SUMMARY
November 3, 2022

2022COA127

No. 19CA0395, *People v. Black* — Crimes — Murder in the First Degree — Conspiracy to Commit Murder in the First Degree; Constitutional Law — Sixth Amendment — Right to Public Trial — Trivial Courtroom Closures

A division of the court of appeals addresses and rejects the defendant's challenges to the judgment of conviction entered on jury verdicts finding him guilty of first degree murder and conspiracy to commit first degree murder.

In doing so, the division addresses a novel issue: the application of the triviality test, adopted in *People v. Lujan*, 2020 CO 26, ¶ 23, for a violation of the constitutional right to a public trial, to the closure of a criminal trial during part of jury selection. The division concludes that under the circumstances presented here — a small courtroom, a large venire, and a brief closure based on the

district court's concern for fire safety — the closure was so trivial that it did not impair the defendant's right to a public trial.

The division also rejects the defendant's contentions that (1) venue was improper in Arapahoe County; (2) the Eighteenth Judicial District Attorney's Office lacked authority to prosecute him; and (3) his trial should have been severed from his codefendant's.

Accordingly, the division affirms the judgment of conviction.

COLORADO COURT OF APPEALS **2022COA127**

Court of Appeals No. 19CA0395
Arapahoe County District Court No. 17CR2206
Honorable Ryan J. Stuart, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Terance Jamal Black,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division III
Opinion by JUDGE YUN
Fox and Tow, JJ., concur

Announced November 3, 2022

Philip J. Weiser, Attorney General, Erin K. Grundy, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

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¶ 1 Terance Jamal Black appeals the judgment of conviction entered on jury verdicts finding him guilty of first degree murder and conspiracy to commit first degree murder.

¶ 2 We affirm the judgment. In doing so, we address a novel issue: whether the district court's closure of Mr. Black's trial during part of jury selection violated his constitutional right to a public trial. Applying the triviality standard adopted in *People v. Lujan*, 2020 CO 26, ¶ 23, we conclude that under the circumstances presented here — a small courtroom, a large venire, and a brief closure based on the district court's concern for fire safety — the closure was so trivial that it did not impair Mr. Black's right to a public trial.

I. Background

¶ 3 In August 2016, the victim, a traveling mechanic who advertised his services on Craigslist, fixed a car for an acquaintance of Tina Black, Mr. Black's mother, at a motel in Denver. While waiting for a ride home, the victim saw evidence in Ms. Black's motel room that the Blacks and several others had robbed a medical marijuana dispensary: duffle bags, tubs, and a garbage can full of marijuana trim, as well as guns, masks, and gloves.

Mr. Black pointed a gun at the victim and the acquaintance and said, "Y'all better not say anything or I will fucking kill you." Still, the victim reported what he had seen to the police later that day. Officers responded to the motel and eventually arrested Mr. Black and several others.

¶ 4 In September 2016, the People charged Mr. Black and three codefendants (though not Ms. Black[1]) with two counts of first degree burglary, one count of conspiracy to commit first degree burglary, three counts of aggravated robbery, and one count of conspiracy to commit aggravated robbery.

¶ 5 That same month, Mr. Black and his mother picked up the acquaintance on East Colfax Avenue and told him that "the mechanic was telling." The Blacks had learned through discovery in the dispensary robbery case that the victim was the main witness against them, so they believed they had to get rid of him. But Ms. Black told Mr. Black in the acquaintance's presence that, to avoid suspicion, they "should wait a little while" before they killed the victim.

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[1] Ms. Black was charged in the dispensary robbery by separate complaint in July 2017.

¶ 6 In October 2016, the victim was shot to death outside the Denver apartment he shared with his mother.

¶ 7 In July 2017, the People moved to dismiss the charges in the dispensary robbery case against Mr. Black. The following month, though, the People refiled those charges and added charges of first degree murder and conspiracy to commit first degree murder. The district court later granted Mr. Black's motion to dismiss the dispensary robbery charges, finding that the People had violated his statutory and constitutional speedy trial rights by using "the speedy trial period in the [dispensary robbery case] as a witness protection device while they investigated the more serious charges against [him]."

¶ 8 Months later, in June 2018, the district court granted the People's motion to consolidate Mr. Black's trial with Ms. Black's trial, even though, by that time, Mr. Black was charged only in the murder case, while Ms. Black was charged in both the dispensary robbery case and the murder case.

¶ 9 At the end of a four-week joint trial in early 2019, the jury found Mr. Black and Ms. Black guilty as charged. The court sentenced Mr. Black to life in prison for first degree murder, plus a

concurrent forty-eight years in prison for conspiracy to commit first degree murder.

¶ 10 Mr. Black now appeals.

