable, [or] unfair." *Gutierrez*, ¶ 11, 432 P.3d at 581. By prohibiting arbitrary decision-making, the abuse of discretion standard directly addresses concerns that judges will exclude spectators based on pretext.

¶62 In any event, that is not what happened here. Mrs. Cruse didn't merely express emotion during her husband's trial. She allegedly threatened a witness. And Mrs. Cruse's conduct—which disrupted the court's core function and resulted in her arrest—provides a clear example of the *type* of conduct that justifies

exclusion for cause. Such conduct undermines the very core of the public trial right that the Sixth Amendment seeks to protect: the integrity and fairness of trial. When a spectator disrupts the proceedings and imperils the integrity and fairness of the trial, I would hold that exclusion for cause is justified under an abuse of discretion standard.

¶63 By requiring full *Waller* findings, the majority's approach poses real costs. Today's holding requires that the trial court "consider reasonable alternatives to closing the proceeding." Maj. op. at ¶ 37 (quoting *Jones*, ¶ 21, 464 P.3d at 740). To satisfy that requirement, the majority considers a few possible alternatives: whether the court could have excluded the victim advocate,[2] whether Mrs. Cruse and the victim advocate could have alternated time in the courtroom, and whether Mrs. Cruse could have attended trial remotely. *Id.* at ¶¶ 44–46. In the end, it *of course* rightfully rejects each—the first would punish Mrs. Cruse's alleged victim, the second wouldn't prevent Mrs. Cruse from disrupting trial further, and the third (remote attendance) "would not have served to 'keep [defendants'] triers keenly alive to a sense of their responsibility.'" *Id.* (quoting *Waller*, 467 U.S. at 46).

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[2] A closure itself, under the majority's reasoning. *See* Maj. op. ¶ 23 (citing *Caldwell*, 945 N.E.2d at 325 & n.15) ("[T]he exclusion of even a single individual from the courtroom, regardless of the reason for the exclusion, constitutes a partial closure that implicates the Sixth Amendment and the *Waller* test.").

But the majority elides the amount of time a trial court must spend before entering findings on these alternatives; importantly, it does not answer how deeply the court must investigate a disruptive spectator's background, relationship to trial participants, access to remote viewing options, and so on before it can order her exclusion. To me, when a spectator threatens a witness, the trial court shouldn't have to conduct a mini-trial—it should exclude the spectator and move the real trial forward.

¶64 In exchange for these costs, assessing reasonable alternatives provides little-to-no benefit here. As the majority candidly recognizes, "there likely weren't reasonable alternatives available." *Id.* at ¶ 44; *see also* Smith, *supra*, at 244 ("Admittedly, there are few 'reasonable alternatives' in a disruption case."). It immediately rejects each of the hypothetical alternatives it considers because, on these facts, excluding Mrs. Cruse was the only reasonable response to her conduct. If the best that courts can offer disruptive spectators is a "second-chance, stay-quietly-or-go ultimatum," *see* Smith, *supra*, at 245, it's unclear why they must still pause, hypothesize unworkable alternatives, and reject them one by one. I agree that the trial process may occasionally sacrifice efficiency in favor of other interests. *See* Maj. op. ¶ 25. I worry, though, that today's holding sacrifices courtroom efficiency—and potentially safety—without meaningfully furthering the right to a public trial in return. And after reading the majority's opinion, I

remain unconvinced that requiring trial courts to undergo a full *Waller* analysis in circumstances like these will serve the public trial right well enough to justify the costs, if it will serve that right at all.

¶65 With that in mind, I believe that the trial court judge here had the power to exclude Mrs. Cruse from the room in order to maintain the participants' safety. Police arrested Mrs. Cruse for an encounter with the victim advocate and another witness in the hallway outside the courtroom. Mrs. Cruse was charged with "retaliation against a witness," and the court found that a mandatory protection order preventing her from having any contact with the victim advocate would be appropriate. The court found that she "directly contacted a witness and made aggressive statements," and thus "forfeited her right to be present in this trial" by "interfer[ing] with the orderly presentation of the evidence."

¶66 The judge made these findings after reading the arrest affidavit and found it reasonable to exclude Mrs. Cruse based on the information found within it. Therefore, that decision should be reviewed for abuse of discretion rather than, as the majority determines, by going through each of the *Waller* factors. Mrs. Cruse's conduct demanded her removal from the courtroom. And by ordering her removal, the court did not weaken any of the protections that the right to a public trial ensures.

