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COURT OF APPEALS
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

Gilpin County District Court
Honorable Todd Vriesman, Judge
Case No. 2017CR12

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee

v.

MICHELLE RE NAE BIALAS

Defendant-Appellant.

▲ **COURT USE ONLY** ▲

Case No. 2021CA1645

PHILIP J. WEISER, Attorney General
JAYCEY DEHOYOS, Assistant Attorney General*
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 9th Floor
Denver, CO 80203
Telephone: 720-508-6000
E-Mail: AG.Appellate@coag.gov
Registration Number: 55234
*Counsel of Record

ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

In 2017, a jury convicted the defendant, Michelle Re Nae Bialas, of first degree assault, second degree assault, burglary, and violation of a protection order. (CF, pp 89-94.) A division of this Court reversed the convictions on appeal. *See People v. Bialas*, 2017CA1841 (unpublished). The case was remanded for a new trial, where a jury in 2021 found the defendant guilty of second degree assault and violation of a protection order. (CF, pp 275-78.) The evidence at the second trial allowed the jury to find the following:

The defendant and victim had been dating for almost twenty years, but at the time of the assault, a protection order prohibited contact between the two. (TR 7/13/2021, p 29:1-16.)

The defendant drove to the victim's home despite knowing she was not allowed to be there. (TR 7/14/2021, pp 24:24-26:2.) After she knocked on the door and the victim answered, she immediately swung at his head while screaming and swearing at him. (TR 7/13/2021, p 33:6-14.) The victim felt a tug on the back of his head and realized he

was bleeding. (TR 7/13/2021, pp 33:20-23, 34:6-9.) He stepped back into the house to call 911. (TR 7/13/2021, p 34:11-21.)

The defendant followed him into the house. (TR 7/13/2021, pp 43:22-44:20.) The victim ran to the bedroom and closed the door, leaving a trail of blood on his furniture, floors, and walls. (TR 7/13/2021, pp 43:22-44:20.) The defendant tried to open the bedroom door multiple times before ultimately leaving the house. (TR 7/13/2021, pp 34:20-23, 35:1-6.) Help arrived and transported the victim to a hospital; the victim's head wound required seventeen staples. (TR 7/13/2021, p 50:22-25.)

Law enforcement found the defendant in her locked car along the home's driveway. (TR 7/13/2021, p 157:9-16.) She was hiding on the floorboard with a jacket covering her body. (TR 7/13/2021, p 157:18-23; TR 7/14/2021, p 62:21-25.) The defendant ignored officers' attempts to speak with her; eventually, the officers unlocked the car themselves and removed the defendant. (TR 7/13/2021, pp 158:17-159:1, 159:8-13.) She was intoxicated and uncooperative. (TR 7/13/2021, pp 160:24-161:9.)

The object that was used to cut the victim was never found. (TR 7/13/2021, pp 211:20-212:13.)

The defendant testified at trial. (*See* TR 7/14/2021, pp 23:13-31:17, 61:14-82:15, 86:16-4.) Her theory of defense was general denial; while she admitted to visiting the victim, she denied ever cutting him or entering the home. (TR 7/14/2021, pp 66:22-68:2.)

SUMMARY OF THE ARGUMENT

The defendant's public trial claim fails at the start. The trial court did not close the courtroom within the meaning of the Sixth Amendment when it moved spectators, related to both the defendant and the victim, who had been seated directly behind jurors and making inappropriate comments about the previous trial, to a separate area to watch the remainder of the proceedings.

Due to COVID-19 precautions, an auxiliary room next to the courtroom had been set up with a television broadcasting live audio and video of the proceedings. The trial court's decision to move the family members to that auxiliary room did not constitute a closure because they were not prevented from observing the trial. Even had this constituted a closure, it was too trivial to implicate the protections of the Sixth

Amendment given that the families relied on the livestream for only a portion of the last day of trial. Regardless, if this modified access constituted a closure, the trial court made sufficient findings to justify it under *Waller*.

The trial court's evidentiary ruling on previous domestic disputes was proper and did not impede the defendant's ability to present a defense. The proposed evidence was irrelevant; the alleged previous disputes took place months prior to, and had no bearing on, the charged conduct. And the trial court was within its discretion to find that if the defendant *were* to testify that the victim had previously hit her, the prosecution could both cross-examine her on the statement and present rebuttal evidence. But any error in excluding the evidence was harmless; it had no relevance to the facts of the case and no relation to the defendant's general denial defense.

The defendant also seeks a remand to seek for a waiver of some surcharges. Although the People agree she should be allowed to seek a waiver of surcharges, none of the substantive issues warrant a new trial.

ARGUMENT

I. Although the trial court did not "close" the courtroom within the meaning of the Sixth Amendment, the record nevertheless justifies a partial closure under *Waller*.

A. Preservation and Standard of Review

The People agree that the issue is preserved. (OB, p 8; TR 7/14/2021, pp 55:3-10, 56:2-10.)

