No. _____

In The
Supreme Court of the United States

VANESSA CAMERON,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITION FOR WRIT OF CERTIORARI

GERALD H. GOLDSTEIN*
DONALD H. FLANARY, III
GOLDSTEIN, GOLDSTEIN, & HILLEY
310 S. St. Mary's Street
29th Floor – Tower Life Bldg.
San Antonio, Texas 78205
(210) 226-1463
(210) 226-8367 (telecopier)
ggandh@aol.com

JOHN T. HUNTER
LAW OFFICE OF JOHN HUNTER
310 S. St. Mary's Street
Suite 1840 – Tower Life Bldg.
San Antonio, Texas 78205
(210) 937-1034
(210) 568-4927 (telecopier)

*Counsel of Record

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

The Sixth Amendment affords the accused in a criminal case the right to a public jury trial, including a publicly held *voir dire* of potential jurors in the case. The Texas Court of Criminal Appeals has construed this to mean that the Defendant must prove her trial was closed to the public, but it has not enunciated a standard the defendant must establish on appeal for proving such a violation. By placing an undisclosed burden of proof on the Defendant, has the Court of Criminal Appeals improperly shifted the inquiry away from the fundamental question of whether the trial court undertook every reasonable measure to accommodate public attendance?

TABLE OF CONTENTS

APPENDIX

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a writ of certiorari issue to review the judgments below.

REFERENCE TO OPINIONS IN THE CASE

The opinion of the Court of Appeals for the Fourth District of Texas, unpublished, *Cameron v. State*, 415 S.W.3d 404 (Tex. App. – San Antonio, 2013), appears at page 34 of the appendix hereto. The Texas Court of Criminal Appeals' original opinion on the State of Texas' petition for discretionary review, *Cameron v. State*, No. PD-1427-13, 2014 Tex. Crim. App. LEXIS 1536 (Tex. Crim. App. 2014), appears at page 15 of the appendix hereto. The opinion of the Texas Court of Criminal Appeals on the State of Texas' motion for rehearing, *Cameron v. State*, 482 S.W.3d 576 (Tex. Crim. App. 2016) appears at page 1 of the appendix hereto.

JURISDICTION

The date on which the Texas Court of Criminal Appeals vacated the judgment of the San Antonio Court of Appeals was on March 2, 2016. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

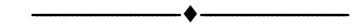
CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.



STATEMENT OF THE CASE

Vanessa Cameron proceeded to trial for first degree murder on February 22, 2012. Prior to the judge taking the bench, the bailiff ushered all spectators out of the courtroom to make room for the sixty-five person jury panel called for *voir dire*. Cameron's trial counsel

objected to the exclusion the moment the trial court called the cause on the record.[1] Because of the large jury panel, every seat not occupied by the judge, counsel for the parties, or the defendant was allocated for a venireman.[2] The judge responded to counsel, saying "I don't see any room whatsoever where anybody else would be able to sit and observe."[3] Without elaboration, the trial court proceeded to reject the proposals of defense counsel as either "unreasonable" or "a security risk.[4]" The trial court remarked that they could be placed standing up in the narrow entryway to the courtroom, a suggestion that the prosecution described

---

[1] RR Vol. 1 at 4 ("[DEFENSE ATTORNEY]: I noticed prior to the Court calling the case for trial, the bailiff ushered out or secluded the general public, to include family and friends of my client. I ask that family and friends be allowed to be present here in the courtroom during the voir dire. They're excluded and I – if they're excluded, I would just put for the record an objection to the 6th Amendment of the U.S. Constitution and Article I, § 10 of the Texas Constitution since she does have the right to a public trial.").

[2] RR Vol. 1 at 4 ("[JUDGE]: I notice for the record that every single chair that we have available for attorneys that come in during trial and **every chair that we have available** for other people have been **removed and placed in the jury area because it is the only way we can accommodate the number of jurors** in this courtroom . . . ***I don't see any room whatsoever where anybody else would be able to sit and observe . . .*** [B]efore we called the case we saw a pretty significant number of family members that were walking in. ***There is no way this courtroom can accommodate them***.") (emphasis added).

[3] RR Vol. 1 at 4 ln. 19-20.

[4] RR Vol. 1 at 7 ln. 3-8.

as a fire code violation.[5] Throughout the exchange, despite repeated lip service to the Sixth Amendment's guarantee of a public trial, the trial court's position could be summarized as follows: *I am not ruling that the courtroom is closed; all I am saying is that the courtroom is closed.*

After a pause in the *voir dire* process, the court again addressed this issue. After stating plainly on the record that there was no place within the courtroom suitable for public spectators and foreclosing the possibility of using a larger courtroom, the court said that defense counsel would be allowed to bring in public spectators before the defense's portion of the *voir dire*.[6] By the time this second exchange occurred, eighty-three pages of the State's *voir dire* had passed; jurors were interviewed and instructions were given, unavailable for public scrutiny.

Cameron was convicted on March 1, 2012. Her motion for new trial, with its accompanying twelve affidavits from friends and family excluded by the bailiff during the selection process, was overruled by operation of law.

The Fourth Court of Appeals in San Antonio found that actual members of the public were excluded, found that the totality of the circumstances exposed the trial court's failure to accommodate public attendance, and that the resulting closure of the courtroom

---

[5] RR Vol. 1 at 8 ln. 1-3.

[6] RR Vol. 1 at 83.

was unjustified. *Cameron v. State*, 415 S.W.3d 404, 410-412 (Tex. App. – San Antonio, 2013) (Thus, despite the trial judge's insistence that he had not closed the courtroom, ***the record shows it was, in fact, closed***.") (emphasis added). The court of appeals reversed and remanded for new trial.

The State of Texas sought a petition for discretionary review to the Texas Court of Criminal Appeals. Upon granting review, the Court of Criminal Appeals agreed that the courtroom was closed to the public:

> The State relies heavily on the fact that the trial court repeatedly stated that he had not ruled that the courtroom was closed. He stated repeatedly that he respected and recognized the appellant's right to a public trial, that he was not ruling, and that he had not ruled, that the court was closed. We ordinarily defer to a trial court's findings of fact. But the judge's own statements show that there was no room in the court for spectators; he all but conceded that no one was allowed to witness voir dire.

Cameron v. State, 2014 Tex. Crim. App. LEXIS 1536 at *12 (Tex. Crim. App. 2014) [Appendix at pages 26-27]. The Court further found that the closure was not constitutionally justifiable in light of this Court's precedent, and affirmed the San Antonio Court of Appeals. *Id.* at 15. In so doing, the court dismissed a secondary issue presented by the State: who bears the burden of proof to demonstrate that the proceedings were in fact closed? *Id.* at 15, fn. 21.

The court subsequently granted the State's motion for rehearing. After renewed briefing and argument, the court issued a substitute opinion which vacated its prior ruling, reversed the San Antonio Court of Appeals, and remanded the cause for further proceedings. In its substitute opinion, the Court of Criminal Appeals stated:

> Having decided that the initial burden of proof is on Appellant to show that her trial was closed to the public, and after explaining the applicable standard of review on appeal, we vacate the judgment of the court of appeals and remand this cause for it to apply the principles of this opinion.

Cameron v. State, 482 S.W.3d 576 (Tex. Crim. App. 2016) [Appendix at pages 13-14]. Despite claiming that it had outlined the "applicable standard of review," nowhere in its substitute opinion did the court detail, describe, or quantify this alluded to "initial burden of proof" which the Appellant must satisfy. Left without guidance and a seemingly impossible task, Cameron now seeks certiorari from this honorable Court.

REASONS FOR GRANTING THE PETITION

The denial of a public trial is a structural error, and the defendant need not identify or prove specific prejudice in order to obtain relief. *Waller v. Georgia*, 467 U.S. 39, 49-50 (1984). The Court of Criminal Appeals' opinion on rehearing circumvents this long

standing rule, and forces the criminally accused to prove a negative, without even the benefit of knowing by what degree of proof this burden entails. In this case, the Court of Criminal Appeals' treatment of the public trial right is particularly egregious, as it was all but conceded in the court's prior decision that Cameron's trial was closed to the public, but now the court has remanded to determine whether or not Cameron can affirmatively prove that her trial was closed. This approach is utterly inapposite with this Court's mandate that it is the trial court, not the defendant, who must take every reasonable measure to accommodate public attendance.

I. The Court of Criminal Appeals Has Shifted the Burden Away from the Trial Judge, Who Must Take Every Reasonable Measure to Accommodate Public Attendance, and Onto the Defendant, In Contravention of the Sixth Amendment.

The notion that a defendant has some "burden of proof," apart from her responsibility to merely object and preserve the error for review, is a red herring orchestrated to shift the onus away from the trial court's duty to accommodate public attendance. In this case, the Fourth Court of Appeals and the Court of Criminal Appeals both found sufficient evidence in the record to establish that the public was excluded from the courtroom in an effort to clear room for a very large panel of potential jurors. What is now at issue, in light of the opinion of rehearing, is whether Cameron's failure to

conclusively prove that no one came back inside the courtroom vitiates her Sixth Amendment claim:

> The Court says that 'this Court accepts as true factual assertions [that spectators were removed] made by counsel which are not disputed by opposing counsel,' and that is correct. But the Court applies the concept in this case to accept as true 'that the appellant's friends and family were ushered out of the courtroom and not allowed back in.' Whether the friends and family were allowed back in was, in fact, disputed.

Cameron v. State, 2014 Tex. Crim. App. LEXIS at *16 (Keller, J., dissenting) (First Court of Criminal Appeals' decision in *Cameron*, affirming the lower court of appeals). This Court has never addressed such a question.

In *Presley v. Georgia*, the trial judge excluded a spectator to make room for the *venire* panel. *Presley v. Georgia*, 558 U.S. 209, 210 (2010). The judge made it clear the spectator was allowed to watch other parts of the trial. *Id.* Presley's defense attorney objected, and the trial judge recited excuses similar to those relied upon by the trial court in this case – "[t]here just isn't space for them to sit in the audience." *Id.* Presley's counsel, like Cameron's counsel, asked for an accommodation, and again the judge, like the judge in Cameron's trial, said that spectators could come back in at a specified time later in the trial. *Id.*

In *Presley*, there actually *was* room for spectators. During Cameron's trial, the court made it abundantly

clear there wasn't any room anywhere in the courtroom to seat members of the public. Could Presley have satisfied the amorphous "burden of proof" requirement set by the Court of Criminal Appeals in this case? It is, after all, *possible* that someone walked into Presley's jury selection after defense counsel made his objection.

Appellant does not dispute the fact that a defendant carries some kind of affirmative duty with respect to every trial error and appellate issue. To require otherwise would essentially strike the concept of error preservation off the books. Nevertheless, in the context of structural error, that burden is slight.

In *Tumey v. Ohio*, for example, this Court did not require the Defendant to produce the authenticated tax returns or the general accounting documents of the mayor of North College Hill to prove that the compensation structure of his office disqualified him from hearing the case. *Tumey v. Ohio*, 273 U.S. 510, 520 (1926). The Ohio statutes authorizing the tribunal to get paid from the fines assessed were sufficient for this Court to find the mayor biased without him having to openly admit that he was. Similarly, in *Vasquez*, this Court found structural error in the systemic exclusion of black citizens from grand juries in Kings County, California. The Court did not require the Defendant to prove definitively the subjective motivations of those tasked with selecting the grand jurors. The objective historical fact that no black people had ever served on a Kings County grand jury spoke for itself. *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986).

