Circuit Court for Montgomery County
Case No. 123943C

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1823

September Term, 2023

NAJIE SHABAY WALKER

v.

STATE OF MARYLAND

Nazarian,
Albright,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: June 3, 2025

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

Najie Walker and Francis Lee were tried jointly before a jury in the Circuit Court for Montgomery County for armed robbery and conspiracy to commit armed robbery. The jury convicted both of armed robbery and acquitted them of conspiracy. In this appeal, Mr. Walker challenges the effectiveness of his trial counsel's performance and the circuit court's decision to close the courtroom during jury selection. Mr. Walker's ineffective assistance of counsel claim fails because he wasn't prejudiced by his attorney's decisions, but we reverse because the courtroom closure violated his constitutional rights and we remand for further proceedings consistent with this opinion.

I. BACKGROUND

Two men robbed D'Angelo Burke at gunpoint in Silver Spring on October 12, 2013. Mr. Burke recognized one man, Najie Walker, as a former high school classmate; he didn't recognize the other man, identified later as Francis Lee. Mr. Burke allowed Mr. Walker to use his phone, then Mr. Lee pulled a gun on Mr. Burke and hit him on the head with it. The gun "went off," and all three men ran away in different directions. Mr. Walker still had Mr. Burke's phone when he ran. Police identified and arrested Messrs. Walker and Lee within a month. A grand jury indicted both on charges for armed robbery and conspiracy to commit armed robbery.

A. Evidence Adduced at Trial

Messrs. Walker's and Lee's joint trial began on March 31, 2014. As its first order of business, the court informed the parties that it would close the courtroom to the public during jury selection due to space limitations. The court maintained this decision despite

defense counsels' opposition and suggestions for alternative courses of action, and seemed to ground this ruling in its belief that "asking spectators to wait outside while [the parties] select a jury and go through the voir dire, [would not] infringe[] significantly upon anybody's right." Alongside a few preliminary matters, the court spent the entire morning conducting jury selection.

After the lunch recess and opening statements, the State called Mr. Burke as its first witness. He testified that he had been "partying" in Washington, D.C., on the night of October 12, 2013. He left Washington, D.C., at approximately 10:30 p.m. and rode the Metro to Silver Spring. Two men boarded the Metro when it stopped near Fort Totten. Mr. Burke recognized one of them as a former high school classmate he knew as "Nijee" or "Nigel." He didn't recognize the other man. In court, Mr. Burke identified Mr. Walker positively as the man he knew by the name Nijee and Mr. Lee as the man he didn't recognize at the time.

Mr. Burke explained that Messrs. Walker and Lee sat across the aisle from him on the Metro and chatted with him. At some point during the seven-to-ten-minute ride to Silver Spring, Mr. Walker asked Mr. Burke if he could use his phone. Mr. Burke agreed. Then, when the three of them stepped off the train in Silver Spring, Mr. Walker asked again to use Mr. Burke's phone. Mr. Burke agreed once more.

Mr. Burke walked with the two men as Mr. Walker used his phone. They reached Newell Street about a quarter of a mile later, where Mr. Burke saw two people walking their dog. Mr. Burke heard Mr. Walker say into the phone, "I don't know, there's two

people outside." Mr. Burke began to back away when suddenly, Mr. Lee pointed a gun at Mr. Burke and said something to the effect of, "you already know what time it is." Mr. Burke described the gun as black and platinum or silver in color. Mr. Walker, still holding Mr. Burke's phone, stood between them and said to Mr. Lee, "nah, he's cool, he's cool." Mr. Lee then hit Mr. Burke on the head with the gun and the gun "went off." Mr. Burke said Mr. Lee "continued to point [the gun] at me and, like, in shock I guess, all of us." He heard Mr. Walker, who seemed to be in shock as well, say to Mr. Lee "what are you going to do, what are you going to do." Bleeding and unsure if he'd been shot, Mr. Burke ran away from the two men.

The couple who had been walking their dog nearby saw Mr. Burke running, brought him to their apartment, and called 911. The State introduced a recording of the 911 call into evidence and played it for the jury. Although parts of the recording are "unintelligible" in the transcript, most of the call is transcribed in the record. Initially, the man who dialed 911—Mr. Delarosa—gave the phone to Mr. Burke. Mr. Burke, however, was distressed and unable to answer the operator's questions, so Mr. Delarosa spoke with the operator. He said that he heard a "pop," then saw people running, and that Mr. Burke was bleeding but didn't appear to be shot. The operator asked what the assailants were wearing and Mr. Delarosa, relaying the information from Mr. Burke, said that "[o]ne was wearing an orange shirt [and] [t]he other was wearing a green jacket with a hat." He explained that the man in the green jacket was the gunman and that he ran towards East-West Highway. The man in

the orange shirt ran in the opposite direction, towards Georgia Avenue. Mr. Delarosa confirmed that they had only taken Mr. Burke's iPhone 5, nothing else.

Mr. Delarosa's girlfriend, Ms. Mills, testified next. She said that she and Mr. Delarosa were out walking their dog that evening when they heard "a loud bang" as they turned from Newell Street onto Eastern Avenue. Mr. Burke came running towards her and Mr. Delarosa. He was "holding his head," and saying, "call the police . . . . [T]hey have a gun." She and Mr. Delarosa brought Mr. Burke back to their apartment building and Mr. Delarosa called the police. When asked to elaborate on the scene as she remembered it, Ms. Mills said the three men were standing "about halfway up Newell [Street]," near the entrance of a U-Haul facility. She said that as Mr. Burke ran towards her and Mr. Delarosa, the larger of the other two men ran towards East-West Highway and the second man ran in the opposite direction.

Officer Dean Skiba responded to the 911 call. He saw the gash on Mr. Burke's head and called Fire Rescue to provide aid. He then obtained Mr. Burke's description of the assailants: two black males, both with dreadlocks, one wearing a green jacket and the other wearing an orange shirt. Officer Skiba relayed the description to other officers over the radio and scanned the area where the crime occurred. He said the lighting conditions by the U-Haul site and part of East-West Highway were "not stellar, but . . . as good as you can get at night," and that the Silver Spring Metro station was "very bright." He found an unfired, 9mm bullet on the ground near Ms. Mills's and Mr. Delarosa's apartment building and collected it as evidence.

Officer Skiba testified that he received calls from other units that had apprehended suspects matching the description. He put Mr. Burke in his patrol car and conducted four "show ups," which entailed bringing suspects to Mr. Burke so he could confirm whether they were the assailants. Mr. Burke confirmed that none of those four gentlemen were involved.

In describing his interview with Mr. Burke that evening, Officer Skiba said one assailant asked to use Mr. Burke's cellphone twice and didn't return it the second time. The other assailant then "started approaching [Mr. Burke] a little aggressively. And that's when, you know, everything occurred," according to Officer Skiba's conversation with Mr. Burke. Officer Skiba stated further that he "got the faint odor of burned marijuana on [Mr. Burke]" when he placed him in the patrol car, but Mr. Burke didn't have any trouble communicating or answering questions.