The People agree that a trial court's decision to close a courtroom involves a mixed question of law and fact. *People v. Jones*, 2020 CO 45, ¶ 14. This Court accepts a trial court's findings of fact absent an abuse of discretion, but it reviews the legal court's legal conclusions de novo. *Id.* The People generally agree that a violation of the Sixth Amendment right to a public trial is structural error. *Id.* at ¶ 51. But if the closure is too trivial to deprive the defendant of the Sixth Amendment's protections, reversal is not required. *People v. Lujan*, 2020 CO 26, ¶¶ 28–38.

B. Applicable Facts

The trial took place in July of 2021, as jury trials were resuming in the spring following the previous winter's COVID-19 resurgence. (TR 7/12/2021, p 23:10-24.) Because the COVID-19 pandemic was still a

public health crisis and vaccines were only starting to become available, comprehensive procedures were put in place to keep everyone safe. (TR 6/25/2021, pp 6:21-15:23.)

Everyone in the courtroom was separated by three feet. (TR 6/25/2021, p 6:21-7:4; TR 7/12/2021, p 7:14-15.) The twelve jurors and alternate were seated not just in the jury box but throughout the benches of the courtroom to maintain distance from each other. (TR 6/25/2021, p 7:9-14.) The proceedings were broadcast through a video and audio livestream and the courthouse set up a viewing area in an auxiliary room next to the trial court. (TR 6/25/2021, p 10:3-4.) There was limited space available in the back row of the court room; the court allowed family members to watch the trial in person from the back row and other members of the public were invited to watch the livestream over the internet or in the auxiliary room. (TR 6/25/2021, pp 14:20-15:6.) Both parties agreed the COVID-19 procedures were appropriate. (TR 6/25/2021, p 17:2-23.)

These procedures were followed throughout the first two days of trial and into the morning of the third—including voir dire, the entirety

of the prosecution's case, and the beginning of the defendant's testimony. (*See generally* TR 7/12/2021; TR 7/13/2021; TR 7/14/2021.) But an objection during the defendant's testimony required a bench conference and the social distancing requirements meant that the bench conference had to be held in a hallway outside the courtroom. (TR 7/14/2021, p 31:15-18.)

When the parties returned to the courtroom, a juror handed the court a note that read: "Your Honor, the spectators behind me were discussing the history of the case and we could hear them." (TR 7/14/2021, p 39:21-23.) The court asked the members of the public to leave the courtroom and join the auxiliary courtroom across the hall where the proceedings were being broadcast. (TR 7/14/2021, p 39:8-15.) The jurors were also escorted out with the bailiff. (TR 7/14/2021, p 39:15-19.)

The court noted that the spectators in the back were members of both the victim's and defendant's families. (TR 7/14/2021, pp 39:25-40:2.) The parties agreed that the jurors seated near the back of the courtroom should be individually questioned to determine what they

had overheard and whether trial could continue. (TR 7/14/2021, p 40:3-25.)

Five jurors were questioned. The juror who submitted the note explained he had heard the family behind him discussing "a verdict in [a] previous trial," using the word "guilty," and expressing that the trial was "bias[ed]." (TR 7/14/2021, pp 41:23-25, 43:1-5.) The other jurors indicated that they had only overheard vague discussions but each of the five indicated that the things they had heard would not affect their ability to serve. (TR 7/14/2021, pp 47:15-25, 49:16-19, 52:19-53:19.)

Outside the presence of any jurors, defense counsel explained that the people sitting behind the juror who submitted the note were members of the victim's family. (TR 7/14/2021, p 46:4-9.) The court responded that it was "not placing fault," and intended only to "figure out whether or not [there was] a fair and impartial jury." (TR 7/14/2021, p 46:16-22.)

Defense counsel suggested that the spectators, specifically the defendant's family, be allowed back in so long as they were admonished to not speak any further. (TR 7/14/2021, p 55:1-6.) He argued that because the defendant's family did not appear to be at fault, they should

not be removed from the courtroom. (TR 7/14/2021, p 55:6-10.) The prosecution had no objection to allowing the defendant's family to remain in the courtroom. (TR 7/14/2021, p 56:18-20.)

The court declined to make such a ruling, determining it unnecessary to "inquire from each one of the spectators who [was] at fault." (TR 7/14/2021, p 55:11-20.) Instead, the court invoked a uniform rule: spectators could watch the proceedings from the auxiliary courtroom across the hall. (TR 7/14/2021, p 55:12-23.) The Webex livestream was broadcast there and allowed spectators to "see witnesses, the judge, counsel and parties."[1] (TR 7/14/2021, p 58:21-25.) The prosecution noted the set up "allow[ed] the court to maintain a public trial." (TR 7/14/2021, p 56:20-23.)

Defense counsel objected under both the United States and Colorado Constitutions. (TR 7/14/2021, p 56:2-10.)