The stuff of which structural error is made is inherently difficult to show in the light of day. Few judges or prosecutors would openly admit that the indictment was sought or the ruling made solely on the basis of the defendant's racial ethnicity. No court wants to admit that it prevented a defendant from retaining counsel, or denied appointment of counsel to an indigent defendant. Public officials will not typically acknowledge that they have conducted public business in secret. At its heart, structural errors go to the integrity and transparency of public institutions. It is precisely because structural errors are so invidious and thus so likely to be concealed that this Court has refused to ascribe a harmless error analysis to them. *Neder v. United States*, 527 U.S. 1 (1985).

In this case, the Court of Criminal Appeals is not referring to this minimal duty to preserve the error when it commented that the Appellant has a burden to prove that the courtroom was closed. The trial court "all but conceded that no one was allowed to witness voir dire." *Cameron v. State*, 2014 Tex. Crim. App. LEXIS 1536 at *12 (Tex. Crim. App. 2014) [Appendix at page 27]; *see also Cameron v. State*, 415 S.W.3d 404, 410 (Tex. App. – San Antonio 2013, pet. granted) [Appendix at page 46] ("It is undisputed that Cameron's mother [a peace officer] was excluded from the courtroom during *voir dire*"). This conclusion is further supported by the fact that 82 pages into the *voir dire* proceedings, the trial court took up the issue again, *sua sponte*, and made factual findings on the record consistent with this Court's mandate in *Waller v.*

Georgia that, when the courtroom must be closed to public attendance, the trial court must justify such a closure:

> In order to accommodate all 65 [venire panel members], there are about ten chairs that are placed in the gallery. Additionally, there are three or – three other chairs located next to the jury box. ***Every single chair in the gallery and in the jury box is filled with 65 individuals.*** The court reporter is seated directly in front of the defense table directly in front of the jury box, so there would be no room there. Directly in front of the defense table there is a table used by the probation department that has a computer, a printer, some files. Directly next to the defense table is a panel that has been set up by the defense for use during *voir dire*. Directly behind that panel is a box where the bailiffs sit, a bailiff's table.
>
> The Court considered the size of the configuration. Court also considered alternative courts, knowing that the juries – the central jury room is not adequately sufficient for a trial such as this. Also the Court is expecting a potentially emotionally charged jury trial . . . [t]he Court does not want to make any jury or potential jurors feel in any way constrained with truthfulness and honesty, making them uncomfortable in regards to potential family members next to them.

[RR Vol. 1 at 82-83]. The Fourth Court of Appeals found this attempt at *Waller* analysis unpersuasive. *Cameron v. State*, 415 S.W.3d 404, 411 (Tex. App. – San Antonio 2013, pet. granted) [Appendix at page 47]. The vagueness with which the trial court recited and then rejected alternatives this Court has deemed proper for accommodating public attendance is insufficient to justify the closure. *See Presley v. Georgia*, 558 U.S. 209, 215 (2010) ("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.").

In light of these facts, there are only two possible rationales for the Court of Criminal Appeals' decision to remand for consideration of whether Cameron has 'met her burden of proof.' First, the court considers the exclusion of spectators from *voir dire* as trivial, and has attempted to create a clandestine form of harmless error analysis in order to mitigate the impact of this Court's opinion in *Presley.* Second, the court is attempting to reduce the burden placed on trial courts as a result of their obligation to accommodate public attendance by shifting that burden onto the Defendant. Neither of these motivations can secure the right to a public trial guaranteed by the Sixth Amendment.

CONCLUSION AND PRAYER

The Court of Criminal Appeals' decision to shift the focus away from the trial court's obligation to take

every reasonable measure to accommodate public attendance is unprecedented, and places an undue burden on the accused; this Court should grant certiorari.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays this Honorable Court grant his petition for writ of certiorari, to reverse the judgment of the Court of Criminal Appeals, and to affirm the judgment of the San Antonio Court of Appeals.

Respectfully submitted,

GERALD H. GOLDSTEIN*
DONALD H. FLANARY, III
GOLDSTEIN, GOLDSTEIN, & HILLEY
310 S. St. Mary's Street
29th Floor – Tower Life Bldg.
San Antonio, Texas 78205
(210) 226-1463
(210) 226-8367 (telecopier)

JOHN T. HUNTER
LAW OFFICE OF JOHN HUNTER
310 S. St. Mary's Street
Suite 1840 – Tower Life Bldg.
San Antonio, Texas 78205
(210) 937-1034
(210) 568-4927 (telecopier)

**Counsel of Record*
Attorneys for Petitioner

[SEAL]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1427-13

VANESSA CAMERON, Appellant

v.

THE STATE OF TEXAS

ON STATE'S MOTION FOR REHEARING FROM THE FOURTH COURT OF APPEALS BEXAR COUNTY

HERVEY, J., delivered the opinion of the Court, in which KELLER, P.J., and MEYERS, KEASLER, RICHARDSON, NEWELL, JJ., joined. ALCALA, J., filed a dissenting opinion in which JOHNSON, J., joined. YEARY, J., did not participate.

OPINION ON REHEARING

(Filed Mar. 2, 2016)

Appellant was found guilty of murder for killing her former boyfriend. She appealed, arguing that her right to a public trial was violated. The Fourth Court of Appeals agreed and reversed her conviction, holding that Appellant's right to a public trial was violated during voir dire because the public was asked to leave the

courtroom to accommodate a large venire panel. *Cameron v. State*, 415 S.W.3d 404, 406 (Tex. App. – San Antonio Sept. 18, 2013). On discretionary review, we affirmed the judgment of the court of appeals. *Cameron v. State*, No. PD-1427-13, 2014 WL 4996290, *1 (Tex. Crim. App. Oct. 8, 2014). However, we granted the State's timely motion for rehearing and ordered further briefing and oral argument. *Id.* We will vacate the judgment of the court of appeals and remand this cause for further proceedings.

Facts

Vanessa Cameron was convicted of organizing a murder-for-hire plot to kill the father of her child for life-insurance proceeds. Just before jury selection began, defense counsel suggested that the bailiff had excluded the public from the courtroom, including Cameron's family and friends, and objected that the exclusion violated his client's right to a public trial. The following exchange occurred:

> [THE COURT]: We recognize their right to be present during the voir dire. I'm looking around the courtroom, and the jury panel – we have 65 jury panel members that are going to be here. I notice for the record that every single chair that we have available for attorneys that come in during trial and every chair that we have available for other people have been removed and placed in the jury area because that is the only way we can accommodate the number of jurors in this courtroom.

So we're talking about 65 jury panel members. It's going to take up a huge majority of this courtroom, plus counsel table. I don't see any room whatsoever where anybody else would be able to sit and observe.

Now, during – before we called the case, we saw a pretty significant number of family members that were walking in. There is no way this courtroom can accommodate them, and I certainly appreciate the security concerns of the State – excuse me, of the sheriff's department. It is a public trial. It's an open trial. Certainly people have the opportunity to observe. We just don't know where to put them, Mr. Esparza.

[DEFENSE COUNSEL]: Judge, is the Court overruling my objection?

[THE COURT]: No, I'm not ruling. I'm just telling you, where can we put them? Where are we going to put them?

[DEFENSE COUNSEL]: I understand, Judge.

[THE COURT]: I'm not overruling you. Where are we going to put them?

[DEFENSE COUNSEL]: And I still request a ruling from the Court.

[THE COURT]: Well, you're – you're objecting to something I haven't made a ruling. What is it that you're objecting to?

[DEFENSE COUNSEL]: That the public has been excluded from –

[THE COURT]: No. No, no. The Court has never ruled that. I've never ruled that the public is excluded. All I'm saying is, where do you suggest we put them?

[DEFENSE COUNSEL]: We could bring in chairs and put them right here in front of the bench, Judge. We can find places to put them.

[THE COURT]: Okay. We have attorneys that are seated at both sides. We have security issues. That is unreasonable. Where would we put them? Are we going to have them stand here next to the – next to me? That – I think that would be considered a security risk. You want to open up those doors and have them all stand in that little hallway there so they can observe the whole thing? Maybe we could do that. Would that satisfy you?

[DEFENSE COUNSEL]: I just wanted an alternative, Judge.

[THE COURT]: I'm giving you alternatives. Which one would satisfy you in a way that the bailiffs would feel that their job in keeping the courtroom safe and secure would be satisfied?

[DEFENSE COUNSEL]: I can't suggest that. If you want to open those doors and put chairs and have people – have the public sit there, that's fine with me.

[THE COURT]: We don't have enough chairs. Are we going to – if you want, we can open up those doors in the back and have them stand to where they can observe and hear every single thing that's going on.

[STATE]: And, Your Honor, just for the record, I think that's going to be in violation of any fire codes in this city.

[THE COURT]: And that – I mean, we're having issues. Counsel obviously wants her entire family here. I mean, I don't know what else we could do. The courtroom's going to be absolutely stuffed with venirepanel members. I don't know what we're going to do.

[DEFENSE COUNSEL]: But there's no ruling from the Court on my objection?

[THE COURT]: Your objection is that people have been excluded from the Court.

[DEFENSE COUNSEL]: Yes, sir.

[THE COURT]: The Court has never ruled that way, so I'm not sure what it is that you're objecting to.

* * *

[THE COURT]: I am telling you that you can have people in this courtroom. I'm telling you that. Do you understand that? So there's no issue in regards to what it is that you're asking. I just don't know where to put them. So I'm not making a ruling that anybody's excluded. I'm not making a ruling denying anything that you're asking because I haven't ruled on what it is that you're asking. I haven't told you that you cannot have people in the courtroom. Tell me where to put them and we'll put members of her family.

> [DEFENSE COUNSEL]: Okay. Thank you, Judge.

Subsequently, the jury found Cameron guilty, and she appealed, arguing in relevant part that her trial was closed to the public.

Opinions

1. Direct Appeal

A divided panel of the court of appeals held that Appellant's right to a public trial was violated. *Cameron*, 415 S.W.3d at 412. The court found that, despite the trial judge's insistence that he had not closed the courtroom, the record reflects that it was, in fact, closed. *Id.* at 410. The court noted that, while the trial court may have offered an accommodation of allowing members of the public to observe the voir dire proceeding from the foyer of the courthouse, the record does not establish that any steps were taken to facilitate this proffered accommodation. *Id.* Moreover, the appellate court concluded that the trial court did not consider all reasonable measures to accommodate the public during voir dire, including the possibility of splitting the venire panel to make room for spectators to sit in the courtroom. *Id.* According to the court of appeals, because the record does not show that any of these accommodations were employed, the courtroom was closed, and Appellant's Sixth Amendment right to a public trial was violated. *Id.* at 412.

Justice Angelini, writing in dissent, would have held that Appellant failed to satisfy her burden to show

that voir dire was closed to the public. *Id.* at 413 (Angelini, J., dissenting). She reasoned that our opinion in *Lilly* allocated an evidentiary burden to a defendant to show that their trial was closed to the public before considering the *Waller* factors. *Lilly v. State*, 365 S.W.3d 321, 331 (Tex. Crim. App. 2012); *see Waller v. Georgia*, 467 U.S. 39 (1984).

