SUMMARY
April 18, 2024

2024COA37M

No. 21CA1539, *People v. Montoya* — Constitutional Law — Sixth Amendment — Right to Public Trial — *Waller* Test; Crimes — Failure or Refusal to Leave Premises — Barricading

A division of the court of appeals holds that the defendant's right to a public trial was violated when the trial court conducted the trial virtually and made no findings under *Waller v. Georgia*, 467 U.S. 39 (1984). The division further holds that a remand for further *Waller* findings would be futile because the prosecuting attorneys are no longer licensed, and the record is devoid of any evidence to support the *Waller* factors. Additionally, because the defendant's sufficiency of the evidence argument implicates the prohibition against double jeopardy, the division addresses it and the novel issue it presents. The division concludes that the plain language of section 18-9-119(2), C.R.S. 2023, provides two different

means of committing failure to leave the premises and that sufficient evidence supports the defendant's conviction under the "barricading" clause. Accordingly, the defendant may be retried on this charge.

COLORADO COURT OF APPEALS **2024COA37M**

Court of Appeals No. 21CA1539
Alamosa County District Court No. 20CR301
Honorable Martin A. Gonzales, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Gilberto Andres Montoya,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE FREYRE
Brown and Johnson, JJ., concur

Opinion Modified
on the Court's Own Motion
Petition for Rehearing DENIED

Announced April 18, 2024

Philip J. Weiser, Attorney General, Sonia Raichur Russo, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Julieanne Farchione, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

OPINION is modified as follows:

Page 1, ¶ 1 currently reads:

Montoya challenges his convictions on four grounds, contending that the trial court reversibly erred by (1) denying his motion to disqualify the prosecutor and the entire district attorney's office; (2) denying his right to a public trial by requiring the public to view the proceedings via livestream; (3) denying his motion for judgment of acquittal and finding that sufficient evidence supported his conviction for failure to leave the premises, and; (4) failing to make any findings concerning two jurors who were not paying attention to the evidence during trial.

Opinion now reads:

Montoya challenges his convictions on four grounds, contending that the trial court reversibly erred by (1) denying his motion to disqualify the prosecutor and the entire district attorney's office; (2) denying his right to a public trial by requiring the public to view the proceedings via livestream; (3) denying his motion for judgment of acquittal and finding that sufficient evidence supported his conviction for failure to leave the premises, and; (4) failing to

make any findings concerning two jurors who were not paying attention to the evidence at trial.

Page 4, ¶ 10 currently reads:

Montoya admits that he did not contemporaneously object to the virtual proceedings, but he argues this was not a strategic choice, so we should review for plain error.

Opinion now reads:

Montoya admits that he did not contemporaneously object to the virtual proceedings at the trial, but he argues this was not a strategic choice, so we should review for plain error.

Page 5, ¶ 11 currently reads:

We conclude the issue is preserved. *See People v. Carter*, 2021 COA 29, ¶ 13 ("We have an independent, affirmative obligation to determine whether a claim of error was preserved and to determine the appropriate standard of review under the law, notwithstanding the parties' respective positions or concessions pertaining to those issues."). The record shows that Montoya sent a letter to the court on November 9, 2020, in which he objected to *all* proceedings being held "in remote form" and requested the "courthouse to remain open," under both the Federal and Colorado Constitutions. In an

order dated November 12, 2020, the county court granted Montoya a preliminary hearing on the felony count, stating that the "parties may proceed by Webex as desired [please refer to the latest health guidelines/chief judge directives]," and deferred entry of a not guilty plea until probable cause was determined.

Opinion now reads:

We conclude, based on the record, that the issue is preserved. *See People v. Carter*, 2021 COA 29, ¶ 13 ("We have an independent, affirmative obligation to determine whether a claim of error was preserved and to determine the appropriate standard of review under the law, notwithstanding the parties' respective positions or concessions pertaining to those issues."). The record shows that Montoya, who was pro se, sent a letter[3] to the court on November 9, 2020, in which he objected to all proceedings being held "in remote form" and requested the "courthouse to remain open," under both the Federal and Colorado Constitutions. In an order dated November 12, 2020, the county court judge granted Montoya a preliminary hearing on the felony count, stated that the "parties

---

[3] We construe this letter as a motion since it also requested a preliminary hearing and discovery.

may proceed by Webex as desired [please refer to the latest health guidelines/chief judge directives]," and deferred entry of a not guilty plea until probable cause was determined. *See Presley v. Georgia*, 558 U.S. 209, 214-15 (2010) (noting that the court found error even though neither the prosecution nor the defense requested an open courtroom in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 503 (1984)).

Page 5, ¶ 12 currently reads:

Having determined that this issue was preserved, we must decide whether there was a courtroom closure that violated Montoya's constitutional rights and, if so, the proper remedy.

Opinion now reads:

We acknowledge that the waiver issue is a close one because the record shows that after filing his written objection, Montoya appeared to acquiesce to the virtual proceedings by saying such things as "let's move along" and "I'm ready to proceed" when the court explained that it intended to comply with social distancing and masking requirements necessitated by the pandemic and that it would proceed virtually during the trial. However, we are not persuaded that Stackhouse compels a finding of waiver.

Added ¶ 13 on page 6 reads:

In *Stackhouse*, the closure issue arose at the trial proceeding when the judge advised the parties the public would not be permitted in the courtroom for jury selection due to the large number of jurors, the limited space, and the risk that family members would come into contact with prospective jurors and potentially bias them. *Stackhouse*, ¶ 2. No one objected to the closure, and the Colorado Supreme Court held that a defendant waives his right to a public trial by not objecting to a known closure. *Id.* at ¶ 17.

Added ¶ 14 on page 7 reads:

As in *Stackhouse*, Montoya knew his case would be closed to the public because of the pandemic from the onset of the proceedings. But unlike the defendant in *Stackhouse*, he filed his written objection contemporaneously with this knowledge, and not only requested in-person proceedings, but also requested that the courthouse remain open to the public. The People have not cited, nor are we aware of, any authority that required Montoya to reraise his objection at every court appearance to preserve this issue for our review once the court denied his request for public proceedings.

See Bondsteel v. People, 2019 CO 26, ¶ 28 (finding defendant's pretrial objection to joinder sufficiently preserved appellate claim despite no renewal of the objection at trial); *People v. Melendez*, 102 P.3d 315, 322 (Colo. 2004) (no talismanic language is required to preserve an issue, so long as the court is given an opportunity to rule); *People v. Pratt*, 759 P.2d 676, 685 n.5 (Colo. 1988) (to prevent a "waste of time and fraying of patience," most courts hold that the objector is entitled to assume the trial court will adhere to its initial ruling and the objection need not be repeated (quoting Kenneth S. Broun et al., *McCormick on Evidence* § 52 (3d ed. 1984))); *People v. Kessler*, 2018 COA 60, ¶ 9 (noting that the defendant does not need to reassert an objection on a ruling specifically addressed by the trial court to preserve it).

Added ¶ 15 on page 8 reads:

Moreover, the fact that Montoya filed his written objection at the commencement of his case does not alter our conclusion. While the right to a public trial does not mean that all aspects of the proceedings must be open to the public, *see, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 598 n.23 (1980) (Brennan, J., concurring in the judgment) (noting no right of public

or press access to bench conferences), many court proceedings are subject to the public access and public trial rights under the First and Sixth Amendments. These include: (1) preliminary hearings in a criminal case, *Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1, 10 (1986); (2) pretrial suppression, due process, and entrapment hearings, *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982); (3) suppression hearings, *Waller*, 467 U.S. at 48; (4) omnibus pretrial hearings, *United States v. Waters*, 627 F.3d 345, 359 (9th Cir. 2010); (5) hearings on motions in limine, *Rovinsky v. McKaskle*, 722 F.2d 197 (5th Cir. 1984); (6) voir dire, *Press-Enterprise*, 464 U.S. at 509-10); (7) plea hearings, *United States v. Haller*, 837 F.2d 84, 86-87 (2d Cir. 1988); (8) post-trial hearings to investigate jury misconduct, *United States v. Simone*, 14 F.3d 833, 840 (3d Cir. 1994); and (9) sentencing, *United States v. Rivera*, 682 F.3d 1223, 1228 (9th Cir. 2012).