[1] The court had two cameras streaming; one directed at witnesses, one directed at counsel. The camera focused on counsel could be turned towards the judge. (TR 7/14/2021, p 57:1-6.)

Trial resumed and the court instructed the jury that the delay had "nothing to do with the defendant" and that she had only been asked to step down to allow the parties to resolve a different issue. (TR 7/14/2021, p 61:1-8.) The defendant finished testifying, the parties presented closing arguments, and the jury began deliberating. (TR 7/14/2021, pp 61:14-92:3, 98:10-154:3.)

C. Law and Analysis

Both the United States and Colorado Constitutions guarantee a criminal defendant the right to a public trial. U.S. Const. amend. VI, XIV; Colo. Const. art. II, § 16. But the right is not absolute. *Waller v Georgia*, 467 U.S. 44 (1984). Some restrictions are so insignificant that they do not amount to a true closure. *See, e.g., Lujan*, 2020 CO 26, ¶ 23. Additionally, the right, even though undoubtedly important, can be waived. *Stackhouse v. People*, 2015 CO 48, ¶ 8

If a closure occurs over a defendant's objection, it may be justifiable and otherwise consistent with the Sixth Amendment if the party seeking to close the proceeding advances "an overriding interest that is likely to be prejudiced"; "the closure" is "no broader than necessary to protect that

interest"; "the trial court" considers "reasonable alternatives to closing the proceeding"; and the court makes "findings adequate to support the closure." *Waller*, 467 U.S. at 48. In Colorado, trial courts must consider the *Waller* factors for both full and partial closures. *Jones*, ¶ 27.

With this background in mind, the defendant's public trial claim fails for three reasons: (1) there was no closure; (2) even assuming a partial closure, it was justified; and (3) even if a closure occurred and the court did not provide sufficient findings on the *Waller* factors, the remedy for such an error is not reversal but a remand for additional findings.

1. The defendant received a public trial.

Where real-time audio and video of court proceedings are streamed over the internet to the public and broadcasted to public a room within the courthouse, there is no closure under the Sixth Amendment.

Allowing the public access to a trial via livestream is markedly different from the cases where the United States Supreme Court has determined that proceedings were closed within the meaning of the Sixth Amendment. *See Strommen v. Larson*, 401 Mont. 554, 2020 WL 3791665

(2020) (where public could view proceedings remotely, live and in real-time, the proceeding was not "truly 'closed' in the sense that the proceedings were closed in *Waller*, *Presley*, and *Weaver*"). In each of the cases where a court was considered "closed," the public and the press were not only excluded from the courtroom but had no alternative way to observe the proceedings. *See Waller*, 467 U.S. at 42 (suppression hearing completely closed to the public); *Presley v. Georgia*, 558 U.S. 209, 210 (2010) (public excluded during jury selection); *see also Weaver v. Massachusetts*, 582 U.S. at ___, 137 S. Ct. 1899, 1906 (2017) (anyone who was not a potential juror was excluded). In such cases, the purpose of the public trial right—to ensure accountability and transparency—was not honored.

By contrast, where the public can view the proceedings via live audio and video conferencing, a true closure of the courtroom has not occurred. *See, e.g., United States v. Barrow*, 2021 WL 3602859 (D. D.C. 2021) (streaming defendant's trial to a separate courtroom, even where jurors could not be seen, was not a closure); *United States v. Huling*, 542

F. Supp. 3d 144, 147 (D. R.I. 2021) (providing access via streaming proceedings was a "reasonable alternative[] to total or partial closure").

Although no published Colorado appellate court decision has directly addressed whether the use of audio and video conferencing constitutes a partial closure, courts have approved of their use in other contexts precisely because this technology approximates an in-person experience. *See People in Int. of R.J.B.*, 2021 COA 4, ¶ 21 (concluding that holding a parental termination hearing by Webex did not violate due process and noting that "Webex is a real-time-video-conference platform in which all participants may view one another"); *see also People v. Hernandez*, 2021 CO 45, ¶ 27 (trial court order permitting parties to appear via Webex did not violate a criminal defendant's confrontation right).

And because real-time audio and video conferencing approximate in-person attendance, the access granted here accomplished all the goals underlying the public trial right. *See Waller*, 467 U.S. at 47. Specifically, the livestream ensured that the public—including the defendant's family—could see that the defendant was treated fairly and not unjustly

condemned and it kept trial participants aware of their responsibilities and duties discouraging perjury. *See id*.

The impact of the public was not lost. All parties were present when the court asked the families to move to auxiliary room and the court further made all parties aware that multiple additional spectators were remotely attending the WebEx stream from outside the courthouse. (TR 7/14/2021, pp 39:8-15, 57:23-58:5.) ("[R]ight now on Webex I have one, two, three, maybe three or four people who I do not recognize who are attending remotely … the other four or five names are court personnel who are attending from the Clerk's office or maybe it's that feed that's across the hall.") Webex allowed the court to see, at the very least, the names of the spectators attending remotely. (TR 7/14/2021, pp 58:1-5.)

