No. 123975

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- TAVARIUS D. RADFORD Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-14-0404. There on appeal from the Circuit Court of the Twenty-First Judicial Circuit, Kankakee County, Illinois, No. 11-CF-662. Honorable Clark Erickson, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

JAMES E. CHADD
State Appellate Defender

PETER A. CARUSONA
Deputy Defender

STEVEN VAREL
Assistant Appellate Defender
Office of the State Appellate Defender
Third Judicial District
770 E. Etna Road
Ottawa, IL 61350
(815) 434-5531
3rddistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

ORAL ARGUMENT REQUESTED

E-FILED
3/28/2019 12:55 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

POINTS AND AUTHORITIES

NATURE OF THE CASE

Tavarius D. Radford was convicted of child endangerment after a jury trial and was sentenced to a 42-month prison term. The appellate court, with one justice dissenting, affirmed his conviction. *People v. Radford*, 2018 IL App (3d) 140404. The majority held that (1) the evidence adduced at trial was sufficient to prove beyond a reasonable doubt that Tavarius both proximately caused the death of his daughter, M.R., and possessed the required mental state at the time of the offense, (2) no error occurred with respect to the jury instruction concerning the mental state requirement for the offense of child endangerment, and (3) the trial court's closure of the courtroom did not constitute clear error, was "trivial," and did not constitute second-prong plain error. *Radford*, 2018 IL App (3d) 140404, ¶¶ 36, 40, 47, 60. The dissenting justice found that the trial court's improper closure of the courtroom was clear error, was not "trivial," and constituted second-prong plain error. The dissenting justice therefore found that Tavarius was entitled to a new trial due to the trial court's violation of his right to a public trial. *Radford*, 2018 IL App (3d) 140404, ¶¶ 65, 69, 74–77 (McDade, J., dissenting).

No issue is raised challenging the charging instrument.

JURISDICTION

Jurisdiction lies with this Court under Supreme Court Rules 315 and 612(b). This Court allowed Tavarius Radford's petition for leave to appeal on January 3, 2019.

ISSUES PRESENTED FOR REVIEW

I. Whether the trial court committed second-prong plain error when it violated Tavarius Radford's right to a public trial by *sua sponte* intentionally excluding from the courtroom all members of the public with the exception of four individuals for the entirety of jury selection in order to create enough space to seat the entire venire in the courtroom at the same time.

II. Whether the trial court erred in instructing the jury that the mental state requirement for the offense of child endangerment is satisfied if the defendant acted "willfully" rather than "knowingly," where the term "willfully" is ambiguous and has been interpreted even by some judges to mean "voluntarily."

STATEMENT OF FACTS

Tavarius Radford was charged with murder and felony child endangerment. Both charges were based on the allegation that he caused head trauma to his 26-month-old daughter, M.R., that ultimately resulted in her death. The offenses were alleged to have occurred in October of 2011, when Tavarius was 17 (C6; R954, 1468–69).

At pre-trial hearings, it was noted that an innocence project was providing assistance to the defense in this case (R545–50).

Jury Selection

The case proceeded to a jury trial. Jury selection occurred on November 18, 2013, and November 19, 2013 (R613, *et seq.*, R806, *et seq.*). On November 18, 2013, prior the start of jury selection, the trial judge *sua sponte* decided to close the courtroom to all members of the public except for "two individuals from the victim's family and two individuals from the defendant's family" (R637–38). The judge stated:

> What I'm gonna do during jury selection, it's gonna be difficult—it's a public proceeding, jury selection, but here's the problem. There's only so many seats, and I am going to allow during jury selection say two individuals from—I—I take it the—the courtroom appears to be divided, okay, between perhaps people here in support of the defendant and individuals here more or less in—in—not in support of the defendant, and I will allow two individuals from the victim's family and two individuals from the defendant's family to be present during jury selection and there may not even be room for you, but you cannot talk to any particular—any jurors. You'll have to sit at the back of the courtroom . . . . [I]f you are behind the jurors, you are—they are—there's less risk that you might inadvertently—you know, you wouldn't have like some sort of facial expression to something that's said that could potentially influence the jurors. We don't want that to happen. Okay? Certainly, you know, I want to commend everybody in the courtroom for—that's here in the courtroom right now for your patience this morning and your demeanor, and I'm gonna ask that throughout the trial which could

> involve, obviously, considering the nature of the case emotions running high. I'm gonna appreciate it if you remember that it's inappropriate to display those emotions because that can have an [e]ffect on the jury and it can—and it can have an [e]ffect on whether or not the trial is ultimately able to even take place or whether or not a mistrial would have to occur, and nobody wants to see that happen. Okay?
>
> So at this time we're gonna bring the jurors up. I am going to clear the courtroom with the exception of two people from each side . . . .

(R637–39, at Appendix).

Then, prior to bringing the prospective jurors into the courtroom to begin jury selection, the judge implemented this rule by telling certain people inside the courtroom that they had to leave, stating: "Folks, at this time I'm gonna ask that with the exception—the very limited exception of those who are permitted to remain in the courtroom, I'm gonna ask that everyone else step out and make room for the jurors who are now coming in. Thank you very much" (R648, at Appendix). After bringing the prospective jurors into the courtroom, the judge commented, "We're kind of out of space," and told the potential jurors, "If there's not a seat for you, come up into the jury box" (R650, at Appendix).

As jury selection proceeded, multiple peremptory challenges were used by both parties (R749–50, 799–801). Since jury selection was not completed that day, it was to continue the next day. The judge said that 62 potential jurors would be "coming back" the next day (R803, at Appendix).

At the beginning of proceedings on November 19, 2013, and prior to bringing in the potential jurors, the judge reminded those in the courtroom about the rule, stating: "Now the rule I had yesterday was that two people from—so I'm gonna limit it to two people for jury selection . . . two individuals from—associated with the defendant's family, two individuals associated with the alleged victim's family

can be in the courtroom. Okay" (R807, at Appendix). Then the judge brought in 35 potential jurors and resumed jury selection (R808, at Appendix).

Additional peremptory challenges were used by the State that day, so that, in total, the defense used seven and the State used six peremptory challenges throughout the course of the entire two-day jury selection (R801, 885–86). Three alternate jurors were selected (R886–88). After jury selection was completed, the judge ended his limitation on public attendance (R890).