II. Analysis

¶ 11 Mr. Black urges us to vacate his convictions because Arapahoe County was not the proper venue for his trial and, relatedly, because the Eighteenth Judicial District Attorney's Office lacked authority to prosecute him. He also argues that the district court reversibly erred by closing the courtroom to the public. Finally, Mr. Black contends that the court reversibly erred by refusing to sever his trial from Ms. Black's. We address each of his arguments in turn.

A. Venue

¶ 12 Mr. Black argues that the district court misinterpreted the venue statute when it ruled that venue was proper in Arapahoe County. We disagree.

1. Additional Background

¶ 13 Before Mr. Black's preliminary hearing, he objected to the Arapahoe County District Court's jurisdiction over the first degree murder and conspiracy to commit first degree murder charges

against him. He pointed out that these charges involved a killing that happened in the City and County of Denver and that no evidence showed "that any part of [the] homicide occurred" anywhere else. Thus, he argued, under the venue statute, Denver — not Arapahoe County — was the proper venue for the murder charges.

¶ 14 At Mr. Black's preliminary hearing, a police detective testified that he learned from the acquaintance of a conversation the Blacks had about killing the victim while driving with the acquaintance on East Colfax Avenue. Specifically, the detective testified as follows:

> Q Where did Tina and Terance Black pick up [the acquaintance] from?
>
> A [The acquaintance] said he was down on East Colfax, on the Aurora[2] side of East Colfax. He was on both sides of Colfax, they picked him up, drove him around a little bit, began to talk about [the victim].
>
> Q . . . . When they were driving him along, did they say were driving along both sides of Colfax?
>
> A Yes, sir. . . .

[2] The area of the city of Aurora on the south side of East Colfax Avenue is in Arapahoe County.

> Q Was [the acquaintance] clear on how long this conversation took?
>
> A You know, I don't think he was clear, but it was as they drove around. [The Blacks] picked [the acquaintance] up on specifically one side of Colfax and drove him to the other side of Colfax where there was a hotel room that he was staying in.

¶ 15 The district court denied Mr. Black's motion. It observed that the venue statute allows charges to be tried in any county "where an act in furtherance of the offense occurred." And the court noted that, according to the evidence at the hearing,

> [Mr. Black] and one of his alleged co-conspirators discussed the planning and timing of the murder of [the victim] and the location of [the victim's] residence while driving up and down East Colfax Avenue. This discussion constitute[d] an act in furtherance of the murder and, with respect to the conspiracy to commit murder, planning and an overt act in pursuance of the conspiracy. East Colfax is the dividing line between Arapahoe County and Adams County. Thus, venue is proper in Arapahoe County, Adams County, and Denver County.

2. Standard of Review

¶ 16 Colorado Supreme Court precedent suggests that a district court's ruling as to whether venue is proper presents a mixed question of fact and law. In *People v. Reed*, the court said that

> while the [district] court must resolve factual disputes about the location of relevant conduct and circumstances . . . to determine whether an offense is deemed to have been committed and triable in the county in which it was filed, the court must also interpret and apply legislative provisions designating the situs of the offense.

132 P.3d 347, 350 (Colo. 2006). Generally, we apply a "dual standard of review" to such mixed questions of fact and law, reviewing the district court's factual findings for clear error and reviewing its legal conclusions de novo. *People v. Harris*, 2016 COA 159, ¶ 18.

¶ 17 To the extent that Mr. Black's argument raises an issue of statutory interpretation, however, we review that issue de novo. *See Allman v. People*, 2019 CO 78, ¶ 29; *Harris*, ¶ 18.

¶ 18 We interpret a statute to effectuate the legislature's intent. *Allman*, ¶ 31. We "first look to the statute's text and 'apply the plain and ordinary meaning of the provision.'" *Id.* at ¶ 13 (quoting *Perfect Place, LLC v. Semler*, 2018 CO 74, ¶ 40). And "we consider 'the statute as a whole, construing each provision consistently and in harmony with the overall statutory design.'" *Id.* (quoting *Whitaker v. People*, 48 P.3d 555, 558 (Colo. 2002)). "If separate

clauses within a statute may be reconciled by one construction but would conflict under a different interpretation, the construction which results in harmony rather than inconsistency should be adopted." *People v. Dist. Ct.*, 713 P.2d 918, 921 (Colo. 1986).

3. The Venue Statute

¶ 19 The venue statute, section 18-1-202, C.R.S. 2022, provides as pertinent here:

> (1) Except as otherwise provided by law, criminal actions *shall be tried* in the county where the offense was committed, or in any other county where an act in furtherance of the offense occurred.
>
> . . . .
>
> (3) In a case involving the death of a person, the offense is *committed* and the offender *may be tried* in any county in which the cause of death is inflicted, or in which death occurs, or in which the body of the deceased or any part of such body is found.
>
> . . . .
>
> (7)(a) When multiple crimes are based upon the same act or series of acts arising from the same criminal episode and are committed in several counties, the offender *may be tried* in any county in which any one of the individual crimes could have been tried, regardless of whether or not the counties are in the same judicial district.