Added ¶ 16 on page 9 reads:

In the end, we cannot say that the record clearly establishes that Montoya's comments reflect an intention to relinquish his right to a public trial. At best, they are ambiguous regarding whether he sought to abandon his original request that all proceedings be

public. And we must indulge every reasonable presumption against waiver. *People v. Rediger*, 2018 CO 32, ¶ 46. Indeed, "[t]he presumption of openness 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." *Press-Enterprise*, 464 U.S. at 510. "The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered," the issue we next address. *Id.*

Deleted the following sentence at page 6, ¶ 13:

Specifically, the right may yield to "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* (quoting *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501, 510 (1984)).

Page 11, ¶ 22 currently reads:

As in *Bialas*, the court made no findings under *Waller*; instead, it addressed the issue in one sentence by saying it would comply with health guidelines and the applicable chief justice directives.

Opinion now reads (as ¶ 27):

As in *Bialas*, the court made no findings under *Waller*; instead, it addressed the issue in one sentence by saying it would comply with health guidelines and the applicable chief judge directives.

Page 11, ¶ 23 currently reads:

We conclude that a remand would be futile, for two reasons. First, the elected district attorney has been disbarred, *People v. Payne*, (Colo. O.P.D.J. No. 22PDJ033, September 21, 2022), and the prosecuting attorney was suspended and is no longer an employee of the district attorney's office, *People v. Raines*, 510 P.3d 1089 (Colo. O.P.D.J. 2022); *see People v. Raines*, (Colo. O.P.D.J. No. 22PDJ021, May 3, 2022). Thus, neither prosecutor can assist in developing an additional record on any of the *Waller* factors. *Cf. Jones*, ¶ 46 (concluding that a remand for additional *Waller* findings would not be helpful in part because the trial judge had died).

Opinion now reads (as ¶ 28):

We conclude that a remand would be futile because, as we explain below, the *Waller* factors were not explored contemporaneously. *See Jones*, ¶ 50 ("And even if findings by

another judge based on records from the dependency and neglect case and other reconstruction methods were an option, supplemental findings would still fail to adequately address the second and third factors . . . .”). Specifically, the record contains no contemporaneous findings concerning the breadth factor (the second factor) or the alternatives factor (the third factor).

Page 12, ¶ 24 currently reads:

Second, concerning steps two and three of the *Waller* analysis, the undisputed record clearly shows no other options were “explored contemporaneously.” *Jones*, ¶¶ 48-49. Because the need for *Waller* findings was well established and because, unlike in *Roper*, the record is devoid of evidence that would support any of the *Waller* factors, we conclude that the closure constituted structural error that requires reversal of Montoya’s convictions and a new trial.

Opinion now reads (as ¶ 29):

We begin by noting that the county court judge entered the order denying Montoya’s request for a public trial and referred to the administrative orders restricting trials, but the trial judge made no findings concerning the status or content of the health orders or

the chief judge directive at the time of trial. So we cannot know whether the closure was broader than necessary to protect the public interest. And while the precise language of the health orders or the chief judge directive is likely ascertainable, the record is devoid of any information concerning the third factor — whether there were reasonable alternatives. We do not know whether there were other courtrooms or court spaces available to accommodate in-person proceedings or if the court could have allowed some members of the public into the courtroom despite the health orders and chief judge directive. For example, in *Roper*, the division remanded the case to the district court for *Waller* findings because there was some evidence in the record suggesting that such findings were capable of accurate and ready determination based on sources whose accuracy was not reasonably questioned. Here, the undisputed record shows that "a remand would fail to satisfy [the third *Waller* factor] because these options were not explored contemporaneously." *Jones*, ¶¶ 48-49. Because the need for *Waller* findings was well established and a remand for further findings on the *Waller* factors would be futile, we conclude that the courtroom

closure constituted structural error that requires reversal of Montoya's convictions and a new trial.

¶ 1 Defendant, Gilberto Andres Montoya, appeals the judgment of conviction entered on jury verdicts finding him guilty of first degree trespass (a class 5 felony), criminal mischief (a class 3 misdemeanor), and failure to leave the premises (a class 3 misdemeanor). Montoya challenges his convictions on four grounds, contending that the trial court reversibly erred by (1) denying his motion to disqualify the prosecutor and the entire district attorney's office; (2) denying his right to a public trial by requiring the public to view the proceedings via livestream; (3) denying his motion for judgment of acquittal and finding that sufficient evidence supported his conviction for failure to leave the premises; and (4) failing to make any findings concerning two jurors who were not paying attention to the evidence at trial.

¶ 2 Montoya's sufficiency argument raises a novel issue of statutory interpretation concerning section 18-9-119(2), C.R.S. 2023. Based on the statute's plain language, we conclude that it sets forth two means of committing the offense of failure to leave the premises and that sufficient evidence supports Montoya's conviction under the barricading clause. However, we also

conclude that Montoya was deprived of his constitutional right to a public trial and that remanding for further findings under *Waller v. Georgia*, 467 U.S. 39 (1984), would be futile. Accordingly, we reverse the judgment and remand the case for a new trial. We do not address the remaining issues because they are unlikely to arise on retrial.

I. Background

¶ 3 In October 2020, the Alamosa Sheriff's Office responded to a call from Montoya's sister reporting that Montoya had broken into a house in Alamosa County. When officers arrived at the house, Montoya's sister gave them a key to the front door, but it did not work because the lock was damaged. The officers noticed chips in the paint and wood of the door, which indicated that the door had been pried open. The officers went to a set of French doors at the back of the home and saw that they were jammed shut by a two-by-four placed in the space beneath them.

¶ 4 The officers then saw Montoya inside the house. After they gave Montoya several commands to unlock the door and come outside, he left the house and was arrested.

¶ 5 The People charged Montoya with first degree criminal trespass, failure to leave the premises, and criminal mischief.

¶ 6 Montoya proceeded to trial without counsel in April 2021, during the COVID-19 pandemic. The jurors were seated throughout the courtroom to allow for social distancing, and the public watched the trial via Webex. Throughout the proceedings, the Webex camera was focused solely on the judge, counsel, and Montoya.

¶ 7 At trial, Montoya asserted that he was not trespassing at the property in question because the deed to it was in his legal name, Gilberto A. Montoya. However, Montoya's father, Gilbert Andy Montoya,[1] testified that he owned the property, that it was in his name (not in Montoya's legal name[2]), and that he had told Montoya that he could not be there.

¶ 8 The jury found Montoya guilty of all charges. The court sentenced him to eighteen months in community corrections.

---

[1] Montoya's father testified that he has also used the name Gilberto Andres Montoya.

[2] Montoya's father testified that Montoya's legal name is Gilberto Andres Miguel Montoya.

II. Courtroom Closure

¶ 9 Montoya contends that the trial court completely closed the courtroom by excluding all members of the public and requiring them to view the trial in a separate courtroom via a live audio and video stream. He further contends that the trial court's failure to make findings justifying the closure under *Waller* and its failure to consider reasonable alternatives violated his right to a public trial under the Sixth Amendment to the United States Constitution and article II, section 16 of the Colorado Constitution. We conclude that reversal for a new trial is required.