Justice Angelini also would have held that conducting a trial in a public courthouse should create a rebuttable presumption that the trial was open to the public unless a defendant can show that the trial was closed. *Cameron*, 415 S.W.3d at 415. She agreed with the majority that the appellate record is silent on many factual considerations. *Id.* However, unlike the majority, Justice Angelini concluded that the silence weighs against Appellant as it was her initial burden to show that the trial was closed to the public. *Id.*

2. On Discretionary Review

The State appealed the judgment of the court of appeals, arguing that Appellant failed to preserve her complaint for appellate review and that the court of appeals erred in not addressing preservation. It also asserted that the burden was on Appellant to show that her trial was closed to the public and that she failed to meet that burden.

This Court affirmed the Fourth Court of Appeals's judgment, holding that the trial court record "sufficiently shows that the *voir dire* proceedings were closed" and that it was not constitutionally justified

under the Sixth Amendment. *Cameron*, 2014 WL 4996290 at *5. The State subsequently filed a timely motion for rehearing, in which it argues that our decision would be nearly impossible for trial judges to implement and that we erroneously dismissed its burden-of-proof ground for review despite the fact that we granted Appellant relief. We granted the motion for rehearing and address its contentions now.

Discussion

1. General Public-Trial Principles

The Sixth Amendment of the United States Constitution guarantees an accused the right to a public trial in all criminal prosecutions. U.S. CONST. amend. VI; *Lilly*, 365 S.W.3d at 328; *see Johnson v. United States*, 520 U.S. 461, 468-69 (1997). The violation of a defendant's public-trial right is structural error that does not require a showing of harm. *Lilly*, 365 S.W.3d at 328; *see Johnson*, 520 U.S. at 468. To prevail on a public-trial claim, a defendant must first show that the trial was, in fact, closed to the public. *Lilly*, 365 S.W.3d at 331 (applying the *Waller* test after noting that Appellant met his burden to show that the prison-chapel courtroom was closed to the public in light of the extensive evidence that the public was discouraged from attending the proceedings). To determine if a trial was closed, a reviewing court should look to the totality of the evidence, rather than whether a spectator was actually excluded from trial. *Id.* If the defendant's trial

was closed, the reviewing court *then* must decide whether the closure was proper. *See id.*

Some courts have applied a less stringent test for "partial" or "trivial" closures, where members of the public are temporarily excluded from the courtroom. These courts require only a "substantial" or "important" interest rather than *Waller*'s "compelling" reason for limiting access in order to justify a closure,[1] in part because a less-than-complete closure does not "implicate the same secrecy and fairness concerns that a total closure does." *Garcia v. Bertsch*, 470 F.3d 748, 753 (8th Cir. 2006). For example, these courts have held that partial closures are permissible to exclude certain spectators when it is deemed necessary to preserve order in the courtroom. *See Cosentino v. Kelly*,

[1] *See United States v. Perry*, 479 F.3d 885 (D.C. Cir. 2007) (Sixth Amendment not violated by exclusion of eight-year-old son of defendant; closure was trivial when son was only person excluded, his presence would not have ensured fair proceedings, discouraged perjury, or encouraged witnesses to come forward); *Carson v. Fischer*, 421 F.3d 83 (2d Cir. 2005) (exclusion of defendant's ex-mother-in-law from limited portions of criminal trial did not deny defendant his right to a public trial; although the denial of the right to a public trial is not subject to a harm analysis, even an unjustified closure may, in some circumstances, be so trivial as not to implicate the right to a public trial); *Ayala v. Speckard*, 131 F.3d 62 (2d Cir. 1997) ("[T]he sensible course is for the trial judge to recognize that open trials are strongly favored, to require persuasive evidence of serious risk to an important interest in ordering any closure, and to realize that the more extensive is the closure requested, the greater must be the gravity of the required interest and the likelihood of risk to that interest").

102 F.3d 71 (2d Cir. 1996) (no violation when defendants' families who had "rioted," causing a mistrial, were excluded).

2. Arguments of the Parties'

Appellant argues that the court of appeals reached the right result because both the arguments of counsel and the trial court's responses paint a plain picture of a private proceeding that was closed to the general public. She also asserts that the trial court did not factually controvert the allegations laid out. The trial court never refuted Appellant's principal observation that the bailiff had excluded members of the public, and it repeatedly reinforced Appellant's observation by reminding Appellant that there was no room for any member of the public in the courtroom. Further, Appellant contends that the only matter on which the trial court disagreed with Appellant was the legal result of Appellant's observations and that there is sufficient evidence to determine that her trial was closed to the public. Thus, according to Appellant, regardless of whether the burden of proof is on Appellant to show that her trial was closed to the public, she has met that evidentiary burden.

The State responds that the court of appeals erred by not assigning a burden of proof and that, while this Court's opinion in *Lilly* does not directly address the burden-of-proof issue, it was clearly implicit that the burden is on the defense. *Lilly*, 365 S.W.3d at 331. The court of appeals acknowledged that the record was

largely silent to this issue, yet nonetheless ruled, contrary to the trial court's findings of fact, that the court had been closed. Based on the silent record, and the fact that the burden to show the courtroom is closed to the public was on Appellant, the State argues that the court of appeals erred by granting relief without ever mentioning the applicable burden of proof.

Further, the State asserts that the court of appeals failed to follow the standard laid out in *Lilly*, which holds that the first step in analyzing a public-trial claim is finding whether the court was actually closed. *Id.* Instead, the State argues, the court of appeals held that a *Lilly* analysis is one holistic inquiry that includes examining the *Waller* factors. The State contends that this type of review not only makes no sense, but it completely contradicts the precedent laid out in *Lilly.*

3. Burden of Proof to Show a Trial is Closed

The parties argue that we have never squarely addressed to whom the burden belongs to show that a trial is closed to public. While it is true that we did not directly address that issue in *Lilly*, our opinion makes clear that the burden to show that a trial is closed to the public is on the defendant.

In *Lilly*, we stated multiple times that the appellant met his burden to show that the trial was closed to the public. For example, "The State also argues that the court of appeals correctly concluded that ***Appellant failed to carry his burden*** to show that his trial

was closed to the public." *Lilly*, 365 S.W.3d at 326 (emphasis added). Again, as pointed out in the dissenting opinion in the court below, this Court stated, "When determining ***whether a defendant has proved*** that his trial was closed to the public, the focus is not on whether the defendant can show that someone was actually excluded." *Id.* at 331 (emphasis added). Finally this Court concluded, "In sum, we hold that, under the facts of this case, ***Appellant met his burden*** to show that his trial was closed to the public." *Id.* at 331-32 (emphasis added).

We now take the opportunity to definitively resolve this issue and hold that the initial burden of proof is on the defendant to show that the trial is closed to the public. If the defendant fails to carry that burden, the analysis is concluded. Only after a trial is closed to the public is it necessary to determine if the closure was justified.

4. Standard of Review of Public-Trial Claim

Next, to resolve whether Appellant met her burden to show that her trial was closed to the public, we must address the applicable standard of review on appeal.

In *Guzman*, this Court held,

> [A]s a general rule, the appellate courts, including this Court, should afford almost total deference to a trial court's determination of the historical facts that the record supports especially when the trial court's fact finding

> are based on an evaluation of credibility and demeanor. The appellate courts, including this Court, should afford the same amount of deference to trial courts' rulings on "applications of law to fact questions," also known as "mixed questions of law and fact," if the ultimate resolution of those questions turns on an evaluation of credibility and demeanor. The appellate courts may review *de novo* "mixed questions of law and fact" not falling within this category.

Guzman v. State, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). Here, the question of whether a defendant's trial was closed to the public is a mixed question of law and fact that does not turn on credibility and demeanor.

Unlike a legal question, such as statutory construction, in which we construe only the legal meaning of words and provisions, when dealing with the Sixth Amendment right to a public trial, deferring to the court's findings of fact that are supported by the record is a necessary prerequisite before an appellate court can resolve whether a defendant met his burden to show his trial was closed to the public based on the totality of the evidence, and then the ultimate legal question of whether a defendant's public-trial right was violated. *Abney v. State*, 394 S.W.3d 542, 548 (Tex. Crim. App. 2013).

Conclusion

Having decided that the initial burden of proof is on Appellant to show that her trial was closed to the

public, and after explaining the applicable standard of review on appeal, we vacate the judgment of the court of appeals and remand this cause for it to apply the principles of this opinion.

Hervey, J.

Delivered: March 2, 2016

Publish

[SEAL]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1427-13

VANESSA CAMERON, Appellant

V.

THE STATE OF TEXAS

ON THE STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTH COURT OF APPEALS, BEXAR COUNTY

(Filed Oct. 8, 2014)

Womack, J., delivered the opinion of the Court, in which Price, Johnson, Cochran, and Alcala, JJ., joined. Keller, P.J., filed a dissenting opinion, in which Hervey, J., joined. Keasler, J., concurred in the judgment. Meyers, J., dissented.

The appellant, Vanessa Cameron, contends that her constitutional right to a public trial was violated when the trial court excluded the public from the *voir dire* at the beginning of her trial for murder. She appealed from the judgment of conviction and sentence of 70 years' imprisonment and a $5,000 fine. The

Fourth Court of Appeals reversed her conviction,[1] and we granted review. We shall affirm the Court of Appeals' judgment remanding the case for a new trial.

Trial Proceedings

Before *voir dire* was begun, the bailiff removed all spectators from the courtroom. After the venire panel was seated and the judge called the case, the appellant's counsel stated:

> I noticed prior to the Court calling the case for trial, the bailiff ushered out or secluded the general public, to include family and friends of my client. I would ask that family and friends be allowed to be present here in the courtroom during the *voir dire*. They're excluded and I – if they're excluded, I would just put for the record an objection to the 6th Amendment of the U.S. Constitution and Article 1, Section 10 of the Texas Constitution since she does have a right to the public trial.

A lengthy debate followed:

> The Court: We recognize their right to be present during the *voir dire*. I'm looking around the courtroom, and the jury panel – we have 65 jury panel members that are going to be here. I notice for the record that every single chair that we have available for attorneys

[1] *Cameron v. State*, 415 S.W.3d 404 (Tex. App. – San Antonio 2013).

that come in during trial and every chair that we have available for other people have been removed and placed in the jury area because that is the only way we can accommodate the number of jurors in this courtroom.

So we're talking about 65 jury panel members. It's going to take up a huge majority of this courtroom, plus counsel table. I don't see any room whatsoever where anybody else would be able to sit and observe.

Now, during – before we called the case, we saw a pretty significant number of family members that were walking in. There is no way this courtroom can accommodate them, and I certainly appreciate the security concerns of the State – excuse me, of the sheriff's department. It is a public trial. It's an open trial. Certainly people have the opportunity to observe. We just don't know where to put them, Mr. Esparza.

Defense: Judge, is the Court overruling my objection?

The Court: No, I'm not ruling. I'm just telling you, where can we put them? Where are we going to put them?

Defense: I understand, Judge.

The Court: I'm not overruling you. Where are we going to put them?

Defense: And I still request a ruling from the Court.

The Court: Well, you're – you're objecting to something I haven't made a ruling. What is it that you're objecting to?