¶67 In sum, trial judges have the authority to exclude disruptive spectators in order to preserve a hallmark of our judicial system—judges' control over the courtroom. The majority holding—that in every scenario where a single person is removed from the courtroom for unruly behavior, the court must stop to make *Waller* findings—is unnecessary and inefficient. Therefore, in my view, excluding a single spectator for cause, like the trial court did here, does not implicate the Sixth Amendment right to a public trial, nor does it require the court to make *Waller* findings. Hence, I would review a trial judge's decision to exclude a disruptive spectator for abuse of discretion. The judge here clearly made the right call. A person who threatens anyone, let alone a witness and a victim advocate, in the middle of trial should be excluded from the courtroom. Accordingly, I respectfully concur in the judgment only.

JUSTICE GABRIEL, dissenting.

¶68 In my view, the majority opinion in this case diminishes the Sixth Amendment right to a public trial. It is undisputed that co-defendant Christopher Cruse's wife was intentionally prohibited from being present in the courtroom for most of her husband's trial. Thus, the majority rightly concludes that this was a partial closure of the courtroom and that, under *Waller v. Georgia*, 467 U.S. 39, 48 (1984), to justify such a closure, (1) the party seeking to close the courtroom was required to advance an overriding interest that was likely to be prejudiced; (2) the closure could be no broader than necessary to protect that interest; (3) the trial court had to consider reasonable alternatives to closing the proceeding; and (4) the trial court was required to make findings adequate to support the closure. Maj. op. ¶¶ 19–26, 32.

¶69 Here, the majority recognizes that the trial court made *no* express findings on *any* of the foregoing *Waller* factors. *Id.* at ¶¶ 20, 32–33, 36. Indeed, as the majority correctly observes, "At no point did the court mention the *Waller* test or expressly consider it." *Id.* at ¶ 20. Nor does the majority contend that the trial court made *implicit* findings regarding any of the *Waller* factors. After all, the trial court could not have made implicit findings on a test that it does not appear to have recognized even applied here. In these circumstances, the disposition mandated by the Supreme Court strikes me as obvious: reversal and remand for a

new trial. But that is not what the majority decides. Instead, the majority concludes that the trial court's findings were somehow "adequate" to support the closure order under *Waller*, and the majority justifies this conclusion by making what appear to me to be its own findings of fact. *See id.* at ¶¶ 40–46. This result, however, is directly contrary to *Waller*'s express admonition against post hoc appellate assertions that the trial court had balanced the co-defendants' rights to a public trial against any countervailing interests. *See Waller*, 467 U.S. at 48–49 & n.8.

¶70 Because I believe that the course that the majority sets today is contrary to settled precedent of both the United States Supreme Court and of this court and therefore diminishes the heretofore long-settled Sixth Amendment public trial right, I respectfully dissent.

I. Factual Background

¶71 The facts that are pertinent to the issues before us are not disputed.

¶72 An incident occurred outside the courtroom involving a witness who had finished testifying, a victim advocate, and Mrs. Cruse. The record discloses nothing about this incident other than the fact that Mrs. Cruse was arrested for harassing a witness who had finished testifying. We do not know what occurred. We do not know what prompted the incident. We do not know whether Mrs. Cruse's alleged conduct related solely to the one witness (as opposed to other witnesses). We do not know what, if anything, Mrs. Cruse did vis-à-vis the victim

advocate. We do not know if Mrs. Cruse's conduct triggered any concerns regarding any other witnesses. And we do not know if any of Mrs. Cruse's conduct in any way implicated how she might act inside the courtroom or in relation to any other witnesses.

¶73 The sum total of what the record shows is that the next morning, the prosecutor advised the court that Mrs. Cruse had been arrested on harassment charges arising from an encounter with a witness and the victim advocate that had occurred in the hallway outside the courtroom. The prosecutor advised that Mrs. Cruse was scheduled to appear in front of a magistrate that morning and that a mandatory protection order restraining her from contact with the victim advocate *would likely issue*. The prosecutor then stated that the advocate would obviously be in the courtroom, "so Mrs. Cruse is not going to be allowed legally to be in the courtroom."