Trial evidence

M.R. was found dead at about 10 a.m. on October 26, 2011, at an apartment in Bourbonnais where Tavarius Radford, Kayleigh Reardenz, M.R., Cheryl Heather, David Heather, Kimberly Brewington, and Echo Brewington all resided (R920–23, 983–84, 987). Tavarius and Kayleigh were M.R.'s parents (R953–54).[1]

Testimony elicited on direct examination by the State of its own witnesses (Kayleigh and Echo) demonstrated that M.R. accidentally fell and hit her head on concrete twice just days prior to her death. One of those falls occurred at least four days before M.R.'s death. At that time, Kayleigh was playing with M.R. outside the apartment (R971–72, 1018, 1020). M.R. was running to chase Kayleigh when Kayleigh heard a "big bang" from the impact of M.R. hitting the pavement (R971, 1033). M.R. cried and told Kayleigh that the back of her head hurt (R971). Kayleigh noticed some redness but did not notice any other signs of injury (R971–72). Kayleigh made sure that M.R. did not fall asleep for an hour afterward (R972). She kept M.R. from going to sleep anytime she thought M.R. took a "good enough fall" involving a "blow to the head"; she understood that it could be a serious situation

[1] For nicknames or familial terms the witnesses used in court, see R922–23, 960, 963, 1127, 1149, 1154.

(R1032).

Kayleigh and Echo made conflicting statements about whether the second accidental fall occurred three days before M.R.'s death or the day before she died (R1013, 1018, 1161). Describing that fall, Kayleigh and Echo testified that M.R. threw a tantrum, threw herself backward, and hit her head on the concrete of the parking lot outside of their apartment (R1013–14, 1162). Echo heard M.R.'s head hitting the concrete and said it was a "bad fall" (R1163). M.R. did not want anyone to touch the back of her head after that fall (R1163).

Sometime around Saturday October 22 or Monday October 24, M.R. indicated feeling head pain (R930, 972–73, 1021–22, 1163–64). Echo said M.R. did not want anyone to touch the back of her head (R1163–64). Kayleigh and Cheryl testified that M.R. complained of head pain when they tried to fix her hair (R930, 972–73). All three examined M.R.'s head but did not see signs of injury (R930, 974, 1021–22, 1163–64).

Kayleigh initially did not think that M.R. died from head trauma (R1029–31). On December 1, Kayleigh and Tavarius met with the coroner, who told them M.R. died from blunt force head trauma caused by child abuse (R1266–68). After being told that head trauma was the cause of death, Kayleigh thought the accidental falls may have caused M.R.'s death (R1071–73). After Kayleigh and Tavarius spoke with the coroner, Officer Brett Bukowski questioned Kayleigh and then Tavarius (R1269, 1468–69).

Officer Bukowski used the Reid technique in interrogating Tavarius, who was 17 at the time, and repeatedly lied to Tavarius by telling him that the evidence showed with certainty that he committed an act of abuse that caused M.R.'s death.

Officer Bukowski suggested to Tavarius that he did so sometime within 24 hours of M.R.'s death (R1436–39, 1450, 1468–69, 2178–79; St. Ex. 17, 16:20, 23:09, 27:30, 30:55, 32:30, 33:15). Tavarius then stated that, when he was putting M.R. down for a nap in Kim's bedroom on the afternoon of the day prior to M.R.'s death, he grabbed M.R. by the arms and pushed her from a sitting position onto her back onto a soft daybed a single time. He stated that he did so forcefully and demonstrated with a stuffed bear. He indicated that M.R. sat at most a foot or two high. He indicated that he was on his knees at the time, and that he held on to M.R.'s arms throughout (St. Ex. 17, 47:25, 48:10, 1:22:55, 1:35:30 (demonstration), 136:00, 1:37:15, 1:37:20, 1:38:10, 1:39:00, 1:52:45, 1:53:00 (demonstration); R1140–42, 1147–48 (Cheryl's testimony about daybed); see also St. Ex. 4–5 for photos of the daybed taken when it was at a location other than where the alleged offense occurred).[2] (Standing, M.R. was 3' 3.5" tall, and she weighed 36 pounds; Tavarius was 5' 9" tall and weighed 163 pounds (R1308; C252).)

Forensic pathologist Dr. Valerie Arangelovich performed the autopsy on M.R. and opined that M.R. died from head trauma caused by child abuse (R1299, 1306, 1336). She observed subgaleal and subdural hemorrhages in the back of M.R.'s head (R1323–33). She testified that the accidental fall several days before

---

[2] After Officer Bukowski suggested to Tavarius that M.R. hit her head on some object behind the daybed, Tavarius speculated (using conditional language) that M.R. "could have" hit her head on a wooden plaque (Tavarius said that if that occurred it was a complete accident) (St. Ex. 17, 32:30, 32:50, 48:35, 48:50, 1:18:30). However, the trial judge found at the hearing on the motion for JNOV that the evidence did not support the theory that the plaque was the instrument of death (2142–44, 2154–55, at Appendix). Though noting in the background section of its opinion that Tavarius "speculated" about the plaque, the appellate court likewise did not consider the plaque in its analysis of any of the issues presented on appeal. *Radford*, 2018 IL App (3d) 140404, ¶¶ 18–19, 28–47.

M.R.'s death described by Kayleigh could have caused the subgaleal hemorrhages (R1404). However, she opined that the subgaleal hemorrhages did not cause death in themselves—the fatal injury was the subdural hemorrhage, which she opined occurred within 24 hours of M.R.'s death (R1339, 1415–16).

Dr. Shaku Teas, a forensic pathologist who had significantly more experience and expertise with deaths involving children and had testified for the prosecution in hundreds of criminal cases (R1302; 1612–18), opined that M.R.'s head injuries were consistent with the accidental falls several days before her death, and that those falls probably caused her death (R1696, 1698, 1704). She testified that M.R.'s head injuries were definitely more than 24 hours old, that there was no medical basis to conclude that inflicted trauma occurred less than 24 hours prior to M.R.'s death, and that there was no evidence of child abuse (R1637, 1665, 1683–84, 1704–05). Dr. Teas further testified that it was reasonable to conclude that M.R.'s subgaleal hemorrhaging caused her subdural hemorrhage (R1675–76, 1693, 1776–77). She said that a subgaleal hemorrhage the size of M.R.'s could easily have gone undetected by family members or even a doctor, as symptoms a few days before death would be mild (R1698–99).

Twelve character witnesses (including family, friends, schoolmates, and teachers) testified that Tavarius was "kind," "gentle," "caring," "a really good dad," and that he "wouldn't hurt a fly" (R1166, 1526–30, 1535–56, 1573–1600, 1825–33). The band director at Tavarius's school said that Tavarius was "one of the most gentle, nonaggressive, kind, and caring [male] students . . . that I have taught in 30 years" (R1833). Kayleigh testified that Tavarius loved M.R., M.R. loved him, and that she never saw Tavarius treat M.R. badly (R1055, 1081).

Conclusion of trial, jury instructions, sentencing, and appeal

In closing arguments, the State advanced the theory that this case involved a new injury caused by Tavarius on top of an older injury caused by the accidental falls (R2028). The State requested a jury instruction on involuntary manslaughter (R1848).