Defense: That the public has been excluded from –

The Court: No. No, no. The Court has never ruled that. I've never ruled that the public is excluded. All I'm saying, where do you suggest we put them?

Defense: We could bring in chairs and put them right here in front of the bench, Judge. We can find places to put them.

The Court: Okay. We have attorneys that are seated at both sides. We have security issues.

That is unreasonable. Where would we put them? Are we going to have them stand here next to the – next to me? That – I think that would be considered a security risk. You want to open up those doors and have them all stand in that little hallway there

so they can observe the whole thing? Maybe we could do that. Would that satisfy you?

Defense: I just wanted an alternative, Judge.

The Court: I'm giving you alternatives. Which one would satisfy you in a way that the bailiffs would feel that their job in keeping the courtroom safe and secure would be satisfied?

Defense: I can't suggest that. If you want to open those doors and put chairs and have people – have the public sit there, that's fine with me.

The Court: We don't have enough chairs. Are we going to – if you want, we can open up those doors in the back and have them stand to where they can observe and hear every single thing that's going on.[2]

The State: And, Your Honor, just for the record, I think that's going to be in violation of any fire codes in this city.

The Court: And that – I mean, we're having issues. Counsel obviously wants her entire family

---

[2] Nothing in the record indicates to us that this was attempted.

here. I mean, I don't know what else we could do. The courtroom's going to be absolutely stuffed with venire panel members. I don't know what we're going to do.

Defense: But there's no ruling from the Court on my objection.

The Court: Your objection is that people have been excluded from the Court.

Defense: Yes sir.

The Court: The Court has never ruled that way, so I'm not sure what it is that you're objecting to. . . .

I am telling you that you can have people in this courtroom. I'm telling you that. Do you understand that? So there's no issue in regards to what it is that you're asking. I just don't know where to put them. So I'm not making a ruling that anybody's excluded. I'm not making a ruling denying anything you're asking because I haven't ruled on what it is that you're asking. I haven't told you that you cannot have people in the courtroom. Tell me where to put them and we'll put members of her family.

Defense: Okay. Thank you, Judge.

After this, the court went off the record and apparently continued the discussion, but there is no indication that any spectators were allowed into the court room.

Sometime after lunch and in the middle of the State's *voir dire*, the trial court added:

> All right. And while we're on the record and the jury is out, I know that the State is still in the middle of their general *voir dire.* I just want to put something on the record.
>
> Earlier defense asked if members of the defendant's family or other members could sit in, observe portions of the *voir dire.* The Court did not close the proceedings by any means, recognizing the 1st and 6th Amendment rights to the extent of the *voir dire* proceedings.
>
> During the course of discussions, the Court did analyze the four-prong questions tested out in 467 U.S. 39. Specifically, the Court considered the size and configuration of the courtroom. 65 venire panel members have been summoned to the courtroom. In order to accommodate all 65, there are about ten chairs that are placed in the gallery. Additionally, there are three or – three other chairs located next to the jury box. Every single chair in the gallery and in the jury box is filled with the 65 individuals.
>
> The court reporter is seated directly in front of the defense table directly in front of the jury box, so there would be no room there.

Directly in front of the defense table there is a table used by the probation department that has a computer, a printer, some files. Directly next to the defense table is a panel that has been set up by the defense for use during *voir dire*. Directly behind that panel is a box where the bailiffs sit, a bailiff's table.

The Court considered the size of the configuration. Court also considered alternative courts, knowing that the juries – the central jury room is not adequately sufficient for a trial such as this. Also, the Court is expecting a potentially emotionally charged jury trial, this originally being filed, I believe, as a capital. I know that it is now a murder charge.

As such, the space within the courtroom area for the participants and the bailiffs is very narrow. The Court does not want to make any jury or potential jurors feel in any way constrained with truthfulness and honesty, making them uncomfortable in regards to potential family members next to them.

Essentially, the bottom line is that the Court was concerned about safety and safety in the courtroom. Recognizing that the courtroom is not closed, Defense, before you begin your general *voir dire*, you're certainly able to bring in some family members and we will do our best to accommodate them in areas around the gallery where the Court, where the bailiffs feel security will not be an issue.

> All right. Just wanted to put that on the record.[3]

This was the last the issue was discussed. The appellant was found guilty of murder by the jury, and the court assessed a sentence of 70 years' imprisonment and a $5,000 fine.

Law

"In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial. . . ."[4] This right extends to *voir dire* proceedings[5] and is necessary to insure that jurors, prosecutors, and the court are kept aware of their sense of responsibility and can properly carry out their functions.[6] It discourages perjury by holding parties responsible to the public.[7] A violation of this right is a structural error and does not require any showing of harm.[8]

The right to a public trial may give way to other competing rights or interests (such as a defendant's right to a fair trial). However, these circumstances

---

[3] Again, the record does not indicate that this actually happened.

[4] U.S. CONST. AMEND. VI.

[5] *Presley v. Georgia*, 558 U.S. 209, 214 (2010); *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984).

[6] *Waller v. Georgia*, 467 U.S. 39, 46 (1984), *quoting In re Oliver*, 333 U.S. 257, 270 (1948).

[7] *Ibid.*

[8] *Lilly v. Texas*, 365 S.W.3d 321, 328 (Tex. Cr. App. 2012), *citing Johnson v. United States*, 520 U.S. 461, 468-68 [sic] (1998).

should be rare, occurring only if: (1) there is an overriding interest (2) based on findings (3) that closure is essential to preserve higher values and (4) the closure is narrowly tailored to protect that value.[9] Further, the trial court must issue findings specific enough for a reviewing court to determine if the closure was properly ordered.[10]

The party seeking to justify the closure carries the burden of proof of a specific overriding interest. It must be likely that this interest would be prejudiced in the current case, and the closure must be no broader than necessary. The trial court has the burden to consider *all* reasonable alternatives and make findings specific enough to support a closure.[11]

Preservation of Error

The State argues that the appellant did not preserve her complaint for appeal. As we view it, the record shows very clearly that the appellant's trial counsel brought the issue of the closed courtroom to the attention of the trial court. The court acknowledged the appellant's Sixth Amendment rights and then stated that the courtroom was not closed. Counsel then requested (at least six separate times) that the court rule on his objection, but the court declined to rule.

---

[9] *Waller*, 467 U.S., at 45; *Press-Enterprise*, 464 U.S., at 510.

[10] *Ibid.*

[11] *Waller*, 467 U.S., at 48; *see also Lilly*, 365 S.W.3d, at 329.

Texas Rule of Appellate Procedure 33.1 clearly states that, in order to preserve error, the record must show that the trial court either "ruled on the request, objection, or motion either expressly or implicitly *or refused to rule on the request, objection, or motion*, and the complaining party objected to the refusal." This happened below.

Was the appellant's trial closed?

The preliminary question is whether the appellant's trial was in fact closed.[12] This is a question to be determined on a case-by-case basis in light of the totality of the evidence.[13]

The State argues that the lower court erred in disregarding the trial court's findings based on a silent record. But the record in this case is not silent. On the contrary, there are several pages of discussion about the exclusion of the public. As soon as the court went on the record, the appellant's counsel objected to the removal of the public. While it is true that the trial

---

[12] The State argues in its third ground for review that the Court of Appeals erred by not first and separately considering the issue of closure as required under *Lilly*. It is true that *Lilly* states "the first step for a reviewing court when analyzing whether a defendant's right to a public trial was violated is to determine if the trial was, in fact, closed to the public. Once it is determined that the defendant's trial was closed to the public, the reviewing court decides whether that closure was proper." *Lilly*, 365 S.W.3d, at 329. Although this order of analysis is preferable, we were able to review the Fourth Court's opinion, which covered the essential issues.

[13] *Lilly*, 365 S.W.3d, at 330.

court repeatedly stated that the courtroom was not closed, there was no dispute of the fact that all spectators had been removed. It is well established that "this Court accepts as true factual assertions made by counsel which are not disputed by opposing counsel."[14] Accordingly, we accept as true that the appellant's friends and family were ushered out of the courtroom and not allowed back in.

Indeed, far from disputing these facts, the trial judge sought to justify them. Were the *voir dire* proceedings actually open to the public, the trial judge would not have needed to cite space limitations and safety concerns as reasons to keep the public out. The trial court stated that he could not "accommodate" the appellant's friends and family and that "every single chair" was being used by the venire panel. Halfway through the State's *voir dire* examination, the trial court went on the record and described the cramped conditions of the courtroom at length. He then made findings in accordance with the Supreme Court's *Waller* opinion. These findings track the test for whether or not a closure was justified. Again, were the *voir dire* proceedings actually open, there would be no need for a *Waller* analysis.

The State relies heavily on the fact that the trial court repeatedly stated that he had not ruled that the

---

[14] *Thieleman v. State*, 187 S.W.3d 455, 457 (Tex. Cr. App. 2005), *citing Pitts v. State*, 916 S.W.2d 507, 510 (Tex. Cr. App. 1996); *Resanovich v. State*, 906 S.W.2d 40, 42 (Tex. Cr. App. 1995).

courtroom was closed. He stated repeatedly that he respected and recognized the appellant's right to a public trial, that he was not ruling, and that he had not ruled, that the court was closed. We ordinarily defer to a trial court's findings of fact. But the judge's own statements show that there was no room in the court for spectators; he all but conceded that no one was allowed to witness *voir dire*.

The record sufficiently shows that the *voir dire* proceedings were closed.

Was the closure justified?

Having held that the *voir dire* proceedings were, in fact, closed to the public, we move on to the *Waller* test to determine if this closure was constitutionally justified under the Sixth Amendment.

Under *Waller*, a closure will be justified only if the trial court makes findings that closure is necessary to protect an overriding interest and the closure is narrowly tailored to protect that interest.[15] A court also must consider all reasonable alternatives to closure.[16]

In this case, the trial judge's findings cited several interests to justify the exclusion of the public. First, he cited the "size and configuration of the courtroom" and the fact that every chair was used for the venire panel. Next, the court expressed general concerns about

---

[15] *Waller*, 467 U.S., at 45.

[16] *Presley*, 588 U.S. at 215; *Steadman v. State*, 360 S.W.3d 499, 509 (Tex. Cr. App. 2012).

safety. Finally, the court explained that he expected the trial to be emotionally charged.

While concerns over space and overcrowding may be legitimate concerns of a trial court, they must not outweigh a defendant's Sixth Amendment rights. In part, this is because there are readily available alternatives to fix these problems. Both this Court and the Supreme Court have suggested that, in such situations, a trial court should move to a bigger courtroom or split the panel in half. It is no valid argument that these alternatives are inconvenient or would cause delay.[17]

Next, while security issues can be overriding enough to justify a closure, vague or general concerns are not sufficient.[18] The trial court did not make any specific findings concerning specific dangers that would *likely* (not just possibly) occur. On this record, there are only vague mentions of "security concerns" such as "fire code issues" and "police detection issues." At no point did the trial court make case-specific findings about a security interest that was *likely* to be prejudiced. The only case-specific issue in the record came from one of the bailiffs, who stated in an affidavit that the appellant's mother was a law-enforcement officer who could have legally brought her firearm into the courtroom. However, this concern is a mere hypothetical that was not investigated or adopted by the court. Further, there is no evidence that alternatives were

---

[17] *Steadman*, 360 S.W.3d at 509.