Additionally, when the spectators were moved to the auxiliary viewing room, the defendant was the only witness left to testify. And because of the record the court made, she knew that multiple other members of the public were watching the proceedings. (TR 7/14/2021, pp 57:23-58:5.) This awareness served to keep the defendant aware of her duty to provide truthful testimony.

Despite all of this, the defendant argues that the video stream was not an adequate substitute for in-person observation because jurors and the judge could not be seen[2]. But this minor variation does not defeat the conclusion that the courtroom remained open. After all, spectators cannot always see everything that goes on in the courtroom, and often will not see an attorney's face when they are arguing to the court or to the jury.

For example, a division of this Court has rejected the premise that a closure occurs anytime spectators cannot see everything in the courtroom. *See, e.g.*, *People v. Robles-Sierra*, 2018 COA 28, ¶ 14 (rejecting an argument that a closure occurred because spectators could not see certain exhibits); *see also Jones*, ¶ 27 n.2 (in camera voir dire does not implicate a defendant's right to a public trial). Further, the court here noted that the broadcast allowed the public an "almost … better" view of the proceedings because the cameras gave a "closer" view of witness expressions and prevented the public from having to "squint and see what's happening." (TR 6/25/2021, pp 14:23-15:6.)

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[2] The judge could always be heard over the livestream even when the camera was not focused on him.

Because all members of the public were able to witness the trial through the WebEx livestream, no one was excluded from the proceedings and no closure occurred.

Alternatively, because the trial was broadcast in real-time and available to watch in a nearby room, the limitation on the family member's ability to be physically in the court room for the last hours of the trial was only trivial. *Lujan*, ¶ 24. Trivial closures do not implicate the protections and values of the Sixth Amendment and do not constitute error, let alone structural error. *Lujan*, ¶ 24.

In determining whether a closure was trivial, courts consider the totality of the circumstances including the duration of the proceedings during the closure, the substance of those proceedings, whether the proceedings were later placed on the record, whether the closure was intentional, and whether it was total or partial. *Lujan*, at ¶ 19; *Jones*, ¶¶ 102–103 (Boatright, J. dissenting).

The substance of the proceedings following the families move to the auxiliary courtroom was limited; when trial resumed all that was left was the end of the defendant's testimony and the presentation of closing

arguments. (TR 7/14/2021, pp 61:14- 92:3, 98:10-154:3.) And because any closure was partial, thanks to the real-time video and audio livestream, the proceedings did not need to be later memorialized in court or otherwise placed on the record. *Lujan*, ¶ 19. The courtroom was readily accessible via Webex throughout the entirety of the trial and members of the public could and did freely attend the proceedings—no one was turned away from observing the trial. (TR 7/14/2021, pp 57:15-18, 57:23-58:4.) Thus, any closure was too trivial to amount to structural error. *Lujan*¸¶ 24.

2. Even assuming that a closure occurred, it was a partial closure justified by the record below.

Should this Court find that allowing the public access to the trial through the livestreamed proceedings constituted a closure, reversal is still unnecessary as the closure was partial and justified under *Waller*. *See State v. Modtland*, 970 N.W.2d 711, 721 (Minn. Ct. App. 2022) (assuming without deciding that livestreaming the trial constituted a closure but declaring it proper under *Waller*).

The trial court's record of why public access was limited and why the alternative procedure was being employed implicitly addressed the *Waller* factors in a manner sufficient for this Court to review them. *See People v. Whitman*, 205 P.3d 371, 380 (Colo. App 2007) (trial court's failure to expressly refer to *Waller* did not require reversal where the trial court made sufficient findings to support the closure); *see also Waller*, 467 U.S. at 45

As the Colorado Supreme Court recently summarized, the *Waller* test requires that in order to justify the closure, the party seeking closure must: (1) advance an overriding interest likely to be prejudiced; (2) the closure must be no broader than necessary; (3) the court must consider reasonable alternatives; and (4) the trial court must make adequate findings to support the closure. *Jones*, ¶ 21

First, the Opening Brief takes no issue with the initial limitation that required general members of the public to watch the WebEx livestream. And this makes sense; the COVID-19 pandemic was an overriding interest that justified the initial modification of public access to the courtroom. *See United States v. Allen*, 34 F.4th 789, 797 (9th Cir.

2022) (preventing the spread of COVID-19 pandemic was "compelling interest" justifying some form of closure); *United States v. Babichenko*, 508 F. Supp. 3d 774, (D. Idaho 2020) (COVID-19 pandemic justified partial closure).

Instead, the Opening Brief argues that the court erred when it found that prejudicial comments from the spectators physically present in the courtroom justified separating the spectators from the jury. (OB, p 21-22.)

