Circuit Court for Baltimore City
Case No. 120301025

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1646

September Term, 2022

DOMINICK SCARBORO

v.

STATE OF MARYLAND

Wells, C.J.
Zic,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, C.J.

Filed: December 7, 2023

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

A jury in the Circuit Court for Baltimore City convicted Dominick Scarboro, appellant, of two counts of first-degree assault, one count of second-degree assault, and one count of use of a firearm in the commission of a crime of violence. The court sentenced Scarboro to a total term of twenty years' imprisonment, with all but eleven years suspended.

In this appeal, Scarboro presents four questions, which we have rephrased as:[1]

1. Did the trial court violate Scarboro's right to a public trial by preventing his mother from entering the courtroom during *voir dire*?

2. Did the trial court err in admitting testimony indicating that Scarboro talked to the police and was informed of his *Miranda* rights following his arrest?

3. Did the trial court err in admitting testimony that the police obtained an arrest warrant for Scarboro?

4. Did the trial court err in admitting a recording of a 911 call?

For reasons to follow, we hold that the trial court violated Scarboro's right to a public trial by preventing his mother from entering the courtroom during *voir dire*. We

[1] Scarboro phrased the questions as:

1. Did the trial court err in denying Mr. Scarboro a public trial?

2. Did the trial court err in admitting testimony that after Mr. Scarboro was arrested Detective Green talked to Mr. Scarboro and mirandized him?

3. Did the trial court err in admitting testimony that the police had obtained an arrest warrant for Mr. Scarboro?

4. Did the trial court err in admitting the recording of the 911 call?

therefore reverse the court's judgments and remand the case for a new trial. Because we reverse, we need not address Scarboro's other questions.

BACKGROUND

Scarboro was arrested and charged following a shooting at his girlfriend's home in Baltimore. At trial, Scarboro's girlfriend, Shavontae Spence, testified that, on September 10, 2020, she went go-kart riding with Scarboro and several other individuals. Afterward, Scarboro and Spence went to Spence's home, where she lived with her mother and stepfather, both of whom were home at the time. Upon arriving at Spence's home, Scarboro went to Spence's room and retrieved a gun from underneath her bed. Spence, who was unaware of the presence of the gun, asked Scarboro to leave. Scarboro eventually complied. A short time later, Scarboro returned to the home and began banging on the home's front door, which was closed. Spence's stepfather went to the front door to investigate, and, after Scarboro tried to force his way inside, a fight ensued. Spence's mother then ran to the front door and broke up the fight, and Spence's stepfather managed to push Scarboro out of the house and close the front door. At that point, Scarboro pulled out a gun and fired several shots at the home's closed front door. The bullets pierced the door, striking and wounding (non-fatally) Spence's mother and stepfather. Spence called 911, and, after the police arrived, Spence identified Scarboro as the person who shot her mother and stepfather.

Spence's mother, Leatrice Johnson, also testified, providing a similar account of what transpired at her home on the day of the shooting. Johnson identified Scarboro as the person who had shot her.

The jury ultimately convicted Scarboro of two counts of first-degree assault, one count of second-degree assault, and one count of use of a firearm in the commission of a crime of violence. This timely appeal followed. Additional facts will be supplied as needed below.

DISCUSSION

I.

Scarboro's first claim of error concerns an issue that arose on the first day of trial during jury selection. By way of background, the first day of trial began at approximately 9:15 a.m. At approximately 9:45 a.m., the venire panel began entering the courtroom. As the prospective jurors were filing in, the court stated that there would be "ninety people in here," and the court asked the venirepersons to "make room" and "be prepared to get a little bit closer." After the entire venire was in the courtroom, the court proceeded with roll call and then informed the venirepersons that jury selection would consist of three phases. During the first phase, the entire venire would be asked a series of questions, and the court would make note of how each juror responded. During the second phase, any venireperson who responded in the affirmative to any of the court's questions would be asked to approach the bench, where the venireperson would be questioned individually. Finally, during the third phase, the parties would be given the opportunity to exercise their peremptory challenges and excuse a prospective juror for a nondiscriminatory reason.

At the conclusion of the first phase of jury selection, at approximately 10:45 a.m., the court held a bench conference, at which the following colloquy ensued:

[DEFENSE]: The Court's guidance, my client's mother is out in the hallway, she'd like to come in.

THE COURT: We can't do that during jury selection.

[DEFENSE]: Okay. All I could do was ask.

THE COURT: Yup. Okay. Sorry, sir, that's just—you see we've got a full room and everything, so.

[SCARBORO]: I understand.