A. Standard of Review and Preservation

¶ 10 The parties agree that a trial court's decision to close the courtroom presents a mixed question of law and fact, and that we review the court's legal conclusions de novo and its findings of fact for clear error. *People v. Turner*, 2022 CO 50, ¶ 19. But they disagree on the applicable standard of reversal. Montoya admits that he did not contemporaneously object to the virtual proceedings at trial, but he argues this was not a strategic choice, so we should review for plain error. Relying on *People v. Garcia*, 2023 COA 58, and *Stackhouse v. People*, 2015 CO 48, the People respond that

Montoya knew about the closure and failed to object, so he waived this issue.

¶ 11 We conclude, based on the record, that the issue is preserved. *See People v. Carter*, 2021 COA 29, ¶ 13 ("We have an independent, affirmative obligation to determine whether a claim of error was preserved and to determine the appropriate standard of review under the law, notwithstanding the parties' respective positions or concessions pertaining to those issues."). The record shows that Montoya, who was pro se, sent a letter[3] to the court on November 9, 2020, in which he objected to all proceedings being held "in remote form" and requested the "courthouse to remain open" under both the Federal and Colorado Constitutions. In an order dated November 12, 2020, the county court judge granted Montoya a preliminary hearing on the felony count, stated that the "parties may proceed by Webex as desired [please refer to the latest health guidelines/chief judge directives]," and deferred entry of a not guilty plea until probable cause was determined. *See Presley v. Georgia*,

[3] We construe this letter as a motion since it also requested a preliminary hearing and discovery.

558 U.S. 209, 214-15 (2010) (noting that the court found error even though neither the prosecution nor the defense requested an open courtroom in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 503 (1984)).

¶ 12 We acknowledge that the waiver issue is a close one because the record shows that after filing his written objection, Montoya appeared to acquiesce to the virtual proceedings by saying such things as "let's move along" and "I'm ready to proceed" when the court explained that it intended to comply with social distancing and masking requirements necessitated by the pandemic and that it would proceed virtually during the trial. However, we are not persuaded that *Stackhouse* compels a finding of waiver.

¶ 13 In *Stackhouse*, the closure issue arose at the trial proceeding when the judge advised the parties the public would not be permitted in the courtroom for jury selection due to the large number of jurors, the limited space, and the risk that family members would come into contact with prospective jurors and potentially bias them. *Stackhouse*, ¶ 2. No one objected to the closure, and the Colorado Supreme Court held that a defendant

waives his right to a public trial by not objecting to a known closure. *Id.* at ¶ 17.

¶ 14 As in *Stackhouse*, Montoya knew his case would be closed to the public because of the pandemic from the onset of the proceedings. But unlike the defendant in *Stackhouse*, he filed his written objection contemporaneously with this knowledge, and not only requested in-person proceedings, but also requested that the courthouse remain open to the public. The People have not cited, nor are we aware of, any authority that required Montoya to reraise his objection at every court appearance to preserve this issue for our review once the court denied his request for public proceedings. *See Bondsteel v. People*, 2019 CO 26, ¶ 28 (finding defendant's pretrial objection to joinder sufficiently preserved appellate claim despite no renewal of the objection at trial); *People v. Melendez*, 102 P.3d 315, 322 (Colo. 2004) (no talismanic language is required to preserve an issue, so long as the court is given an opportunity to rule); *People v. Pratt*, 759 P.2d 676, 685 n.5 (Colo. 1988) (to prevent a "waste of time and fraying of patience," most courts hold that the objector is entitled to assume the trial court will adhere to its initial

ruling and the objection need not be repeated (quoting Kenneth S. Broun et al., *McCormick on Evidence* § 52 (3d ed. 1984))); *People v Kessler*, 2018 COA 60, ¶ 9 (noting that the defendant does not need to reassert an objection on a ruling specifically addressed by the trial court to preserve it).

¶ 15 Moreover, the fact that Montoya filed his written objection at the commencement of his case does not alter our conclusion. While the right to a public trial does not mean that all aspects of the proceedings must be open to the public, *see, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 598 n.23 (1980) (Brennan, J., concurring in the judgment) (noting no right of public or private access to bench conferences), many court proceedings are subject to the public access and public trial rights under the First and Sixth Amendments. These include (1) preliminary hearings in a criminal case, *Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1, 10 (1986); (2) pretrial suppression, due process, and entrapment hearings, *United States v. Criden*, 675 F.2d 550 (3d Cir. 1983); (3) suppression hearings, *Waller*, 467 U.S. at 48; (4) omnibus pretrial hearings, *United States v. Waters*, 627 F.3d 345, 359 (9th Cir.

2010); (5) hearings on motions in limine, *Rovinsky v. McKaskle*, 722 F.2d 197 (5th Cir. 1984); (6) voir dire, *Press-Enterprise*, 464 U.S. at 509-10; (7) plea hearings, *United States v. Haller*, 837 F.2d 84, 86-87 (2d Cir. 1988); (8) post-trial hearings to investigate jury misconduct, *United States v. Simone*, 14 F.3d 833, 840 (3d Cir. 1994); and (9) sentencing, *United States v. Rivera*, 682 F.3d 1223, 1228 (9th Cir. 2012).

¶ 16 In the end, we cannot say that the record clearly establishes that Montoya's comments reflect an intention to relinquish his right to a public trial. At best, they are ambiguous regarding whether he sought to abandon his original request that all proceedings be public. And we must indulge every reasonable presumption against waiver. *People v. Rediger*, 2018 CO 32, ¶ 46. Indeed, "[t]he presumption of openness 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." *Press-Enterprise*, 464 U.S. at 510. "The interest is to be articulated along with findings specific enough that a reviewing court can determine

whether the closure order was properly entered," the issue we next address. *Id.*

¶ 17 Having determined that this issue was preserved, we must decide whether there was a courtroom closure that violated Montoya's constitutional rights, and, if so, the proper remedy.

B. Applicable Law

¶ 18 Both the United States and Colorado Constitutions guarantee a criminal defendant the right to a public trial. U.S. Const. amends. VI, XIV; Colo. Const. art. II § 16; *Waller*, 467 U.S. at 44; *People v. Jones*, 2020 CO 45, ¶ 15. However, the public trial right is not absolute. *Waller*, 467 U.S. at 45. The right to a public trial may give way, in rare circumstances, to other rights or interests. *Id.*

¶ 19 Further, not every exclusion of the public constitutes a denial of a public trial. *See People v. Whitman*, 205 P.3d 371, 379-80 (Colo. App. 2007). 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." *Turner*, ¶ 23. When a court physically

excludes members of the public from the courtroom for the duration of the trial but allows them to view the trial via live video and audio streaming, such procedure constitutes at least a partial closure. *See People v. Bialas*, 2023 COA 50, ¶¶ 5, 13, 15 (*cert. granted* Mar. 11, 2024); *People v. Roper*, 2024 COA 9, ¶ 16.

¶ 20 Still to implicate a defendant's right to a public trial, the courtroom closure must be nontrivial. *See Bialas*, ¶ 8 ("Trivial closures . . . do not implicate the protections and values of the Sixth Amendment and thus do not amount to any error at all."); *People v. Lujan*, 2020 CO 26, ¶ 23 (noting that trivial closures do not violate the public trial right because they are "inconsequential" and "de minimis"). A closure is trivial if it does not undermine the values advanced by the public trial guarantee — namely, ensuring a fair trial, reminding the prosecutor and judge of their responsibilities and the importance of their functions, encouraging witnesses to come forward, and discouraging perjury. *See Lujan*, ¶¶ 27-28. Courts consider factors such 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, . . . whether the closure was total or partial," or any other relevant consideration. *Id.* at ¶ 19.