The trial court instructed the jury that it should find the mental state requirement for murder to be met if it found beyond a reasonable doubt that Tavarius "knew" his acts "created a strong probability of . . . great bodily harm" (C216–17; R2038). The court instructed the jury that it should find the mental state requirement for involuntary manslaughter to be met if it found beyond a reasonable doubt that Tavarius acted recklessly in causing M.R.'s death (C218–19; R2039). The court instructed the jury that a person acts recklessly where he "consciously disregards a substantial and unjustifiable risk" (C215; R2037–38). The court instructed the jury that it should find the mental state requirement for child endangerment to be met if it found beyond a reasonable doubt that Tavarius "willfully caused or permitted the life of [M.R.] to be endangered" (C220–21; R2040). The court did not provide any instruction defining the term "willfully."

The jury acquitted Tavarius of murder and involuntary manslaughter but convicted him of child endangerment (R2097–98; C225, 229). At sentencing, it was noted that Tavarius had no prior convictions, arrests, or traffic tickets (R2171; C253). The trial court sentenced him to a 42-month prison term (R2184; C264).

The appellate court, with one justice dissenting, affirmed Tavarius's conviction and sentence. *Radford*, 2018 IL App (3d) 140404. This Court allowed leave to appeal on January 3, 2019.

I. Where the trial court *sua sponte* intentionally excluded from the courtroom all members of the public with the exception of four individuals for the entirety of jury selection in order to create enough space to seat the entire venire in the courtroom at the same time, the court committed a violation of Tavarius Radford's right to a public trial that constituted second-prong plain error.

Standard of review

"The standard of review for determining whether an individual's constitutional rights have been violated is *de novo*." *People v. Burns*, 209 Ill. 2d 551, 560 (2004).

Argument

The trial court in this case *sua sponte* intentionally excluded from the courtroom all members of the public with the exception of four individuals for the entirety of jury selection. The court did so because it wished to seat the entire venire in the courtroom at the same time. The trial court's closure of the courtroom failed to satisfy the U.S. Supreme Court's overriding interest test. It therefore constituted a clear violation of Tavarius Radford's right to a public trial.

Because a public trial violation is a structural error, it is automatically reversal under the Illinois law doctrine of second-prong plain error. Further, the trial court's intentional closure of the courtroom for the entirety of jury selection was not "trivial." Accordingly, this Court should reverse Tavarius's conviction and remand his case for further proceedings.

A. Where the trial court's closure of the courtroom failed to satisfy the overriding interest test, the closure violated U.S. Supreme Court precedent and constituted clear error.

The Sixth Amendment to the U.S. Constitution guarantees a criminal defendant the right to a public trial. U.S. Const. amends. VI, XIV; *see also* Ill. Const. 1970, art. I, § 8. That right is no less protective than the First Amendment right of the press and members of the public to attend. *Waller v. Georgia*, 467 U.S.

39, 46 (1984). The right to a public trial extends to jury selection. *Presley v. Georgia,* 558 U.S. 209, 213 (2010). Although the right to an open trial may give way to other interests, such as a defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information, such circumstances are rare. *Waller*, 467 U.S. at 45. Trial proceedings may be closed to members of the public only if (1) the party seeking to close the proceedings advances an overriding interest that is likely to be prejudiced, (2) the closure is no broader than necessary to protect that interest, (3) the trial court considers reasonable alternatives to closing the proceeding, and (4) the trial court makes findings adequate to support the closure. *Presley*, 558 U.S. at 214; *Waller*, 467 U.S. at 48 (citing *Press-Enterprise Co. v. Superior Court of California, Riverside Cty.*, 464 U.S. 501, 510–11 (1984)); *see also People v. Taylor*, 244 Ill. App. 3d 460, 468 (2d Dist. 1993) (citing *People v. Holveck*, 141 Ill. 2d 84, 100, 102 (1990), court found that overriding interest test applies to partial closures, i.e., closures in which not all members of the public are excluded).

Here, the trial court decided—without a request from either party or the consent of Tavarius—to close the courtroom to all members of the public with the exception of "two individuals from the victim's family and two individuals from the defendant's family" for the entirety of jury selection, which occurred over a two-day period. The trial judge articulated only one reason for doing so: he wished to seat the entire venire in the courtroom at the same time and "[t]here's only so many seats" (R637–38, 648, 650, 807–08, 890, at Appendix). As the dissenting appellate court justice found, the closure in this case failed to satisfy any of four requirements established by the U.S. Supreme Court to justify a courtroom closure.

People v. Radford, 2018 IL App (3d) 140404, ¶¶ 66, 68–71 (McDade, J., dissenting).

The judge's desire to seat the entire venire in the courtroom at the same time was solely a matter of the judge's preference and convenience. This was not a sufficient reason to override either Tavarius's constitutional right to a public trial or the First Amendment right of members of the public to attend. *Radford*, 2018 IL App (3d) 140404, ¶¶ 69–70 (McDade, J., dissenting) (citing *People v. Evans*, 2016 IL App (1st) 142190, ¶ 12). If it were, a trial judge could exclude almost all members of the public for the entirety of jury selection "in *every criminal* case . . . whenever the trial judge decides, for whatever reason, that he or she would prefer to fill the courtroom with potential jurors rather than spectators." *Presley*, 558 U.S. at 215; *see also Evans*, 2016 IL App (1st) 142190, ¶ 18.

The trial court also failed to consider any reasonable alternatives. Trial courts are required to consider alternatives to a closure even when they are not offered by the parties. *Presley*, 558 U.S. at 214–15 (citing *Press-Enterprise Co.*, 464 U.S. at 511). One such reasonable alternative that should have been considered here was "dividing the jury venire panel to reduce courtroom congestion." *Presley*, 558 U.S. at 215. If the judge in this case would have limited the number of potential jurors in the courtroom to 15 at a time, the conditions would have been the same as they were during the rest of the trial (as there were 12 jurors and 3 alternates present at all times during the rest of the trial) (R886–88). The fact that the judge's closure order only applied to jury selection and not to the rest of the trial proceedings indicates that the closure order was indeed unnecessary. In addition to "simply calling the potential jurors into the room in smaller groups," the judge could have asked either potential jurors or members of the public to stand until a seat became

available, *Evans*, 2016 IL App (1st) 142190, ¶ 15, or utilized technology to allow members of the public to view the proceedings from a remote "overflow" room. *Radford*, 2018 IL App (3d) 140404, ¶ 71 (McDade, J., dissenting). The judge failed to consider any of these options.

Nor did the judge articulate any findings to support the closure. As the dissenting appellate court justice observed:

> [T]he court did not articulate adequate findings to support the closure. . . . [T]he court's stated reason does not even pretend to identify an "overriding" need served only by having the entire venire present in the courtroom at the same time and moving the public out because of the resulting lack of seats. Nor does the court indicate how such an interest would be prejudiced by, for example, working with panels, or other smaller configurations, of jurors. It is impossible to ascertain from the court's simple statement what overriding interest was at stake and how that interest would be prejudiced without the nearly total exclusion of the public from the jury selection proceedings.