> . . . .
>
> (8) An inchoate offense is *committed* and the offender *may be tried* in any county in which any act which is an element of the offense, including formation of the agreement in conspiracy, is committed.
>
> (9) When a person in one county solicits, abets, agrees, aids, or attempts to aid another in the planning or commission of an offense in another county, the offense is *committed* and the offender *may be tried* for the offense in either county, or in any other county in which the principal offense could be tried.
>
> (10) When an offense is committed on the boundary line between two counties, or so close thereto as to be difficult to readily ascertain in which county the offense occurred, the offense is *committed* and the offender *may be tried* for the offense in either county.

(Emphases added.)

¶ 20 As the division in *People v. Bobo* explained, the plain language of section 18-1-202(1) provides that a case "shall be tried" either in the county where the offense was committed or in any other county in which an act in furtherance of the offense occurred. 897 P.2d 909, 912 (Colo. App. 1995). The nine subsections that follow "define the place where a criminal act is *committed*, but do not, in

themselves, further limit or define where or under what circumstances an act in furtherance of the offense occurs." *Id.*

4. Discussion

¶ 21 Mr. Black argues that, because both the murder and conspiracy to commit murder charges against him "involv[e] the death of a person," section 18-1-202(3) required that his trial occur "in any county in which the cause of death is inflicted, or in which death occurs, or in which the body of the deceased or any part of such body is found" — i.e., in Denver. He contends that this section is more specific than section 18-1-202(1), which allows for trial "in any other county where an act in furtherance of the offense occurred," and that the district court therefore erred by applying the more general subsection and allowing his trial to proceed in Arapahoe County. *See People v. Yoder*, 2016 COA 50, ¶ 17 ("Ordinarily, specific language in a statute acts to restrict more general language.").

¶ 22 But the plain language of section 18-1-202 indicates that subsection (3) defines where an offense "involving the death of a person . . . is *committed*." (Emphasis added.) That subsection does not restrict subsection (1)'s mandate that an offense "*shall be tried*

in the county where the offense was committed, *or* in any other county where an act in furtherance of the offense occurred." (Emphases added.) This reading of the statute does not render subsections (2) through (10) superfluous. Those subsections define where specific offenses are committed and, therefore, where they *may* be tried. As the *Bobo* division explained, those subsections — including subsection (3) — do not "negate[] or modif[y] in any way the provision of § 18-1-202(1) which allows trial 'in any other county where an act in furtherance of the offense occurred' *in addition to* the place where the criminal act was committed." 897 P.2d at 912 (quoting § 18-1-202(1)).

¶ 23 This interpretation of the statute gains further support from the legislature's use of "*shall* be tried" in section 18-1-202(1) and "*may* be tried" in section 18-1-202(3). (Emphases added.) When "both mandatory and directory verbs are used in the same statute, . . . it is a fair inference that the legislature realized the difference in meaning, and intended that the verbs should carry with them their ordinary meanings." *A.S. v. People*, 2013 CO 63, ¶ 21 (alteration in original) (quoting 3 Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction § 57:11 (7th

ed.)). This presumption is especially reasonable when "'shall' and 'may' are used in close juxtaposition." *Id.* (quoting 3 Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction § 57:11 (7th ed.)). In other words, while subsection (1) provides only two options for where an offense *must* be tried, including where that offense was committed, subsections (2) through (10) further define where certain offenses are committed — and, therefore, where they *may* be tried.

¶ 24 For Mr. Black, who was charged with murder and conspiracy to commit murder, five subsections of the statute could apply to define where those crimes were committed and may be tried. *See* § 18-1-202(3) (offenses involving the death of a person), -202(7) (multiple acts part of a single criminal episode), -202(8) (inchoate offenses), -202(9) (soliciting, abetting, agreeing, or aiding another in the planning or commission of an offense in another county), & -202(10) (offenses committed on the boundary between two counties).

¶ 25 Accordingly, the district court did not err by ruling that Mr. Black could be tried in Arapahoe County because an act in furtherance of the murder — namely, Mr. Black's discussion with

Ms. Black, in the presence of the acquaintance, about whether and when to kill the victim — occurred there. *Cf. People v. Shackley*, 248 P.3d 1204, 1205-06 (Colo. 2011) ("[A] criminal court does not have the inherent power to transfer a criminal prosecution from a county in which the legislature has deemed it triable 'merely because the court considers another county to be a more appropriate venue or more easily established as a proper situs of the offense.'" (quoting *Reed*, 132 P.3d at 351)).