[18] *Presley*, 558 U.S. at 215-16.

considered (such as asking the appellant's mother to relinquish her firearm).

Finally, we reject the trial court's assertion that the public would prevent the jurors from being truthful. This goes against the entire logic behind the right to a public trial. As the Supreme Court has stated:

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. . . . In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and *discourages perjury.*[19]

As well as:

> The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.[20]

---

[19] *Waller*, 467 U.S., at 46 (emphasis added).

[20] *Press-Enterprise*, 464 U.S., at 510.

These great values, which help to keep our criminal justice system just, could be completely eroded if a trial judge could close a trial because open testimony *might* make some jurors uncomfortable. This is not an argument that we can accept.

Conclusion

The opinion of the Court of Appeals is affirmed. The trial court was closed at a critical stage at the proceedings. Further, the trial court did not make findings to support a legitimate overriding interest for this closure.[21]

We affirm the judgment of the Court of Appeals remanding the case for a new trial.

Delivered October 8, 2014.
Publish.

[21] Another issue of which we granted review, which asked who bears the burden to demonstrate that the proceedings were closed, is dismissed.

[SEAL]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1427-13

VANESSA CAMERON, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTH COURT OF APPEALS BEXAR COUNTY

(Filed Oct. 8, 2014)

KELLER, P.J., filed a dissenting opinion in which HERVEY, J., joined.

The Court says that "this Court accepts as true factual assertions made by counsel which are not disputed by opposing counsel," and that is correct. But the Court applies the concept in this case to accept as true "that the appellant's friends and family were ushered out of the courtroom *and not allowed back in*."[1] Whether the friends and family were allowed back in was, in fact, disputed.

[1] Emphasis added.

In affidavits filed in response to appellant's motion for new trial, one of the bailiffs said that standard procedure was to clear the courtroom to let the jurors be seated, but he swore that he never said that no one could come back into the courtroom and he never told anyone to leave the courthouse. Another bailiff swore that no one was excluded from the courtroom with the intention of not being allowed to watch the trial, including voir dire. The trial court found as a fact that the bailiffs cleared the courtroom in order to make room to bring the venire panel in and get them organized and seated, but they did not tell any spectators that they were not allowed to watch the voir dire or any other part of the proceedings.

I think Justice Angelini's dissent in the court of appeals was exactly right: appellant failed to satisfy her burden of showing that the voir dire was not open to the public.[2] Justice Angelini pointed out that the trial court offered to open up the doors into the courtroom and allow spectators to stand in the hallway area leading into the courtroom to watch the proceedings.[3] Defense counsel suggested that opening the doors would be acceptable if chairs were put in the hallway area for the spectators to sit.[4] The trial court replied

---

[2] *See Cameron v. State*, 415 S.W.3d 404, 412-20 (Tex. App. – San Antonio 2013, pet. granted) (Angelini, J., dissenting).

[3] *See id.* at 416, 419.

[4] *Id.* at 416.

that there were not enough chairs but that the spectators could stand in the hallway area and watch.[5] Defense counsel demanded a ruling, but the trial court replied that he had never ruled that people had been excluded from the courtroom and he was not sure what defense counsel was objecting to.[6] Defense counsel never responded to the trial court's suggestion that the doors be opened and spectators be allowed to stand and watch the voir dire proceedings.[7]

The trial court told defense counsel on the record, "[W]e can open up those doors in the back and have them stand to where they can observe and hear every single thing that's going on." At that point, defense counsel had the option of saying, "Okay." The fact that he didn't (if he didn't) should not be held against the judge, who had made a suggestion that, if followed, would have allowed the spectators to view the proceedings.

I agree with Justice Angelini that appellant has failed in her burden to show that the courtroom was not open to the public.

I respectfully dissent.

Filed: October 8, 2014
Publish

---

[5] *Id.*

[6] *Id.*

[7] *Id.*

[SEAL]

Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-12-00294-CR

Vanessa **CAMERON,**
Appellant

v.

The **STATE** of Texas,
Appellee

From the 379th Judicial District Court,
Bexar County, Texas Trial Court No. 2010-CR-4286C
Honorable Ron Rangel, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice
Dissenting Opinion by: Karen Angelini, Justice

Sitting: Catherine Stone, Chief Justice
Karen Angelini, Justice
Rebeca C. Martinez, Justice

Delivered and Filed: September 18, 2013

REVERSED AND REMANDED

Vanessa Cameron appeals her conviction for the murder of her former boyfriend. Because we conclude that Cameron's constitutional right to a public trial was violated during the jury selection phase of her trial, we reverse the trial court's judgment and remand for a new trial.

Factual and Procedural Background

On December 13, 2010, Samuel Johnson, Jr. was shot to death. A few days later, his body was found in a cemetery. Cameron, Johnson's former girlfriend and the mother of Johnson's young son, was charged with murdering Johnson. The State alleged that Cameron, upset over Johnson leaving her for another woman, concocted a plot to murder Johnson so that she could collect life insurance proceeds as Johnson's named beneficiary. A jury found Cameron guilty of murder, and the trial court sentenced Cameron to seventy years' imprisonment and imposed a $5,000 fine. Cameron now appeals.

Discussion

On appeal, Cameron argues that (1) her right to a public trial under the Sixth Amendment to the United States Constitution was violated by the trial court during voir dire, (2) the trial court erred in denying her motion to suppress her oral statements obtained in violation of the Texas Constitution, article 38.22 of the Texas Code of Criminal Procedure, and the Fifth and Fourteenth Amendments to the United States Constitution, and (3) the trial court abused its discretion in admitting rebuttal evidence of an alleged prior solicitation over her objections based on Rules 403 and 404(b) of the Texas Rules of Evidence. We begin by addressing the public trial issue.

RIGHT TO PUBLIC TRIAL

Voir Dire Proceedings

Prior to the beginning of voir dire, the bailiff ushered Cameron's family and friends out of the courtroom, stating that only the jury panel members would be allowed inside the courtroom during jury selection and there was no room for the public. When the trial judge took the bench, and before the venire panel was brought into the courtroom, defense counsel brought to the trial court's attention that the public, including Cameron's family and friends, had been excluded from the courtroom. Counsel requested that the trial court permit Cameron's family and friends to be present in the courtroom during voir dire and objected to their exclusion on the ground that Cameron was being denied her right to a public trial under the Sixth Amendment. The trial court responded that it recognized Cameron's right to have her family and friends present during voir dire, but explained that due to the sixty-five venire members and the lack of additional chairs, it did not "see any room whatsoever where anybody else would be able to sit and observe." The court further stated, "before we called the case, we saw a pretty significant number of family members that were walking in. There is no way this courtroom can accommodate them, and I certainly appreciate the security concerns of . . . the sheriff's department. It is a public trial. It's an open trial. Certainly people have the opportunity to observe. We just don't know where to put them."

At that point, defense counsel asked if the trial court was overruling his objection to exclusion of the public. The court replied, "No, I'm not ruling. I'm just telling you, where can we put them?" When counsel reiterated that he was still requesting a ruling, the court stated, "you're objecting to something I haven't made a ruling [on]." Defense counsel stated he was asking for a ruling on his objection to exclusion of the public. The court replied, "No. No, no. The Court has never ruled that. I've never ruled that the public is excluded. All I'm saying is, where do you suggest we put them?" Counsel suggested the court could bring in chairs and place them in front of the bench, stating "we can find places to put them." The judge dismissed the suggestion as unreasonable, citing "security issues" and the "security risk" of having spectators stand next to him. The court then asked defense counsel if he would be satisfied with opening the courtroom doors and "have them all stand in 'that little hallway there' so they can observe the whole thing?" Counsel responded, "I just wanted an alternative . . . If you want to open those doors and put chairs and have people – have the public sit there, that's fine with me." The court replied that it did not have enough chairs, but "if you want, we can open up those doors in the back and have them stand to where they can observe and hear every single thing that's going on." Joining the discussion for the first time, the prosecutor stated he thought opening the courtroom doors and permitting the public to stand in that space would be a fire code violation. The court then stated, "And that – I mean, we're having issues. Counsel obviously wants her entire family here. I

mean, I don't know what else we could do. The courtroom's going to be absolutely stuffed with venirepanel members."

Defense counsel again attempted to obtain a ruling on his objection and the court again declined to rule, explaining that his objection was "premature" because the court had not ruled that the public was excluded from voir dire. When counsel explained that his objection was based on the bailiff's exclusion of the public that had already occurred prior to the judge taking the bench, the court again acknowledged Cameron's right to an open court proceeding but reiterated the lack of space and available chairs, stating "I just don't know how we could accommodate." When counsel asked if his objection was therefore overruled, the court replied, "I am telling you that you can have people in this courtroom . . . I just don't know where to put them. So I'm not making a ruling that anybody's excluded. I'm not making a ruling denying anything that you're asking because I haven't ruled on what it is that you're asking. I haven't told you that you cannot have people in the courtroom. Tell me where to put them and we'll put members of her family." Counsel stated, "okay. Thank you, Judge." During the entire exchange regarding exclusion of the public during voir dire, the prosecutor was silent except for pointing out the potential fire code violation. The venire panel was then brought into the courtroom and the voir dire proceedings began.

Later, during the middle of general voir dire, after a recess required by a venire member's need for medical attention, the court revisited the issue of the public's exclusion from the courtroom. Outside the presence of the venire panel, the court again stated on the record that it did not close the voir dire proceedings, but also added, "[d]uring the course of discussions, the Court did analyze the four-prong questions" laid out in *Waller v. Georgia*, 467 U.S. 39 (1984). The court described its *Waller* analysis as follows:

> Specifically, the Court considered the size and configuration of the courtroom. 65 venirepanel members have been summoned to the courtroom. In order to accommodate all 65, there are about ten chairs that are placed in the gallery. Additionally, there are three or – three other chairs located next to the jury box. Every single chair in the gallery and in the jury box is filled with the 65 individuals.
>
> The court reporter is seated directly in front of the defense table directly in front of the jury box, so there would be no room there. Directly in front of the defense table there is a table used by the probation department that has a computer, a printer, some files. Directly next to the defense table is a panel that has been set up by the defense for use during voir dire. Directly behind that panel is a box where the bailiffs sit, a bailiff's table.
>
> The Court considered the size of the configuration. [The] Court also considered alternative courts, knowing that the juries – the

> central jury room is not adequately sufficient for a trial such as this. Also, the Court is expecting a potentially emotionally charged jury trial, this originally being filed, I believe, as a capital. I know that it is now a murder charge.
>
> As such, the space within the courtroom area for the participants and the bailiffs is very narrow. The Court does not want to make any jury or potential jurors feel in any way constrained with truthfulness and honesty, making them uncomfortable in regards to potential family members next to them.
>
> Essentially, the bottom line is the Court was concerned about safety and safety in the courtroom. Recognizing that the courtroom is not closed, Defense, before you begin your general voir dire, you're certainly able to bring in some family members and we will do our best to accommodate them in areas around the gallery where the Court, where the bailiffs feel the security will not be an issue.

This is the last reference to exclusion of the public made on the record during trial. There is no indication in the record that any of Cameron's family or friends were permitted inside the courtroom during the remainder of voir dire, or that the courtroom's doors into the foyer area were ever opened or that any member of the public stood there during voir dire.