¶ 21 To protect a defendant's right to a public trial, any nontrivial courtroom closure requires that four conditions be met: (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 hearing; and (4) the trial court must make findings adequate to support the closure. *Waller*, 467 U.S. at 48.

¶ 22 The Colorado Supreme Court has held that violation of the right to a public trial constitutes structural error that requires reversal without an individualize prejudice analysis. *Stackhouse*, ¶ 7. However, "more recent case law suggests that the supreme court did not intend such a strict reading of its earlier pronouncements." *Roper*, ¶ 31; *see Jones*, ¶¶ 36, 45-46 (finding a partial closure, reversing under structural error, and acknowledging that some courts have chosen to remand for further findings, but

concluding that doing so would be futile because the trial judge was now deceased); *Turner*, ¶¶ 19, 32, 34, 40, 47 (finding a partial closure where the defendant's friend was excluded from the courtroom and holding that no error occurred, despite the lack of *Waller* findings, because the record supported the partial closure). "[S]tructural error doesn't flow simply from the trial court's failure to employ the precise language found in *Waller*. *Roper*, ¶ 34 (quoting *Turner*, ¶ 35).

C. Analysis

¶ 23 We first conclude that the closure was at least partial and nontrivial, for the reasons articulated by two different divisions of this court in *Bialas* and *Roper*.

¶ 24 In *Bialas*, the trial court initially allowed a small number of spectators in the courtroom, but later it physically excluded the entire public from the courtroom based on its concern that some of the jurors could hear some spectators' inappropriate comments. *Bialas*, ¶ 5. It permitted the public to view the trial via a live video and audio stream. *Id.* Emphasizing that "'the *presence* of interested spectators' is important to remind the triers of 'the

importance of their functions,'" the division held that the complete removal of the public from the courtroom, coupled with the live video and audio streaming, constituted a nontrivial partial closure. *Id.* at ¶¶ 13-20 (quoting *Jones*, ¶ 16). The division then concluded that the *Waller* factors had not been satisfied, determined that a remand for additional *Waller* findings would be futile, reversed Bialas's conviction, and remanded for a new trial. *Id.* at ¶ 27.

¶ 25 Similarly in *Roper*, the trial court excluded the public from the courtroom despite the defendant's request that four family members and four friends be permitted to attend in person. *Roper*, ¶ 5. The court's denial relied on an administrative order governing the health and safety of participants in trial proceedings in the district, as the trial took place during the COVID-19 pandemic. *Id.* at ¶¶ 6, 9. The court allowed the public to view the trial proceedings via Webex livestream in an adjacent courtroom, agreed to advise the witnesses that the trial was being observed publicly via Webex, and permitted the defendant's family to have contact with him during breaks. *Id.* at ¶¶ 7-8. The division held that the exclusion of the entire public from the physical courtroom for the duration of the trial constituted

at least a partial closure that was nontrivial. *Id.* at ¶¶ 16-17. Although the court had referenced *Waller*, the decision concluded that the court had failed to articulate how the *Waller* factors applied to the trial at issue. *Id.* at ¶ 26. Even so, the division concluded that a limited remand for supplemental findings would not be futile and that findings could be made that would satisfy the *Waller* test. *Id.* at ¶ 42.

¶ 26 As in *Bialas* and *Roper*, the trial court in the case at hand physically excluded the entire public from the courtroom, and as in *Roper* that exclusion was for the duration of the trial. Therefore, at least a partial, nontrivial closure occurred. *See Roper*, ¶ 16.

¶ 27 As in *Bialas*, the court made no findings under *Waller*; instead, it addressed the issue in one sentence by saying it would comply with health guidelines and the applicable chief judge directives. Therefore, we must decide whether a remand for further findings would be futile. *See Jones*, ¶ 46; *Roper*, ¶ 41.

¶ 28 We conclude that a remand would be futile because, as we explain below, the *Waller* factors were not explored contemporaneously. *See Jones*, ¶ 50 ("And even if findings by

another judge based on records from the dependency and neglect case and other reconstruction methods were an option, supplemental findings would still fail to adequately address the second and third factors . . . ."). Specifically, the record contains no contemporaneous findings concerning the breadth factor (the second factor) or the alternatives factor (the third factor).

¶ 29 We begin by noting that the county court judge entered the order denying Montoya's request for a public trial and referred to the administrative orders restricting trials, but the trial judge made no findings concerning the status or content of the health orders or the chief judge directive at the time of trial. So we cannot know whether the closure was broader than necessary to protect the public interest. And while the precise language of the health orders or the chief judge directive is likely ascertainable, the record is devoid of any information concerning the third factor — whether there were reasonable alternatives. We do not know whether there were other courtrooms or court spaces available to accommodate in-person proceedings or if the court could have allowed some members of the public into the courtroom despite the health orders

and chief judge directive. For example, in *Roper*, the division remanded the case to the district court for *Waller* findings because there was some evidence in the record suggesting that such findings were capable of accurate and ready determination based on sources who accuracy was not reasonably questioned. Here, the undisputed record shows that "a remand would fail to satisfy [the third *Waller* factor] because these options were not explored contemporaneously." *Jones*, ¶¶ 48-49. Because the need for *Waller* findings was well established and a remand for further findings on the *Waller* factors would be futile, we conclude that the courtroom closure constituted structural error that requires reversal of Montoya's convictions and a new trial.

III. Sufficiency

¶ 30 Montoya contends that his conviction for failure to leave the premises under section 18-9-119(2) must be vacated because the prosecution presented insufficient evidence to show that he used or threatened to use force to prevent law enforcement from entering the premises. Because the sufficiency issue implicates the

prohibition against double jeopardy and may preclude a retrial, we address Montoya's contention.

¶ 31 Montoya contends that section 18-9-119(2) describes a single way to commit failure to leave the premises, which must include the "use . . . or threatened use of force." The People contend that the statute's plain language provides *two* distinct ways of committing the offense: (1) when a person barricades himself and refuses to leave the premises upon being requested to do so by law enforcement or (2) when a person refuses police entry through use of force or threatened use of force and refuses to leave the premises upon being requested to do so by law enforcement.

¶ 32 No Colorado case has interpreted this statute, so we must address whether the "barricade" clause and the "use of force" clause in section 18-9-119(2) describes one or two separate means of committing failure to leave the premises.

A. Additional Facts

¶ 33 Officer Paul Gilleland and Deputy Tyler Martinez responded to Montoya's sister's 911 call. Officer Gilleland saw that all the doors to the house were locked, including a set of French doors that were

damaged and barricaded (a two-by-four had been placed in the space beneath them). Officer Gilleland saw Montoya inside the house behind the French doors and ordered him to open the door, come outside, and show his hands. Both officers repeated this order several times, and each time, Montoya yelled back, "Or what?!" After several minutes of this back and forth, Montoya opened the door, came outside, and was taken into custody.

¶ 34 Following the trial, newly appointed counsel filed a motion for judgment of acquittal, arguing that the prosecution presented insufficient evidence that Montoya had used or threatened to use force and therefore insufficient evidence supported his conviction for failure to leave the premises under section 18-9-119(2). The court denied the motion, finding it was "not well taken based upon the evidence presented."

B. Standard of Review and Applicable Law

¶ 35 We review questions of statutory construction de novo, *People v. Cali*, 2020 CO 20, ¶ 14, assessing "whether the evidence before the jury was sufficient both in quantity and quality to sustain the

defendant's conviction." *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010).