¶ 26 We are not persuaded otherwise by Mr. Black's argument that "the record does not clearly support that an act in furtherance actually occurred in Arapahoe County." He points out that the preliminary hearing evidence showed the Blacks picked up the acquaintance on "one side of Colfax and drove him to the other side of Colfax" but that it did not indicate how long the conversation lasted. And the two "sides" of Colfax Avenue — East Colfax and West Colfax — run not just through Arapahoe County but south through Denver and into Jefferson County. The testimony, however, was that the acquaintance "was down on East Colfax, on the Aurora side of East Colfax" — i.e., where Colfax Avenue divides Arapahoe County and Adams County — when the Blacks picked

him up and began talking about killing the victim. We therefore conclude that the record supports the district court's factual finding that an act in furtherance of the offenses took place on "the dividing line between Arapahoe County and Adams County." *See Harris*, ¶ 18; *see also* § 18-1-202(10) (An offense "committed on the boundary line between two counties, or so close thereto as to be difficult to readily ascertain in which county the offense occurred" is committed, and may be tried, in either county.).

B. Authority of the District Attorney

¶ 27 Mr. Black next argues that the Eighteenth Judicial District Attorney lacked authority to charge him in the victim's death. In large part for the same reasons discussed above, we disagree.

1. Additional Background

¶ 28 Before trial, Mr. Black moved to dismiss the first degree murder and conspiracy to commit first degree murder charges on the ground that the Eighteenth Judicial District Attorney's Office lacked authority to prosecute them. Based on statutory and case law, Mr. Black contended that no part of the victim's murder happened outside Denver, so the Eighteenth Judicial District

Attorney's Office did "not have the authority to bring or pursue criminal charges."

¶ 29 The district court denied Mr. Black's motion. "Having found venue proper in Arapahoe County," the court reasoned that "the District Attorney has authority to prosecute felonies where the offense or an act in furtherance of an offense occurred."

2. Discussion

¶ 30 Mr. Black's argument regarding the Eighteenth Judicial District Attorney's authority appears to differ little from his venue argument, which we have rejected above.

¶ 31 Mr. Black's briefing on this issue also suggests that the complaint against him was insufficient because it "does not include any information about where the[] offenses allegedly occurred — no address, city, or even the State of Colorado is included in the[] charges." To an extent, he is correct: the complaint does not say where the crimes allegedly took place, only that they are "[a]ll offenses against the peace and dignity of the people of the State of Colorado."

¶ 32 But in *People v. Joseph*, the division explained that "[t]he overriding concern in determining the sufficiency of an information

is whether it is definite enough to inform the defendant of the charges against him or her so as to enable the defendant to prepare an effective defense." 920 P.2d 850, 852 (Colo. App. 1995). Defects in the form of the complaint do not render an information void and may be waived if not timely objected to. *Id.* at 853. Mr. Black did not argue before the district court that the complaint against him was insufficient in any way other than the fact that the murder had occurred in Denver, not in the Eighteenth Judicial District. He did not then, and does not now, argue that the complaint was insufficient to inform him of the charges or prepare an effective defense. In fact, Mr. Black alleges no prejudice at all from the lack of an address on the complaint.

¶ 33 Accordingly, because venue was proper in the Eighteenth Judicial District under section 18-1-202(1), the offenses were triable there, and the Eighteenth Judicial District Attorney's Office had the authority to pursue them.

C. Sixth Amendment Right to a Public Trial

¶ 34 Mr. Black next contends that the district court violated his constitutional right to a public trial when it excluded the public

from the courtroom during jury selection. We disagree that the court impaired his constitutional rights.

1. Additional Background

¶ 35 At the start of a one-and-a-half-day voir dire with fifty potential jurors, the district court noted that a member of the public was seated in the courtroom. Because the court needed every available chair in the room to seat the venire, the court asked the person to leave until a seat became available.

¶ 36 Ms. Black's counsel objected to the court "closing the trial to the gentleman that's in the courtroom." The court replied, "I'm not closing the trial, we just need all the seats in the courtroom. It's not a big enough courtroom." The court added, "As soon as there's seats available, we'll let the public back in." The court also refused Ms. Black's counsel's request that an extra chair be brought in, commenting, "If there were no concerns with fire safety, we could probably pack the courtroom with more seats."

¶ 37 Twenty-four pages in the transcript later, the court excused a prospective juror for cause because they did not reside in Arapahoe County. The record does not indicate the amount of time that had

elapsed or whether the person who had initially been asked to leave the courtroom asked, or was allowed, to return.