Radford, 2018 IL App (3d) 140404, ¶ 70 (McDade, J., dissenting); *see Waller*, 467 U.S. at 48–49 & n.8 ("broad and general" findings are insufficient; instead specific findings must be made that show the nature of the interest requiring closure, that there are no reasonable alternatives, and that the closure is no broader than necessary); *see also Presley*, 558 U.S. at 215 ("Nothing in the record shows that the trial court could not have accommodated the public at Presley's trial."); *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1909 (2017) ("A public-trial violation can occur, moreover, as it did in *Presley*, simply because the trial court omits to make the proper findings before closing the courtroom . . . .").

The trial court's November 2013 decision to close jury selection to nearly all members of the public was made in violation of U.S. Supreme Court precedent in existence at that time. As such, it constituted clear error.

B. Because a public trial violation is a structural error that inherently affects the fairness of defendants' trials and challenges the integrity of the judicial process, it is a reversible error under the Illinois law doctrine of second-prong plain error.

Although trial counsel in this case failed to object to the public trial violation that occurred, Tavarius's conviction should be reversed under the second prong of the plain error doctrine. The Illinois doctrine of second-prong plain error allows a reviewing court to reach a forfeited issue where clear or obvious error occurred, and where the error was so serious that it "affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *People v. Clark*, 2016 IL 118845, ¶ 42 (internal quotation marks omitted); Ill. S. Ct. R. 615(a).

This Court has stated that the Illinois doctrine of second-prong plain error includes all of the six federally identified categories of structural error, as all of those types of error inherently serve to "erode the integrity of the judicial process and undermine the fairness of the defendant's trial." *People v. Glasper*, 234 Ill. 2d 173, 197–98 (2009) (under the doctrine of second-prong plain error, "automatic reversal is . . . required where an error is deemed 'structural'"); *People v. Thompson*, 238 Ill. 2d 598, 613 (2010) ("[i]n *Glasper*, this [C]ourt equated the second prong of plain-error review with structural error"); *Radford*, 2018 IL App (3d) 140404, ¶¶ 76–77 (McDade, J., dissenting). A public trial violation is a structural error. *Weaver*, 137 S. Ct. at 1908. This Court has therefore recognized that a public trial violation constitutes second-prong plain error. *Thompson*, 238 Ill. 2d at 609, 613–14; *see also Clark*, 2016 IL 118845, ¶ 46; *Glasper*, 234 Ill. 2d at 197–98; *Radford*, 2018 IL App (3d) 140404, ¶¶ 76–77 (McDade, J., dissenting).

As the dissenting appellate court justice observed, *Weaver* is not applicable

to this case. *Radford*, 2018 IL App (3d) 140404, ¶¶ 75–77 (McDade, J., dissenting). In *Weaver*, the Court held that a defendant who raises a public trial violation for the first time in a petition for collateral relief as a claim of ineffective assistance of counsel is required under *Strickland v. Washington*, 466 U.S. 668 (1984), to show that the specific error that occurred resulted in prejudice. *Weaver*, 137 S. Ct. at 1906–07, 1910–13. The Court reasoned that "finality concerns are far more pronounced" in cases where the issue is raised for the first time in a collateral proceeding which "justif[ies] a different standard for evaluating a structural error depending on whether it is raised on direct review or raised instead in a claim alleging ineffective assistance of counsel [in a collateral proceeding]." *Weaver*, 137 S. Ct. at 1912–13.

The finality concerns that motivated the *Weaver* Court's decision do not apply to cases like this one where a defendant raises a structural error on direct appeal under the Illinois doctrine of second-prong plain error. Thus, *Weaver* is not applicable.

The Illinois second-prong plain error standard, of course, is not the same as the *Strickland* standard. All structural errors are *automatically reversible* as second-prong plain error under Illinois law when raised on direct appeal. *Clark*, 2016 IL 118845, ¶ 42; *Thompson*, 238 Ill. 2d at 613; *Glasper*, 234 Ill. 2d at 197–98. *Weaver* teaches that structural errors raised under the federal *Strickland* standard (at least those raised for the first time in a collateral proceeding) are not automatically reversible because there is still a requirement that the defendant make a showing that there is "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"

Weaver, 137 S. Ct. at 1911 (quoting *Strickland*, 466 U.S. at 694). In *Weaver*, though, the Court chose to assume, without deciding, that *Strickland* prejudice could also be shown if counsel's errors "rendered the trial fundamentally unfair." *Weaver*, 137 S. Ct. at 1911. Either way, the *Strickland* standard requires something more than just a showing that a structural error occurred. The Illinois doctrine of second-prong plain error does not.

Structural errors, like the public trial violation in this case, are automatically reversible when raised on direct appeal under the Illinois doctrine of second-prong plain error. Accordingly, this Court should reverse Tavarius's conviction and remand his case for further proceedings.

C. The appellate court majority erred in (1) adopting a "triviality" standard, and (2) finding that the closure in this case—an intentional closure of the courtroom for the entirety of jury selection—was "trivial."

The appellate court majority found the closure in this case to be "trivial." *Radford*, 2018 IL App (3d) 140404, ¶¶ 56, 60. However, neither this Court nor the U.S. Supreme Court has adopted a "triviality" standard. The U.S. Supreme Court has granted defendants relief in cases involving improper courtroom closures without any discussion whatsoever as to whether the closures were "trivial." *See Presley*, 558 U.S. 209 (closure during jury selection); *Waller*, 467 U.S. 39 (closure of pre-trial hearing on motion to suppress). The Illinois Appellate Court has also done so. *See People v. Willis*, 274 Ill. App. 3d 551, 553–55 (1st Dist. 1995) (partial closure during jury selection); *Taylor*, 244 Ill. App. 3d at 467–68 (partial closure during jury selection).

If a "triviality" standard existed, surely these courts would have discussed whether the closure was "trivial" before granting relief. Since they did not, these

courts have indicated that courts may not, as the appellate court majority did here, deny a defendant relief on the ground that an improper closure was "too trivial to amount to a violation of the [Sixth Amendment right to a public trial]." *Radford*, 2018 IL App (3d) 140404, ¶¶ 56, 59–60 (citing *Peterson v. Williams*, 85 F.3d 39, 42 (2d Cir. 1996) (containing the quoted language)). Instead, as noted in Issue I.A, a closure that cannot satisfy the U.S. Supreme Court's overriding interest test is by definition a violation of the Sixth Amendment right to a public trial which is not "trivial."

Importantly, the overriding interest test already balances the competing interests involved and allows closures where they are merited. *See, e.g.*, *Press-Enterprise Co.*, 464 U.S. at 511–12 (when *voir dire* involves deeply personal or sensitive questioning that may cause embarrassment, overriding interest in protecting potential jurors' privacy allows a judge to inform potential jurors in advance that they may request to discuss a matter *in camera* and permits the judge, upon a potential juror's request, to engage in brief *in camera* follow-up questioning). For this reason, as the U.S. Supreme Court has evidently determined, there is simply no reason to adopt a "triviality" standard. Therefore, this Court should decline to do so.

