SUMMARY
June 8, 2023

2023COA50

No. 21CA1645, *People v. Bialas* — Constitutional Law — Sixth Amendment — Right to Public Trial — Trivial Courtroom Closures — *Waller* Test

A division of the court of appeals holds, as a matter of first impression, that removal of members of the defendant's family from the courtroom and seating them in an auxiliary courtroom to view a video livestream of the trial was a nontrivial partial courtroom closure. Because the closure was not justified under the factors articulated in *Waller v. Georgia*, 467 U.S. 39 (1984), reversal is required.

COLORADO COURT OF APPEALS **2023COA50**

Court of Appeals No. 21CA1645
Gilpin County District Court No. 17CR12
Honorable Todd L. Vriesman, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Michelle Re Nae Bialas,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE TOW
Furman and Johnson, JJ., concur

Announced June 8, 2023

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¶ 1 Defendant, Michelle Re Nae Bialas, appeals her judgment of conviction for second degree assault and violation of a protection order, arguing that the district court violated her right to a public trial. Her challenge requires us to consider, as a matter of first impression in Colorado, whether a court's order removing the public from the physical courtroom, while allowing trial to be observed via a live video and audio stream, constitutes a partial closure violating a criminal defendant's constitutional right to a public trial. We conclude that it does and, therefore, reverse Bialas's conviction and remand for a new trial.

I. Background

¶ 2 In 2017, a jury found Bialas guilty of various charges relating to an attack on her ex-boyfriend, James Bynum. A division of this court reversed, *see People v. Bialas*, (Colo. App. No. 17CA1841, Dec. 17, 2020) (not published pursuant to C.A.R. 35(e)), and the prosecution retried Bialas in 2021.

¶ 3 At the second trial, the jury and the viewing public were dispersed throughout the courtroom as a precaution against the COVID-19 pandemic. Some members of the jury sat in the front rows of the public viewing gallery, while the public occupied the

back row. Additional members of the public watched the trial in a separate courtroom via Webex, which provided a live video and audio stream of the proceedings.

¶ 4 Bialas testified at trial. During her direct examination, the court and counsel held a bench conference outside the courtroom.[1] When the judge and the attorneys returned, a juror passed the court a note that said, "[T]he spectators behind me were discussing the history of this case and we could hear them." The court ordered the jury and the public out of the courtroom, and then it brought in individual jurors to be questioned in camera on what was heard and how it might affect trial. The questioned jurors said they overheard that there had been a previous trial with a guilty verdict and that the commenting spectators believed the current trial was biased in favor of Bialas. They said it was "obvious that [the spectators] were here for Jim [Bynum]."

¶ 5 Neither party requested a mistrial, but defense counsel asked that Bialas's family be allowed to return to the courtroom because

[1] Because jury members were dispersed around the courtroom to maintain social distancing, bench conferences had to be conducted outside the courtroom to avoid jurors overhearing.

the questioned jurors indicated that it was members of Bynum's family, not members of Bialas's family, who had made the inappropriate comments. Despite the prosecution expressly not objecting to Bialas's family being in the courtroom and agreeing that they had not acted inappropriately, the district court denied the request:

> All spectators will be banned from the courtroom for the rest of the day and they can be across the hall and watch the proceedings via WebEx [sic] just like anybody else, but I'm not going to now inquire from each one of the spectators who is at fault. It is my province to govern what [is] happening here in the courtroom and something has happened which is not proper . . . and I'm not going to sit around and try and determine who is at fault for making comments or not. The best, easiest, and uniform [rule] is that there will be no further spectators for the rest of the trial in the courtroom.

The public watched the rest of the trial, including the remainder of Bialas's direct examination, cross-examination, and re-direct, and both parties' closing arguments, via live video and audio stream. Ultimately, the jury convicted Bialas of second degree assault and violation of a protection order.

II. Sixth Amendment Right to Public Trial

¶ 6 Bialas argues that the district court's removal of her family from the courtroom, despite their being able to view the trial via a live video and audio stream, constituted a nontrivial partial closure of the courtroom.[2] Further, Bialas contends the closure was not justified under *Waller v. Georgia*, 467 U.S. 39 (1984), and thus the closure violated her right to a public trial under the Sixth Amendment to the United States Constitution and article II, section 16 of the Colorado Constitution. We agree.