¶ 38 Though Ms. Black's counsel objected to the court's exclusion of the public, Mr. Black's attorneys neither joined that objection nor made their own.[3]

2. Standard of Review

¶ 39 A trial court's decision to close the courtroom presents a mixed question of law and fact. *People v. Turner*, 2022 CO 50, ¶ 19. Thus, "we review the court's legal conclusions de novo and its findings of fact for clear error." *Id.*

3. Governing Law

¶ 40 The Sixth and Fourteenth Amendments to the United States Constitution, as well as Article II, Section 16 of the Colorado Constitution, guarantee a criminal defendant the right to a public trial. "A 'public trial' is one that is not secret; it is one that the

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[3] The People contend that because only Ms. Black's counsel, and not Mr. Black's counsel, objected to the exclusion of the public, Mr. Black did not preserve his Sixth Amendment argument. Because we resolve the merits of the issue in the People's favor, however, we need not, and do not, address whether one codefendant's objection is sufficient to preserve an appellate issue for the other codefendant. *See People v. Turner*, 2022 CO 50, ¶ 15 n.2 (declining to resolve this issue and saving it for another day).

public is free to attend." *People v. Jones*, 2020 CO 45, ¶ 19 (citing *Hampton v. People*, 171 Colo. 153, 163, 465 P.2d 394, 399 (1970)).

¶ 41 But the right is not absolute. *Id.* at ¶ 20. In rare circumstances, a court may close the courtroom, either completely or partially — e.g., only to certain people or only for a certain part of the trial. *Id.* at ¶¶ 22-27. To justify the closure, the following requirements, laid out in *Waller v. Georgia*, 467 U.S. 39, 48 (1984), 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.'" *Turner*, ¶ 19 (alteration in original) (quoting *Jones*, ¶ 21).

¶ 42 Even if the trial court fails to make the four *Waller* findings, however, "the Sixth Amendment is not necessarily violated 'every time the public is excluded from the courtroom.'" *Lujan*, ¶ 16 (quoting *Peterson v. Williams*, 85 F.3d 39, 40 (2d Cir. 1996)). In *Lujan*, our supreme court followed numerous other jurisdictions in holding that "some closures are simply so trivial that they do not

rise to the level of a constitutional violation." *Id.*; *see also id.* at ¶ 23.

¶ 43 Under the triviality standard, a court looks at "the totality of the circumstances surrounding the closure" to determine whether it was so trivial that it did not violate the defendant's public trial right. *Id.* at ¶ 19; *see also Turner*, ¶ 28. "Factors to be considered include 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." *Lujan*, ¶ 19. But no one factor is determinative, and other considerations may also be relevant. *Id.*

¶ 44 As the Second Circuit has explained, the triviality standard

> does not dismiss a defendant's claim on the grounds that the defendant was guilty anyway or that he did not suffer "prejudice" or "specific injury." It is, in other words, very different from a harmless error inquiry. It looks, rather, to whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant — whether otherwise innocent or guilty — of the protections conferred by the Sixth Amendment.

Peterson, 85 F.3d at 42. Those protections enhance both "basic fairness" and "the appearance of fairness." *Lujan*, ¶ 14 (quoting *Press-Enter. Co. v. Superior Ct.*, 464 U.S. 501, 508 (1984)). More specifically, a public trial (1) ensures a fair trial; (2) reminds "the prosecutor and judge of their responsibility to the accused and the importance of their functions"; (3) encourages witnesses to come forward; and (4) discourages perjury. *Id.* (quoting *Peterson*, 85 F.3d at 43); *see also Waller*, 467 U.S. at 46-47.

4. Discussion

¶ 45 Mr. Black argues that the district court closed the courtroom to the public without considering the *Waller* factors. He further argues that the closure cannot be considered trivial because (1) the closure was not "inadvertent," like the one deemed trivial in *Peterson*; and (2) the closure was total, in that the district court "failed to make the slightest accommodation for the only member of the public," and jury selection lasted a day and a half.

¶ 46 We agree with Mr. Black that, by telling the only member of the public who was present at the start of voir dire to leave (albeit temporarily), the district court completely closed the courtroom to the public. And we need not decide, as the People urge us to do,

whether the court made sufficient findings to satisfy the four *Waller* requirements. *Cf. Turner*, ¶¶ 38-40. In our view, the closure was so trivial that it did not implicate Mr. Black's public trial right.

¶ 47 To start, we disagree with Mr. Black that, because the court did not act inadvertently, the closure was not trivial. Unlike the district court in *Peterson*, which made an "administerial mistake" by not reopening the courtroom after an undercover police officer testified (and thereby excluding the public for the defendant's "very brief" testimony), 85 F.3d at 41, the court here asked the only member of the public who was present to leave. In applying the triviality standard, however, "[n]o one factor is determinative." *Lujan*, ¶ 19; *see also id.* at ¶ 36. And the closure here, though intentional, was for a good reason — fire safety. The closure was also brief, in that it lasted only as long as it took the court to dismiss the first potential juror as being ineligible to serve on the jury, and the closed proceeding took place on the record.