Even assuming that it is proper to apply a "triviality" standard, the appellate court majority erred in extending the "triviality" standard of *Peterson* to the closure in this case—an intentional closure that lasted for the entirety of jury selection. *Radford*, 2018 IL App (3d) 140404, ¶¶ 56, 59–60. In finding a closure to be "trivial," the *Peterson* court stressed that the closure it addressed was both "extremely short" (15–20 minutes) and "entirely inadvertent" (i.e., the trial judge was not aware

of it). The *Peterson* court also stated that the closure did not deprive the defendant of the "protections conferred by the Sixth Amendment," which it described as: (1) to ensure a fair trial, (2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, (3) to encourage witnesses to come forward, and (4) to discourage perjury. *Peterson*, 85 F.3d at 41–44.

The same federal court that decided *Peterson* recently held in *United States v. Gupta* that "Whatever the outer boundaries of our 'triviality standard' may be (and we see no reason to define these boundaries in the present context), a trial court's intentional, unjustified closure of a courtroom during the entirety of *voir dire* cannot be deemed 'trivial.'" *United States v. Gupta*, 699 F.3d 682, 689 (2d Cir. 2012). In *Gupta*, the State argued that the defendant had failed to identify any of the four protections conferred by the Sixth Amendment listed in *Peterson* that he was deprived of due to the closure. The *Gupta* court rejected the State's argument that the defendant was required to do so, stating:

> Much of the Government's argument rests on its observation that the *voir dire* proceedings here failed to produce any contentious issues. We do not necessarily disagree. Most *voir dire* proceedings are uncontroversial. But the public trial right is not implicated solely in discordant situations. Rather, "the value of openness" that a public trial guarantees "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." [*Press-Enterprise Co.*, 464 U.S. at 508]. Thus, the regularity of the proceedings is an important impression with which the courts should leave observers. While a public presence will more likely bring to light any errors that do occur, it is the openness of the proceeding itself, regardless of what actually transpires, that imparts "the appearance of fairness so essential to public confidence in the system" as a whole. *Id.*
>
> Given the exceptional importance of the right to a public trial, excluding the public for all of *voir dire* without justification grounded in the record, *see Presley*, 130 S. Ct. at 724; *Waller*, 467 U.S. at 48, 104 S. Ct. 2210, is not trivial. Indeed, to conclude otherwise would

> eviscerate the right entirely. Absent the triviality exception, reversal is required here because the district court failed to make *Waller* findings before excluding the public from the courtroom.

Gupta, 699 F.3d at 689.

Consistent with *Gupta*, in addressing a situation where the trial court improperly excluded the defendant's step-grandmother from the courtroom for the entirety of jury selection, the *Evans* court found that "[w]hat occurred here is in no way a 'trivial' closure" and "was a complete denial of [the] right [to a public trial]." *Evans*, 2016 IL App (1st) 142190, ¶ 17. In addition to *Evans* and *Gupta*, the position of the dissenting justice in this case that an intentional closure that lasts for the entirety of jury selection cannot be "trivial," *Radford*, 2018 IL App (3d) 140404, ¶¶ 74–75 (McDade, J., dissenting), is supported by the overwhelming weight of authority from other jurisdictions. *United States v. Withers*, 231 F. Supp. 3d 524, 528 (C.D. Cal. 2017) ("The government does not argue that this closure was trivial. Nor could it: precedent clearly establishes that closure of the courtroom for the entirety of voir dire is significant enough to give rise to a Sixth Amendment violation.").[3]

The only other Illinois case that applied the *Peterson* "triviality" standard,

---

[3] *See also, e.g.*, *Schnarr v. State*, 2017 Ark. 10, *14–16 (Ark. 2017) (a precedential decision of the Arkansas Supreme Court under Ark. S. Ct. R. 5–2(c) (2018), holding that partial closure for most of jury selection was not "trivial"); *Commonwealth v. Cohen*, 921 N.E.2d 906, 919–20 (Mass. 2010) (partial closure for most of jury selection not "trivial"); *Commonwealth v. Downey*, 936 N.E.2d 442, 446–48 (Mass. App. Ct. 2010) (closure not "trivial" where courtroom was partially closed during *voir dire* of 21 potential jurors and where, as in *People v. Jones*, 2014 IL App (1st) 120927, no members of the public were allowed to observe brief follow-up questioning of two potential jurors); *State v. Torres*, 844 A.2d 155, 162 (R.I. 2004) (partial closure for entire jury selection was not "trivial," as deprivation of the protections of the Sixth Amendment was "inherent" in the exclusion of two of the defendant's family members).

People v. Jones, 2014 IL App (1st) 120927, is readily distinguishable from the case at bar. The closure in *Jones* involved nothing more than brief *in camera* follow-up questioning of three potential jurors. *Jones*, 2014 IL App (1st) 120927, ¶ 45.

In light of the above-discussed case law, and the *Peterson* court's emphasis on the closure being brief and inadvertent, the *Peterson* "triviality" doctrine "is largely confined to 'cases involving unintentional closures for short periods of time.'" *E.g.*, *State v. Davis*, 434 S.W.3d 549, 552 n.3 (Mo. Ct. App. 2014) (quoting Zach Cronen, *Behind Closed Doors: Expanding the Triviality Doctrine to Intentional Closures–State v. Brown*, 40 Wm. Mitchell L. Rev. 252, 258, 261 & n.80 (2013)). Indeed, the *Peterson* court cited only two cases in support of its position that a "triviality" standard applied, both of which involved brief, inadvertent closures. *Peterson*, 85 F.3d at 43 (citing *United States v. Al-Smadi*, 15 F.3d 153, 154–55 (10th Cir. 1994), and *Snyder v. Coiner*, 510 F.2d 224, 230 (4th Cir. 1975)).

Therefore, even if it is proper to apply a "triviality standard," an intentional courtroom closure that lasts for the entirety of jury selection, like the closure in this case, is not "trivial." To hold otherwise would affect the fairness of defendants' trials. *See Gomez v. United States*, 490 U.S. 858, 873 (1989) (jury selection is a crucial part of a criminal case because it is "the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice . . . or predisposition about the defendant's culpability"); *State v. Brightman*, 122 P.3d 150, 155 (Wash. 2005) ("a closed jury selection process harms the defendant by preventing his or her family from contributing their knowledge or insight to jury selection and by preventing the venire from seeing the interested individuals"). It would also dismiss the constitutional right of members

of the public to attend jury selection as a mere "triviality." *Radford*, 2018 IL App (3d) 140404, ¶ 69 (McDade, J., dissenting) (citing *Presley*, 558 U.S. at 212, and *Press-Enterprise Co.*, 464 U.S. 501, for the proposition that the spectators excluded in this case had a First Amendment right to be present). Accordingly, this Court should hold that the closure in this case was not "trivial."