¶ 36 In construing a statute, our primary purpose is to ascertain and give effect to the legislature's intent. *McCoy v. People*, 2019 CO 44, ¶ 37. To do so, we look first to the statutory language, giving words and phrases their plain and ordinary meanings and giving consistent, harmonious, and sensible effect to all parts of the statute. *Id.*; *Finney v. People*, 2014 CO 38, ¶ 12. We read words and phrases in context and construe them according to the rules of grammar and common usage. *McCoy*, ¶ 37.

¶ 37 We will not add words to or subtract words from a statute. *People v. Laeke*, 2018 COA 78, ¶ 15. And we will avoid a reading of a statute that would leave to an absurd or illogical result. *McCoy*, ¶ 38.

¶ 38 If the statute is ambiguous, we may consider other principles of statutory construction. *Id.* A statute is ambiguous when it is reasonably susceptible of multiple interpretations. *People v. Opana*, 2017 CO 56, ¶ 35. But if a statute is clear and unambiguous, we need not resort to other principles of statutory interpretation. *Cali*,

¶ 18. "We apply facially clear and unambiguous statutes as written because we presume the General Assembly meant what it clearly said." *People v. Durapau*, 280 P.3d 42, 45 (Colo. App. 2011).

¶ 39 A challenge to the sufficiency of the evidence requires a reviewing court to determine whether the evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, is sufficient to support a conclusion by a reasonable fact finder that the defendant is guilty of the crime charged beyond a reasonable doubt. *People v. Duncan*, 109 P.3d 1044, 1045 (Colo. App. 2004).

¶ 40 Section 18-9-119(2) provides,

> Any person who barricades or refuses police entry to any premises or property through use of or threatened use of force and who knowingly refuses or fails to leave any premises or property upon being requested to do so by a peace officer who has probable cause to believe a crime is occurring and that such person constitutes a danger to himself or herself or others commits a class 2 misdemeanor.

C. Analysis

¶ 41 We conclude that the plain language of section 18-9-119 provides two ways of committing failure to leave the premises: (1)

barricading and refusing to leave the premises when asked to do so by law enforcement or (2) refusing police entry by using or threatening to use force and refusing to leave the premises when asked to do so by law enforcement. We reach this conclusion for four reasons.

¶ 42 First, the General Assembly placed the disjunctive "or" between "barricades" and "refuses . . . entry . . . through . . . use of force," signaling that the barricading clause and the refusing entry through use of force clause are two alternative means of committing the crime of failure to leave the premises. § 18-9-119(2). "[W]hen the word 'or' is used in a statute, it is presumed to be used in the disjunctive sense, unless legislative intent is clearly to the contrary." *Armintrout v. People*, 864 P.2d 576, 581 (Colo. 1993); *see also People v. Valenzuela*, 216 P.3d 588, 592 (Colo. 2009) ("Use of the word 'or' is ordinarily 'assumed to demarcate different categories.'" (quoting *Garcia v. United States*, 469 U.S. 70, 73 (1984))). Absent any language suggesting otherwise, we conclude the General Assembly provided two ways of committing the offense

and only the second way requires the use or threatened use of force.

¶ 43 Second, had the General Assembly intended for the barricading clause and the refusing entry by use of force clause to together provide a single way of committing the offense, it would have used the conjunctive word "and" instead of the disjunctive word "or." Indeed, we find significant section 18-9-119(2)'s use of the word "and" following both the barricading and refusing entry by use of force clauses ("and who knowingly refuses or fails to leave any premises or property upon being requested to do so by a peace officer"). This shows that the General Assembly intended this latter clause to apply to both the barricading and refusing entry by use of force clauses. See 1A Norman J. Singer & Shambie Singer, *Sutherland Statutory Construction* § 21:14, Westlaw (7th ed. Database updated Nov. 2023) ("The literal meaning of ['and' or 'or'] should be followed unless it renders the statute inoperable or the meaning becomes questionable.").

¶ 44 Third, we note the absence of a comma between "property" and "through . . . use of force" in the following language: "Any

person who barricades or refuses police entry to any premises or *property through . . . use of force . . . .*" § 18-9-119(2) (emphasis added). This indicates that the use of force requirement applies only to "refuses police entry to any premises or property" and not to the preceding barricading clause. Had the General Assembly intended for the phrase "through . . . use of force" to modify both means of committing the crime, it would have set off these words by using a comma. *See People v. Tomaske*, 2022 COA 52, ¶¶ 23-24 (concluding that if the legislature had intended a specific meaning, it could have indicated so).

¶ 45 Fourth, the plain meaning of the operative words shows that the General Assembly intended the barricading clause and the refusing entry by use of force clause to describe different ways of committing the offense. "Barricade" is defined as "to block off or stop up with a barricade" or "to prevent access to by means of a barricade." Merriam-Webster Dictionary, https://perma.cc/A8UA-U8NA. No Colorado statute defines what actions constitute "barricading." *Cf. Grant v. Winik*, 948 F. Supp. 2d 480, 514 (E.D. Pa. 2013) (circumstances did not meet several criteria typical of a

barricaded person scenario; notably, defendant did not refuse orders to come out but instead remained nonresponsive and silent); *State v. Pejsa*, 876 P.2d 963, 969 (Wash. Ct. App. 1994) ("A 'barricaded person' is one who establishes a perimeter around an area from which others are excluded and either: (i) Is committing or is immediately fleeing from the commission of a violent felony; or (ii) Is threatening or has immediately prior threatened a violent felony or suicide . . . ." (quoting Wash. Rev. Code Ann. § 70.85.100(2)(b) (West 2023))).

¶ 46 As the People note, tethering the barricading clause to the phrase "through use of or threatened use of force" would create vagueness and lead to an absurd result because it would be unclear what actions beyond barricading would be needed to satisfy this requirement. *McCoy*, ¶ 38; *see AviComm, Inc. v. Colo. Pub. Utils. Comm'n*, 955 P.2d 1023, 1031 (Colo. 1998) ("[T]he intention of the legislature will prevail over a literal interpretation of the statute that leads to an absurd result."). For example, because barricading constitutes a physical impediment to entry, we have difficulty

conceiving of any circumstances in which one can barricade "through . . . threatened use of force."

¶ 47 Moreover, if we follow Montoya's proposed reading to its logical conclusion, merely placing a barricade to prevent entry, without any use or threatened use of force, would not be punishable under section 18-9-119(2), thereby rendering the word "barricading" meaningless. This reading runs contrary to the legislative purpose and cannot be what the General Assembly intended.

¶ 48 Considering the plain language of section 18-9-119(2) within the statute as a whole and giving consistent meaning to all its parts, we disagree with Montoya's proffered interpretation. *See Reno v. Marks*, 2015 CO 33, ¶ 20 ("[W]e examine . . . statutory language in the context of the statute as a whole and strive to give 'consistent, harmonious, and sensible effect to all parts.'" (quoting *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088-89 (Colo. 2011))).

¶ 49 Applying our statutory interpretation to the evidence introduced at trial, we conclude that sufficient evidence supports Montoya's conviction under the barricading clause of the statute. The record shows that when police officers arrived, they saw that

the French doors had been barricaded with a two-by-four placed in the space beneath them. They also saw Montoya inside the house behind the French doors and repeatedly told him to open the doors and come outside. Each time he responded, "Or what?!" And only after repeated orders did he eventually comply and leave the house. Viewing this evidence in the light most favorable to the prosecution, we conclude that sufficient evidence supports Montoya's failure to leave the premises conviction. Accordingly, the prosecution may retry him on this charge.

