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COURT OF APPEALS,
STATE OF COLORADO

Ralph L. Carr Judicial Center
2 East 14th Ave.
Denver, CO 80203

Appeal; Gilpin District Court;
Honorable Todd L. Vriesman;
Case Number 2017CR12

Plaintiff-Appellee
THE PEOPLE OF THE
STATE OF COLORADO

v.

Defendant-Appellant
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Case Number: 2021CA1645

REPLY BRIEF

CERTIFICATE OF COMPLIANCE

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

It contains 2,159 words.

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

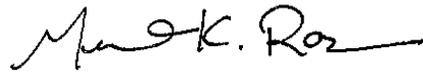


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STATEMENT OF THE ISSUES PRESENTED

- I. Whether the trial court violated Ms. Bialas's constitutional right to a public trial by closing the courtroom to Ms. Bialas's family.
- II. Whether the trial court erred by limiting Ms. Bialas's presentation of impeachment evidence when it ruled that if Ms. Bialas testified that the alleged victim had hit her in the past, it would open the door to evidence of Ms. Bialas's previous threats and actions against the alleged victim.
- III. Whether Ms. Bialas is entitled to a hearing to request a waiver of surcharges, fees, and costs.

ARGUMENT

I. Excluding spectators from the courtroom, including Ms. Bialas's family members, violated Ms. Bialas's public-trial right and requires reversal.

Ms. Bialas argues that removing spectators from in-person attendance at her trial while providing a video feed to another room constituted a partial closure of the courtroom, and because the trial court failed to consider her constitutional rights and make appropriate findings, the closure violated her right to a public trial, requiring reversal. (OB p 7-24)

A. Barring in-person attendance of the public at trial is a partial closure.

Despite the substantial majority of jurisdictions that have concluded that excluding the public from the courtroom while providing virtual access constitutes a partial courtroom closure, *see* 6 Wayne R. LaFare et al., *Criminal Procedure* § 24.1(b) & n.24.30, n.24.50 (4th ed. 2022), the State claims that there was no closure here. (AB p 11) But the authorities that the State relies on are mostly inapposite.

While *Strommen v. Larson*, 401 Mont. 554 (2020) (not reported), did reason that a remote, real-time video feed prevented the trial from being “truly ‘closed,’” the court also observed that the trial was “not unequivocally open,” cited *Waller v. Georgia*, 467 U.S. 39 (1984), and held that the defendant’s public-trial right was protected by the District Court’s “proper factual findings.”

Unlike Colorado, where a partial courtroom closure requires consideration of the *Waller* factors, *see People v. Jones*, 2020 CO 45, ¶ 27, the United States District Court for the District of Columbia requires a defendant to “demonstrate that a ‘complete closure’ of the trial occurred” before the *Waller* factors are triggered. *United States v. Barrow*, 2021 WL 3602859, at *9 (D.D.C. Aug. 13, 2021). In other words, the jurisdiction doesn’t recognize partial closures. Thus, *Barrow* is distinguishable when it held that streaming the defendant’s trial to a separate

courtroom wasn't a "complete closure" and therefore the procedure did not implicate the defendant's public-trial right.

And the State's reliance on *People In Interest of R.J.B.*, 2021 COA 4, and *People v. Hernandez*, 2021 CO 45, is misplaced because neither of those cases address a defendant's constitutional right to a public trial. (AB p 13)

In addition to the authorities cited in the Opening Brief, pages 13 through 15, at least two other jurisdictions have also held that limiting the public's attendance while providing remote access required *Waller* findings. *See Lappin v. State*, 171 N.E.3d 702, 707 (Ind. Ct. App. 2021); *Gomes v. U.S. Dep't of Homeland Sec.*, 460 F. Supp. 3d 129, 130-31 (D.N.H. 2020) (video hearing was a partial closure).

The State is wrong when it asserts that audio and video conferencing honored the purposes underlying the public-trial right. (AB p 13) As discussed in the Opening Brief, in-person attendance by a defendant's supporters—especially family members—ensures that judges and prosecutors discharge their duties responsibly and treat the defendant fairly. (OB p 16-19) *See Waller*, 467 U.S. at 46; *People v. Turner*, 2022 CO 50, ¶ 17 (a public trial "reminds the prosecutor and judge of their responsibility to the accused and the importance of their functions" (internal punctuation omitted)).