Conclusion

The trial court's decision to exclude all except four members of the public for the entirety of jury selection so that it could seat the entire venire in the courtroom at the same time did not satisfy the overriding interest test. It was therefore a clear public trial violation. It was not "trivial." And, as a structural error, it is automatically reversal under the Illinois law doctrine of second-prong plain error. Accordingly, this Court should reverse the appellate court's judgment, reverse Tavarius Radford's conviction of child endangerment, and remand his case to the circuit court for further proceedings. *Evans*, 2016 IL App (1st) 142190, ¶¶ 7–19.

II. Where the term "willfully" is ambiguous and has been interpreted even by some judges to mean "voluntarily," the trial court erred in instructing the jury that the mental state requirement for the offense of child endangerment is satisfied if the defendant acted "willfully." The error denied Tavarius Radford a fair trial where it led the jury to convict him based on a less culpable mental state than "knowledge."

Standard of review

The issue of whether the jury instructions accurately conveyed the applicable law to the jury is reviewed *de novo*. *People v. Fonder*, 2013 IL App (3d) 120178, ¶ 19.

Argument

It has long been recognized that the term "willfully" is ambiguous. Even some judges have interpreted "willfully" to mean "voluntarily." Therefore, the trial court in this case erred in instructing the jury that the mental state requirement for the offense of child endangerment is satisfied if the defendant acted "willfully" rather than "knowingly." The error denied Tavarius Radford a fair trial where it led the jurors to convict him based on a less culpable mental state than "knowledge."

It is well established that the function of jury instructions is to provide the jury with the correct legal principles applicable to the evidence, so that the jury may reach a correct decision according to the law and the evidence. *People v. Bannister*, 232 Ill. 2d 52, 81 (2008); *People v. Fonder*, 2013 IL App (3d) 120178, ¶ 19. It is the trial court's burden to insure that the jury is given the essential instructions as to the elements of the crime charged. *People v. Williams*, 181 Ill. 2d 297, 318 (1998). Accordingly, "[f]undamental fairness requires the trial court to give correct instructions on the elements of the offense in order to insure a fair determination of the case by the jury." *Williams*, 181 Ill. 2d at 318; *see People v.*

Ogunsola, 87 Ill. 2d 216, 222 (1981) ("It is of the essence of a fair trial that the jury not be permitted to deliberate a defendant's guilt or innocence of the crime charged without being told the essential characteristics of that crime." (internal quotation marks omitted)).

Here, Tavarius was charged with child endangerment (C6). The jury was instructed that it should find the mental state element of that offense to be met if it found beyond a reasonable doubt that Tavarius "willfully caused or permitted the life of [his daughter, M.R.,] to be endangered" (C220–21; R2040). The child endangerment statute had previously used the mental state term "willfully." 720 ILCS 5/12–21.6 (2012). However, in 2006 this Court had interpreted the term "willfully" in that statute to mean "knowingly." *People v. Jordan*, 218 Ill. 2d 255, 270 (2006). Then, prior to Tavarius's trial (which began on November 18, 2013), the legislature amended the statute, replacing the term "willfully" with the term "knowingly." 720 ILCS 5/12C–5 (2014); *see* P.A. 97–1109 (eff. Jan. 1, 2013). Thus, based on *Jordan*, as well as the language of the statute, "knowingly" was the proper mental state term to use in jury instructions for the offense of child endangerment. It was therefore error to use the term "willfully" in this case. *See People v. Smith*, 2015 IL App (4th) 131020, ¶¶ 39–40 (Illinois Pattern Jury Instructions for offense of aggravated battery to a person over the age of 60 were out of date because they failed to convey that a defendant must know that the person was over 60 despite a legislative amendment making it clear that this was required).

Additionally, even before the legislature changed the mental state language of the statute, if the term "willfully" was used in child endangerment instructions, it was necessary to provide an additional instruction clarifying its meaning.

Specifically, the Special Supreme Court Committee on Pattern Jury Instructions-Criminal directed trial courts to instruct juries with paragraph 3 of Illinois Pattern Instruction (IPI) 5.01B—which explains that "[c]onduct performed knowingly or with knowledge is performed willfully"—in cases involving an offense with a mental state requirement of "willfullness," if willfullness was interpreted to be synonymous with knowledge for the offense at issue. Thus, after *Jordan* was decided, there was clear authority directing trial courts to use paragraph 3 of IPI 5.01B in cases in which the term "willfully" was used in jury instructions for child endangerment. However, in this case, neither paragraph 3 of IPI 5.01B nor any instruction defining the term "willfully" was provided.

The legislature has recognized that "willfully" can have more than one meaning. 720 ILCS 5/4–5 (2014) ("[c]onduct performed knowingly or with knowledge is performed wilfully [*sic*], within the meaning of a statute using the term 'willfully", [*sic*] *unless the statute clearly requires another meaning*," emphasis added). Furthermore, the recognition that the term "willfully" is not clear to jurors is implicit in (1) the legislature's decision to amend the mental state language of the child endangerment statute to "knowingly" after the *Jordan* Court had already decided that the mental state for the offense was "knowingly," and (2) the IPI committee's direction to provide paragraph 3 of IPI 5.01B when "willfully" is used in instructions for offenses like the version of the child endangerment statute in effect prior to the 2013 amendment. Neither the amendment nor paragraph 3 of IPI 5.01B would be necessary if there was no risk of jurors interpreting "willfully" to mean something other than "knowingly." *See People v. Delgado*, 376 Ill. App. 3d 307, 317 (1st Dist. 2007) ("[T]he choice [by the authors of the pattern jury instructions] to include

the definition of 'sexual conduct' in the [IPI] instructions further undermines the State's argument that the term is self-defining and demonstrates recognition by those who authored the [IPI] instruction of the need to define 'sexual conduct.'").

Court have long recognized the ambiguity inherent in the term "willfully." *E.g.*, *Spies v. United States*, 317 U.S. 492, 497 (1943) ("willful . . . is a word of many meanings); *United States v. Mottweiler*, 82 F.3d 769, 771 (7th Cir. 1996) ("'Wilful' is of course a term of many meanings."); *see also Commonwealth v. Kneeland*, 37 Mass. 206, 220, 244, 246 (1838) (court issued split opinions on question of whether the term "willfully" in a jury instruction conveyed to the jury that it should convict if the defendant acted "voluntarily," i.e., on a theory of strict liability). Even *judges* have believed that the term "willfully" referred to a lesser mental state than "knowingly." For example, in *Mottweiler*, the trial judge interpreted "willfully" to mean voluntarily and found the defendant guilty based on strict liability. In reversing the defendant's conviction, the appellate court followed its prior precedent and found "willfully" to mean "recklessly." *Mottweiler*, 82 F.3d at 770–71. If judges have interpreted the term to mean a lesser mental state than "knowingly," certainly there is a high risk that jurors will do so.