¶74 Cruse's lawyer immediately objected, contending that "this is a public courtroom, that her husband is on trial, and that she has a right to be here." Counsel thus asked the court to allow Mrs. Cruse to be in the courtroom pursuant to Cruse's "rights to a public and fair trial and under the Sixth Amendment to the United States Constitution and the Colorado Constitution."

¶75 The court then asked co-defendant Terrel Turner's counsel if he had a position, and counsel responded that he had no information as to what had

occurred and could not access anything other than the fact that Mrs. Cruse had been arrested. Counsel thus stated, "Until I have information, I have no position."

¶76 The court proceeded to read the arrest affidavit, which affidavit is not in the record before us; noted that a magistrate had found probable cause and issued an arrest warrant; and stated that based on what the court had read, it believed that the facts, none of which are in the record before us, supported a finding of probable cause. The court then found, in full, as follows:

> [A]ny mandatory protection order that Magistrate White deems appropriate to enter, which would, of course, include, I suspect, a no-contact provision with victim and witnesses of that alleged offense, would be appropriate, and I further find that based on what I've read, Ms. Cruse has forfeited her right to be present in this trial, because she has interfered with the orderly presentation of the evidence.
>
> She has directly contacted a witness and made aggressive statements. The Court finds that I have an obligation to [e]nsure a fair trial for all parties, and that includes [e]nsuring the safety of all participants in the trial, whether those participants are the defendants or the witnesses, counsel, and other people associated with the parties, and the Court now enters an order that Yolanda Cruse is not permitted in this courtroom during the remainder of this trial.

¶77 The court then clarified that Mrs. Cruse was not allowed in the hallway outside of the courtroom either, although she could be elsewhere in the courthouse. At this point, Turner's counsel reiterated that he was the only one who did not have the arrest affidavit, and he indicated that he did not even know

if the affidavit impacted Turner. The court responded that the affidavit did not mention Turner or anyone associated with him.

¶78 Notably, in making its above-quoted findings, the court did not explain how Mrs. Cruse had interfered with the orderly presentation of any evidence, particularly given that the incident occurred outside the courtroom and that the witness who was involved had finished testifying, and the record discloses no such interference. Moreover, the court made no express findings regarding *any* of the *Waller* factors. Nor do the court's findings suggest that the court even recognized the applicability of such factors or the need to make findings on them, belying any assertion that *Waller* findings were somehow implicit in the court's determinations.

¶79 Specifically, the court made no findings as to whether and how the prosecutor had advanced an overriding interest that was likely to be prejudiced (a conclusory statement that Mrs. Cruse had interfered with the orderly presentation of the evidence, without any apparent basis for such a conclusion in the record, does not, in my view, satisfy this factor). The court does not appear to have considered whether the closure was broader than necessary to protect whatever overriding interest the court may have perceived, much less made any findings in that regard. And the court likewise does not appear to have considered whether there were any reasonable alternatives to the complete banishment of Mrs. Cruse

from the courtroom for what amounted to most of her husband's trial, much less made any findings on that question.

¶80 Ultimately, Mrs. Cruse was excluded from the courtroom during (1) the testimony of fifteen witnesses whose testimony resulted in over 700 pages of trial transcript; (2) the entire defense case; (3) the reading of the jury instructions; (4) the parties' closing arguments; and (5) the reading of the verdict.

II. Analysis

¶81 I begin by setting forth the applicable Supreme Court law and the law of this court concerning the constitutional right to a public trial. I then explain why, on the undisputed facts of this case, Turner and Cruse's Sixth Amendment rights to a public trial were violated.

A. Applicable Law

¶82 Both the United States and the Colorado Constitutions guarantee criminal defendants the right to a public trial. *See* U.S. Const. amends. VI, XIV; Colo. Const. art. II, § 16.

¶83 As both the Supreme Court and this court have long recognized, this right "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 triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller*, 467 U.S. at 46 (quoting *Gannett Co. v. DePasquale*, 443 U.S.

368, 380 (1979)); *accord People v. Jones*, 2020 CO 45, ¶ 16, 464 P.3d 735, 739. In addition, both the Supreme Court and this court have recognized the significant role that a defendant's family plays in reminding trial participants of these duties. *See, e.g.*, *In re Oliver*, 333 U.S. 257, 271–72 (1948); *Jones*, ¶ 16, 464 P.3d at 739.