But the United States Supreme Court has recognized that, in certain circumstances, the risk of jurors "overhearing prejudicial remarks" or having "improper communications" with observers can justify limiting public access to a proceeding so long as the trial court makes sufficient findings. *Presley*, 558 U.S. at 214-15. *See also*

Here, the trial court was not merely looking to preemptively mitigate a potential risk but addressing an inappropriate situation that had already unfolded. Responding to and limiting improper remarks—thereby preventing a mistrial—is a compelling interest justifying a partial closure and the first *Waller* prong is met. *Id.*

Second, the trial court implemented procedures no broader than necessary to protect that interest. Rather than close the courtroom to the public completely, the trial court asked the spectators present to move to the "room across the hall" to view the proceedings over the Webex broadcast. (TR 7/14/2021, p 39:12-14.) *See United States v. Ansari*, 48 F.4th 393, 402 (5th Cir. 2022) (finding that limiting public access to an audio and video feed of the courtroom was only a partial closure, justified during the COVID-19 pandemic). *Cf. United States v. Allen*, 34 F.4th 789, 799-800 (9th Cir. 2022) (trial court's providing only audio access to trial proceedings was not narrowly tailored because video streaming would have been a less restrictive alternative).

The Opening Briefs contends this procedure was nonetheless overbroad because it "swept up [the defendant's] family members, who, as defense counsel and the prosecutor agreed, were not involved in the disruption." *OB,* p 21. But the trial court did not make such a finding, and, in any case, the closure was not overbroad because neither family was prevented from watching the trial.

When questioned by the court and counsel, the jury members did not uniformly identify who had been saying what. The juror who wrote the note explained that they had heard "the victim's first name," and mention of the words "bias," and "guilty," from the family sitting behind them. (TR 7/14/2021, pp 42:1-3, 43:3-44:3.) After he was questioned, defense counsel made a record that the victim's family was seated behind that juror but only one juror was able to specifically indicate that the comments had come from people attending in support of the victim. (TR 7/14/2021, pp 46:6-9, 50:24-51:7, 59:6-10.) The other jurors indicated they were not "paying any attention" and "didn't realize that [the spectators] were discussing issues of the case." (TR 7/14/2021, pp 47:15-25, 49:16-19, 52:19-53:19.)

The record makes clear that the trial court did not find it prudent to further delay the proceedings with additional fact finding and questioning of spectators. (TR 7/14/2021, p 55:17-20.) And there was no need to make those additional findings because the court's proposed solution was not a total closure; all of the family members were able to continue observing the trial.

And, given the general COVID-19 procedure that was already being followed, the court's remedy was not overbroad. Bench conferences had to be conducted in the hallway to maintain social distancing; this procedure created a frequent and impermissible opportunity for spectators to speak to the jury. *See People v. Turner,* 2022 CO 50, ¶¶ 43 ("[A] trial court shouldn't have to wonder whether a party who has allegedly exhibited volatility might do so again in a way that could endanger or distract other trial participants."). The court's solution properly prevented the issue from reoccurring while keeping the trial compliant with public health recommendations.

Third, although the Opening Brief disputes that the trial court considered other alternatives to closure, the court did weigh other alternatives when it addressed counsel's proposals for how to proceed. (TR 7/14/2021, p 55:3-23.) Counsel requested and the court considered, the option of asking only the victim's family to leave the room or admonishing the families to maintain "absolute silence moving forward." (TR 7/14/2021, p 55:3-23.) But the families here had been admonished prior to trial and the court determined additional fact finding to "place

blame" was not reason enough to further delay the trial. (TR 7/14/2021, pp 46:11-15, 46:19-22, 55:3-23.) And once a flagrant disregard for the standards of proper courtroom conduct has been exhibited, a trial court is not required to leave open opportunity for additional inappropriate behavior which might distract trial participants. *Turner*, ¶¶ 42-43.

The trial court's decision to move the families away from the jurors and have them observe the trial via Webex was itself a reasonable alternative to a complete closure; livestreaming has been widely recognized as a way to accommodate the right to a public trial. *See Allen*, 34 F.4th at 789-99 n.5 & 6 (collecting cases); *see also People v. Paul*, 2022 WL 3903547 (Ill. Ct. App. 2022) (unreported) (noting the "universal acceptance of video streaming as a means of accommodating defendant's interest in a public trial").

Finally, though the court did not reference *Waller*, its findings were sufficient because compliance under Waller is gauged by "substance, not form." *Turner*¸ ¶35. The purpose of the fourth *Waller* factor is to enable reviewing courts to assess the adequacy of the trial court's decision to affect a partial closure and the record here allows this Court to do so. The

jury was closer to spectators than typical because of COVID-19 induced set-up of the courtroom and improper comments made by the spectators demanded a response from the court to ensure a mistrial was not declared. (TR 7/14/2021, pp 39:20-40:5, 55:16-19). Because the court could not determine who was at fault for the comments without spending substantial additional time questioning the families, it found that the reasonable alternative to removing the families was to simply move them away from the jury while still allowing them to observe the trial. (TR 7/14/2021, pp 39:20-40:21, 55:11-23, 57:8-12.)