The court then continued with the final two phases of *voir dire*, excusing the venire for lunch at 12:14 p.m. and bringing the venire back at 1:44 p.m. A jury panel was ultimately selected, and the jurors were excused for the day at 3:17 p.m. The following morning, the jurors returned to court and were sworn in.

Parties' contentions

Scarboro contends that the trial court erred in refusing to allow his mother to enter the courtroom during jury selection. Scarboro argues that the court's actions violated his constitutional right to a public trial.

The State contends that the closure was "*de minimus*" and therefore did not trigger Scarboro's constitutional right to a public trial. The State contends further that, even if the court's actions implicated Scarboro's right to a public trial, the circumstances of the closure do not support Scarboro's claim that his right to a public trial was violated.

Relevant Law

A defendant's right to a public trial is guaranteed by the Sixth Amendment to the United States Constitution. *Kelly v. State*, 195 Md. App. 403, 417 (2010). A public trial

permits the public to observe the judicial process, thereby ensuring that the judge and prosecution act responsibly and providing an effective restraint on the abuse of judicial power. *Id.* A public trial also encourages witnesses to testify and discourages perjury. *Id.* "Consequently, criminal trials are to be open to the public as a matter of course, and any closure of the courtroom for even part of the trial and only affecting some of the public must be done with great caution." *Robinson v. State*, 410 Md. 91, 102 (2009). Moreover, "[b]ecause 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." *Campbell v. State*, 240 Md. App. 428, 441 (2019) (quoting *Weaver v. Massachusetts*, 582 U.S. 286, 293-94 (2017)). The right to a public trial extends to the *voir dire* process. *Kelly*, 195 Md. App. at 418.

That said, not every closure of a courtroom to the public implicates a defendant's constitutional right to a public trial, as some violations "could be 'classified as *de minimus* and undeserving of constitutional protection.'" *Id.* at 420–21 (quoting *Watters v. State*, 328 Md. 38, 46 (1992)). In determining whether a courtroom closure is *de minimus*, courts look to various factors, including "the length of the closure, the significance of the proceedings that took place while the courtroom was closed, and the scope of the closure, *i.e.*, whether it was a total or partial closure." *Id.* at 421–22.

Even when a closure implicates a defendant's constitutional right to a public trial, that right is not absolute. *Campbell*, 240 Md. App. at 441. "'In some circumstances, the

trial court can close the courtroom in order to maintain order, to preserve the dignity of the court, and to meet the State's interests in safeguarding witnesses and protecting confidentiality.'" *Kelly*, 195 Md. App. at 417 (quoting *Markham v. State*, 189 Md. App. 140, 152 (2009)). The United States Supreme Court has identified four factors that a court must consider before closing a courtroom to the public:

> (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 v. Georgia, 467 U.S. 39, 48 (1984).

Our courts have considered the closure of a courtroom during *voir dire*, and its impact on a defendant's right to a public trial, under a variety of circumstances. In *Watters v. State*, *supra*, the Supreme Court of Maryland held that the defendant's right to a public trial had been violated after a deputy sheriff, citing an overcrowded courtroom, prevented the public, including the press and the defendant's family, from entering the courtroom during an entire morning of trial that included *voir dire* and jury selection. *Watters*, 328 Md. at 42, 50. The Court explained that the State's justification for the closure—overcrowding—was not, under the circumstances, compelling enough to justify a total closure, given that the record showed that there were at least some seats available in the courtroom. *Id.* at 45. The Court explained further that, even if the State's interest in closing the courtroom was legitimate, the State failed to establish that the closure was "narrowly tailored," as there was "no effort to ensure that [the defendant's] family could be present

while the jury was selected, nor was there apparently any effort to admit representatives of the press." *Id.* In addition, the Court concluded that the violation was not *de minimus*. *Id.* at 49. The Court determined the scope of the closure to be "substantial" given that the courtroom was open only to court personnel, the venirepersons, and witnesses. *Id.* The Court also determined that "[t]he closure extended over a significant period of time – an entire morning of trial during which the *voir dire* and selection and swearing of the jury were accomplished." *Id.*

In *Kelly v. State*, *supra*, we held that a partial closure of the courtroom to the defendant's family during *voir dire* was *de minimus* and did not implicate the defendant's right to a public trial. *Kelly*, 195 Md. App. at 428-29. There, a court sheriff prevented the defendant's father from entering the courtroom during the portion of *voir dire* where prospective jurors were questioned individually at the bench. *Id.* at 413–16. The trial court eventually explained that the closure was due to overcrowding in the courtroom, that it only spanned the morning session that day, and that the defendant's family was not prevented from entering the courtroom for the afternoon session, which included the selection of individual jurors. *Id*. In holding that the closure was *de minimus*, we noted that, although the length of the closure—approximately two to three hours—was not insignificant, it was nevertheless relatively brief. *Id.* at 422–24, 428. We also noted that the closure occurred only during the portion of *voir dire* in which prospective jurors were questioned at the bench, and the defendant's family was permitted to enter the courtroom

prior to the selection of the jury. *Id.* at 427. Finally, we noted that the closure was partial, as the record made clear that only the defendant's family was excluded. *Id.* at 428–29.