The next to testify was the State's expert in toolmark and firearm identification, Mark Williford. Mr. Williford examined the "unfired cartridge" that Officer Skiba found and compared it to a firearm that police had recovered from Mr. Lee. He said the cartridge was of the Winchester brand and identified the firearm as an SR-9 9mm Ruger (the "Ruger"). He "cycled" four Winchester brand cartridges through the Ruger—he loaded the four cartridges into the Ruger's magazine, "put the magazine in the [Ruger], loaded it, [and] extracted each cartridge with the same amount of pressure until all four cartridges were ejected from the [Ruger]." He then placed those cartridges under a comparison microscope with the recovered cartridge to look for similarities in their markings. Mr.

Williford found some similarities between the test cartridges and the recovered cartridge, which served as the basis of his opinion that he could neither include nor exclude the recovered cartridge as having been cycled through the Ruger.

The primary detective on the case, Sarah White, testified next. She spoke with Mr. Burke on the phone about a week after the crime. Mr. Burke gave Detective White a more detailed description of the two assailants than he had on the night of the crime. He described Mr. Walker as "a dark skinned male with shoulder length dreads and tattoos." He said Mr. Walker was about five feet five inches or five feet seven inches tall, 150 pounds, with no accent, and that he was wearing an orange shirt. As for Mr. Lee, Mr. Burke said he was a black male with a lighter complexion than Mr. Walker and shoulder-length dreads, and was around the same height and weight as Mr. Walker. Mr. Burke added that Mr. Lee had a mustache and a beard, no accent, and was wearing a hat and long sleeves. He was unsure of whether Mr. Lee had any tattoos.

Detective White went to Mr. Burke's high school to locate Mr. Walker, who at that point Mr. Burke knew only by his nickname. She identified Mr. Walker as suspect number one and submitted a statement of charges against him on October 23, 2013. Police arrested Mr. Walker on October 25. Mr. Walker did not have Mr. Burke's phone when police arrested him, and Detective White never located it.

In her search for Mr. Lee (suspect number two), who was still unknown at the time, Detective White showed Mr. Burke two photo arrays. He did not identify any of the pictured individuals as the second suspect. Without going into detail, Detective White

testified that she eventually narrowed her search down to Mr. Lee. She did not, however, present Mr. Burke with a third photo array that included Mr. Lee. She filed a statement of charges against Mr. Lee on October 30, and police arrested him on November 7, 2013. Detective White testified further that she submitted the recovered cartridge for DNA testing and fingerprint analysis, but the analysts found neither DNA nor fingerprints on the cartridge.

Officer Leslie Wheeler from the Metropolitan Police Department testified briefly that he encountered Mr. Lee in Washington, D.C., on October 23, 2013. He said that Mr. Lee was wearing a green jacket and pants and that he found a handgun on Mr. Lee's person. The handgun was black and silver and was loaded with Winchester and Federal brand, 9mm ammunition. This handgun was the Ruger that Mr. Williford would examine later as part of the investigation into Mr. Burke's robbery case.

The State rested its case after Officer Wheeler's testimony. Mr. Lee then moved for judgment of acquittal "based on sufficiency of the evidence with regard to all counts." Mr. Walker joined in that motion without further argument. The court denied both motions.

Over the State's objection, the court allowed Mr. Lee to put his mother on the stand even though she wasn't a planned witness and had been sitting in the courtroom during the entire evidentiary phase of the trial. Because Officer Wheeler could not recall whether Mr. Lee had his distinctive face and hand tattoos when he encountered him in Washington, D.C., on October 23, Mr. Lee called his mother to testify that he had those tattoos before that date. Both Mr. Walker and Mr. Lee rested their cases after this testimony.

The State believed that Mr. Lee's mother perjured herself when she testified on cross-examination that Mr. Lee was living with her in October 2013. So the court allowed the State to bring Officer Wheeler back in on rebuttal to testify that during their encounter on October 23, 2013, Mr. Lee said he was homeless. After this brief testimony, Messrs. Lee and Walker renewed their motions for judgments of acquittal. The court denied both motions again.

The court instructed the jury on the law and the jury deliberated for about six-and-a-half hours. Ultimately, the jury found both Messrs. Walker and Lee guilty of robbery and acquitted them of conspiracy. On August 12, 2014, the court sentenced Mr. Walker to twenty years' imprisonment, with all but five years suspended, and credit for time served (169 days). The court also ordered two years of supervised probation following Mr. Walker's release with special conditions: drug and alcohol treatment and no contact with Messrs. Burke or Lee. Mr. Walker did not file a timely notice of appeal.

B. Post-Conviction History

After sentencing, Mr. Walker filed two motions for sentence modification, once through counsel from the Maryland Office of the Public Defender ("MOPD") and once *pro se*. The court denied both. On July 5, 2016, Mr. Walker filed a *pro se* post-conviction petition in which he claimed that his trial counsel rendered ineffective assistance for, among other reasons, failing to file a timely motion for sentence modification. Mr. Walker later obtained counsel through the Post Conviction Defenders Division of the MOPD and filed a motion to withdraw that petition without prejudice. The court granted this motion.

On June 6, 2019, the State filed a motion alleging that Mr. Walker, who had been released from custody on August 3, 2017, violated his probation by incurring a new criminal charge. The court held a hearing on March 4, 2020, found that Mr. Walker violated his probation, and sentenced him to fifteen years' incarceration (the remainder of his suspended sentence), with credit for 139 days of time served. He filed an application for leave to appeal this order that this Court denied.

Mr. Walker filed another *pro se* post-conviction petition on September 9, 2022. He argued that the attorney who represented him at his violation of probation hearing was ineffective because they failed to file a motion for a sentence modification. He later filed a supplemental petition in which he claimed that the same attorney had failed to introduce a relevant evaluation report before the court sentenced him for the violation.

With a new attorney from the Post Conviction Defenders Division, Mr. Walker filed yet another motion to withdraw his latest *pro se* post-conviction petition, which the court granted. He then filed a new post-conviction petition through counsel, claiming his trial counsel rendered ineffective assistance when they failed to file a timely notice of appeal. Several months later, he filed a supplemental petition alleging additional reasons why he believed his trial counsel was ineffective, including that counsel did not move for judgment of acquittal with particularity. With a stipulation from the State, the court granted Mr. Walker leave to file a belated direct appeal and held his supplemental petition for post-conviction relief in abeyance until the resolution of this appeal.

We supplement the following discussion with additional facts as necessary.

II. DISCUSSION

Mr. Walker raises two issues on appeal.[1] *First*, he claims his trial counsel was constitutionally ineffective because counsel didn't support his motion for judgment of acquittal with a particularized argument. *Second*, Mr. Walker argues that the trial court violated his Sixth Amendment right to a public trial when it closed the courtroom to the public during the entire jury selection process. We hold that Mr. Walker was not prejudiced by counsel's allegedly deficient performance but that the courtroom closure violated his right to a public trial.

[1] Mr. Walker phrased his Questions Presented as:

> 1. Was the defendant's right to receive effective assistance of counsel violated when his attorney failed to move for judgment of acquittal with particularity, even though the State produced no evidence from which a jury could infer, beyond a reasonable doubt, that the defendant acted with criminal intent?
> 2. Was the defendant's right to a public jury trial infringed when the trial court barred the public from the courtroom for the entire jury selection process?