The court's findings satisfied the *Waller* factors and the defendant received a public trial.

3. A remand, not reversal, is the appropriate remedy for any error.

Even if the trial court should have made additional or more explicit findings, the proper remedy is a limited remand for the trial court to make explicit findings, not reversal and remand for a new trial. *See Waller*, 467 U.S. at 49-50; *cf. Jones*, ¶ 46 (concluding that the error could

not be cured by a remand because the trial judge had died, and additional information would not satisfy the *Waller* factors).

Crucially, this is not a case where the court's actions could not possibly satisfy the *Waller* test. *Cf. Jones*, ¶ 46. The trial court could certainly provide additional findings to further explain why the access provided satisfied *Waller*. Because any error could be remedied by additional findings, and it is likely that the same result would follow, this Court should not reverse for a new trial.

II. The court properly determined the scope of admissible evidence related to prior domestic violence incidents.

A. Preservation and Standard of Review

The People agree that the issue is preserved. (OB, p 24; TR 7/14/2021, pp 17:9-18:8.)

The People further agree that an appellate court reviews a trial court's evidentiary rulings for abuse of discretion. *See, e.g.*, *Yusem v. People*, 210 P.3d 458, 463 (Colo. 2009). A trial court's ruling will be disturbed only if it "was manifestly arbitrary, unreasonable, or unfair." *Id.*

But the People disagree that the issue should be reviewed for constitutional harmless error; a preserved evidentiary claim is reviewed for harmless error. *Id.* at 469. Reversal is required where there is a reasonable probability that the inadmissible evidence contributed to the conviction. *People v. Whitlock*, 2014 COA 162, ¶ 22.

B. Applicable Facts

During the prosecution's case in chief, the prosecutor asked the victim: "When [the defendant] was coming after you, why didn't you go after her? … Why did you run?" (TR 7/13/2021, pp 35:25-36:3.) The victim responded:

> I couldn't attack her. I couldn't hurt her. I just couldn't bring myself to do that – you know, hit women; especially a woman you have been with for 20 years. She had already inflicted damage right in the door so I just stayed away from her. She couldn't do any more. It wasn't necessary to hit her for any reason.

(TR 7/13/2021, p 36:4-9.)

After the jury left for the day, defense counsel told the court that he believed the victim had "opened the door" to testimony that the victim had hit the defendant in the past. (TR 7/13/2021, pp 254:15-

255:6.) The prosecutor disagreed, noting that the victim did not claim to have never hit the defendant, but that he did not and would not have hit her on the day she assaulted him. (TR 7/13/2021, p 256:9-14.) She also noted that if the defendant testified that the victim previously hit her it would further open the door to evidence of other domestic violence incidents. (TR 7/13/2021, p 256:14-22.) The court noted it would rule on the issue the next day. (TR 7/13/2021, pp 256:23-257:17.)

During the *Curtis* advisement, defense counsel asked the court for a ruling on whether the defendant could testify that the victim had hit her in the past. (TR 7/14/2021, pp 9:19-10:9.) Defense counsel argued that such testimony would not open the door for evidence that the defendant had previously and recently hit the victim. (TR 7/14/2021, pp 10:16-11:3.) Defense counsel proposed that the defendant's testimony be limited to only a yes or no response as to whether or not she had been hit by the victim in the past. (TR 7/14/2021, p 12:6-10.)

The prosecutor maintained that the door had not been opened and that the testimony was not relevant. (TR 7/14/2021, p 11:5-16.) But she also argued that if the proposed testimony would entitle the prosecution

to put on a rebuttal case to show that the victim had, just a few months prior to the charged incident, assaulted the victim, threatened to stab him, and, most importantly, made her allegations against the victim within that context. (TR 7/14/2021, p 11:17-23.) The prosecutor argued such rebuttal evidence would be critical because the credibility of each witness was at issue, and it would be misleading for the defendant to tell the jury that the victim had hit her in the past without the context. (TR 7/14/2021, p 12:17-13:7.)

The court noted that the admissibility of the evidence was not "about the truth" but about "what truth [was] relevant and what [was] not." (TR 7/14/2021, p 13:8-14.) The court found that the victim's statement was "relatively small or inconsequential in the context of [the] discussion," but determined that the defendant could rebut that statement although doing so would open the door to the other domestic dispute evidence. (TR 7/14/2021, p 14:9-15.) The court rejected defense counsel's proposal for limited testimony, noting that it would unfairly limit the prosecution's ability to cross-examine the defendant on the subject. (TR 7/14/2021, pp 14:16-15:3.) Ultimately, the court found:

> [I]f [the defendant] wants to testify that [the victim's statement] was not a true statement and that "he has hit me," … my ruling is that the District Attorney may cross-examine her on not only that particular statement but may also talk about her threats to him and those related incidents immediately prior relatively surrounding this particular incident including the protection orders.

(TR 7/14/2021, p 16:1-7.)