¶84 In addition to ensuring that courts and prosecutors carry out their duties responsibly, "a public trial encourages witnesses to come forward and discourages perjury." *Waller*, 467 U.S. at 46; *accord Jones*, ¶ 17, 464 P.3d at 740.

¶85 And public trials protect the public's and the press's qualified First Amendment rights to attend a criminal trial. *Waller*, 467 U.S. at 44–45; *Jones*, ¶ 18, 464 P.3d at 740.

¶86 Notwithstanding the foregoing, courts have recognized that a criminal defendant's right to a public trial is not absolute and that, at times, it must give way to other rights or interests, as, for example, "the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller*, 467 U.S. at 45; *accord Jones*, ¶ 20, 464 P.3d at 740. As the Supreme Court and this court have recognized, however, "[s]uch circumstances will be rare, . . . and the balance of interests must be struck with special care." *Waller*, 467 U.S. at 45; *accord People v. Hassen*, 2015 CO 49, ¶ 8, 351 P.3d 418, 421.

¶87 To justify a closure, (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." *Waller*, 467 U.S. at 48; *accord Jones*, ¶ 21, 464 P.3d at 740. Regarding the third factor, both the Supreme Court and this court have emphasized that "[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); *accord Hassen*, ¶ 9, 351 P.3d at 421. As to the fourth factor, the Supreme Court has expressly warned against post hoc assertions by appellate courts that a trial court had, in fact, balanced a defendant's right to a public trial against the countervailing interests to which the *Waller* factors are directed. *See Waller*, 467 U.S. at 48–49 & n.8. Thus, in *Waller*, the court noted that the trial court had not considered alternatives to closure of the entire hearing, directed the government to provide more detail about its need for closure, or closed only parts of the hearing that jeopardized the interests advanced. *Id.* at 48–49. In these circumstances, the court concluded, "The post hoc assertion by the Georgia Supreme Court that the trial court balanced petitioners' right to a public hearing against the privacy rights of others cannot satisfy the deficiencies in the trial court's record." *Id.* at 49 n.8.

¶88 In addition, as we have recently made clear, the exclusion of even a single individual can implicate the Sixth Amendment right to a public trial, and a limited

exclusion like this constitutes a partial closure requiring findings under *Waller*. *Jones*, ¶¶ 23, 27, 464 P.3d at 740–41. In so concluding, we specifically rejected the People's reliance on *State v. Lormor*, 257 P.3d 624, 628–29 (Wash. 2011), for the proposition that an exclusion of a single person for cause is not a closure for Sixth Amendment purposes, a position that the People advance again today and that the majority properly rejects. *See Jones*, ¶¶ 31–36, 464 P.3d at 742–43; *accord* Maj. op. ¶¶ 22–24.

B. Sixth Amendment Violation Here

¶89 Applying the foregoing principles to the case now before us persuades me that Turner and Cruse were denied their Sixth Amendment right to a public trial. I reach this conclusion for several reasons.

¶90 First, as the majority correctly concludes, the exclusion of Mrs. Cruse for the great majority of this trial was a partial closure requiring findings under *Waller*, and nothing in requiring such findings is inconsistent with a trial court's need and ability to control its courtroom. Maj. op. ¶¶ 19–26, 32.

¶91 Second, as the majority again correctly decides, this closure was by no means trivial. *Id.* at ¶¶ 27–32. Mrs. Cruse was excluded from most of her husband's trial. Specifically, she was prohibited from entering the courtroom for three and one-half days, during which time she missed the testimony of fifteen witnesses whose testimony resulted in over 700 pages of trial transcript, the

entirety of the defense case, closing arguments, jury instructions, and the jury's verdicts. In this regard, the closure was somewhat similar—albeit far more extreme—than the closure that we found to be non-trivial in *Jones*. *See Jones*, ¶¶ 41–42, 464 P.3d at 744 (concluding that the exclusion of the defendant's parents during the portion of the trial in which his children testified was not trivial because (1) the presence of a defendant's family plays an important role in ensuring a fair trial and (2) the testimony at issue was significant and the partial closure was not brief, given that the testimony took almost the entire afternoon of a ten-day trial and the testimony resulted in 146 pages of transcript).