¶ 48 Given the totality of the circumstances, this closure did not implicate the protections afforded by a public trial. *See id.* at ¶ 19. First, because the closure lasted only as long as it took to dismiss the first juror for cause — and thus create space for the public to

return — and because it excluded only one person from a courtroom that apparently seated fifty, it did not affect the fairness of Mr. Black's trial. Second, though the closure excluded one member of the public for part of voir dire, the defendants, their counsel, and — most importantly — the fifty people in the venire remained, and their presence reminded the prosecutors and the judge of their responsibility to the accused and the importance of their functions. Further, the court's statements, like "I'm not closing the trial, we just need all the seats in the courtroom," suggest both that it was aware of the importance of a public trial and that it tailored the closure as narrowly as it thought practically possible. Third, although the closure covered some interaction between the court and prospective jurors, it did not involve the empaneled jury or any presentation of evidence. We therefore conclude that it did not impact other witnesses' willingness to come forward. And fourth, because the closure did not occur during the presentation of evidence, we also conclude that it had no impact on discouraging perjury. *See id.* at ¶¶ 28-34.

¶ 49 For the foregoing reasons, we conclude that the district court's brief closure of the courtroom to the public at the beginning of voir

dire was so trivial that it did not violate Mr. Black's public trial right. By so concluding, however, we do not mean to suggest that closing the courtroom during jury selection can *never* violate that right or that it is *necessarily* trivial — only that, on these particular facts, involving a small courtroom and a large venire, the brief closure during voir dire was trivial. *See Presley v. Georgia*, 558 U.S. 209, 213 (2010) ("[T]he Sixth Amendment right to a public trial extends to the voir dire of prospective jurors.").

D. Severance

¶ 50 Last, Mr. Black contends that the district court reversibly erred by declining to sever his case from his mother's. We again disagree.

1. Additional Background

¶ 51 In considering the People's motion to join Mr. Black's trial with Ms. Black's, the district court explained that the question before it was whether evidence that was inadmissible against Mr. Black would be admissible against Ms. Black. And while the district court ultimately dismissed Mr. Black's charges related to the dispensary robbery, that robbery was still "part of the criminal episode where the victim in the homicide was murdered in order to hide the

robbery." So the court ruled that joinder was proper under Crim. P. 13.

¶ 52 The court further concluded that Crim. P. 14 did not require severance. It noted that

> no one has articulated a defense that one defendant has against the other saying that these two defenses are antagonistic such that, for example, Terance Black is saying Tina Black did it, Tina Black is saying Terance Black did it. As far as the Court knows, they are both saying neither of them participated.
>
> Now, there may be [a] suggestion made during the course of trial as to whether one party is more culpable than the other, but the case law has indicated that that is not grounds for denying a severance.

Further, the court observed, the case involved

> events that occurred in August, September, and October of 2016 with two defendants. So the number of defendants is clearly manageable. The complexity of the evidence is such that the jury will not be confused, and the Court is convinced that admonitory instructions to the extent that there is evidence . . . admissible against one defendant for a particular purpose but not against the other defendant for that purpose, or vice versa, the jury can understand that, and I specifically refer to the evidence about the [dispensary] robbery . . . . If the Court determines — and it has not yet — that evidence against Mr. Black is admissible as res gestae or [CRE] 404(b), the

> Court will instruct the jury as it is required to do so that the jury may only consider that for a limited purpose, and there is no doubt in the Court's mind that a jury will be able to evaluate that evidence as to the respective defendants for the limited purposes [for] which [it is] admissible.

For all these reasons, the court granted the People's motion to join Mr. Black's and Ms. Black's cases going forward.

¶ 53 At a subsequent hearing, the district court also granted the People's motion to introduce evidence of the dispensary robbery against Mr. Black under CRE 404(b). The court found, by a preponderance of the evidence, "that Mr. Black did engage in the conduct involved in" the dispensary robbery. It also found that the evidence met all four prongs of the test in *People v. Spoto*, 795 P.2d 1314, 1318 (Colo. 1990): (1) it was relevant to a material fact — the motive for the homicide; (2) it was logically relevant to that fact because it explained "why there was an alleged conspiracy, an alleged murder"; (3) the logical relevance was independent of the inference that Mr. Black had a bad character and acted in conformity with that character; and (4) the evidence was not unfairly prejudicial under CRE 403.