The court limited the admissible testimony to "incidents … relatively close in time to the event that is at issue here … not any incidents that are several years beforehand." (TR 7/14/2021, p 17:1-7.)

The defendant testified but counsel did not elicit evidence that the victim had hit the defendant in the past. (TR 7/14/2021, pp 23:20-97:12.)

C. Law and Analysis

The defendant's proposed testimony was properly excluded because it was irrelevant. *See, e.g.*, *People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006) (holding that a reviewing court can affirm on different grounds than those relied upon by the trial court and a party may "defend the trial court's judgment on any ground supported by the record, whether relied upon or even considered by the trial court.").

Evidence that the victim had previously hit the defendant was not probative of any material fact. *See* CRE 401 (relevant evidence is any evidence that tends to make the existence of any fact of consequence more or less probable than it would be without the evidence). Here, because the alleged domestic violence occurred separately, months before the trial, it had no relation to the charges or her general denial defense.

And even if the evidence was relevant, it was still properly excluded because any probative value would have been substantially outweighed by the danger of unfair prejudice. CRE 403; *People v. Brown*, 2022 COA 19, ¶ 68. Evidence is unfairly prejudicial if it introduces extraneous information that would suggest the jury decide the case on an improper basis. *People v. Ramirez,* 155 P.3d 371, 379 (Colo. 2007). Introducing allegations that the victim had previously hit the defendant would have inflamed the sympathy of the jury and distracted from the issue at hand—whether the defendant violated her protection order by going to the victim's home and assaulted him by cutting his head.

But further, the trial court properly determined that should the defendant choose to testify that the victim hit her, she would be opening

the door to rebuttal evidence. Where a party presents misleading information, the prosecution has a right to "explain or rebut any adverse inferences injected into the case." *People v. Cohen*, 2019 COA 38, ¶ 24. Thus, the court was within its discretion to rule that while the defense could present evidence that the victim had previously hit the defendant, rebuttal evidence addressing or rebutting the allegations was also admissible.

"The doctrine of 'opening the door' allows a trial court to admit otherwise inadmissible evidence when such evidence is necessary to prevent the other party from gaining an unfair advantage through the presentation of 'evidence that, without being placed in context, creates an incorrect or misleading impression.'" *People v. Ramos*, 2012 COA 191, ¶ 25 (quoting *People v. Melillo*, 25 P.3d 769, 775 (Colo. 2001)).

The Opening Brief appears to argue that the defendant should have been able to testify that the victim had previously hit her without worry that the prosecution would address or respond to her allegations. (OB, p 29.) But because the concept of opening the door is meant to "prevent" prejudice rather than to allow prejudice to be "inject[ed]" into trial, the

court properly found that it would be improper for the jury to *only* hear that the victim had previously hit the defendant. *People v. Cohen*, 2019 COA 38, ¶ 23.

Prior acts of domestic violence had not been a focus at trial. The court specifically found that the victim's testimony—that he "couldn't" attack the defendant on the day of the incident—was "inconsequential" and "relatively small" in context. (TR 7/14/2021, p 14:9-15.) But had the defendant testified that the victim had previously hit her, the issue of prior domestic violence would have become a major component of the proceedings; such allegations implicate the credibility of both the defendant and the victim. *See People v. Davis,* 312 P.2d 193, 196 (Colo. App. 2010); OB, p 30. If, as the defendant argues, the defendant's testimony that the victim had hit her colored the victim's credibility, then evidence that the defendant hit the victim would likewise color the defendant's credibility.

Parties can admit rebuttal evidence "to the extent necessary to rebut any adverse inferences" or "misleading impressions." *Id.* at ¶ 26. And such evidence would have been especially necessary here because of

the circumstances surrounding the defendant's allegations. The defendant previously assaulted and threatened to stab the victim just months before the charged incident. (TR 7/14/2021, p 11:17-23.) It was after that previous incident was reported that the defendant claimed the victim had hit her. (TR 7/14/2021, p 12:24-13:1.) As the prosecutor noted, to present the defendant's allegations to the jury "without context or without chance to evaluate the credibility surrounding the circumstances or the timing of the claims," would "mislead the jury." (TR 7/14/2021, p 13:2-7.)

And contrary to the Opening Brief's assertions, this case has little in common with *People v. Johnson*. 2021 CO 35. The dissimilarities begin with the fact that *Johnson* was decided in the context of the impeachment exception to the exclusionary rule. *Id.* at ¶ 1.

In *Johnson*, the trial court suppressed evidence that the defendant tested positive for gunshot residue (GSR) because the test sample had been obtained in violation of the Fourth Amendment. *Id.* at ¶¶ 4-5. At trial, the defendant sought to introduce evidence that an alternate suspect has tested positive for GSR. *Id.* at ¶ 6. The trial court concluded

that if the defendant introduced the GSR results from the alternate suspect, he would be opening the door to allow his own, previously suppressed, GSR results as well. *Id.* But our supreme court found this to be error; the prosecution could not use the defendant's wish to present truthful evidence as basis to open the door to evidence suppressed under the exclusionary rule. *Id.* at ¶ 32.