The State rephrased those Questions Presented as:

> 1. Should this Court decline to consider Walker's claim of ineffective assistance of counsel on direct appeal, and did the evidence suffice to convict Walker in any event?
> 2. Did Walker fail to preserve a claim that the trial court violated his Sixth Amendment right to a public trial during voir dire, and did the court not violate that right in any event?

A. Mr. Walker's Ineffective Assistance Of Counsel Claim Fails Because He Was Not Prejudiced By Counsel's Failure To Move For Judgment Of Acquittal With Particularity.

Mr. Walker argues *first* that his trial attorney's decision to join Mr. Lee's motion for judgment of acquittal without providing a particularized argument amounted to ineffective assistance of counsel. He claims that he was prejudiced by this allegedly deficient performance because, had his attorney made a more specific argument, the court would have granted his motion. The State counters that this claim is better suited for a post-conviction court because we do not have a "developed post-conviction factual record." On the merits, the State claims that trial counsel was not deficient for choosing not to make a "futile argument," and that Mr. Walker was not prejudiced by counsel's decision. We hold that Mr. Walker's claim on this issue fails because trial counsel's failure to provide specific arguments in support of his motion for judgment of acquittal, regardless of whether that represented deficient performance, did not prejudice Mr. Walker.

All criminal defendants have the right to the assistance of counsel under the Sixth Amendment of the United States Constitution. U.S. Const. amend. VI. This guarantee requires not only that defendants have an attorney, but also that their attorney be *effective*. *See Strickland v. Washington*, 466 U.S. 668, 684–86 (1984) (explaining Sixth Amendment right to effective assistance of counsel); *see also McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) ("[T]he right to counsel is the right to the *effective* assistance of counsel." (emphasis added)). To succeed on a claim that trial counsel's performance was

constitutionally *ineffective*, a defendant (or in this case, appellant) must satisfy two elements:

> *First*, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Second*, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687 (emphasis added). If either element is not met, then "it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* Because both elements are required, a reviewing court need not address them in the order stated nor address both elements if the defendant/appellant has failed to satisfy one of the two. *Id.* at 697.

As we explained in *Testerman v. State*, 170 Md. App. 324 (2006), "generally a post-conviction proceeding is the 'most appropriate' way to raise a claim of ineffective assistance of counsel," because the trial record often will not "'illuminate the basis for the challenged acts or omissions of counsel.'" *Id.* at 335 (*first quoting Mosley v. State*, 378 Md. 548, 558–59 (2003), *then quoting In re Parris W.*, 363 Md. 717, 726 (2001)). We will address an ineffective assistance claim on direct appeal, however, when "'the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim . . . .'" *Id.* (*quoting In re Parris W.*, 363 Md. at 726).

Mr. Walker has met this threshold requirement. *First*, the critical facts in this case are undisputed: Mr. Walker's trial counsel did not move for judgment of acquittal with

particularity, and Mr. Walker doesn't challenge or dispute the evidence upon which his conviction rests; he merely disputes the *sufficiency* of that evidence. *Compare Mosley*, 378 Md. at 568–71 (Court refused to consider ineffective assistance of counsel claim that would involve a sufficiency analysis on direct appeal where defendant disputed whether air gun was a dangerous or deadly weapon, and record was insufficient to resolve that dispute).

Second, we have a fully developed record on which to base our review. The issue of whether the evidence was sufficient was "fully aired at trial," not only through the admission of evidence, but also through the court's responses to defense counsels' initial and renewed motions for judgment of acquittal. *Testerman*, 170 Md. App. at 336. Although the exhibits admitted at trial have since been destroyed or returned to Washington, D.C., the parties created an adequate record through the transcript alone to conduct this analysis. *Compare Mosley*, 378 Md. at 568–71 (unable to resolve dispute regarding air gun's characteristics because the air gun, which was admitted as exhibit during trial, was no longer available, and the remaining record was insufficient to resolve the dispute).

Ordinarily, we require more fact-finding on trial counsel's allegedly deficient performance to conduct a *Strickland* analysis. *See Johnson v. State*, 292 Md. 405, 434–35 (1982) (declining to review post-conviction claim on direct appeal because "the record shed[] no light on why counsel acted as he did," which would require court to second-guess counsel's actions without permitting counsel to explain their strategy), *disapproved on other grounds by Hoey v. State*, 311 Md. 473 (1988). We are comfortable with the record before us in this case and context, however, because (1) trial counsel has passed away and

would not be available for additional fact-finding in post-conviction court in any event, and (2) as we explain below, we need not reach the performance prong of *Strickland* to dispose of this issue because it can be resolved on the prejudice prong. We will, therefore, exercise our discretion to review Mr. Walker's ineffective assistance of counsel claim on direct appeal.

Mr. Walker claims the evidence was insufficient because the State did not prove that he used force or helped Mr. Lee use force (a required element of armed robbery). He argues further that the evidence is insufficient to support a conviction of theft—the lesser included offense—because the State presented no evidence from which a reasonable jury could infer Mr. Walker's intent to deprive Mr. Burke of his property. The State responds that a reasonable jury could infer from the facts that Mr. Walker was a principal actor in the robbery based on his interaction with Mr. Burke, his conversation on the phone, and Mr. Burke's report that there were two assailants. The State claims that the evidence also supports Mr. Walker's conviction based on the theory that he was an accomplice, even if the jury found that he didn't help to plan the robbery.

Mr. Walker has not established that he was prejudiced by counsel's failure to move for judgment of acquittal with particularity. In other words, he hasn't demonstrated that the evidence was insufficient and that, as a result, the court would have granted his motion. Therefore, we hold that the evidence is sufficient and that counsel's failure to make a more specific argument in support of Mr. Walker's motion for judgment of acquittal was not prejudicial.

The "'critical inquiry'" in a sufficiency analysis "'is whether, after viewing the evidence [and any reasonable inferences supported by the evidence] in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Smith v. State*, 415 Md. 174, 184, 185–86 (2010) (*quoting Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979)). In conducting this analysis, we acknowledge that the jury was in the best position to view the evidence and assess the witnesses' credibility. *Id.* at 185. We defer to the jury's reasonable inferences, *id.*, and their "'ability to choose among differing inferences . . . .'" *State v. Manion*, 442 Md. 419, 431 (2015) (*quoting State v. Smith*, 374 Md. 527, 534 (2003)). Our role simply is to "determine whether [those inferences] are supported by the evidence." *Smith*, 415 Md. at 185. This standard remains the same even though Mr. Walker's conviction rests on circumstantial evidence alone. *See id.* 185–86 (citations omitted). Although circumstantial evidence must produce more than a "'strong suspicion'" that the defendant committed the subject offense, *id.* at 185 (*quoting Bible v. State*, 411 Md. 138, 157 (2009)), "'generally, proof of guilt [beyond a reasonable doubt] based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eyewitness accounts.'" *Manion*, 442 Md. at 431–32 (*quoting Smith*, 374 Md. at 534). What matters is that the circumstantial evidence "'afford[s] the basis for an inference of guilt beyond a reasonable doubt.'" *Smith*, 415 Md. at 185 (*quoting Taylor v. State*, 346 Md. 452, 458 (1992)).