IV. Disposition

¶ 50 The judgment is reversed, and the case is remanded for a new trial.

JUDGE BROWN and JUDGE JOHNSON concur.

SUMMARY
April 18, 2024

2024COA37

No. 21CA1539, *Peo v Montoya* — Constitutional Law — Sixth Amendment — Right to Public Trial — Waller Test; Crimes — Failure or Refusal to Leave Premises — Barricading

A division of the court of appeals holds that the defendant's right to a public trial was violated when the trial court conducted the trial virtually and made no findings under *Waller v. Georgia*, 467 U.S. 39 (1984). The division further holds that a remand for further *Waller* findings would be futile because the prosecuting attorneys are no longer licensed, and the record is devoid of any evidence to support the *Waller* factors. Additionally, because the defendant's sufficiency of the evidence argument implicates the prohibition against double jeopardy, the division addresses it and the novel issue it presents. The division concludes that the plain language of section 18-9-119(2), C.R.S. 2023, provides two different

means of committing failure to leave the premises and that sufficient evidence supports the defendant's conviction under the "barricading" clause. Accordingly, the defendant may be retried on this charge.

COLORADO COURT OF APPEALS **2024COA37**

Court of Appeals No. 21CA1539
Alamosa County District Court No. 20CR301
Honorable Martin A. Gonzales, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Gilberto Andres Montoya,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE FREYRE
Brown and Johnson, JJ., concur

Announced April 18, 2024

Philip J. Weiser, Attorney General, Sonia Raichur Russo, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Julieanne Farchione, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Gilberto Andres Montoya, appeals the judgment of conviction entered on jury verdicts finding him guilty of first degree trespass (a class 5 felony), criminal mischief (a class 3 misdemeanor), and failure to leave the premises (a class 3 misdemeanor). Montoya challenges his convictions on four grounds, contending that the trial court reversibly erred by (1) denying his motion to disqualify the prosecutor and the entire district attorney's office; (2) denying his right to a public trial by requiring the public to view the proceedings via livestream; (3) denying his motion for judgment of acquittal and finding that sufficient evidence supported his conviction for failure to leave the premises; and (4) failing to make any findings concerning two jurors who were not paying attention to the evidence during trial.

¶ 2 Montoya's sufficiency argument raises a novel issue of statutory interpretation concerning section 18-9-119(2), C.R.S. 2023. Based on the statute's plain language, we conclude that it sets forth two means of committing the offense of failure to leave the premises and that sufficient evidence supports Montoya's conviction under the barricading clause. However, we also conclude that Montoya was deprived of his constitutional right to a

public trial and that remanding for further findings under *Waller v. Georgia*, 467 U.S. 39 (1984), would be futile. Accordingly, we reverse the judgment and remand the case for a new trial. We do not address the remaining issues because they are unlikely to arise on retrial.

I. Background

¶ 3 In October 2020, the Alamosa Sheriff's Office responded to a call from Montoya's sister reporting that Montoya had broken into a house in Alamosa County. When officers arrived at the house, Montoya's sister gave them a key to the front door, but it did not work because the lock was damaged. The officers noticed chips in the paint and wood of the door, which indicated that the door had been pried open. The officers went to a set of French doors at the back of the home and saw that they were jammed shut by a two-by-four placed in the space beneath them.

¶ 4 The officers then saw Montoya inside the house. After they gave Montoya several commands to unlock the door and come outside, he left the house and was arrested.

¶ 5 The People charged Montoya with first degree criminal trespass, failure to leave the premises, and criminal mischief.

¶ 6 Montoya proceeded to trial without counsel in April 2021, during the COVID-19 pandemic. The jurors were seated throughout the courtroom to allow for social distancing, and the public watched the trial via Webex. Throughout the proceedings, the Webex camera was focused solely on the judge, counsel, and Montoya.

¶ 7 At trial, Montoya asserted that he was not trespassing at the property in question because the deed to it was in his legal name, Gilberto A. Montoya. However, Montoya's father, Gilbert Andy Montoya,[1] testified that he owned the property, that it was in his name (not in Montoya's legal name[2]), and that he had told Montoya he could not be there.

¶ 8 The jury found Montoya guilty of all charges. The court sentenced him to eighteen months in community corrections.

---

[1] Montoya's father testified that he has also used the name Gilberto Andres Montoya.

[2] Montoya's father testified that Montoya's legal name is Gilberto Andres Miguel Montoya.

II. Courtroom Closure

¶ 9 Montoya contends that the trial court completely closed the courtroom by excluding all members of the public and requiring them to view the trial in a separate courtroom via a live audio and video stream. He further contends that the trial court's failure to make findings justifying the closure under *Waller* and its failure to consider reasonable alternatives violated his right to a public trial under the Sixth Amendment to the United States Constitution and article II, section 16 of the Colorado Constitution. We conclude that reversal for a new trial is required.

A. Standard of Review and Preservation

¶ 10 The parties agree that a trial court's decision to close the courtroom presents a mixed question of law and fact, and that we review the court's legal conclusions de novo and its findings of fact for clear error. *People v. Turner*, 2022 CO 50, ¶ 19. But they disagree on the applicable standard of reversal. Montoya admits that he did not contemporaneously object to the virtual proceedings, but he argues this was not a strategic choice, so we should review for plain error. Relying on *People v. Garcia*, 2023 COA 58, and *Stackhouse v. People*, 2015 CO 48, the People respond

that Montoya knew about the closure and failed to object, so he waived this issue.

¶ 11 We conclude the issue is preserved. *See People v. Carter*, 2021 COA 29, ¶ 13 ("We have an independent, affirmative obligation to determine whether a claim of error was preserved and to determine the appropriate standard of review under the law, notwithstanding the parties' respective positions or concessions pertaining to those issues."). The record shows that Montoya sent a letter to the court on November 9, 2020, in which he objected to *all* proceedings being held "in remote form" and requested the "courthouse to remain open," under both the Federal and Colorado Constitutions. In an order dated November 12, 2020, the county court granted Montoya a preliminary hearing on the felony count, stating that the "parties may proceed by Webex as desired [please refer to the latest health guidelines/chief judge directives]," and deferred entry of a not guilty plea until probable cause was determined.

¶ 12 Having determined that this issue was preserved, we must decide whether there was a courtroom closure that violated Montoya's constitutional rights and, if so, the proper remedy.

B. Applicable Law

¶ 13 Both the United States and Colorado Constitutions guarantee a criminal defendant the right to a public trial. U.S. Const. amends. VI, XIV; Colo. Const. art. II, § 16; *Waller*, 467 U.S. at 44; *People v. Jones*, 2020 CO 45, ¶ 15. However, the public trial right is not absolute. *Waller*, 467 U.S. at 45. The right to a public trial may give way, in rare circumstances, to other rights or interests. *Id.* Specifically, the right may yield to "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* (quoting *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501, 510 (1984)).

¶ 14 Further, not every exclusion of the public constitutes a denial of a public trial. *See People v. Whitman*, 205 P.3d 371, 379-80 (Colo. App. 2007). 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." *Turner*, ¶ 23. When a court physically excludes members of the public from the courtroom for the duration of the trial but allows them to view the trial via live video and audio streaming, such procedure constitutes at least a partial closure.

See People v. Bialas, 2023 COA 50, ¶¶ 5, 13, 15 (*cert. granted* Mar. 11, 2024); *People v. Roper*, 2024 COA 9, ¶ 16.