In *Campbell v. State*, *supra*, we held that the defendant's right to a public trial was violated after the defendant's family members were excluded from the courtroom for over three hours during a portion of *voir dire* that included the entire selection of the jury and the swearing-in of jury members. *Campbell*, 240 Md. App. at 433. In reaching that decision, we disagreed with the State's claim that the closure was *de minimis*. *Id.* at 448. We explained that the length of the closure was distinguishable from the two-to-three-hour closure in *Kelly*, which we determined to be *de minimis*, and was more akin to the closure in *Watters*, which spanned an entire morning and which the Supreme Court of Maryland determined to be constitutionally significant. *Id.* at 449. We also explained that, while the difference between the length of the closure in *Kelly* and the length of the closure in the defendant's case was "admittedly marginal," the significance of the proceedings weighed against a *de minimus* finding:

> The exclusion of the [defendant's] family during a portion of *voir dire* and the entire selection and swearing-in of the jury is the most significant fact that distinguishes the case *sub judice* from *Kelly*. As explained *supra*, Kelly's family members were only excluded during *voir dire*, which was a fact on which we heavily relied to distinguish *Kelly* from *Watters*. We wrote that "unlike in *Watters*, [the closure in *Kelly*] did not extend to the actual selection of the jury." Moreover, unlike in *Kelly*, the selection and swearing-in of the jury in [the defendant's] case was not a process conducted at the bench where spectators would not have been able to observe or overhear the parties and prospective jurors. Instead, the parties used their peremptory challenges to select the jury, and the selected jury members were subsequently sworn in in a proceeding that would have been observable to spectators in the courtroom. Accordingly, the proceedings in [the defendant's] case are analogous to

> *Watters*, where the courtroom closure occurred over a period "during which the [*voir dire*] and selection and swearing of the jury were accomplished."

Id. at 449–50 (internal citations omitted).

We went on to explain that the jury selection process, and in particular the State's use of peremptory challenges, was a significant part of a defendant's right to a public trial. *Id.* at 450–57. We noted that prosecutors and defense attorneys are prohibited from using peremptory challenges to strike prospective jurors based on race, ethnicity, or gender. *Id.* at 454. We reasoned that permitting the public, including a defendant's family, to view that process ensures compliance with the law and deters any arbitrary exercise of power. *Id.* at 454–55. We reasoned further that having family members present during that process "allows jurors to see that there are interested parties present and allows 'the defendant's family to contribute their knowledge and insight' on which jurors to select." *Id.* at 455 (citing *Watters*, 328 Md. at 48). We concluded that "public observation of jury selection furthers the Sixth Amendment's purpose to 'enhance both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the judicial system.'" *Id.* (quoting *Press-Enterprise Co. v. Superior Court of Cal., Riverside, Cty.*, 464 U.S. 501, 508 (1984)).

As to the scope of the closure, we noted that, while it was undisputed that the defendant's family was excluded from the courtroom, the record was silent as to whether other members of the public were also excluded. *Id.* at 457–58. We found, therefore, that that factor was neutral. *Id.* In so doing, we declined to adopt a *de facto* rule that a silent record implies the presence of the public. *Id.* at 458. Ultimately, we concluded that, given

the length of the closure and the significance of the proceedings, the closure was not *de minimus*. *Id.*

Turning to the four-part test set forth by the Supreme Court in *Waller*, we held that the closure violated the defendant's right to a public trial. *Id.* at 459–62. We noted that the court, in closing the courtroom to the defendant's family, failed to consider any alternatives to closure. *Id.* at 460. We held that the court's failure in that regard was dispositive, and we reversed without considering any of the other factors. *Id.* at 459–62.