¶92 Third, as the majority candidly concedes, the trial court made no express findings under *Waller*. S*ee* Maj. op. ¶ 20. Nor does the majority endeavor to assert that the court made implicit findings under *Waller*. And rightly so in both respects.

¶93 The prosecution did not identify an overriding interest requiring that Mrs. Cruse be excluded from most of the trial. Nor did the trial court make any findings regarding any such overriding interest. To be sure, the court found, based on what it had read in an arrest affidavit that is not in the record before us, that Mrs. Cruse had forfeited her right to be present in the courtroom because she had "interfered with the orderly presentation of the evidence" and "made aggressive statements" to a witness. But the court did not identify what the statements were or to whom they were made. Nor did the court explain how Mrs. Cruse's conduct

interfered with the orderly presentation of the evidence. The incident occurred outside the courtroom (and outside the judge's presence), and it involved a witness whose testimony was already complete. The record provides no basis for a conclusion that Mrs. Cruse's conduct—whatever it entailed (and we do not know)—interfered with the orderly presentation of any evidence in this case. At best, we can only speculate that the court may have had a concern as to how Mrs. Cruse *might* act in the courtroom later in the trial. And although the prosecutor indicated that a protective order would likely issue restraining Mrs. Cruse from contact with the victim advocate, no such order appears to have been entered at the time of the court's ruling barring Mrs. Cruse from the courtroom. The court simply credited what the prosecutor said was *likely* to occur.

¶94 Likewise, the record plainly shows that the trial court did not consider or make any findings as to whether the closure that it ordered was broader than necessary to protect whatever overriding interest the court may have perceived. Was Mrs. Cruse's conduct directed solely toward the one witness who had already testified (as opposed to any other witnesses)? Was there a history between Mrs. Cruse and the witness who was involved that explained her behavior? Was the behavior isolated so as to alleviate any concern of future misbehavior by Mrs. Cruse? Should the court have at least waited until a protective order actually issued, and, if such an order was issued, assessed whether accommodations could

be made under it (e.g., whether the court could have controlled seating in the courtroom to alleviate any concern or to satisfy any protective order regarding the victim advocate)? Was the courtroom technology such that Mrs. Cruse could at least have watched the proceedings remotely? We have no answer to any of these questions because the court made no findings at all on this *Waller* factor.

¶95 And the court made no findings as to whether there were reasonable alternatives to excluding Mrs. Cruse from most of her husband's trial. Indeed, as the majority recognizes, the trial court did not even consider any alternatives. *See* Maj. op. ¶ 44.

¶96 In my view, this record does not come close to satisfying the requirements set forth by the Supreme Court in *Waller*. Accordingly, unlike the majority, I would conclude, on the undisputed facts in the record before us, that the exclusion of Mrs. Cruse violated Turner and Cruse's Sixth Amendment rights to a public trial, and like the divisions below, I would reverse Turner and Cruse's convictions and remand for a new trial.

¶97 In so concluding, I respectfully disagree with the majority's determination that the few findings that the trial court made were sufficient to support the partial closure at issue. *Id.* at ¶¶ 36–47.

¶98 As an initial matter, I note that nothing in the trial court's findings suggests an acknowledgement or recognition that *Waller* even applied in this case. For this

reason alone, I perceive no basis for imputing *any Waller* findings to the court, much less sufficient *Waller* findings.

¶99 Nor do I perceive any basis for concluding, as the majority does, that the few findings that the court made are somehow "adequate" under *Waller*. *Id.* at ¶¶ 40–47.

¶100 As to the first *Waller* factor, which requires the party seeking to close the courtroom to advance an overriding interest that was likely to be prejudiced, the record discloses nothing more than the prosecutor's statement that Mrs. Cruse had been arrested on harassment charges arising from an encounter with a witness and the victim advocate that had occurred in the hallway outside the courtroom and that a restraining order would *likely* issue. As noted above, we know nothing about what actually occurred, who was involved, or how, if at all, anyone's safety would be in jeopardy were Mrs. Cruse to be allowed in the courtroom. Nor did the trial court make any findings as to how Mrs. Cruse's conduct interfered—or would further interfere—with the orderly presentation of any evidence in this case.