¶ 15 Still, to implicate a defendant's right to a public trial, the courtroom closure must be nontrivial. *See Bialas*, ¶ 8 ("Trivial closures . . . do not implicate the protections and values of the Sixth Amendment and thus do not amount to any error at all."); *People v. Lujan*, 2020 CO 26, ¶ 23 (noting that trivial closures do not violate the public trial right because they are "inconsequential" and "de minimis"). A closure is trivial if it does not undermine the values advanced by the public trial guarantee — namely, ensuring a fair trial, reminding the prosecutor and judge of their responsibilities and the importance of their functions, encouraging witnesses to come forward, and discouraging perjury. *See Lujan*, ¶¶ 27-28. Courts consider factors such 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, . . . whether the closure was total or partial," or any other relevant consideration. *Id.* at ¶ 19.

¶ 16 To protect a defendant's right to a public trial, any nontrivial courtroom closure requires that four conditions be met: (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 hearing; and (4) the trial court must make findings adequate to support the closure. *Waller*, 467 U.S. at 48.

¶ 17 The Colorado Supreme Court has held that violation of the right to a public trial constitutes structural error that requires reversal without an individualized prejudice analysis. *Stackhouse*, ¶ 7. However, "more recent case law suggests that the supreme court did not intend such a strict reading of its earlier pronouncements." *Roper*, ¶ 31; *see Jones*, ¶¶ 36, 45-46 (finding a partial closure, reversing under structural error, and acknowledging that some courts have chosen to remand for further findings, but concluding that doing so would be futile because the trial judge was now deceased); *Turner*, ¶¶ 19, 32, 34, 40, 47 (finding a partial closure where the defendant's friend was excluded from the courtroom and holding that no error occurred, despite the lack of

Waller findings, because the record supported the partial closure). "[S]tructural error doesn't flow simply from the trial court's failure to employ the precise language found in *Waller*." *Roper*, ¶ 34 (quoting *Turner*, ¶ 35).

C. Analysis

¶ 18 We first conclude that the closure was at least partial and nontrivial, for the reasons articulated by two different divisions of this court in *Bialas* and *Roper*.

¶ 19 In *Bialas*, the trial court initially allowed a small number of spectators in the courtroom, but later it physically excluded the entire public from the courtroom based on its concern that some of the jurors could hear some spectators' inappropriate comments. *Bialas*, ¶ 5. It permitted the public to view the trial via a live video and audio stream. *Id.* Emphasizing that "'the *presence* of interested spectators' is important to remind the triers of 'the importance of their functions,'" the division held that the complete removal of the public from the courtroom, coupled with the live video and audio streaming, constituted a nontrivial partial closure. *Id.* at ¶¶ 13-20 (quoting *Jones*, ¶ 16). The division then concluded that the *Waller* factors had not been satisfied, determined that a

remand for additional *Waller* findings would be futile, reversed Bialas's conviction, and remanded for a new trial. *Id.* at ¶ 27.

¶ 20 Similarly in *Roper*, the trial court excluded the public from the courtroom despite the defendant's request that four family members and four friends be permitted to attend in person. *Roper*, ¶ 5. The court's denial relied on an administrative order governing the health and safety of participants in trial proceedings in the district, as the trial took place during the COVID-19 pandemic. *Id.* at ¶¶ 6, 9. The court allowed the public to view the trial proceedings via Webex livestream in an adjacent courtroom, agreed to advise the witnesses that the trial was being observed publicly via Webex, and permitted the defendant's family to have contact with him during breaks. *Id.* at ¶¶ 7-8. The division held that the exclusion of the entire public from the physical courtroom for the duration of the trial constituted at least a partial closure that was nontrivial. *Id.* at ¶¶ 16-17. Although the court had referenced *Waller*, the division concluded that the court had failed to articulate how the *Waller* factors applied to the trial at issue. *Id.* at ¶ 26. Even so, the division concluded that a limited remand for supplemental findings would not be futile

and that findings could be made that would satisfy the *Waller* test. *Id.* at ¶ 42.

¶ 21 As in *Bialas* and *Roper*, the trial court in the case at hand physically excluded the entire public from the courtroom, and as in *Roper* that exclusion was for the duration of the trial. Therefore, at least a partial, nontrivial closure occurred. *See Roper*, ¶ 16.

¶ 22 As in *Bialas*, the court made no findings under *Waller*; instead, it addressed the issue in one sentence by saying it would comply with health guidelines and the applicable chief justice directives. Therefore, we must decide whether a remand for further findings would be futile. *See Jones*, ¶ 46; *Roper*, ¶ 41.

¶ 23 We conclude that a remand would be futile, for two reasons. First, the elected district attorney has been disbarred, *People v. Payne*, (Colo. O.P.D.J. No. 22PDJ033, September 21, 2022), and the prosecuting attorney was suspended and is no longer an employee of the district attorney's office, *People v. Raines*, 510 P.3d 1089 (Colo. O.P.D.J. 2022); *see People v. Raines*, (Colo. O.P.D.J. No. 22PDJ021, May 3, 2022). Thus, neither prosecutor can assist in developing an additional record on any of the *Waller* factors. *Cf.*

Jones, ¶ 46 (concluding that a remand for additional *Waller* findings would not be helpful in part because the trial judge had died).

¶ 24 Second, concerning steps two and three of the *Waller* analysis, the undisputed record clearly shows no other options were "explored contemporaneously." *Jones*, ¶¶ 48-49. Because the need for *Waller* findings was well established and because, unlike in *Roper*, the record is devoid of evidence that would support any of the *Waller* factors, we conclude that the closure constituted structural error that requires reversal of Montoya's convictions and a new trial.

III. Sufficiency

¶ 25 Montoya contends that his conviction for failure to leave the premises under section 18-9-119(2) must be vacated because the prosecution presented insufficient evidence to show that he used or threatened to use force to prevent law enforcement from entering the premises. Because the sufficiency issue implicates the prohibition against double jeopardy and may preclude a retrial, we address Montoya's contention.

¶ 26 Montoya contends that section 18-9-119(2) describes a single way to commit failure to leave the premises, which must include the

"use . . . or threatened use of force." The People contend that the statute's plain language provides *two* distinct ways of committing the offense: (1) when a person barricades himself and refuses to leave the premises upon being requested to do so by law enforcement or (2) when a person refuses police entry through use of force or threatened use of force and refuses to leave the premises upon being requested to do so by law enforcement.

¶ 27 No Colorado case has interpreted this statute, so we must address whether the "barricade" clause and the "use of force" clause in section 18-9-119(2) describes one or two separate means of committing failure to leave the premises.

A. Additional Facts

¶ 28 Officer Paul Gilleland and Deputy Tyler Martinez responded to Montoya's sister's 911 call. Officer Gilleland saw that all the doors to the house were locked, including a set of French doors that were damaged and barricaded (a two-by-four had been placed in the space beneath them). Officer Gilleland saw Montoya inside the house behind the French doors and ordered him to open the door, come outside, and show his hands. Both officers repeated this order several times, and each time, Montoya yelled back, "Or

what?!" After several minutes of this back and forth, Montoya opened the door, came outside, and was taken into custody.

¶ 29 Following the trial, newly appointed counsel filed a motion for judgment of acquittal, arguing that the prosecution presented insufficient evidence that Montoya had used or threatened to use force and therefore insufficient evidence supported his conviction for failure to leave the premises under section 18-9-119(2). The court denied the motion, finding it was "not well taken based upon the evidence presented."

B. Standard of Review and Applicable Law

¶ 30 We review questions of statutory construction de novo, *People v. Cali*, 2020 CO 20, ¶ 14, assessing "whether the evidence before the jury was sufficient both in quantity and quality to sustain the defendant's conviction." *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010).