This Case

Here, Scarboro's mother sought entry into the courtroom at approximately 10:45 a.m., after the prospective jurors were initially questioned but before any venireperson was asked to approach the bench to be questioned individually. Prior to the request, the court made comments suggesting that the courtroom may have been crowded, but the court did not indicate that the courtroom was unable to accommodate Scarboro's mother. When the request was made, the court responded flatly: "We can't do that during jury selection." The court then apologized to Scarboro and stated that they had "a full room and everything." At no point did the court consider alternatives to closure. The court then proceeded with the individual *voir dire* of prospective jurors and jury selection, pausing for a ninety-minute lunch break. The court concluded jury selection that day and ended the proceedings at 3:17 p.m. Although there is nothing in the record to indicate that anyone else was prevented from entering the courtroom after the court closed the courtroom to Scarboro's mother, there is also nothing in the record to indicate that anyone was permitted to enter the

courtroom during that same period. The court resumed the proceedings the following morning, at which time the jury was sworn in, and trial ensued with opening statements.

We hold that the closure of the courtroom violated Scarboro's right to a public trial. First, we cannot say that the closure was *de minimis*. There is simply not enough in the record for us to declare, with any semblance of certainty, how long the courtroom was closed, which portion of the *voir dire* was impacted by the closure, or the exact scope of the closure. The only thing clear from the record is that, at approximately 10:45 a.m., after the prospective jurors were initially questioned but before any venireperson was asked to approach the bench to be questioned individually, Scarboro asked if his mother could enter the courtroom, and the court said no. There was no further discussion of the matter, no subsequent requests, and no apparent attempts by any member of the public (other than Scarboro's mother) to enter the courtroom on the first day of trial. As such, we cannot give any of the three factors any weight. *See Campbell*, 240 Md. App. at 457–58 (reasoning that a silent record regarding the scope of the closure favors giving that factor a neutral weight).

The State contends that Scarboro's failure to repeat his request when the parties returned to court following the lunch break permits an inference that either Scarboro's mother was able to enter the courtroom or that she no longer wished to do so. The State contends, moreover, that the record's silence regarding whether other members of the public were denied access supports an inference that the closure was partial, *i.e.*, limited to Scarboro's mother, and confined to the portion of *voir dire* in which the court questioned prospective jurors individually at the bench. The State argues, therefore, that the case "sits

squarely on the end of the spectrum with *Kelly* that compels a finding that any closure was *de minimus*."[2]

We are not persuaded by the State's arguments. Although we do not dispute that the State's inferences are reasonable, we point out that several equally reasonable inferences could be drawn that support a finding that the closure was not *de minimus*. For instance, that Scarboro had to ask permission for his mother to enter the courtroom supports an inference that the courtroom may have been closed to the public when the request was made. Moreover, that Scarboro did not repeat his request, and that the record is devoid of any indication that anyone other than court personnel and venirepersons entered the courtroom from that point forward, supports an inference that the courtroom may have remained closed for the rest of the day. Therefore, when we factor in the ninety-minute lunch break, it seems that the courtroom may have been completely closed to the public for at least three hours. Importantly, that time period would have encompassed the entirety of the jury selection process. If true, the instant case would be distinguishable from *Kelly* and more akin to *Campbell*.

Because all of the factors are, in essence, neutral, we cannot declare the closure to be *de minimus*. *See Campbell*, 240 Md. App. at 446 (noting that, in *Kelly*, we held that a closure could be deemed *de minimus* if the "three factors *weighed favorably toward*

[2] In its argument in support of its claim that the closure was *de minimus*, the State insists that we should consider "that the exclusion was reasonably related to practical measures," namely, "that COVID had forced the case into an unfamiliar courtroom with limited space." As the State concedes, however, that factor "is not one of the three factors explicitly articulated." Thus, even if the State's contention is true, and we are not convinced that it is, that factor is not relevant in a *de minimus* analysis.

closure") (emphasis added). Having found the closure in the instant case to be constitutionally significant, we now turn to the four-part *Waller* test. Under that test, a courtroom closure need not be deemed a constitutional violation if: 1) the closure was made in support of an overriding interest that was likely to be prejudiced; 2) the closure was no broader than necessary to protect that interest; 3) the trial court considered reasonable alternatives to closure; and 4) the trial court made adequate factual findings to support the closure. *Waller*, 467 U.S. at 48.

We hold that the closure in the instant case did not satisfy the third factor. As noted, there is nothing in the record to indicate that the trial court considered any alternatives, reasonable or otherwise, to closing the courtroom. That failure was, by itself, dispositive. *Campbell*, 240 Md. App. at 459–62. And, because the court closure did not satisfy all four factors of the *Waller* test, the closure was a "structural error" requiring reversal. We therefore reverse the court's judgment and remand the case for a new trial.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED; CASE REMANDED FOR A NEW TRIAL; COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.