The jury in this case convicted Mr. Walker of armed robbery. To convict a defendant of armed robbery, the jury must find beyond a reasonable doubt that the defendant took and carried away "the personal property of another, from his presence or in his presence, by violence or putting in fear," *Snowden v. State*, 321 Md. 612, 617 (1991), with the intent to withhold that property:

> (i) permanently;
>
> (ii) for a period that results in the appropriation of a part of the property's value;
>
> (iii) with the purpose to restore it only on payment of a reward or other compensation; or
>
> (iv) to dispose of the property or use or deal with the property in a manner that makes it unlikely that the owner will recover it.

Md. Code (2002, 2021 Repl. Vol.), § 3-401(e)(2)(i)–(iv) of the Criminal Law Article ("CL"). The jury also must find that the defendant did so "with a dangerous weapon" or "by displaying a written instrument claiming" that they had a dangerous weapon. CL § 3-403(a)(1)–(2).

As the court instructed here, a jury could convict a defendant of armed robbery as an accomplice even if the jury finds that the defendant was not the principal actor. To prove accomplice liability, the State must produce evidence establishing that the defendant "'participate[d] in the commission of a crime knowingly, voluntarily, and with common criminal intent with the principal offender, or . . . in some way advocate[d] or encourage[d] the commission of the crime.'" *Silva v. State*, 422 Md. 17, 28 (2011) (*quoting State v. Raines*, 326 Md. 582, 597 (1992)). An alleged accomplice need not have committed every

element of a crime to be convicted of that offense. *See Garcia v. State*, 480 Md. 467, 487 (2022) (trial court stated law of accomplice liability accurately when, among its related instructions to the jury, it said "the defendant may be found guilty of [the charged crimes] as an accomplice, *even though the defendant did not personally commit the acts that constitute each one of those crimes*" (emphasis added)). Although presence alone does not establish guilt, when proven, it "'may be considered, along with all the surrounding circumstances in determining whether the defendant intended to aid a participant and communicated that willingness to a participant.'" *Id.* (approving of trial court's instructions on presence); *see also Coleman-Fuller v. State*, 192 Md. App. 577, 594 (2010) (When proven, presence is an "'important element in determination of the guilt of the accused.'" (*quoting Fleming v. State*, 373 Md. 426, 433 (2003))). And while flight from the scene of a crime alone does not establish guilt, a jury may consider such evidence when inferring an alleged accomplice's intent to assist a principal in the commission of a crime. *See State v. Coleman*, 423 Md. 666, 674 (2011) (citation omitted).

The evidence in this case was sufficient to convict Mr. Walker at least as an accomplice to the alleged armed robbery. As to the theft-related elements—*i.e.*, taking and carrying away another's property with the intent to deprive the owner of that property, *see Snowden*, 321 Md. at 617; CL § 3-401(e)(2)(i)–(iv)—the jury heard testimony from Mr. Burke that he allowed Mr. Walker, whom he recognized from high school, to use his phone twice that evening but that he did *not* give Mr. Walker permission to take the phone and not return it. He testified that just as he saw a couple walking their dog nearby, he heard

Mr. Walker say, "I don't know, there's two people outside." Mr. Lee pointed a gun at Mr. Burke and said, "you already know what time it is." Mr. Lee then hit Mr. Burke on the head with the gun, the gun "went off," and he turned the gun back towards Mr. Burke. Mr. Burke testified that he, Mr. Walker, and Mr. Lee all ran away. He also stated that he never got his phone back from Mr. Walker and that he had to purchase a new phone as a result. In court, Mr. Burke identified Messrs. Walker and Lee positively as the two assailants.

Other witness's testimonies aligned with Mr. Burke's. The State introduced a recording of Mr. Burke's 911 call in which Mr. Delarosa confirmed that the assailants ran off with Mr. Burke's iPhone 5. Ms. Mills testified as well that Messrs. Lee and Walker ran away in opposite directions after the gun went off. Detective White testified that she had a hard time contacting Mr. Burke initially "because his cell phone had been taken," and that she never was able to find Mr. Burke's cellphone.

Viewing this evidence in the light most favorable to the State, a reasonable jury could find that Mr. Walker took and carried away Mr. Burke's phone. Although Mr. Burke gave Mr. Walker permission to use his phone, he testified that he didn't permit Mr. Walker to take the phone indefinitely or to leave without returning it. The jury also could infer reasonably that Mr. Walker had the intent to deprive Mr. Burke of his property based on Mr. Walker's comment about the couple nearby (potentially as a warning to Mr. Lee). *See Caldwell v. State*, 26 Md. App. 94, 108 (1975) ("'[P]roof of wrongful intent is seldom direct, but is usually inferred from proven circumstances.' The 'proven circumstances' from which an accused's state of mind or intent can be inferred are his acts, conduct and

words." (*quoting Weaver v. State*, 226 Md. 431, 434 (1961))). Additionally, the fact that Detective White was unable to find the phone after that night also could lead a rational juror to conclude that Mr. Walker concealed or disposed of it, thus permanently depriving Mr. Burke of his property.

As to the force-related elements—*i.e.*, use of force or putting in fear and use of a dangerous weapon, *see Snowden*, 321 Md. at 617; CL § 3-403(a)—a reasonable jury could credit Mr. Burke's testimony about how and when he sustained his head injury (*i.e.*, that Mr. Lee hit him with the firearm during the alleged robbery). Ms. Mills's testimony tracked Mr. Burke's on these elements as well. She testified that she heard a loud bang, then saw Mr. Burke holding his head and running towards her and Mr. Delarosa. She said Mr. Burke was "visibly agitated" and kept repeating the phrases "call the cops," "they have a gun," and "I'm bleeding." Additionally, Officer Skiba testified about Mr. Burke's "distraught" demeanor that evening and said he called Fire Rescue to treat Mr. Burke's head wound. He testified further that he recovered an unfired cartridge from the scene of the crime, which in turn corroborated Mr. Burke's testimony that the gun "went off" when Mr. Lee hit him. Officer Wheeler testified about his encounter with Mr. Lee and the Ruger that he recovered from Mr. Lee's person, which matched Mr. Burke's description of the firearm used during the alleged robbery. Officer Wheeler's description of Mr. Lee's clothing aligned with Mr. Burke's description of the armed assailant on the night of the crime (*i.e.*, wearing a green jacket) as well. And the firearms examiner, Mr. Williford, testified that based on the similarities in markings between the recovered cartridge and four test cartridges, he could

neither include nor exclude the recovered cartridge as having been cycled through that Ruger.