Motion for New Trial

After Cameron was convicted and sentenced, she filed a motion for new trial alleging her right to a public trial was violated during voir dire. Cameron's motion included twelve affidavits by her friends and family, including her mother, stating that the bailiffs excluded them from the courtroom before voir dire began and they did not witness any of the voir dire proceedings. Most of the affiants declared that they left the courthouse for the day after being excluded from voir dire. In her affidavit, Cameron's mother states that she asked the bailiff whether she could sit on the floor, but he refused her request, stating she would be a security risk. Cameron also attached an affidavit by an attorney on an unrelated case who witnessed the bailiffs clearing the courtroom before the venire panel was brought inside. The State filed a response, attaching affidavits from the two bailiffs stating they did not close the courtroom to the public during voir dire. In his affidavit, one bailiff admits that Cameron's mother asked to sit on the floor during voir dire and he refused based on security reasons. The State also submitted proposed findings of fact and conclusions of law. No hearing was held on the motion for new trial, and it was overruled by operation of law. The court adopted the State's proposed findings and signed the written findings of fact and conclusions of law reciting, in part,

that "[t]he Court *never* ruled that observers were excluded from the voir dire or any other part of the trial in this case."[1]

Analysis

Under the Sixth Amendment, an accused has the right to a public trial in all criminal prosecutions. U.S. CONST. amend. VI; *Presley v. Georgia*, 558 U.S. 209, 212 (2010) (per curiam) (Sixth Amendment right to public trial was created for benefit of the accused). The right extends to the jury selection phase of trial, including voir dire of prospective jurors. *Presley*, 558 U.S. at 212-13. The longstanding right to a public trial serves important societal interests of ensuring fairness and accountability in the judicial system. *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 508 (1984) (addressing the right to a public trial under the First Amendment which extends to the press and public). The right to a public trial is not absolute, however, and must give way to other competing rights or interests under certain, rare circumstances. *Waller v. Georgia*, 467 U.S. 39, 45 (1984). In *Waller*, the Supreme Court provided standards for courts to apply before excluding the public from any stage of a criminal trial, stating, "[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider

[1] All of the trial court's written findings of fact and conclusions of law are set forth verbatim in the dissenting opinion.

reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id.* at 48. Violation of a criminal defendant's right to a public trial is structural error that does not require a showing of harm. *Johnson v. United States*, 520 U.S. 461, 468-69 (1997); *Steadman v. State*, 360 S.W.3d 499, 510-11 (Tex. Crim. App. 2012).

In determining whether any portion of a trial was closed to the public, the focus is not on whether the defendant can show that any person was actually excluded. *Lilly v. State*, 365 S.W.3d 321, 331 (Tex. Crim. App. 2012). Rather, we look to "the totality of the evidence and determine whether the trial court fulfilled its obligation 'to take every reasonable measure to accommodate public attendance'. . . ." *Id.* (quoting *Presley*, 558 U.S. at 215). It is the trial court's duty to consider all reasonable alternatives to accommodate the public – the duty does not fall on the parties to suggest reasonable alternatives. *Presley*, 558 U.S. at 214; *Steadman*, 360 S.W.3d at 505 (no burden on defendant to proffer alternatives). Placement of this duty on the trial court is based on the premise that "[t]he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." *Presley*, 558 U.S. at 214 (quoting *Press-Enterprise*, 464 U.S. at 505). The United States Supreme Court specifically recognized "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" as reasonable alternatives to accommodate

the public during voir dire. *Presley*, 558 U.S. at 215; *Steadman*, 360 S.W.3d at 505.

The dissenting opinion suggests that *Lilly* requires a sequential two-part analysis: first, the defendant has the burden to show that his trial was closed to the public; then, only after closure is established does the reviewing court consider whether the trial court failed to take every reasonable measure to accommodate public attendance at trial. To the contrary, *Lilly* instructs us that in determining whether the trial was closed we look at the totality of the circumstances – which includes a determination of whether the court took every reasonable measure to accommodate public attendance. *See Lilly*, 365 S.W.3d at 331. As described in *Lilly*, the analysis is one broad inquiry, not a two-step process. This interpretation of *Lilly* is supported by the substance of the opinions on this issue, as well as by the very structure of the Court of Criminal Appeals' opinion in *Lilly.* In the opinion, the Court discusses the trial court's obligation to take every reasonable measure to accommodate the public under the heading "Was Appellant's trial closed?" *See id.* at 330-31. This indicates that the Court of Criminal Appeals views the analysis as a broad inquiry, not a sequential two-step analysis in which the question of reasonable accommodations is not reached unless the defendant proves the trial was closed. In addition, the United States Supreme Court in *Waller* phrased its four-part test, which includes whether the trial court considered reasonable alternatives to closure, as a

standard for courts to apply before excluding the public from any stage of a criminal trial. *See Waller*, 467 U.S. at 48.

The instant case presents an unusual situation because no party sought to close the trial to the public. Defense counsel emphatically requested that Cameron's family and friends be allowed into the courtroom to observe the voir dire proceedings. The trial court was equally adamant in its insistence that it had not closed the courtroom to the public – there simply was no more room. Despite giving deference to the trial court's written findings, the record shows that members of the public were, in fact, excluded from the courtroom during the jury selection phase. Defense counsel stated on the record that the bailiffs told Cameron's family and friends to leave the courtroom before the venire panel arrived and before the judge took the bench. The State did not counter that assertion of fact. Cameron's counsel then engaged in a lengthy discussion with the trial judge concerning his objection that the public had been excluded from voir dire. Again, the State remained silent. Although the trial court repeatedly stated that it was not excluding the public from voir dire, the court stated several times on the record, before and during voir dire, that there was not enough room for any spectators inside the courtroom, that all available seats were occupied by venire members, and that unspecified "security issues" foreclosed accommodating the public anywhere inside the courtroom. Even the court's written finding No. 14, stating, "If observers had entered after the jury panel was seated, they would have been allowed back in the courtroom by the

court during the proceedings in this case" implies that no public observers were present during voir dire. Again, the defendant need not show that any one person was actually excluded. *See Lilly*, 365 S.W.3d at 331. However, it is undisputed that Cameron's mother was excluded from the courtroom during voir dire. Even if we acknowledge that she asked to sit on the floor and the bailiff denied her request because it presented a security risk, there is no showing that any attempt was made to provide a reasonable, yet secure, accommodation for her to attend her daughter's trial. Placing an extra chair in the courtroom, propping open the courtroom doors to allow observers in the foyer, or splitting the venire panel were all arguably reasonable accommodations, but the record does not show any were actually employed. Instead, the record before this Court indicates that no one other than the venire panel, counsel, and court staff was accommodated in the courtroom during voir dire. Thus, despite the trial judge's insistence that he had not closed the courtroom, the record shows it was, in fact, closed.

Even if we assume the one alternative offered by the trial court – to allow the public to stand in the foyer leading into the courtroom – was a "reasonable alternative," the record does not show it was acted on or made available by the court. After defense counsel requested chairs and the court stated there were none, the record does not show whether, in fact, the courtroom doors were opened up into the foyer to allow spectators to stand there.[2] The record is simply silent on

[2] The record is also silent on whether a spectator could actually see and hear the voir dire proceedings from the vantage point

whether this accommodation offered by the trial court was indeed provided. The trial courts are directed to take action in providing reasonable accommodations, not merely to offer or suggest an accommodation. *Lilly*, 365 S.W.3d at 331 (noting trial court's obligation "to *take* every reasonable measure to accommodate public attendance") (emphasis added) (quoting *Presley*, 558 U.S. at 215). In light of the trial court's affirmative duty to take action, we cannot agree with the State's contention, and the dissenting opinion's suggestion, that the court's obligation was somehow relieved or met when defense counsel "implicitly rejected the trial court's offer" by requesting chairs be placed in the foyer. The court's offer was simply not enough to fulfill its duty; action was required.

In addition, the record is clear that the trial court did not consider one of the key alternatives specifically mentioned in *Presley* as a reasonable accommodation for the public during voir dire – the option of splitting the venire panel. *See Presley*, 558 U.S. at 215; *see also Steadman*, 360 S.W.3d at 505. In *Steadman*, the trial court considered several alternatives to closure, "but discounted them because they would compromise ordinary courtroom-security measures, would cause 'delay,' or were simply 'inconvenient.'" *Steadman*, 360 S.W.3d at 508. The Court of Criminal Appeals held the trial court had failed to consider "*all* reasonable alternatives" as required by *Presley* and *Waller*, including, specifically, "an alternative that would have solved both

---

of the foyer and thus whether the foyer was a reasonable accommodation.

the jury-contamination issue and the courtroom-security issue: 'dividing the jury venire panel to reduce courtroom congestion.'" *Id.* at 509. Based on the trial court's failure to make findings specific enough to warrant closure of the courtroom during voir dire, and the court's failure to consider all reasonable alternatives to closure, the Court held that Steadman's right to a public trial was violated. *Id.* at 510. Here, as in *Steadman*, the trial court considered one alternative, i.e., standing in the foyer, but failed to consider, and take, *all* reasonable measures to accommodate the public during the voir dire proceedings, including splitting the venire panel. *See id.* at 509; *see also Presley*, 558 U.S. at 214-15; *Lilly*, 365 S.W.3d at 331-32.

Further, the trial court's findings are not sufficiently specific with respect to its concerns regarding the risk of venire panel contamination, courtroom security, and space constraints, as well as its consideration of all reasonable measures to accommodate the public during voir dire. *See Steadman*, 360 S.W.3d at 506-08 (trial court failed to articulate a "tangible threat" based on concrete facts, citing only a broad and generic concern about possible panel contamination and security). Under *Presley*, both venire panel contamination and courtroom security could be sufficient overriding interests. *Presley*, 558 U.S. at 215. However, the record here does not include "findings specific enough that a reviewing court can determine whether the closure order was properly entered" based on either interest. *Press-Enterprise*, 464 U.S. at 510. Nowhere did the trial court point to specific, concrete facts of

previous courtroom outbursts or attempts to influence panel members by Cameron's family or friends. The court made no findings that Cameron or her family or friends posed a courtroom security threat. *See Steadman*, 360 S.W.3d at 506. Further, the trial court's concerns regarding space, security, and panel contamination could have been addressed by relocating the trial, "dividing the jury venire panel to reduce courtroom congestion[,] or instructing prospective jurors not to engage or interact with audience members." *Presley*, 558 U.S. at 215. The trial court did not consider all reasonable alternatives to closure, notably, dividing the venire panel. Further, in rejecting relocation of voir dire to other courts or the central jury room, the court did not specify why those alternative locations were insufficient. *See Steadman*, 360 S.W.3d at 508 (concluding that the "delay" or "inconvenience" the trial court found would be caused by relocating voir dire to the central jury room did not, by themselves, satisfy *Presley's* holding that neither convenience nor judicial economy can constitute an "overriding interest").