¶ 54 Approximately two weeks later, at the end of July 2017, Ms. Black asked for a continuance to give her more time to challenge the People's experts and agreed to waive her statutory speedy trial right. Mr. Black objected to the continuance and asserted his own speedy trial rights. The People objected to severing the trials, noting that they intended to call seventy-five to eighty-five witnesses over a three-to-four-week trial and that the charges were based on the same operative facts and involved a single criminal episode. The court concluded that, under section 18-1-405(6)(c), C.R.S. 2022, "good cause" existed to grant the continuance. It also found "that the complexities of these cases necessitate continuing them to be tried jointly."

¶ 55 At the joint trial, when evidence of the dispensary robbery came up, the court gave this limiting instruction:

> Ladies and gentlemen, you are about to hear evidence regarding the robbery of the Cure Dispensary. The evidence pertains to charges against Ms. Tina Black. As to Mr. Terance Black, this evidence is being offered for the sole purpose of showing Mr. Terance Black's intent, motive and identity. You may consider this evidence only for those limited purposes for which it is offered. You may not consider this evidence for any other purpose. Like any other evidence, it is up to you to determine

> what weight, if any, is to be given to this evidence.

¶ 56 At Ms. Black's counsel's request — and over Mr. Black's counsel's objection — the court later told the jury that it was taking "judicial notice" that Mr. Black had been charged with the dispensary robbery in September 2016, that "[t]hose charges were pending on the day" that the victim died, and that "[t]hose charges were then dismissed."

¶ 57 In addition, before admitting the testimony of an expert in "Denver metro area Crip gang culture," the court gave this limiting instruction:

> Ladies and gentlemen of the jury, the testimony you're about to hear regarding an alleged gang affiliation is about to be presented. Guilt may not be inferred from mere association because membership in a gang in and of itself is not a crime and, therefore, your decision shall not be affected by evidence, without more, that the defendant, Mr. Terance Black, was an alleged member of a gang.
>
> You are expected to carefully and impartially consider all of the evidence and follow the law as I have stated and will state again at the conclusion of this case. You're about to hear evidence that is also being admitted for a limited purpose. The expert testimony relating to gang culture is only to be considered with

> respect to the allegations against Terance Black. You may not consider this evidence as it relates to the charges against Tina Black.

2. Governing Law and Standard of Review

¶ 58 Crim. P. 13 provides in pertinent part that, subject to Crim. P. 14, a district court may order two complaints to be tried together "if the offenses, and the defendants . . . could have been joined in a single" complaint. And as pertinent here, Crim. P. 8(2)(b) allows two or more defendants to "be charged in the same . . . complaint if they are alleged to have participated in the same act or series of acts arising from the same criminal episode."

¶ 59 Under Crim. P. 14, if the court has properly joined two defendants' cases, then neither is entitled to severance *as a matter of right* unless (1) material evidence is admissible against one but not both defendants *and* (2) "admission of that evidence is prejudicial to the party against whom the evidence is not admissible." *Peltz v. People*, 728 P.2d 1271, 1275 (Colo. 1986); *see also* § 16-7-101, C.R.S. 2022.

¶ 60 Moreover, if a defendant is *not* entitled to severance as a matter of right, then the district court has discretion as to whether to grant their motion for severance, and its "decision will be

affirmed absent a showing of abuse of discretion and actual prejudice to the moving party." *People v. Johnson*, 30 P.3d 718, 725 (Colo. App. 2000). In considering whether actual prejudice resulted from the denial of a motion to sever, we consider "(1) whether the number of defendants or the complexity of evidence is such that the jury will confuse the evidence and the law applicable to each defendant; (2) whether, despite admonitory instructions, evidence admissible against one defendant will improperly be considered against another; and (3) whether the defenses are antagonistic." *Id.* at 725-26; *see also Peltz*, 728 P.2d at 1277-78.

3. Discussion

¶ 61 Mr. Black contends that "there was no good cause for not granting a severance of trials other than the court's sole focus of efficiency" and that, "[i]n addition to the prosecution's bad faith which resulted in [Mr.] Black being held in continuous custody for approximately two and one half years before his trial, the court's failure to sever the trials resulted in prejudicial evidence which would not have been admitted if [Mr.] Black were tried separately." We separately address whether the court erred by (1) not severing

Mr. Black's trial from that of Ms. Black and (2) tolling his speedy trial period during Ms. Black's requested continuance.

¶ 62 At the outset, we note that. other than a bare assertion, Mr. Black does not argue that any evidence introduced at the joint trial was *inadmissible* against him, so he cannot argue that he was entitled to severance as a matter of right under Crim. P. 14. *See Peltz*, 728 P.2d at 1275. We therefore consider whether the district court abused its discretion by refusing to sever the Blacks' trials because the refusal caused Mr. Black "actual prejudice." *Id.*

¶ 63 When it granted the People's motion to join the Blacks' trials, the district court found that (1) the jury would not be confused by a joint trial because there were only two defendants and the evidence was not too complex; (2) to the extent certain evidence would be admissible against one defendant but not the other, the jury would be able to follow limiting instructions and evaluate the evidence for a limited purpose; and (3) neither defendant articulated a defense antagonistic to the other's. *See id.* at 1277-78.