A reasonable jury could infer from this evidence that the bullet came from the Ruger that Officer Wheeler found on Mr. Lee and that Mr. Lee used that firearm to injure Mr. Burke during the alleged robbery. Although this evidence does not point to Mr. Walker as the aggressor, a reasonable jury could have found Mr. Walker guilty as an accomplice based on his participation in the robbery, specifically by taking Mr. Burke's phone. As the court instructed (correctly), "[e]ach defendant may be guilty of armed robbery as an accomplice even though the defendant did not personally commit all of the acts that constitute the crime." *See Garcia*, 480 Md. at 487. In fact, the verdict sheet in this case allowed the jury, if they found Mr. Walker not guilty of armed robbery or conspiracy to commit armed robbery, to convict him of the lesser included offense of theft but not the lesser included offense of assault. Simultaneously, the verdict sheet allowed the jury, if they found Mr. Lee not guilty of armed robbery or conspiracy to commit armed robbery, to convict him of the lesser included offense of assault, but not the lesser included offense of theft. The State operated under the theory that Mr. Lee committed the assault portion of the robbery and Mr. Walker committed the theft portion. *See Snowden*, 321 Md. at 618 (defining robbery as "'a *larceny* from the person accomplished by either an *assault* (putting in fear) or a *battery* (violence)." (emphasis added)). Based on the evidence, a reasonable jury could agree with this theory and conclude that together their acts constituted an armed robbery. The evidence, then, was sufficient to convict Mr. Walker as an accomplice to

armed robbery. And because trial counsel's failure to make a more particularized argument for Mr. Walker's motion for judgment of acquittal did not prejudice Mr. Walker, his ineffective assistance of counsel claim fails.

B. The Court Violated Mr. Walker's Right To A Public Trial When It Closed The Courtroom During The Entire Jury Selection Process Because The Closure Was Not *De Minimis,* And It Was Not Tailored To Serve An Overriding Interest.

Next, Mr. Walker argues that the court violated his right to a public trial when it closed the courtroom to the public during the entire jury selection process (*i.e.*, *voir dire*, jury selection, and the swearing of the jury). He claims the closure was not *de minimis* and, therefore, implicated his Sixth Amendment right to a public trial. He argues further that the closure fails the "overriding interest" test established in *Waller v. Georgia*, 467 U.S. 39 (1984), such that it violated his right to a public trial. The State argues in response that Mr. Walker failed to preserve this claim for appellate review. Alternatively, the State argues that even if the closure wasn't *de minimis*, the court's order satisfies the *Waller* test. We hold *first* that Mr. Walker preserved this claim, *second* that the closure here was not *de minimis*, and *third* that the closure didn't satisfy the requirements under *Waller* and, as a result, violated Mr. Walker's right to a public trial.

First, a little more procedural history. At the start of the first day of trial, the court closed the courtroom to all spectators until the end of jury selection due to space constraints:

> Preliminarily, when we go to pick the jurors, you want 60 jurors. We're going to need all the seats here, so, spectators are

> going to have to wait outside until we have the jury picked. As soon as we have the jury picked, they can return.

Mr. Lee's attorney expressed disagreement with this order, citing the public's right to be present and Mr. Lee's right to a public trial, and suggested an alternative course of action:

> Your Honor, I spoke with the three people who are here in support of Mr. Lee, they want to sit through jury selection. So consistent with the public's right to be present, Mr. Lee's present right to an open and public trial, I'd ask the court to accommodate them, perhaps by bringing in three more seats so that they can be present for this.

The court declined the attorney's suggestion to bring in more seats because having so many people in the courtroom would be "unwieldy." And, importantly, the court said that "having to wait outside for the voir dire of the jury [does not] interfere[] with the public's right of access to trial." The court reiterated its closure order and said the spectators could reenter the courtroom after the jury was sworn in.

Mr. Walker's attorney then adopted Mr. Lee's arguments and added a second alternative to closing the courtroom:

> Your Honor, *I would echo that*, but I would also suggest that since there's two sets of doors, that the doors to the courtroom could be propped open and chairs could be provided in the vestibule of the courtroom, so that people could still observe.

(Emphasis added). The court rejected this suggestion as well, stating that noise from the hallway would disrupt the proceedings. The parties had no further discussion on the matter.

1. Mr. Walker preserved this issue by adopting Mr. Lee's arguments against the closure.

The State argues that Mr. Walker's mere "echoing" of Mr. Lee's arguments was insufficient and that Messrs. Lee's and Walker's failure to further object to the court's

ruling after it rejected their suggestions for accommodations denied the court an opportunity to "pass on the propriety of the exclusion." According to the State, Mr. Walker's "inaction" has left us with an inadequate record. We disagree.

Generally, non-jurisdictional issues must be "raised in or decided by the trial court" to be eligible for appellate review. Md. Rule 8-131(a). To preserve a claim for appeal, then, counsel must "'bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings.'" *Robinson v. State*, 410 Md. 91, 103 (2009) (*quoting State v. Bell*, 334 Md. 178, 189 (1994)). Trial counsel, however, need not use the "magic words 'I object'" to preserve a claim. *Scott v. State*, 289 Md. 647, 654 (1981); *see also* Lynn McLain, *Maryland Evidence, State & Federal* § 103.8 at n.2, Westlaw (database updated Aug. 2024) ("The words 'I object' are not necessary; it is enough that counsel indicate the protest of a particular thing."). Under Maryland Rule 4-323, which governs objections at trial, "it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court." Md. Rule 4-323(c).

The State relies on *Robinson v. State*, 410 Md. 91 (2009), to assert that Mr. Walker failed to preserve this claim. In *Robinson*, the trial court learned that a member of Mr. Robinson's family approached a witness and told them to lie on the stand. *Id.* at 96–97. After speaking with the parties and the family member, the court ordered the present spectators (Mr. Robinson's family and at least two others) to leave the courtroom. *Id.* at

96–100. Mr. Robinson didn't object or otherwise express his disagreement with that order, and neither the parties nor the court spoke on the matter for the remainder of the trial. *Id.* at 100. On appeal, our Supreme Court declined to reach the merits of Mr. Robinson's claim against the closure order because, notwithstanding the fundamental right at stake, he didn't object to the court's order, and the Court decided that it wasn't an appropriate case to exercise its discretion to review an unpreserved claim. *Id.* at 104–11.

Robinson was a different case. Unlike *Robinson*, where the defendant said *nothing* in response to or against the court's closure order, *id.* at 100, Mr. Walker joined Mr. Lee's argument challenging the closure order here and suggested a second alternative to a total closure. Although Mr. Lee didn't use the "magic words 'I object'" when he brought up the public's right to attend and Mr. Lee's right to a public trial, *Scott*, 289 Md. at 654, his statements challenged and expressed disagreement with the court's decision. The court understood them as such because the court thought it necessary to reject Mr. Lee's suggested alternative and explain that "merely having to wait outside for the voir dire of the jury [would not] interfere[] with the public's right of access to a trial."

Likewise, although Mr. Walker didn't say "I object" or assert his own separate challenge, his statement "I would echo that" equated to Mr. Walker "joining" in Mr. Lee's objection. *See Williams v. State*, 216 Md. App. 235, 254 (2014) (a co-defendant can preserve claim for appeal by expressly joining another co-defendant's objection). The State points out that Mr. Walker didn't explain what "that" was when his attorney said, "I would echo that." In the context of the conversation, however, Mr. Walker obviously was

referring to Mr. Lee's argument against the closure order. And, again, the court understood Mr. Walker's statements as an objection because it responded not only to reject his suggested alternative but also to reiterate that having spectators wait outside during jury selection would not "infringe[] significantly upon anybody's right."