¶ 31 In construing a statute, our primary purpose is to ascertain and give effect to the legislature's intent. *McCoy v. People*, 2019 CO 44, ¶ 37. To do so, we look first to the statutory language, giving words and phrases their plain and ordinary meanings and giving consistent, harmonious, and sensible effect to all parts of the

statute. *Id.*; *Finney v. People*, 2014 CO 38, ¶ 12. We read words and phrases in context and construe them according to the rules of grammar and common usage. *McCoy*, ¶ 37.

¶ 32 We will not add words to or subtract words from a statute. *People v. Laeke*, 2018 COA 78, ¶ 15. And we will avoid a reading of a statute that would lead to an absurd or illogical result. *McCoy*, ¶ 38.

¶ 33 If the statute is ambiguous, we may consider other principles of statutory construction. *Id.* A statute is ambiguous when it is reasonably susceptible of multiple interpretations. *People v. Opana*, 2017 CO 56, ¶ 35. But if a statute is clear and unambiguous, we need not resort to other principles of statutory interpretation. *Cali*, ¶ 18. "We apply facially clear and unambiguous statutes as written because we presume the General Assembly meant what it clearly said." *People v. Durapau*, 280 P.3d 42, 45 (Colo. App. 2011).

¶ 34 A challenge to the sufficiency of the evidence requires a reviewing court to determine whether the evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, is sufficient to support a conclusion by a reasonable fact finder that the defendant is guilty of the crime

charged beyond a reasonable doubt. *People v. Duncan*, 109 P.3d 1044, 1045 (Colo. App. 2004).

¶ 35 Section 18-9-119(2) provides,

> Any person who barricades or refuses police entry to any premises or property through use of or threatened use of force and who knowingly refuses or fails to leave any premises or property upon being requested to do so by a peace officer who has probable cause to believe a crime is occurring and that such person constitutes a danger to himself or herself or others commits a class 2 misdemeanor.

C. Analysis

¶ 36 We conclude that the plain language of section 18-9-119 provides two ways of committing failure to leave the premises: (1) barricading and refusing to leave the premises when asked to do so by law enforcement or (2) refusing police entry by using or threatening to use force and refusing to leave the premises when asked to do so by law enforcement. We reach this conclusion for four reasons.

¶ 37 First, the General Assembly placed the disjunctive "or" between "barricades" and "refuses . . . entry . . . through . . . use of force," signaling that the barricading clause and the refusing entry

through use of force clause are two alternative means of committing the crime of failure to leave the premises. § 18-9-119(2). "[W]hen the word 'or' is used in a statute, it is presumed to be used in the disjunctive sense, unless legislative intent is clearly to the contrary." *Armintrout v. People*, 864 P.2d 576, 581 (Colo. 1993); *see also People v. Valenzuela*, 216 P.3d 588, 592 (Colo. 2009) ("Use of the word 'or' is ordinarily 'assumed to demarcate different categories.'" (quoting *Garcia v. United States*, 469 U.S. 70, 73 (1984))). Absent any language suggesting otherwise, we conclude the General Assembly provided two ways of committing the offense and only the second way requires the use or threatened use of force.

¶ 38 Second, had the General Assembly intended for the barricading clause and the refusing entry by use of force clause to together provide a single way of committing the offense, it would have used the conjunctive word "and" instead of the disjunctive word "or." Indeed, we find significant section 18-9-119(2)'s use of the word "and" following both the barricading and refusing entry by use of force clauses ("and who knowingly refuses or fails to leave any premises or property upon being requested to do so by a peace

officer"). This shows that the General Assembly intended this latter clause to apply to both the barricading and refusing entry by use of force clauses. *See* 1A Norman J. Singer & Shambie Singer, *Sutherland Statutory Construction* § 21:14, Westlaw (7th ed. database updated Nov. 2023) ("The literal meaning of ['and' or 'or'] should be followed unless it renders the statute inoperable or the meaning becomes questionable.").

¶ 39 Third, we note the absence of a comma between "property" and "through . . . use of force" in the following language: "Any person who barricades or refuses police entry to any premises or *property through . . . use of force* . . . ." § 18-9-119(2) (emphasis added). This indicates that the use of force requirement applies only to "refuses police entry to any premises or property" and not to the preceding barricading clause. Had the General Assembly intended for the phrase "through . . . use of force" to modify both means of committing the crime, it would have set off those words by using a comma. *See People v. Tomaske*, 2022 COA 52, ¶¶ 23-24 (concluding that if the legislature had intended a specific meaning, it could have indicated so).

¶ 40 Fourth, the plain meaning of the operative words shows that the General Assembly intended the barricading clause and the refusing entry by use of force clause to describe different ways of committing the offense. "Barricade" is defined as "to block off or stop up with a barricade" or "to prevent access to by means of a barricade." Merriam-Webster Dictionary, https://perma.cc/A8UA-U8NA. No Colorado statute defines what actions constitute "barricading." *Cf. Grant v. Winik*, 948 F. Supp. 2d 480, 514 (E.D. Pa. 2013) (circumstances did not meet several criteria typical of a barricaded person scenario; notably, the defendant did not refuse orders to come out but instead remained nonresponsive and silent); *State v. Pejsa*, 876 P.2d 963, 969 (Wash. Ct. App. 1994) ("A 'barricaded person' is one who establishes a perimeter around an area from which others are excluded and either: (i) Is committing or is immediately fleeing from the commission of a violent felony; or (ii) Is threatening or has immediately prior threatened a violent felony or suicide . . . ." (quoting Wash. Rev. Code Ann. § 70.85.100(2)(b) (West 2023))).

¶ 41 As the People note, tethering the barricading clause to the phrase "through use of or threatened use of force" would create

vagueness and lead to an absurd result because it would be unclear what actions beyond barricading would be needed to satisfy this requirement. *McCoy*, ¶ 38; *see AviComm, Inc. v. Colo. Pub. Utils. Comm'n*, 955 P.2d 1023, 1031 (Colo. 1998) ("[T]he intention of the legislature will prevail over a literal interpretation of the statute that leads to an absurd result."). For example, because barricading constitutes a physical impediment to entry, we have difficulty conceiving of any circumstances in which one can barricade "through . . . threatened use of force."

¶ 42 Moreover, if we follow Montoya's proposed reading to its logical conclusion, merely placing a barricade to prevent entry, without any use or threatened use of force, would not be punishable under section 18-9-119(2), thereby rendering the word "barricading" meaningless. This reading runs contrary to the legislative purpose and cannot be what the General Assembly intended.

¶ 43 Considering the plain language of section 18-9-119(2) within the statute as a whole and giving consistent meaning to all its parts, we disagree with Montoya's proffered interpretation. *See Reno v. Marks*, 2015 CO 33, ¶ 20 ("[W]e examine . . . statutory language in the context of the statute as a whole and strive to give

'consistent, harmonious, and sensible effect to all parts.'" (quoting *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088-89 (Colo. 2011))).

¶ 44 Applying our statutory interpretation to the evidence introduced at trial, we conclude that sufficient evidence supports Montoya's conviction under the barricading clause of the statute. The record shows that when police officers arrived, they saw that the French doors had been barricaded with a two-by-four placed in the space beneath them. They also saw Montoya inside the house behind the French doors and repeatedly told him to open the doors and come outside. Each time he responded, "Or what?!" And only after repeated orders did he eventually comply and leave the house. Viewing this evidence in the light most favorable to the prosecution, we conclude that sufficient evidence supports Montoya's failure to leave the premises conviction. Accordingly, the prosecution may retry him on this charge.

IV. Disposition

¶ 45 The judgment is reversed, and the case is remanded for a new trial.

JUDGE BROWN and JUDGE JOHNSON concur.