¶ 7 The United States and Colorado Constitutions guarantee criminal defendants the right to a public trial. *See* U.S. Const. amends. VI, XIV; Colo. Const. art. II, § 16. "This right 'is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their

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[2] Bialas does not challenge the initial arrangement, allowing both Bialas's and Bynum's family members to watch within the courtroom but requiring *some* members of the public to view the trial from another room, if necessary, due to the lack of space and the necessity of social distancing.

responsibility and to the importance of their functions.'" *People v. Jones*, 2020 CO 45, ¶ 16 (quoting *Waller*, 467 U.S. at 46).

¶ 8 Courtroom closures, whether total or partial, can violate a defendant's right to a public trial. *Id.* at ¶ 27. Trivial closures, however, 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, ¶ 24.

¶ 9 Once a closure is determined to be nontrivial, it is unconstitutional unless justified under the test articulated in *Waller*. *Jones*, ¶ 27. *Waller* requires that (1) "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced"; (2) "the closure must be no broader than necessary to protect that interest"; (3) "the trial court must consider reasonable alternatives to closing the proceeding"; and (4) the trial court "must make findings adequate to support the closure." *Waller*, 467 U.S. at 48.

III. Analysis

A. Standard of Review

¶ 10 "We review a trial court's decision to close the courtroom as a mixed question of law and fact. Thus, 'we accept the trial court's

findings of fact absent an abuse of discretion, but we review the court's legal conclusions de novo.'" *Jones*, ¶ 14 (quoting *People v. Hassen*, 2015 CO 49, ¶ 5).

¶ 11 Moreover, violation of a defendant's right to a public trial — by a nontrivial closure that was not justified by a trial court's findings — is a structural error requiring reversal. *Id.* at ¶ 51; *see also Hassen*, ¶¶ 7-8. However, in certain circumstances, we may remand to allow the trial court to make the required findings under *Waller*. *See Jones*, ¶¶ 45, 51.

B. Whether a Partial Closure Occurred

¶ 12 We thus turn to whether a closure occurred at all, and we first note the importance placed upon "the presence of a defendant's family . . . in ensuring a fair trial." *Jones*, ¶ 41.

¶ 13 In *Jones*, the exclusion of the defendant's parents from the courtroom during witness testimony was a partial closure warranting reversal. *Id.* at ¶ 43. The exclusion of Bialas's family during her testimony likewise cuts against the assurance of a public trial. Even if Bialas's family could still view a livestream of the trial, the jury, the judge, and counsel were unable to see Bialas's family. Again, "the *presence* of interested spectators" is

important to remind the triers of "the importance of their functions." *Id.* at ¶ 16 (emphasis added) (quoting *Waller*, 467 U.S. at 46).

¶ 14 Indeed, "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." *People v. Turner*, 2022 CO 50, ¶ 23. The United States Supreme Court has also expressed skepticism that recordings can replace in-person attendance in protecting a defendant's right to a public trial. *In re Oliver*, 333 U.S. 257, 271 (1948) (suggesting "recordation" of a trial would not remedy the harm of secret trials). Moreover, numerous federal courts have held that video and audio streams constitute closures under the Sixth Amendment. *E.g.*, *United States v. Babichenko*, 508 F. Supp. 3d 774, 779 (D. Idaho 2020) (holding video and audio livestream of trial was a partial closure); *United States v. Allen*, 34 F.4th 789, 797 (9th Cir. 2022) (holding audio stream was total closure).

¶ 15 We are therefore convinced that, in this case, the removal of the entire public (including Bialas's family) from the physical courtroom constituted a partial closure — despite the availability of

a live video and audio stream of the proceedings. Further, we do not believe this closure was trivial.

¶ 16 In determining whether a closure was trivial, we "consider whether it implicated the protections and values of the public trial right." *Lujan*, ¶ 28. These values include (1) ensuring a fair trial; (2) reminding the prosecutor and judge of their responsibility to the accused and the importance of their functions; (3) encouraging witnesses to come forward; and (4) discouraging perjury. *Id.* (citing *Peterson v. Williams*, 85 F.3d 39, 43 (2d Cir. 1996)).

¶ 17 This inquiry considers the totality of the circumstances, and no single fact is dispositive. *Id.* at ¶ 19. However, in analyzing whether a closure implicates the public trial right, the court must consider the duration of the closure, the substance of the proceedings that occurred during the closure, whether the proceedings were later memorialized in open court or placed on the record, whether the closure was intentional, and whether the closure was total or partial. *Id.*

¶ 18 First, the closure here undercut the assurance of a fair trial. Unlike in *Lujan*, ¶ 29, where the trial court "merely reread to the jury a limiting instruction that it had previously read in open

court," which lasted "only a matter of minutes," the district court here removed the public during Bialas's testimony and throughout closing arguments, which lasted approximately half of a day during a four-day trial. This closure is thus more like the one in *Jones*, ¶ 42, where a partial closure was nontrivial because it "resulted in 146 pages of transcript" and lasted "almost an entire afternoon during a ten-day trial."