The State also contends that Mr. Walker failed to produce an adequate record for our Court to conduct either a *de minimis* or a *Waller* analysis, turning again to *Robinson*. Again, the Court held in that case that because Mr. Robinson failed to object to the trial court's closure order, the record was insufficient for the Court to conduct a meaningful review. *Robinson*, 410 Md. at 105–06, 111. That conclusion stemmed from the complete lack of an objection at the trial level; the trial court never had the chance to make the kinds of findings necessary for a *de minimis* or *Waller* analysis because the parties didn't challenge the court's ruling. *Id.* at 105–06. Conversely, in this case, both Messrs. Lee and Walker challenged the court's closure order, and the court responded with reasons why it was closing the courtroom and why it was rejecting the suggested alternatives. We conclude that Mr. Walker preserved this issue.

2. The courtroom closure was not de minimis.

We turn now to the merits of Mr. Walker's claim, starting *first* with his argument that the closure here was not *de minimis*. He argues that all three factors of the *de minimis* analysis—the length of the closure, the significance of the proceedings during the closure, and the scope of the closure—weigh against a determination that this was a *de minimis* closure. The State concedes that this case aligns with *Campbell v. State*, 240 Md. App. 428

(2019), a case in which this Court held that the subject closure was not *de minimis*, *id.* at 458, but argues nevertheless that Mr. Walker failed to satisfy a "crucial piece to the de minimis puzzle" because he "did not assert the right on behalf of any 'supporters' in the same way that [Mr.] Lee did."

We conclude *first* that Mr. Walker didn't have to present specific supporters to assert his right to a public trial. *Second*, we hold that the closure here was not *de minimis* and that it implicated Mr. Walker's Sixth Amendment right to a public trial.

a. Mr. Walker need not have supporters in the courtroom to assert his right to a public trial.

The Sixth Amendment of the United States Constitution guarantees all criminal defendants the right to a public trial. U.S. Const. amend. VI. Separately, the First Amendment provides *the public* with the right to *attend* trials. U.S. Const. amend. I; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) ("[T]he First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees [written in the First Amendment]."). These rights help to ensure fairness in court proceedings, strengthen the public's confidence in our judicial system, and protect defendants against abuses of judicial and prosecutorial power. *See, e.g.*, *In re Oliver*, 333 U.S. 257, 270 (1948) ("[T]he guarantee [to a public trial] has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."); *Press-Enterprise Co. v. Superior Ct. of Cal., Riverside Cnty.*, 464 U.S. 501, 508

(1984) ("Openness . . . enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."); *Waller*, 467 U.S. at 46 ("In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury.").

The First Amendment guarantees *everyone* the right to attend trials, not just those who support the defendant. *Richmond Newspapers, Inc.*, 448 U.S. at 575. Similarly, the Sixth Amendment's "requirement of a public trial is satisfied by the opportunity of *members of the public and the press* to attend the trial and to report what they have observed." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 610 (1978) (emphasis added). Neither right is person-specific—they apply to the public at large. Contrary to the State's position, Mr. Walker did not have to identify specific supporters in the courtroom at the time of the court's closure order to assert his right to a public trial.

b. The significance of the of the proceedings during the closure and the scope of the closure weigh against a conclusion that the closure was *de minimis*.

In service to the guarantees in the First and Sixth Amendments, criminal trials are "open to the public as a matter of course . . . ." *Robinson*, 410 Md. at 102. But those guarantees aren't absolute, and in some cases, other interests may justify a partial or total closure of the courtroom. *See, e.g.*, *Walker v. State*, 125 Md. App. 48, 69 (1999) (court need not "forfeit its legitimate and substantial interest in maintaining security and order in the courtroom" and may close the courtroom to "maintain order, to preserve the dignity of the court, and to meet the State's interests in safeguarding witnesses and protecting

confidentiality"); *Waller*, 467 U.S. at 45 ("[T]he right to an open trial may give way . . . [to] the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information."). Even so, closing a courtroom is the exception rather than the norm, and "the balance of interests must be struck with special care." *Waller*, 467 U.S. at 45; *see also Robinson*, 410 Md. at 102 ("[A]ny closure of the courtroom for even part of the trial and only affecting some of the public must be done with great caution.").

A violation of a defendant's right to a public trial is considered a "structural error" and the defendant need not prove prejudice to obtain relief. *Campbell*, 240 Md. App. at 441 ("Because a public trial is a constitutional guarantee that is essential to the 'framework of any criminal trial[,]' the Supreme Court has deemed a violation of this right to be a structural error that requires 'automatic reversal' when properly preserved and raised on direct appeal." (*quoting Weaver v. Massachusetts*, 582 U.S. 286, 295–99 (2017))). As a result, the deprivation of a defendant's right to a public trial cannot be harmless. *Watters v. State*, 328 Md. 38, 48 (1992). In some cases, however, a courtroom closure can be "*de minimis*," or "'too trivial' to constitute a violation of the Sixth Amendment right to a public trial." *Campbell*, 240 Md. App. at 442 (*quoting Gibbons v. Savage*, 555 F.3d 112, 121 (2d Cir. 2009)). *De minimis* closures are "undeserving of constitutional protection," and therefore do not "carry[] with [them] a presumption of prejudice to the defendant." *Watters*, 328 Md. at 46.

To determine whether a courtroom closure was *de minimis*, we consider three factors: (1) "the length of the closure"; (2) "the significance of the proceedings that took

place while the courtroom was closed"; and (3) "the scope of the closure, *i.e.*, whether it was a total or partial closure." *Kelly v. State*, 195 Md. App. 403, 421–22 (2010). In *Watters*, for example, the Court held that a bailiff's unilateral decision to close the courtroom to the press, the public, and the appellant's family during the first morning of jury selection was not *de minimis* because the closure spanned an entire morning of trial, the public missed *voir dire* and the selection and swearing in of the jury, and the bailiff excluded the public even though some seating was available. 328 Md. at 42, 49. Similarly, in *Campbell*, we held that the closure was not *de minimis* where, on the State's motion, the court excluded the appellant's family from the courtroom for three to three-and-a-half hours for a portion of *voir dire* and for the selection and swearing in of the jury. 240 Md. App. at 449, 457–58.

In *Kelly*, on the other hand, we distinguished *Watters* and held that a closure during part of *voir dire* qualified as *de minimis*. 195 Md. App. at 427. There, a courtroom sheriff excluded the appellant's family from the courtroom during part of *voir dire* because there wasn't enough seating for the prospective jurors. *Id.* at 415. Defense counsel learned about the closure during the lunch recess and moved for a mistrial. *Id.* at 413–14. In denying the mistrial, the court explained that the sheriff excluded spectators due to space limitations—"a couple of jurors . . . were standing throughout [*voir dire*]," and the court "had no place for anybody else in the courtroom." *Id.* at 415. The court also noted that the closure lasted only a few hours in the morning and that the family was not excluded during the afternoon session (although the record was unclear as to whether the family realized they could attend

in the afternoon). *Id.* at 416. Furthermore, unlike in *Watters*, where the public missed the entire *voir dire*, selection, and swearing-in process, the individuals excluded from the courtroom in *Kelly* missed only a portion of *voir dire*, much of which "involved questioning of individual jurors at the bench, a procedure that typically cannot be heard by spectators in the courtroom." *Id.* at 426. Finally, the closure was partial—limited to the appellant's family, according to the record—unlike the total closure of the courtroom in *Watters*. *Id.* at 428.