¶101 Regarding the second factor, which requires the court to find that the closure was no broader than necessary to protect the overriding interest purportedly at issue, the majority states that the trial court's findings support this factor, Maj. op. ¶ 42, but the majority does not—and, indeed, could not—point to any such

findings because the trial court made none. The majority states that this factor was satisfied because the trial court's closure was limited to the one individual whose presence risked the fairness and integrity of the trial, but the majority concedes that we know nothing other than that Mrs. Cruse "allegedly harassed a witness and the victim advocate just outside the courtroom." *Id.* Moreover, no party below or before us made the argument on which the majority relies. Nor did the trial court adopt such an argument. Rather, the majority appears to have made its own post hoc findings, directly contrary to the Supreme Court's admonition against such appellate findings. *See Waller*, 467 U.S. at 48–49 & n.8.

¶102 And regarding the third factor, which requires the court to consider reasonable alternatives to closing the proceeding, the majority correctly notes that "nothing in the record indicates that the court considered any reasonable alternatives to the partial closure." Maj. op. ¶ 44. But the majority inexplicably proceeds to make its own finding that "there likely weren't reasonable alternatives available." *Id.* Again, this is precisely the kind of post hoc appellate finding that the Supreme Court has opined is improper. *See Waller*, 467 U.S. at 48–49 & n.8. And in any event, I perceive nothing in the record to support such a finding. It is mere speculation.

¶103 Perhaps recognizing the thinness of the reed on which its analysis rests, the majority attempts to justify its post hoc appellate fact findings by stating that

Waller does not foreclose appellate review simply because the trial court "overlooks a particular incantation." Maj. op. ¶ 35; *see also id.* at ¶ 36 (noting that nothing in *Waller* requires a reviewing court to evaluate a trial court's closure order solely based on the court's explicit fact findings). In general, I do not disagree with the principle that the majority recites. But for the reasons discussed above, this is not a case in which the trial court simply overlooked a particular incantation or made implicit findings under *Waller* without employing that case's precise language. To the contrary, the record before us makes clear that the trial court does not appear to have recognized that *Waller* even applied in this case, much less made any findings—explicit, implicit, or otherwise—under *Waller*. In these circumstances, imputing *Waller* findings to the trial court amounts to nothing more than the very kind of post hoc appellate fact findings that *Waller* expressly prohibited. *See Waller*, 467 U.S. at 48–49 & n.8.

¶104 Finally, in my view, concluding that the trial court's few findings here were somehow adequate undermines the Sixth Amendment rights protected by *Waller*, *Presley*, and this court's own precedents in *Hassen* and *Jones* and, I fear, will allow a limitless range of arguably implicit findings to justify substantial partial courtroom closures. Indeed, it would appear that, under the majority's rationale, any allegation by a prosecutor that a witness misbehaved toward another witness, whether inside or outside a courtroom, could, in the trial court's discretion,

potentially justify the total exclusion of the misbehaving witness from the entirety of a trial, regardless of any other facts and in spite of the importance of the Sixth Amendment right to a public trial. This, however, is precisely what *Waller* findings were designed to protect against.

¶105 Accordingly, I believe that *Waller* and our own precedents mandate that we reverse Turner and Cruse's convictions and remand for a new trial, and I would therefore affirm the judgments of the divisions below.

III. Conclusion

¶106 The majority agrees that on the facts presented in this case, the exclusion of Mrs. Cruse from the courtroom for most of her husband's trial amounted to a partial closure requiring findings under *Waller*. The majority further agrees that this closure was not trivial and that the trial court did not make any express findings pursuant to *Waller* in order to justify the partial closure at issue. In my view, the matter should have ended there, with a conclusion that a reversal and remand for a new trial is required. The majority, however, proceeds to conclude that the few findings that the trial court made were somehow "adequate" under *Waller*, notwithstanding the facts that the trial court never mentioned *Waller* and apparently never considered that it even applied here. The majority supports this conclusion by making its own post hoc factual findings, but this is directly contrary to the Supreme Court's explicit statement that such post hoc appellate

assertions "cannot satisfy the deficiencies in the trial court's record." *Waller*, 467 U.S. at 49 n.8.

¶107 For the reasons discussed above, I perceive no basis in either fact or law for the course that the majority sets today. To the contrary, the majority's decision conflicts with settled precedent of both the United States Supreme Court and our own court, and I fear that it significantly diminishes the right to a public trial enshrined in the Sixth Amendment.

¶108 Accordingly, I respectfully dissent.