Accordingly, it was error to instruct the jury in Tavarius's case with the term "willfully" rather than the statutory term "knowingly," particularly where the jury was not provided any definition of "willfully" despite the IPI committee's clear direction to give such an instruction when "willfully" is used in jury instructions for offenses like child endangerment. The appellate court majority was incorrect to conclude otherwise. *People v. Radford*, 2018 IL App (3d) 140404, ¶¶ 42–47.

Although trial counsel failed to raise the issue in the trial court, this Court

should reach the issue either because counsel was ineffective or because the jury instruction amounted to either first or second-prong plain error. "Every defendant has a constitutional right to the effective assistance of counsel under the sixth amendment to the United States Constitution and the Constitution of Illinois." *People v. Domagala*, 2013 IL 113688, ¶ 36 (citing U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, § 8). To show that he did not receive the effective help of counsel, a defendant must meet the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First, a defendant must demonstrate that counsel's performance was deficient. *Domagala*, 2013 IL 113688, ¶ 36. Second, a defendant must show that there is a "'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Domagala*, 2013 IL 113688, ¶ 36 (quoting *Strickland*, 466 U.S. at 694).

Supreme Court Rule 451(c) provides that substantial defects in jury instructions are not waived by a defendant's failure to make timely objections if the interests of justice require. Rule 451(c) is coextensive with the plain error doctrine. *People v. Herron*, 215 Ill. 2d 167, 175 (2005). The plain error doctrine allows a reviewing court to reach a forfeited issue where clear or obvious error occurred, and where (1) the evidence was closely balanced, or (2) the error was so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. Ill. S. Ct. R. 615(a); *People v. Piatkowski*, 225 Ill. 2d 551, 564–65 (2007); *Herron*, 215 Ill. 2d at 186–87. "In determining whether the evidence adduced at trial was close [under the first prong of the plain error doctrine], a reviewing court must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case." *People v. Sebby*,

2017 IL 119445, ¶ 53. When there is error in a close case, a reviewing court should "err on the side of fairness, so as not to convict an innocent person." *Herron*, 215 Ill. 2d at 193.

As discussed above, clear error occurred in this case. *See Piatkowski*, 225 Ill. 2d at 565–66 (clear and obvious error to give ambiguous and misleading jury instruction); *see also People v. Claybourn*, 221 Ill. App. 3d 1071, 1075 (1st Dist. 1991) ("[T]he failure to correctly instruct the jury on the elements of the crime charged constitutes plain error."). Therefore, counsel's performance was deficient where (1) despite *Jordan*, counsel failed to object to the jury being instructed with the mental state term "willfully" rather than "knowingly," and (2) counsel failed to request that the jury be instructed with paragraph 3 of IPI 5.01B, despite the IPI committee's clear direction to give such an instruction when "willfully" is used in jury instructions for offenses that require a mental state of "knowledge." *Cf. People v. Falco*, 2014 IL App (1st) 111797, ¶¶ 17–24 (counsel ineffective for failing to request non-IPI instruction incorporating the term "knowledge" and instead allowing jury to be instructed with the statutory language for the offense of possession of a defaced firearm, where the statutory language read like a strict liability offense and courts had already construed the statute to require a mental state of knowledge).

Further, the closely balanced requirement of the first prong of the plain error doctrine, as well as the prejudice prong of *Strickland*, are met. The indictment alleged that Tavarius committed child endangerment by causing head trauma to his daughter, M.R., that ultimately resulted in her death (C6). In order to convict Tavarius of child endangerment in this case, the jury had to find beyond a reasonable

doubt that he knowingly "caused or permitted *the life* of [M.R.] to be endangered," and that his act proximately caused M.R.'s death (C220–21; R2040) (emphasis added). *Jordan*, 218 Ill. 2d at 270. That is, with respect to mental state, the jury had to find that Tavarius knew at the time that he allegedly committed the charged conduct that his conduct endangered M.R.'s life. *Jordan*, 218 Ill. 2d at 270. However, in acquitting Tavarius of murder and involuntary manslaughter charges that were based on the same alleged conduct, the jury found that Tavarius did not knowingly[4] or even recklessly[5] cause M.R.'s death (C6, 215–19, 225; R2037–39, 2097). The trial judge found that the jury's findings of acquittal were "certainly" supported by the evidence (R2176, at appendix). The trial judge found that there was a "strong defense presentation through the testimony of Dr. Teas attacking the . . . testimony of Dr. Arangelovich," expressed concerns that Tavarius's interrogation was a "tricky interview," and called for "greater scrutiny" of the Reid technique in light of evidence of false confessions (R2136–37, 2154–55, 2176–80, at Appendix).

Attempting to explain how the jury could have convicted Tavarius of child endangerment despite its acquittals on the other charges, the trial judge advanced the theory that this was an "eggshell skull" situation where, although what Tavarius did would not have caused the death of a normal child, his action contributed to M.R.'s death here only because M.R. was in a weakened state as a result of her

---

[4] The jury was instructed on knowing murder. Under that theory, the mental state requirement is proven where a defendant "knew" his acts "created a strong probability of . . . great bodily harm" (C216–17; R2038).

[5] The jury was instructed that a person acts recklessly where that person "consciously disregards a substantial and unjustifiable risk" (R2037–38; C215).

prior accidental falls (R2147–48, 2155–56, 2177, at Appendix). The prosecutor—who recognized the weakness of the evidence relating to mental state by requesting an involuntary manslaughter instruction, and who had argued in closing argument that the case involved a new injury on top of an older injury caused by the accidental falls—agreed that the jury could have reached that conclusion (R1848, 2028, 2150, at Appendix). The prosecutor also said that he believed that the jury instructions provided in this case indicated that child endangerment required a less culpable mental state than the other two offenses. The prosecutor explained that it was his belief that "the jury . . . did not believe that [Tavarius] throwing [M.R.] down on the bed was an act likely to cause death or great bodily harm" and that the jury found that Tavarius "didn't necessarily think he was doing anything that bad" when he performed the act in question (R2145–47, at Appendix).

Thus, it is evident from the trial judge's and the prosecutor's comments, that the case was at least close as to the mental state element of child endangerment. Further, the jury verdicts of acquittal on the other counts, counts in which the jury was instructed with the mental state terms for knowledge and recklessness, strongly suggest that Tavarius would not have been convicted of child endangerment if the jury had been properly instructed. It is apparent that jurors assumed that "willfully" simply meant "voluntarily," as even judges have done in other cases.