Based on the foregoing reasons, we conclude that the trial court, despite its commendable good faith efforts, failed to comply with the mandates of the Sixth Amendment. While the court offered an accommodation of allowing members of the public to observe the voir dire proceedings from the foyer, the record does not establish that any steps were taken to facilitate this proffered accommodation (i.e., propping open the

doors)[3] and that the accommodation was reasonable. Further, the court did not consider all reasonable measures to accommodate the public during voir dire, notably failing to consider splitting the venire panel. Accordingly, we hold that Cameron's right to a public trial was violated. *See Presley*, 558 U.S. at 216; *see also Steadman*, 360 S.W.3d at 510. Because the error is structural error, the trial court's judgment must be reversed and the cause remanded for a new trial. *See Presley*, 558 U.S. at 216 (when the record fails to show the trial court considered *all* reasonable alternatives to accommodate the public, it is reversible error); *see Steadman*, 360 S.W.3d at 510-11 (when the constitutionally tainted portion of trial encompasses the entire jury selection process, relief involves a new voir dire and a new jury, thereby necessitating a new trial).

Given our disposition of this issue, we need not reach the other appellate issues raised by Cameron. *See* TEX. R. APP. P. 47.1. Accordingly, we reverse the trial court's judgment and remand for a new trial.

Rebeca C. Martinez, Justice

PUBLISH

---

[3] We acknowledge that the possibility of a fire code violation was raised, but this Court's recent opinion in *Garcia v. State* rejected this concern, recognizing that "[c]learly, the trial court has some responsibility for complying with applicable safety regulations, but that responsibility does not excuse the trial court from considering other alternatives to closing voir dire." *Garcia v. State*, 401 S.W.3d 300, 304 (Tex. App. – San Antonio 2013, pet. ref'd).

[SEAL]

Fourth Court of Appeals
San Antonio, Texas

DISSENTING OPINION

No. 04-12-00294-CR

Vanessa **CAMERON**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 379th Judicial District Court,
Bexar County, Texas Trial Court No. 2010CR4286C
Honorable Ron Rangel, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice
Dissenting Opinion by: Karen Angelini, Justice

Sitting: Catherine Stone, Chief Justice
Karen Angelini, Justice
Rebeca C. Martinez, Justice

Delivered and Filed: September 18, 2013

Because I believe Appellant Vanessa Cameron failed to satisfy her burden of showing that voir dire was not open to the public, I respectfully dissent.

The Sixth Amendment guarantees an accused the right to a public trial in all criminal prosecutions. U.S. CONST. amend. VI. The Supreme Court in *Presley v. Georgia*, 558 U.S. 209, 213 (2010), confirmed that an accused's right to a public trial extends to the voir dire

of prospective jurors. However, the Supreme Court reasoned that the accused's right to a public trial is not absolute and "may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Id.* (quoting *Waller v. Georgia*, 467 U.S. 39, 45 (1984)). Thus, the Supreme Court explained that "before excluding the public from any stage of a criminal trial," the "party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id.* at 21314 (quoting *Waller*, 467 U.S. at 48). That is, *to justify its decision to close its courtroom to the public*, a trial court must consider reasonable alternatives to closing the proceeding and must make findings adequate to support its decision to close the proceedings to the public. *See id.* If, however, a trial court does not close its proceedings, it is under no obligation to consider reasonable alternatives to closing the proceedings, nor must it make findings. *See id.* Thus, an appellate court should make a two-part inquiry. "[T]he first step for a reviewing court when analyzing whether a defendant's right to a public trial was violated is to determine if the trial was, in fact, closed to the public." *Lilly v. State*, 365 S.W.3d 321, 329 (Tex. Crim. App. 2012). "Once it is determined that the defendant's trial was closed to the public, the reviewing court decides whether that closure was proper." *Id.*

The majority states that in determining whether the proceedings were closed to the public, a reviewing court should look at the totality of the circumstances "which includes a determination of whether the court took every reasonable measure to accommodate public attendance." The majority then applies the *Waller* factors and concludes that the trial court failed in its "affirmative duty" to take every reasonable measure to accommodate public attendance. I disagree with the majority because I do not believe based on this appellate record Cameron met her initial burden of showing that the trial court had, in fact, closed the proceedings to the public.

In most cases, whether the trial court closed the trial to the public is not in dispute as often the trial is closed upon the granting of a motion by a party seeking to close the trial to the public. *See Lilly*, 365 S.W.3d at 329, 332; *see also Waller*, 467 U.S. at 48 (explaining that the prosecution sought to close trial proceedings to protect sensitive wiretap information); *Gannett Co. v. DePasquale*, 443 U.S. 368, 375-76 (1979) (stating that defendant requested media to be excluded from his trial due to pretrial publicity). Even in the context of voir dire cases, whether the trial was, in fact, closed to the public does not appear to have been an issue in most cases. *See Presley*, 558 U.S. at 210 (explaining that the record reflected that upon noticing a lone courtroom observer, the trial court explained to the observer that prospective jurors were about to enter and that he was not allowed to remain in the courtroom and had to leave that floor of the courthouse entirely);

Steadman v. State, 360 S.W.3d 499, 500 (Tex. Crim. App. 2012) (explaining that the record showed the trial court denied the defense's request to have four members of his family and friends present during voir dire); *Garcia v. State*, 401 S.W.3d 300, 302 (Tex. App. – San Antonio 2013, pet. ref'd) (explaining that over the defendant's objection under the Sixth Amendment, the trial court denied the defendant's request to have three of his family members present during voir dire and excluded the family members); *Benson v. State*, No. 04-12-00159-CR, 2013 WL 1149028, at *2 (Tex. App. – San Antonio Mar. 20, 2013, no pet.) (concluding that the record reflected that the defendant asked the trial court to allow his parents to be present in the courtroom during voir dire and that the trial court denied his request and excluded his parents from voir dire).

Unlike the above cases, in *Lilly*, 365 S.W.3d at 324, the issue of whether a trial was in fact closed was in dispute on appeal. In that case, the court of criminal appeals considered whether a trial held in the prison-chapel courtroom of a maximum-security prison was closed to the public. *Id.* at 324-25. The court of appeals had held that the appellant's trial was not closed because there was no evidence that anyone was "dissuaded from attempting" to attend, and there was no evidence that anyone was actually prohibited from attending appellant's trial. *Id.* at 331. The court of criminal appeals rejected this reasoning, explaining that "[w]hen determining *whether a defendant has proved that his trial was closed to the public*, the focus is not on whether the defendant can show that someone was

actually excluded." *Id.* (emphasis added). Thus, unlike the majority suggests, the *Lilly* court did place an evidentiary burden on the defendant to show that his trial was in fact closed to the public.

The court of criminal appeals reasoned that rather than look to whether anyone was actually excluded from trial, a reviewing court should look to the totality of the evidence. *Id.* Thus, the court of criminal appeals considered the totality of the following evidence presented by the defendant: (1) visitors who wished to attend trial would have to pass through a front gate of the prison, followed by two fences with razor wire, and a series of three locked metal doors; (2) they would then be subjected to a physical pat-down search, be required to remove their shoes and belt, and be required to walk through a metal detector; and (3) before they could enter, they had to show a valid state-employee identification card or have the on-duty warden's approval. *Id.* Further, the court of criminal appeals explained that although there was conflicting testimony about whether a non-state employee not appearing on an inmate's visitor list could enter the prison without permission of the on-duty warden, "regardless of whether an individual attempting to enter the Unit is ultimately allowed entry, the prison keeps a record of the name and identification number (e.g., a person's driver's license number or TDCJ identification number) of anyone who attempts to enter the Unit and that identification is checked at each barrier." *Id.* Finally, the court of criminal appeals noted that other prison policies allowed guards at their discretion to prohibit

visitors from entering the prison. *Id.* Looking at the totality of the evidence presented by the defendant, the court of criminal appeals concluded that holding a trial in a prison was, in fact, closing the trial to the public. *Id.*

The majority seizes on the following paragraph in *Lilly* to explain why it concludes that whether the trial court fulfilled its affirmative "duty to consider all reasonable alternatives to accommodate the public," including "the option of splitting the venire panel," is relevant to its analysis of whether the trial was in fact closed to the public:

> When determining whether a defendant has proved that his trial was closed to the public, the focus is not on whether the defendant can show that someone was actually excluded. Rather, a reviewing court must look to the totality of the evidence and determine whether the trial *court fulfilled its obligation "to take every reasonable measure to accommodate public attendance at criminal trials."*

Id. (emphasis added) (quoting *Presley*, 558 U.S. at 215). Of course, in *Lilly*, the trial was held in a prison, and in evaluating whether trial was closed, the court of criminal appeals was considering the totality of the circumstances surrounding holding a trial in a prison. *See id.* It concluded that by the nature of a prison's highly restrictive admittance policies, as shown through evidence presented by the defendant, the trial was de facto closed. *See id.* The court of criminal appeals was

not considering the *Waller* factors used to justify a closure, as later in its opinion, it considers whether the closure was justified. *See id.* at 332-33.

Here, unlike in *Lilly*, this trial was held in a public courthouse. Conducting a trial in a public courthouse is fulfilling the trial court's obligation to accommodate public attendance at criminal trials unless a defendant can show that the trial was in fact closed to the public. Cameron was obligated to meet her burden to show in looking at the totality of the evidence that voir dire was actually closed. Both the majority and I agree that this appellate record is not a model of clarity and is largely silent. However, unlike the majority, I believe that the silence in the appellate record weighs against Cameron as it was her initial burden to show the trial was in fact closed to the public.

The record reflects that right before the voir dire panel was ushered into the courtroom, defense counsel stated the following:

> I noticed prior to the Court calling the case for trial, the bailiff ushered out or secluded [sic] the general public, to include family and friends of my client. I would ask that family and friends be allowed to be present here in the courtroom during the voir dire. They're excluded and I – if they're excluded, I would just put for the record an objection to the Sixth Amendment to the U.S. Constitution and article 1, section 10 of the Texas Constitution since she does have a right to the public trial.

The court responded by stating the following:

> We recognize their right to be present during the voir dire. I'm looking around the courtroom, and the jury panel – we have sixty-five jury panel members that are going to be here. I notice for the record that every single chair that we have available for attorneys that come in during trial and every chair that we have available for other people have been removed and placed in the jury area because that is the only way we can accommodate the number of jurors in this courtroom. So we're talking about sixty-five jury panel members. It's going to take up a huge majority of this courtroom, plus counsel table. I don't see any room whatsoever where anybody else would be able to sit and observe.
>
> Now, during – before we called the case, *we saw a pretty significant number of family members that were walking in.* There is no way this courtroom can accommodate them, and I certainly appreciate the security concerns of the State – excuse me, of the sheriff's department. It is a public trial. It's an open trial. Certainly people have the opportunity to observe. We just don't know where to put them, Mr. Esparza [defense counsel].

(emphasis added). Defense counsel then demanded a ruling from the court that the court was excluding the public, but the trial court adamantly stated,

> No. No, no. The court has never ruled that. I've never ruled that the public is excluded. All I'm saying is, where do you suggest we put them?

Defense counsel then suggested that chairs could be brought up right in front of the bench. The court replied that doing so would be an unacceptable security risk. The court then offered,

> You want to open up those doors and have them all stand in that little hallway there so they can observe the whole thing? Maybe we could do that. Would that satisfy you?

(emphasis added). Defense counsel replied that he "just wanted an alternative." The following exchange then occurred:

> COURT: I'm giving you alternatives. Which one would satisfy you in a way that the bailiffs would feel that their job in keeping the courtroom safe and secure would be satisfied?
>
> DEFENSE: I can't suggest that. If you want to open those doors and put chairs and have people – have the public sit there, that's fine with me.
>
> COURT: We don't have enough chairs. Are we going to – if you want, we can open up those doors in the back and have them stand to where they can observe and hear every single thing that's going on. . . . Counsel obviously wants her entire family here. I mean, I don't know what else we could do. . . .