“A one-way streaming link may serve the goal of getting information out but *fail to serve the interest in enabling family members, neighbors, and the general public to keep courtroom participants in check* in the way the Constitution intends.”
Alicia L. Bannon, Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the Covid-19 Pandemic and Beyond*, 115 Nw. U.L. Rev. 1875, 1908 (2021) (emphasis added).

Because the trial court disallowed Ms. Bialas’s family from remaining in the courtroom over defense counsel’s objection, it partially closed her trial.

B. Removing Ms. Bialas’s family from trial during her testimony and closing arguments was not a trivial closure.

In the alternative, the State contends that the limitation on Ms. Bialas’s family members’ ability to be physically present was trivial because the closed proceedings were “limited” to Ms. Bialas’s testimony and the parties’ final arguments. (AB p 16)

As discussed in the Opening Brief, the closure in this case was not trivial because the individuals excluded were Ms. Bialas’s supporters and the closure was intentional. (OB p 23) *See People v. Lujan*, 2020 CO 26, ¶ 19. Moreover, the importance of Ms. Bialas’s testimony to the determination of guilt or innocence cannot be diminished, and closing arguments are also a crucial part of presenting the case.

Accordingly, the closure at issue here was not trivial.

C. The closure of Ms. Bialas's courtroom was not justified by the circumstances or by the trial court's reasoning.

The State claims that the trial court's record in explaining its decision to close the courtroom implicitly addressed *Waller* and provided enough findings for this Court's review. (AB p 18) But the trial court never mentioned the *Waller* factors, and its reasoning was inadequate justification to curtail Ms. Bialas's right to a public trial. (See OB p 20-22)

The State is right that a spectator's improper behavior during trial can justify limiting that person's attendance, as our supreme court recently held in *People v. Turner*, 2022 CO 50, ¶ 22. But *Turner* also emphasized that excluding "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." *Id.* ¶ 23.

Assuming that the trial court's "overriding interest" in closing the courtroom was to forestall improper remarks from reaching the jurors' ears, the court's reasoning still fails the second *Waller* factor because the closure was too broad. The parties and the jurors agreed that the individuals who were speaking loudly about Ms. Bialas's previous trial and conviction were the alleged victim's family members, not Ms. Bialas's. (TR 7/14/20 p 42:18-43:13, 46:6-15, 59:10) Contrary to the State's assertion that only one juror indicated that the inappropriate comments came from the Bynum family (AB p 21), Juror 7 reported that the comments he heard

expressed bias against Ms. Bialas, and Juror 13 stated that “it was just obvious that [the speakers] were here for Jim,” meaning Jim Bynum. (TR 7/14/20 p 41-44, 59:10)

The State also contends that admonishing the families to maintain absolute silence moving forward was not a reasonable alternative to closure because the families had been admonished before trial. (AB p 22) That’s not correct. The record shows that the *prosecutor* had spoken with the *Bynum family* and believed that they should “know better” than to speak about the previous trial in front of the jury. (TR 7/14/20 p 46:11-15) Nothing in the record shows that the *trial court* ever admonished either party’s family members about avoiding improper remarks—and nothing in the record indicates that the court’s admonishment of the Bialas family would have been ineffective.

The trial court’s curt explanation of why it “banned” all spectators from the courtroom cannot truly be considered findings, and certainly not findings that satisfy *Waller*’s exacting test. (See *id.* p 55:11-22) Accordingly, excluding Ms. Bialas’s family from in-person attendance at her trial violated her right to a public trial.

D. Violating Ms. Bialas’s public-trial right was structural error.

The State suggests that the remedy for the trial court’s violation of Ms. Bialas’s right to a public trial is a remand for a hearing to let the trial court cure its error. (AB p 24) The State’s authorities are inapposite.

The State cites *Waller* and *Jones* for its request for a remand. *Waller*, however, addressed a public-trial violation that occurred when the trial court excluded the public from a *suppression hearing*, not from trial; thus when the Court reasoned that “the remedy should be appropriate to the violation,” it meant that the suppression hearing should be redone to determine whether, in a public hearing, the trial court would make the same suppression ruling. 467 U.S. at 49-50. In other words, *Waller* reversed the proceeding where the public-trial violation occurred. By analogy, the appropriate remedy for Ms. Bialas is to reverse the result of her trial, wherein her public-trial right was violated. (See OB p 24)

Jones, which reversed the defendant’s conviction rather than remanding, relied on *Waller* for its observation that in some contexts, remand could be appropriate. 2020 CO 45, ¶ 45.