¶ 64 Mr. Black nevertheless contends that the court's refusal to sever the trials prejudiced him because it led to the introduction of evidence (1) of gang affiliation; (2) that months before the

dispensary robbery, Mr. Black had allegedly been arrested in Kansas with several thousand dollars in drug-trafficking proceeds; and (3) that Mr. Black had been charged in the dispensary robbery, those charges had been pending when the victim died, and those charges had since been dismissed.[4] But none of this evidence rendered the court's refusal to sever the Blacks' trials an abuse of discretion.

¶ 65 First, the record indicates that the evidence of gang affiliation was admitted against Mr. Black but not Ms. Black. The district court admonished the jury: "The expert testimony relating to gang culture is only to be considered with respect to the allegations against Terance Black. You may not consider this evidence as it relates to the charges against Tina Black." Thus, any prejudice from the admission of this evidence was not the result of joining Mr. Black's trial with Ms. Black's.

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[4] Mr. Black also suggests that his defense was antagonistic to Ms. Black's because "he was forced to defend against the prosecutor and [Ms. Black's] counsel." But he did not raise this issue until his reply brief, so we decline to consider it. *See People v. Zapata*, 2016 COA 75M, ¶ 26, *aff'd*, 2018 CO 82.

¶ 66 Second, though the People moved to introduce, under CRE 404(b), evidence that Mr. Black was arrested in Kansas, the district court ruled before trial that this evidence was inadmissible. Mr. Black points to no trial testimony about that incident, and it appears that the parties complied with the court's order.

Mr. Black's brief references testimony from the People's expert in "marijuana drug culture," who explained, among other things, that a black market for legal Colorado marijuana exists because the drug is illegal in many of the states that surround Colorado (like Kansas), creating an incentive to transport marijuana to those states. Yet even if, as Mr. Black asserts, this evidence prejudiced him, he does not contend that the evidence was inadmissible against him or that the jury "improperly . . . considered" it against him. *Peltz*, 728 P.2d at 1278; *see also People v. Coney*, 98 P.3d 930, 933 (Colo. App. 2004) ("Unfair prejudice refers to 'an undue tendency on the part of admissible evidence to suggest a decision made on an improper basis.' Evidence is not unfairly prejudicial simply because it damages the defendant's case.") (citation omitted). Rather, this evidence was relevant to explain Mr. Black's reason for

wanting the victim dead — because he was "telling" about a profitable crime.

¶ 67 Third, regardless of whether it was prejudicial for the district court to tell the jury that Mr. Black was charged with robbing a dispensary at the time of the victim's death, Mr. Black does not argue that this evidence was inadmissible or improperly considered against him. *See Coney*, 98 P.3d at 933. Rather, as the district court found, this evidence was relevant to explain why Mr. Black wanted the victim dead. Moreover, the court did not err by concluding "that the jury would heed the limiting instructions" regarding this evidence. *Peltz*, 728 P.2d at 1277.

¶ 68 Turning to the speedy trial issue, we disagree that the district court erred when it found good cause to toll Mr. Black's speedy trial period under section 18-1-405(6)(c) based on the "enormity of the amount of witnesses and exhibits," as well as the need to call a "special panel" of 250 potential jurors.

¶ 69 Under section 18-1-405(6)(c), a defendant's six-month speedy trial period excludes "[a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a

severance." Mr. Black cites no authority, and we are aware of none, disapproving of relying on matters of "efficiency" in finding good cause to toll a defendant's speedy trial period under section 18-1-405(6)(c). To the contrary, in *People v. Backus*, 952 P.2d 846, 849 (Colo. App. 1998), the division concluded that under section 18-1-405(6)(c), the defendant's speedy trial rights were not violated when his codefendant was granted a continuance that pushed their joint trial beyond the defendant's initial speedy trial deadline. Specifically, the division upheld the district court's finding of good cause based on findings that the

> case is very complex in the sense of at least the number of potential witnesses, the nature of the evidence that is going to be presented, and the various relationships that are involved. It is going to be a lengthy trial [and] there is something over 180 witnesses that have been identified, a good deal of physical evidence has been proposed to be offered, and there are significant legal issues to be resolved.

Id.

¶ 70 Accordingly, the district court did not abuse its discretion by refusing to sever Mr. Black's trial from Ms. Black's, even after it granted her request for a continuance past his speedy trial deadline.

III. Conclusion

¶ 71 For these reasons, we affirm the judgment of conviction.

JUDGE FOX and JUDGE TOW concur.