(emphasis added). When counsel again demanded a ruling, the trial court replied that it "has never ruled [people have been excluded from the courtroom], so I'm not sure what it is you're object[ing] to." The court adamantly stated, "I'm telling you that the Court has never ruled that the public is excluded from jury selection." Thus, the record reflects that the trial court offered defense counsel the alternative of opening the doors to the courtroom and allowing a "significant" number of family and friends to stand in the foyer to the courtroom (or "the little hallway") where the family members could "observe and hear every single thing that's going on." The record also reflects that defense counsel implicitly rejected the trial court's offer by placing a condition on the trial court's suggestion: "If you want to open those doors and put chairs and have people – have the public sit there, that's fine with me."

Later, during a break in voir dire, the trial court again addressed the issue:

> We're back on the record in 2010-CR-4286-C. By my calculation, the jury panel has been out of the courtroom for over – about half an hour now. Juror Number 25 . . . had a medical situation arise during the voir dire period and was just escorted – or just carried out of the courtroom by EMS. . . . And while we're on the record and the jury is out, I know that the State is still in the middle of their general voir dire. I just want to put something on the record. Earlier defense asked if members of the defendant's family or other members could sit in, observe portions of the voir dire. *The Court*

did not close the proceedings by any means, recognizing the First and Sixth Amendment rights to the extent of voir dire proceedings. During the course of discussions, the Court did analyze the four-prong questions tested out in [*Waller v. Georgia*], 467 U.S. 39. Specifically, the Court considered the size and configuration of the courtroom. Sixty-five venirepanel members have been summoned to the courtroom. In order to accommodate all sixty-five, there are about ten chairs that are placed in the gallery. Additionally, there are three or – three other chairs located next to the jury box. Every single chair in the gallery and in the jury box is filled with the sixty-five individuals. The court reporter is seated directly in front of the defense table directly in front of the jury box, so there would be no room there. Directly in front of the defense table there is a table used by the probation department that has a computer, a printer, some files. Directly next to the defense table is a panel that has been set up by the defense for use during voir dire. Directly behind that panel is a box where the bailiffs sit, a bailiffs table. The Court considered the size of the configuration. [The] Court also considered alternative courts, knowing that the juries – the central jury room is not adequately sufficient for a trial such as this. Also, the Court is expecting a potentially emotionally charged jury trial, this originally being filed, I believe, as a capital. I know that it is now a murder charge. As such, the space within the courtroom area for the participants and the bailiffs is very

> narrow. The Court does not want to make any jury or potential jurors feel in any way constrained with truthfulness and honesty, making them uncomfortable in regards to potential family members next to them. Essentially, the bottom line is the Court was concerned about safety and safety in the courtroom. *Recognizing that the courtroom is not closed*, Defense, before you begin your general voir dire, you're certainly able to bring in some family members and we will do our best to accommodate them in areas around the gallery where the Court, where the bailiffs feel the security will not be an issue. All right. Just wanted to put that on the record.

(emphasis added).

After Cameron was convicted, she moved for a new trial claiming that her right to a public trial was violated during voir dire. Attached to her motion were thirteen affidavits. Eleven of these affidavits are almost identical and state in pertinent part:

> Around 10:30 a.m., the jury trial was set to begin. I walked into the courtroom along with other friends and relatives, and noticed that the gallery in the courtroom was about a quarter full. . . . Before we could sit down completely, the courtroom bailiff, one of the deputies assigned to the 379th District Court, approach[ed] our group that just entered and said in a loud authoritative voice that we all needed to clear the courtroom. The bailiff ejected our entire group and the general public and the entire gallery was cleared. The

> bailiff told us that a jury panel was going to come up and that they needed the gallery space for the panel and that unless you were a panel member, you could not be in the courtroom. I watched the bailiff usher everyone out of the courtroom, even though we came downtown just to see jury selection. We were not allowed in the courtroom during this time and no member of the public, other than panel members, entered the courtroom, it seemed. This was upsetting to me to be ejected in this manner and excluded from the courtroom. I thereafter left the courthouse *since it was apparent that we were not going to be let into the courtroom*. I never did see jury selection in the case and do not know what happened in that courtroom after the bailiff excluded me.

(emphasis added). Another affidavit by Cameron's mother, who is a sergeant in the San Antonio Police Department, is identical to the statements above, but also adds the following:

> I later asked the bailiff that morning [whether] I could enter the courtroom and just sit on the floor and was told that there was no room and that I was not permitted in the courtroom. I thereafter left the courthouse, as did the other relatives and friends, since it was apparent that we were not going to be let into the courtroom. I later learned that the court was willing to allow me personally to enter the courtroom and watch the remainder of voir dire in the afternoon, but I had already left the courthouse by that point and there was not going to be any allowance for the rest

> of our family or Vanessa's friends or the general public. I never did see jury selection in my daughter's case and do not know what happened in that courtroom after the bailiff excluded me.

Paul J. Goeke, a criminal defense attorney not associated with Cameron's case, affirmed that he saw the bailiff, Joe Gaska, approach a group of people who had just entered the courtroom and "in a loud, authoritative voice" order the entire gallery cleared. Goeke affirms that the "bailiff told the gallery that a jury panel was going to come up and that they needed the gallery space for the panel and that unless you were a panel member, you could not be in the courtroom." A final affidavit by Tonya Kersey affirms, "Around 4 p.m., I arrived and I was told that I could not come into the courtroom and so I waited outside until the jury selection was over. I tried to go into the courtroom when the jury was being picked, but they wouldn't let me."

The State filed a response to the motion for new trial and attached its own affidavits. Joe Gaska, one of the bailiffs, affirmed in pertinent part:

> Jury selection began in Vanessa Cameron's case on February 21, 2012. In addition to our regular docket that morning, there were at least fifteen or twenty other people in the courtroom. When it came time to bring in the jury panel, I announced to all people in the court that we had to bring a jury panel of sixty-five people into the courtroom. I *never* said that no one could come back into the

courtroom. I *never* told anyone to leave the courthouse.

I read Paul Goeke's affidavit wherein he states that I said "unless you were a panel member, you could not be in the courtroom." This is contrary to what I said. Goeke's statement insinuates I was telling people in the courtroom they had to leave unless they were on the jury panel. I would never make such [a] statement because as bailiffs, we actually escort the jury panel into the courtroom. There would be no opportunity for jury panel members to be in the courtroom at the time I am preparing for them to come in by placing jury numbers in the seats and so forth. Thus I would not address jury panel members that were not even in the courtroom.

Standard procedure in the 379th District Court is to clear the courtroom to let jurors be seated. Then for many trials we have placed chairs along walls to make seating available for the public and the defendant's family and friends. This particular defendant, Vanessa Cameron, had so many spectators that I recall the Court told her attorney he could open the doors and let the jurors stand in the hall to observe. I believe he was referring to the foyer. The foyer is basically a little hall/room about 8 feet by 8 feet right outside the back of the courtroom. This foyer connects the main hallway of the courthouse to our courtroom.

> Although I do not remember when the conversation took place, I do remember being approached by Sylvia Cameron, the mother of the defendant. This possibly could have been when we were on a break from the voir dire due to an event where EMS was present. The courtroom was very crowded with veniremen, and one of the venire members experienced an episode requiring medical attention. When Sylvia Cameron asked if she could sit on the floor, I took it as a sarcastic remark from her, not as a serious request, and I was probably dismissive when I responded to her. My response to her was probably in the negative due to the attitude she displayed to me when she made the request.
>
> Sylvia Cameron is a Sergeant with the San Antonio Police Department and her daughter was on trial for murder. I suspected that she would know that, in such a situation, it is a security risk to have individuals sitting on the floor where they might be out of sight of bailiffs. As a peace officer she is able to carry weapons in the courthouse. I certainly could not have her sitting out of sight, on the floor, potentially carrying a weapon which her daughter (defendant Vanessa Cameron – on trial for murder) probably knew about and could potentially reach during voir dire or any other time during the trial.

(emphasis in original). Also attached was an affidavit by Richard Villarreal, a bailiff, who affirmed that to his knowledge, "no one was excluded from the courtroom

with the intention of not being allowed to watch the trial, including voir dire."

The trial court then made sixteen findings of fact:

1. The Court *never* ruled that observers were excluded from the voir dire or any other part of the trial in this case.

2. The defense attorney in this case seemed intent on objecting to a ruling that was not made (members of the public were not excluded from watching voir dire proceedings), and he did not seem serious about bringing members of the defendant's family or her friends back into the courtroom to observe.

3. Prior to the venire panel entering the courtroom, the defense attorney never requested the Court to allow him to go outside and bring the defendant's family and friends into the courtroom; nor did he ask for a break to call family and friends to come into the courtroom. The Court made it clear that the public was *not* excluded from the courtroom.

4. The Court offered to open up the doors in the back of the court and let the public observe from the hall area.

5. The Court attempted to find places for the public to observe from.

6. Suggestions were offered to the attorney for the defense regarding placement of observers, both on and off the record.

7. Both on and off the record, suggestions were requested from the defense attorney as to where he would like the observers to be placed in the courtroom.

8. Besides the time when the Court's bailiffs cleared the courtroom to bring the venirepanel in and get the panel seated, on two other occasions (one involving a venireman who had a medical episode and another involving a security alarm) the courtroom had to be cleared again.

9. No court personnel ordered observers to leave the courthouse.

10. The Court did not order the bailiffs or anyone else to tell spectators to leave the courtroom.

11. The Court did not order the bailiffs or anyone else to tell spectators to leave the courthouse.

12. The bailiffs did not tell spectators that they should leave the courthouse.

13. The bailiffs did not tell spectators that they would not be allowed to watch the proceedings.

14. If observers had entered after the jury panel was seated, they would have been allowed back in the courtroom by the Court during the proceedings in this case.

15. Prior to voir dire in this case, the Court's bailiffs cleared the courtroom in order to make room to bring the venire panel into the courtroom and to get them organized and seated, but they did not tell any spectators that they

were not allowed to watch the voir dire or any other part of the proceedings in this case.

16. During other trials in the past, including during voir dire proceedings, the 379th Court has had spectators in the courtroom.

(emphasis in original).

Thus, the trial court found that, based on the record and its own recollection, the courtroom had been cleared for short periods of time to allow the venire panel to be seated, during a medical emergency, and during a fire alarm. At oral argument, defense counsel conceded that the trial court could properly clear the courtroom for short periods of time under such circumstances. The trial court found that while the bailiffs did clear the courtroom to allow the venire panel to be seated, they did not tell spectators that they were excluded from watching the proceedings. The record supports the trial court's findings. I agree with the majority that the appellate record is silent on many factual considerations. However, I believe that it was Cameron's burden to show that under the totality of the evidence voir dire was closed to the public, and I do not believe that she met her burden. *See Lilly*, 365 S.W.3d at 331.

Further, because I believe the trial court correctly denied Cameron's motion to suppress and did not abuse its discretion in admitting rebuttal evidence of an alleged prior solicitation, I would affirm the judgment of the trial court.

Karen Angelini, Justice

PUBLISH