Kelly and *Campbell* inform our analyses of the *first* and *second* factors. *Kelly* involved a two- to three-hour closure during *voir dire*, 195 Md. App. at 427, whereas *Campbell* involved a three- to three-and-a-half-hour closure during part of *voir dire*, all of jury selection, and the swearing-in of the jury. 240 Md. App. at 449, 457–58. We concluded in *Kelly* that two to three hours was "not extensive, but . . . clearly is not inconsequential, and it [fell] within the time frame in which courts have reached conflicting results" on this factor (*i.e.*, greater than one hour, but less than one day). 195 Md. App. at 427. In *Campbell*, however, we distinguished *Kelly*—particularly how the closure in *Campbell* spanned *voir dire*, jury selection, and the swearing in of the jury whereas the closure in *Kelly* only covered *voir dire*—and held that "[a] closure of *at least* three hours" during such significant proceedings weighed against concluding that the closure was *de minimis*. 240 Md. App. at 449.

The length of the closure here was more like that in *Campbell* than in *Kelly*. On the first day of trial, before addressing any other matters, the court announced that it was

closing the courtroom to all spectators during the jury selection phase of the trial. The court allowed spectators to remain in the courtroom while it handled preliminary matters (*i.e.*, proposed changes to the *voir dire* questions, a motion *in limine*, and argument about the State's expert witness). But once the prospective jurors arrived, the court dismissed the spectators. The record doesn't indicate exactly what time jury selection began that morning; according to the Maryland online case search system, however, the proceedings were scheduled to begin at 9:30 a.m.[2] We know from the transcript that the court finished swearing and instructing the jury at approximately 12:45 p.m., then called a lunch recess. The entire jury selection process spanned roughly 108 pages of the first day's transcript. Other than the closure order and preliminary matters, which together spanned just twenty-six pages of the transcript, the court did not handle any other matters before the lunch recess. So although we don't know the exact length of time the court spent on jury selection, we know that it consumed the bulk of the court's pre-lunch proceedings. Assuming the proceedings began on time, then, jury selection spanned the majority of a five-hour morning session.

Although this length of time "falls within the timeframe in which courts have reached conflicting results," *Kelly*, 195 Md. App. at 427, the factual distinctions between this case and *Kelly*, particularly as they relate to the second factor (*i.e.*, the significance of

[2] *See Maryland Judiciary Case Search*, https://casesearch.courts.state.md.us/casesearch/ (last visited April 11, 2025) (website providing public access to Maryland Judiciary records, searchable using circuit court case number).

the proceedings), weigh against a *de minimis* determination. *See Campbell*, 240 Md. App. at 449 (fact that closure spanned jury selection and swearing in, not just *voir dire*, was "most significant fact" distinguishing *Campbell* from *Kelly*).

The significance of the proceedings here weighs against a *de minimis* conclusion as well. Like in *Watters*, the court here excluded the public during all of *voir dire*, jury selection, and the swearing in of the jury. 328 Md. at 49; *see also Campbell*, 240 Md. App. at 457–58 (exclusion during part of *voir dire* and all of selection and swearing in weighed against *de minimis* conclusion). These proceedings were significant because the selection and swearing in of the jury are two "vital proceedings in our judicial system." *Campbell*, 240 Md. App. at 457. As the Supreme Court of the United States explained in *Press-Enterprise Co.*, "[t]he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." 464 U.S. at 505.

Moreover, unlike a typical *voir dire* process in which prospective jurors expand on their answers in private rather than in open court, *see, e.g.*, *Kelly*, 195 Md. App. at 428 (spectators excluded during *voir dire* wouldn't have heard much of what occurred because the court questioned jurors at the bench); *Gibbons*, 555 F.3d at 121 (spectators excluded from *voir dire* missed "'nothing of significance'" because court interviewed jurors in adjacent room), the judge in this case chose to conduct most of the *voir dire* process, including additional questioning, in open court unless a prospective juror asked to speak more privately at the bench. Had the spectators in this case attended *voir* dire, jury selection, and the swearing-in, they would have heard nearly everything. As in *Watters* and

Campbell, the significance of the proceedings during the closure in this case weighs against a *de minimis* finding. *See Watters*, 328 Md. at 49; *Campbell*, 240 Md. App. at 457.

The *third* and final factor concerns the scope of the closure—whether the court excluded everyone or specific individuals from the courtroom. *Kelly*, 195 Md. App. at 422. The record in this case indicates that the court excluded the entire public, not specific spectators, from the courtroom throughout all of jury selection. The court said it needed *all* the seats in the courtroom, including those in the jury box, and that "spectators [were] going to have to wait outside" until the jury was sworn. This case is distinguishable from *Kelly*, in which the courtroom sheriff asked the appellant's father and everyone that had been sitting in the courtroom to leave because "'there [wasn't] enough room for *their family* to sit in [the courtroom] while [they] picked jurors.'" *Id.* at 428 n.13. We noted there that "[t]he court stated, without contradiction, that no press was present in the court and the 'public was not excluded in general.'" *Id.* These facts supported our conclusion that the closure was partial. *Id.* at 428–29. In this case, and although Mr. Lee mentioned that three of his family members were in the courtroom, nothing in the record indicates that they were the *only* members of the public in attendance. And again, nothing in the record suggests that the court limited its ruling to certain individuals or that its ruling did not apply to the public in general. In fact, the court referenced "the *public's* right of access to a trial" when explaining its decision to close the courtroom. (Emphasis added). This closure, then, was a complete closure that weighs against finding the closure *de minimis*.

In light of the length and scope of the closure and the significance of the jury selection process to the fairness of the trial, we hold that the closure here was not *de minimis* and that it implicated Mr. Walker's Sixth Amendment right to a public trial.

3. The courtroom closure violated Mr. Walker's right to a public trial.

Finally, Mr. Walker contends that the closure in this case did not satisfy the *Waller* test, and thus deprived him of a fair trial, because space constraints are not an overriding interest, the closure was too broad, the court didn't consider all reasonable alternatives, and the court's findings in support of the closure were insufficient and legally incorrect. The State responds that the court complied with the overriding interest test when it closed the courtroom temporarily due to space limitations, considered defense counsel's suggested alternatives, and made adequate findings to support the closure. We hold that the closure here, which was grounded in the circuit court's belief that the Sixth Amendment doesn't apply to the jury selection process, didn't comply with *Waller*.

Courtroom closures that are not "'too trivial' to constitute a violation of the Sixth Amendment right to a public trial," *Campbell*, 240 Md. App. at 442 (*quoting Gibbons*, 555 F.3d at 121), must satisfy the four elements of the *Waller* overriding interest test to pass constitutional muster: *first*, "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced"; *second*, "the closure must be no broader than necessary to protect that interest"; *third*, "the trial court must consider reasonable alternatives to closing the proceeding"; and *fourth*, the court "must make findings adequate to support the closure." *Waller*, 467 U.S. at 48.