¶ 19 Additionally, the closure was intentional and removed Bialas's family, which, as our supreme court held in *Jones*, ¶ 41, weighs against finding a closure being trivial. Indeed, removing the defendant's family from the courtroom takes away a reminder to the judge, prosecutor, and jury that they are responsible for treating the defendant fairly. *Id.*

¶ 20 Thus, although this was a partial closure that was placed on the record, every other listed factor weighs toward a nontrivial closure. Therefore, we conclude a nontrivial partial closure occurred, implicating Bialas's right to a public trial.

C. Whether the Closure was Unconstitutional

¶ 21 Of course, a defendant's right to a public trial is not absolute, and at times it must yield to competing interests. *Lujan*, ¶ 15

(citing *Waller*, 467 U.S. at 45). A court closure is constitutional if it can be justified under the four requirements in *Waller*, 467 U.S. at 48.

¶ 22 First, "the party seeking to close the [proceeding] must advance an overriding interest that is likely to be prejudiced." *Lujan*, ¶ 15 (quoting *Waller*, 467 U.S. at 48). Neither party sought to remove Bialas's family after juror statements indicated they had not made the inappropriate comments. In fact, the prosecution expressly voiced no objection to Bialas's family continuing to attend the trial in-person because there was no evidence that they had discussed the prior trial within the jury's earshot. While there may have been an overriding interest in excluding the misbehaving spectators, the broad concern that any member of the public might make inappropriate comments cannot justify a closure because it would essentially allow a court to exclude the public as "a matter of course." *Presley v. Georgia*, 558 U.S. 209, 215 (2010) (suggesting that "[t]he generic risk of jurors overhearing prejudicial remarks, unsubstantiated by any specific threat or incident," is not an overriding interest capable of supporting a closure). The threat of

disruption here did not come from Bialas's family, and thus there was no reason for their exclusion.

¶ 23 Second, "the closure must be no broader than necessary to protect [the asserted] interest." *Waller*, 467 U.S. at 48. The court did not simply admonish the spectators not to discuss the prior trial. Instead, it excluded the entire public, including Bialas's family, based on the misbehavior of a few spectators. This action exceeded what was necessary to insulate the jury from improper statements.

¶ 24 This fact also weighs against finding a permissible closure under *Waller*'s third requirement — that "the trial court must consider reasonable alternatives to closing the proceeding." *Id.* Again, a reasonable alternative to excluding all of the public was to determine who had made the inappropriate comments and exclude, or even reprimand, only those persons. The district court even considered this possibility when it said it would not "inquire from each one of the spectators who is at fault." However, this is exactly what the district court was required to do, given that "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." *Presley*, 558 U.S. at 215.

While this endeavor would have taken time, the district court had already demonstrated that such an inquiry was reasonable, given that it had just questioned multiple jurors on the spectators' comments. Questioning the spectators next would not have added significant delay.

¶ 25 Fourth, the court "must make findings adequate to support the closure"; however, these findings need not formulaically recite *Waller*'s language. *Waller*, 467 U.S. at 48; *Turner*, ¶¶ 34-35. The district court here did not conduct a *Waller* analysis, nor did it make sufficient findings to support a courtroom closure. Rather, it ruled it would not further "inquire" into whether Bialas's family had made any inappropriate comments.

¶ 26 Moreover, the record here suggests that Bialas's family had not made any improper comments. One of the questioned jurors indicated it was "obvious that [the misbehaving spectators] were here for Jim [Bynum]." The prosecution also expressly said that they thought Bialas's family had been acting appropriately.

¶ 27 Not only do these facts weigh against finding a permissible partial closure under the fourth *Waller* requirement — that there be sufficient findings to justify the closure — they also undercut the

People's argument that we should remand the case so that the district court can make further findings. Given that it was undisputed that Bialas's family was not responsible for any of the inappropriate comments, that their exclusion was not requested by either party, and that their exclusion was an overbroad remedy for the improper statements of other members of the public, remanding would be an "exercise in futility." *See Jones*, ¶¶ 48-49. We therefore conclude that the partial closure here was unconstitutional under *Waller* and, as such, was a structural error.

IV. Disposition

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

JUDGE FURMAN and JUDGE JOHNSON concur.