Here, the trial court was not dealing with evidence suppressed under the exclusionary rule. And unlike the undisputed and objectively truthful GSR test results in *Johnson*, the veracity of the evidence here was contested. The prosecution disputed that the victim had previously hit the defendant and wanted to introduce evidence that (1) the defendant had recently hit the victim and threatened to stab him in his sleep and (2) alleged she had been within that context. (TR 7/14/2021, pp 12:23-13:4.) Because the evidence was contested, the circumstances of the allegations would have been critical for the jury to understand so that it could properly evaluate each party's credibility.

"An erroneous evidentiary ruling may rise to the level of constitutional error if it deprives a defendant of his or her right to present

a defense[, but] a defendant's right to present a defense is violated 'only where the defendant was denied virtually his or her only means of effectively testing significant prosecution evidence.'" *People v. Brown*, 2104 COA 155M-2, ¶ 6 (quoting *Krutsinger v. People*, 219 P.3d 1054, 1062 (Colo. 2009)).

Under these circumstances, even had the trial court's ruling been an abuse of discretion, it did not deprive the defendant of her right to present a defense. *See, e.g.*, *Brown*, ¶ 16 (concluding that, because exclusion did not prohibit the defendant from presenting a defense and because the evidence could have been excluded as confusing or misleading, "we cannot say the court's rulings, even if erroneous, violated defendant's right to present a defense or any of his other rights"). *Johnson* again offers a useful contrast; there, the court's ruling led the defendant to abandon evidence that would have directly supported his defense at trial. *Id.* at ¶ 37. The supreme court specifically found that the GSR results were the "most probative" evidence of the defendant's alternate suspect theory. *Id.* Accordingly, the error was not harmless beyond a reasonable doubt.

But here, the evidence that the defendant chose not to present—testimony that she had been hit by the victim previously—had no direct relation to her general denial defense. And while the Opening Brief argues that evidence was critical to witness credibility, the court found that the victim's statement was "inconsequential." (TR 7/14/2021, p 14:9-15.) The prosecution did not rely on or even mention the contested statement in closing. (TR 7/14/2021, pp 115:21-130:13, 147:7-149:11.) And notably, the jury acquitted the defendant of the greater offense of first-degree assault. *See People v. Abdulla*, 2020 COA 109M, ¶ 95 ("If the jury was improperly influenced, it would have been more likely to have convicted of the greater offense.")

There is no reasonable probability that a related error would have contributed to the conviction.

III. Remand is appropriate to address the surcharges

A. Preservation and Standard of Review

The People agree that where a defendant argues a sentence was not authorized by law, the issue is reviewed de novo. *Waddell v. People*, 2020 CO 39, ¶ 10.

B. Law and Analysis

The trial court sentenced the defendant to serve twelve years in the Department of Corrections. (*See generally* TR 9/3/2021.) The Court did not explicitly address any fees or surcharges at that time; however, the mittimus shows that $604.50 was assessed against the defendant. (CF, p 470.)

Trial courts are required to assess fees, costs, and surcharges in criminal cases when a judgment of conviction is entered. *See, e.g.*, Chief Justice Directive 85-31; § 24-4.1-119, C.R.S. (2021) (victim compensation fund fee); § 24-4.2-104, C.R.S. (2021) (victim and witness assistance fund fee); § 24-33.5-416.6, C.R.S. (2021) (genetic testing surcharge). And trial courts retain discretion to waive certain costs, fees, and surcharges, including the surcharges identified above, if the defendant is indigent.

See People v. Fisher, 539 P.2d 1258, 1260 (1975); § 21-1-103(3), C.R.S. (2021); § 24-4.2-104(1)(b)(III)(c), C.R.S. (2021); § 24-33.5-415.6(9), C.R.S. (2021). Where surcharges are mandatory, they must be addressed at sentencing. *People v. Ehlebracht*, 2020 COA 132, ¶ 46.

Because the court did not make any assessment of the surcharges at sentencing, and because the surcharges assessed against the defendant may be waived upon a showing of indigency, the case should be remanded to correct the defendant's sentence and allow the defendant an opportunity to prove she is entitled to a waiver. *v. Ehlebracht*, 2020 COA 132, ¶ 47.

CONCLUSION

Based on the foregoing, the People respectfully ask this Court to affirm the defendant's convictions and remand for findings on the record as to the surcharges.

PHILIP J. WEISER
Attorney General

/s/ Jaycey DeHoyos

JAYCEY DEHOYOS, 55234*
Assistant Attorney General
Criminal Appeals
Attorneys for Plaintiff-Appellee
*Counsel of Record

MATTER ID: 8982

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ANSWER BRIEF** upon **MEREDITH K. ROSE** and all parties herein via Colorado Courts E-filing System (CCES) on October 31, 2022.

/s/ Tiffiny Kallina