The Supreme Court of the United States reviewed a similar case in *Presley v. Georgia*, 558 U.S. 209 (2010). There, the trial court ordered Mr. Presley's uncle—the only spectator in the courtroom at the time—to leave the courtroom (and that floor of the building, entirely) until the end of *voir dire*. *Id.* at 210. Mr. Presley's attorney objected, but the court, pointing to a lack of space in the courtroom and the risk of the uncle intermingling with the potential jurors, refused to alter its closure order. *Id.* At the end of his trial, Mr. Presley moved for a new trial due to the closure. *Id.* at 210–11. Although Mr. Presley introduced evidence that there would've been room for spectators had the court utilized the fourteen seats in the jury box, the court denied the motion and said "it's up to the individual judge to decide" how to arrange the courtroom during *voir dire*. *Id.* at 211. Both the intermediate and highest state appellate courts affirmed Mr. Presley's convictions. *Id.*

The Supreme Court reversed. *Id.* at 216. The Court held first that an accused's Sixth Amendment right to a public trial extends to the jury selection phase of trial, including *voir dire*. *Id.* 213. The Court then held that the closure failed the *Waller* test because the trial court didn't consider any alternatives to closing the courtroom. *Id.* at 216. The trial court had rejected Mr. Presley's request for "some accommodation," but did not explain why other options were unavailable. *Id.* at 210. As the Supreme Court explained, "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials," *id.* at 215, and they must consider reasonable alternatives even if the parties do not make any suggestions. *Id.* at 214. The trial court failed to do so in *Presley* and, therefore, violated Mr. Presley's constitutional rights. *Id.* at 215.

Although the Court resolved the matter based on the trial court's failure to consider alternatives, the Court also found merit in Mr. Presley's second argument that the trial court failed to identify an overriding interest other than its concerns about space and the risk of mingling among the public and prospective jurors. *Id.* at 215. The Court noted that although it may be appropriate in some cases to close the courtroom during jury selection because of "threats of improper communications with jurors or safety concerns," the trial court must make specific findings to substantiate those threats. *Presley*, 558 U.S. at 215 (citation omitted). And absent such findings, a court's "broad concerns" about space limitations or the risk of jurors overhearing prejudicial remarks are insufficient grounds to close the courtroom to the public:

> The generic risk of jurors overhearing prejudicial remarks, unsubstantiated by any specific threat or incident, is inherent whenever members of the public are present during the selection of jurors. If broad concerns of this sort were sufficient to override a defendant's constitutional right to a public trial, a court could exclude the public from jury selection almost as a matter of course. . . . [Such reasoning would] "permit[] the closure of voir dire in *every criminal case* conducted in this courtroom whenever the trial judge decides, for whatever reason, that he or she would prefer to fill the courtroom with potential jurors rather than spectators."

Id. (*quoting Presley v. State*, 674 S.E.2d 909, 913 (Ga. 2009) (Sears, C.J., dissenting), *rev'd*, 558 U.S. 209 (2010)).

We reach the same conclusion here. As to the *first* element, the existence of an overriding interest, the court here, like the trial court in *Presley*, 558 U.S. at 210, excluded the public from the entire jury selection process, ostensibly due to insufficient space in the

courtroom—a decision based at least in part on the court's belief that the public wasn't entitled to view jury selection in any event. The court cited concerns that the process would become "unwieldy," that it would have trouble hearing with the prospective jurors speaking among themselves and noise coming in from the hallway (if the courtroom doors remained open), and that prospective jurors sitting in the jury box may overhear bench conferences during *voir dire*. Apart from these general concerns, the last of which existed even without accommodations for the public, the court made no findings of fact to substantiate its concerns despite the opportunity to do so in its responses to defense counsels' objections. Therefore, the court did not present an overriding interest that is likely to be prejudiced.

As to the *second* element, the scope of the closure, the court excluded the public from the courtroom during all of *voir dire*, jury selection, and the swearing in of the jury. As we discussed above, the *Watters* court (through the bailiff's unilateral action) implemented the same type of closure in response to limited space. 328 Md. at 42. Our Supreme Court held that the closure violated Mr. Watters's right to a public trial in part because the closure order was too broad:

> [E]ven if the State could show that under the circumstances then prevailing the government had a legitimate interest in preventing overcrowding, it could not show that the exclusion of all persons was a narrowly tailored means of protecting that interest. There was no effort to ensure that [Mr. Watters's] family could be present while the jury was selected, nor was there apparently any effort to admit representatives of the press. There was not even an attempt to fill the remaining seats impartially. Rather, after the venirepersons and witnesses had taken their places, the empty seats were left vacant, notwithstanding the early arrival of [Mr. Watters's] family members and their request for admission. The closure of the

> courtroom under these circumstances violated [Mr. Watters's] Sixth Amendment right to a public trial.

Id. at 45. Although there were a few seats available in the courtroom after the prospective jurors arrived in *Watters*, unlike in this case, the conclusion here remains the same. The court in this case closed the courtroom during *voir dire*, jury selection, and the swearing of the jury. The basis for the court's concerns regarding spatial limitations, however, would have diminished over time as the court excused prospective jurors throughout the selection process. *See id.* The court did not, however, allow spectators to fill in any open seats as they became vacant. Thus, the exclusion order was too broad in light of the court's stated concerns.

As to the *third* element, the court's consideration of reasonable alternatives, the court considered defense counsel's two suggestions—to bring more seats into the courtroom or open the doors for the public to observe from the hallway. But the court didn't consider any other options or explain why other alternatives such as "reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members" were not feasible. *Presley*, 558 U.S. at 215. It was incumbent upon the court to "take every reasonable measure to accommodate public attendance at" Mr. Walker's trial, and it didn't do so here. *Id.*

Finally, as to the *fourth* element, the court's findings in support of the closure, the court's factual findings here were limited to the broad, conclusory concerns that allowing spectators to attend the jury selection process would make the process unmanageable. The

court believed bringing more chairs into the courtroom was "just not practical" and that propping the doors open would lead to too much noise leaking in from the hallways. The court did not, however, make findings to support these conclusions, such as whether there was space in the courtroom for additional chairs or whether the hallway was particularly crowded or noisy that morning. Again, courts must make specific findings to substantiate their general concerns regarding space or improper communication between jurors and the public. *See Presley*, 558 U.S. at 215–16 (citation omitted).

In addition to the lack of specific factual findings, the court's legal conclusions were incorrect. Twice the court opined that excluding the public from the jury selection process would not infringe anyone's rights. As we've explained, though, both the public's First Amendment right to attend trials and Mr. Walker's Sixth Amendment right to a public trial extend to the jury selection process, including *voir dire*. *See Press-Enterprise Co.*, 464 U.S. at 508–9 n.8 (First Amendment); *Presley*, 558 U.S. at 213 (Sixth Amendment). The court's erroneous baseline legal conclusion undermined its closure order. With none of the *Waller* elements satisfied, we hold that the court's closure order violated Mr. Walker's constitutional right to a public trial. Because this was a structural error, we reverse the conviction and remand for further proceedings consistent with this opinion.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED AND CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. MONTGOMERY COUNTY TO PAY COSTS.