Because violations of the public-trial right are structural error, Ms. Bialas asks this Court to reverse her conviction. *Jones*, ¶ 12.

II. Limiting Ms. Bialas’s impeachment of the alleged victim’s credibility violated her constitutional right to present a complete defense.

Ms. Bialas argues that the trial court reversibly erred by ruling that if she testified that Mr. Bynum had hit her in the past—offered to impeach his testimony

that he would never hit her—then the prosecution could cross-examine Ms. Bialas about unrelated allegations of domestic violence. (OB p 24-31)

A. Evidence that Mr. Bynum had hit Ms. Bialas was directly relevant to impeach his credibility.

The State seems to misunderstand the reason that Ms. Bialas sought to testify that Mr. Bynum had hit her in the past. The State contends that this evidence was irrelevant because the alleged hitting occurred months before trial and had no relation to the charges, and the State implies that the reason Ms. Bialas wished to admit it was to “color[] the victim’s credibility” by painting him as a domestic abuser. (AB p 30, 32)

But Ms. Bialas was not hoping to inject general evidence of Mr. Bynum’s violent character in order to smear him. Ms. Bialas wished to admit this evidence to directly rebut Mr. Bynum’s sworn testimony at trial that he would never hit her. (See TR 7/13/21 p 36:4-9) Defense counsel sought to correct the false impression that Mr. Bynum had created.

The State is mistaken when it argues that the hitting incident was not probative of any material fact because it was probative of the most central issue at trial: whether the jury should believe Mr. Bynum’s version of events or Ms. Bialas’s account. The trial court certainly understood the relevance of this proposed testimony when it refused the prosecution’s invitation to exclude it as irrelevant.

(TR 7/14/21 p 13-16) If Ms. Bialas could show that Mr. Bynum had lied on the stand, his credibility would be undermined, and this is why the trial court's ruling that attached a price to Ms. Bialas's testimony chilled her right to present a defense.

B. Evidence that Mr. Bynum had hit Ms. Bialas did not open the door to their unrelated domestic altercations.

The State attempts to defend the trial court's ruling that evidence of Mr. Bynum hitting Ms. Bialas in the past would open the door to rebuttal about her alleged threats and actions. The State argues that where a party presents misleading evidence, the opposing party has a right to explain it, under the opening-the-door doctrine. (AB p 30-31)

But importantly, it was Mr. Bynum, not Ms. Bialas, who opened the domestic-violence door by testifying that he would never hit women generally, and Ms. Bialas specifically. It wasn't Ms. Bialas's fault that this issue was raised, and she was entitled to fix the misleading impression *Mr. Bynum* had created. Allowing her to correct the record and testify that he had hit her before would not have introduced prejudice into the trial; it would have properly impeached the complaining witness's testimony.

Accordingly, *People v. Johnson*, 2021 CO 35, is on point because the issue wasn't that Ms. Bialas wanted to introduce character evidence about Mr. Bynum—it was that she sought to impeach him.

Because the trial court attached an unwarranted condition to Ms. Bialas's presentation of relevant impeachment evidence, designed to test the credibility of the alleged victim, the court violated her constitutional right to present a defense, requiring reversal.

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

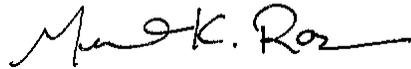
The State agrees that, because the trial court did not assess surcharges, costs, and fees at sentencing, the case should be remanded to allow her the opportunity to show that she is entitled to a waiver. (AB p 37-38)

Ms. Bialas asks for a remand to demonstrate her indigence and to request that all of these costs be waived. (OB p 31-34)

CONCLUSION

Because Ms. Bialas's right to a public trial and right to present a complete defense were violated, she respectfully asks this Court to reverse her convictions. Because the trial court improperly assessed surcharges, costs, and fees, she asks for a remand for a hearing.

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CERTIFICATE OF SERVICE

I certify that, on December 6, 2022, a copy of this Reply Brief was electronically served through Colorado Courts E-Filing on Jaycey DeHoyos of the Attorney General's Office.