As the prosecutor acknowledged, the State's evidence was consistent with the judge's "eggshell skull" theory that an action that would not normally contribute to M.R.'s death could have done so only because she was in a weakened state due to her prior falls. As the State acknowledged, it is undisputed that M.R. accidentally fell and hit her head on concrete twice just days prior to her death (R2028, 2150,

2155–56, at Appendix; see also R971–72, 983, 1013–14, 1018, 1020, 1032–33, 1161–63). Dr. Teas's testimony provided strong evidence that it was those falls, and not any action by Tavarius, that caused M.R.'s death, and that Tavarius was completely innocent of performing any act that caused head trauma to M.R. (R1637, 1665, 1675–76, 1683–84, 1693, 1696, 1698, 1704–05, 1776–77). However, even assuming that Tavarius engaged in conduct within 24 hours of M.R.'s death that contributed to her death only because she was in a weakened condition due to the prior falls, the evidence indicated, as the trial judge evidently found (R2142–44, 2154–55, at Appendix), that Tavarius's act was simply grabbing M.R. by the arms and pushing her from a sitting position back onto a soft daybed a single time (St. Ex. 17, 47:25, 48:10, 1:35:30 (demonstration), 136:00, 1:37:20, 1:39:00, 1:52:45, 1:53:00 (demonstration); see also St. Ex. 4–5 for photos of the daybed taken when it was at a location other than where the alleged offense occurred).

That is not an action that someone would *know* endangered the *life* of a child. Indeed, Officer Bukowski testified at trial that he did not believe a serious injury could have been sustained from pushing a child onto the soft daybed (R1461). And there was no testimony at trial suggesting that such an action was likely to place a child's life in danger. Dr. Arangelovich never testified about the amount of force required to endanger M.R.'s life. She never said the action described in Tavarius's statement could have caused death or could have endangered a child's life. Indeed, because she evidently reached her conclusion that the death was caused by child abuse before the December 1 interrogation in which Tavarius made his statement to police (R1266, 1441–42, 1455–59, 1468–70; see R290–91), her findings were disconnected from any actual descriptions of what occurred. And Tavarius

never said that he *knew* at the time he allegedly committed the charged conduct that his conduct endangered M.R.'s *life*. Based on the prosecutor's comments, it seems the prosecutor actually believed that the jury specifically concluded that Tavarius did not know that any act he performed endangered M.R.'s life.

Had the jury been properly instructed so that it understood it needed to find beyond a reasonable doubt not only that Tavarius voluntarily engaged in the action in question, but also that he knew when he did so that his action endangered M.R.'s life, there is every reason to believe that the jury would have acquitted Tavarius of child endangerment, just as it acquitted him of murder and involuntary manslaughter charges that were based on the same alleged conduct. That is especially the case where 12 character witnesses provided strong evidence that Tavarius would never knowingly endanger anyone's life, let alone the life of his beloved daughter M.R. (R1055, 1081, 1166, 1526–30, 1535–56, 1573–1600, 1825–33). Thus, both the closely balanced requirement of the first prong of the plain error doctrine and the prejudice prong of *Strickland* are met.

The jury instruction error in this case was also second-prong plain error. "Fundamental fairness requires trial courts to see 'to it that certain basic instructions, essential to a fair determination of the case by the jury, are given.'" *Fonder*, 2013 IL App (3d) 120178, ¶ 25 (quoting *Ogunsola*, 87 Ill. 2d at 222). "The failure to inform the jury of the elements of the crime charged is so grave and fundamental that the waiver rule should not apply." *Fonder*, 2013 IL App (3d) 120178, ¶ 25. Here, the error undermined the fairness of Tavarius's trial and challenged the integrity of the judicial process because the instructions that the court provided allowed the jury to convict him without finding beyond a reasonable

doubt that he acted with the requisite mental state. The improper instruction of the jury therefore created a "'serious risk that the jurors incorrectly convicted [him] because they did not understand the applicable law,'" which posed a "'severe threat to the fairness of [his] trial.'" *People v. Getter*, 2015 IL App (1st) 121307, ¶¶ 62, 69 (quoting *People v. Sargent*, 239 Ill. 2d 166, 191 (2010), and *People v. Hopp*, 209 Ill. 2d 1, 12 (2004)); *see, e.g.*, *Ogunsola*, 87 Ill. 2d at 221–23 (finding second-prong plain error where the court failed to instruct the jury that it had to find intent to defraud in order to convict the defendant of deceptive practices); *People v. Ulloa*, 2015 IL App (1st) 131632, ¶ 25 (finding second-prong plain error where jury instruction misstated the elements of the offense); *Fonder*, 2013 IL App (3d) 120178, ¶¶ 25–26 (finding second-prong plain error where the trial court's omission of a jury instruction did not allow the jury to consider an element essential to the determination of the defendant's guilt or innocence).

It is evident that improper jury instructions concerning the mental state requirement for the offense of child endangerment led the jury to convict Tavarius based on a less culpable mental state than "knowingly." Therefore, Tavarius was denied a fair trial. Accordingly, this Court should reverse the appellate court's judgment, reverse Tavarius Radford's conviction of child endangerment, and remand his case to the circuit court for further proceedings.

CONCLUSION

For the foregoing reasons, the defendant-appellant, Tavarius D. Radford, respectfully requests that this Court reverse the appellate court's judgment, reverse his conviction of child endangerment, and remand his case to the circuit court for further proceedings.

Respectfully submitted,

PETER A. CARUSONA
Deputy Defender

STEVEN VAREL
Assistant Appellate Defender
Office of the State Appellate Defender
Third Judicial District
770 E. Etna Road
Ottawa, IL 61350
(815) 434-5531
3rddistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE

I, Steven Varel, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 33 pages.

/s/Steven Varel
STEVEN VAREL
Assistant Appellate Defender

APPENDIX TO THE BRIEF

Tavarius D. Radford No. 123975

E-FILED
3/28/2019 12:55 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

PEOPLE V. TAVARIUS D. RADFORD
11-CF-662 3-14-0404

Report of Proceedings

VOLUME RP1

VOLUME RP2

Witnesses	DX	CX	RDX	CDX
Brent Bukowski	R264	R279	R293/R298	R295
Karren Farmer	R300	R309		

VOLUME RP6

VOLUME RP7

VOLUME RP8

VOLUME RP9

R1504 Motion Denied

R1505 State Rests

Witnesses	DX	CX	RDX	CDX
Karren Farmer	R1505	R1511	R1523	R1524
Melody Ausec	R1526	R1527		
Kimberly Brewington	R1530	R1534		
Leon Ausec	R1535	R1537		
List Huntley	R1539	R1542		
Echo Brewington	R1544	R1549		
Stephanie Jackson	R1556	R1567		
David Suprenant	R1570			
Ashleigh Godwin	R1573	R1574		
Mary Jo Bowers	R1577	R1579	R1580	R1581
Scherry Mather	R1582	R1585		
Maddy Mather	R1586	R1589	R1590	
Kevin Huntley	R1592	R1594		
Marcus Strother	R1598			

VOLUME RP10

R1608 Report of Proceedings - November 26, 2013
Jury Trial

Witnesses	DX	CX	RDX	CDX
Dr. Shaku Teas	R1611	R1707	R1781/1788	R1786

VOLUME RP11

R1792 Report of Proceedings - November 27, 2013
Jury Trial/Motion in Limine

R1796 Motion in Limine Denied

Witnesses	DX	CX	RDX	CDX
Robert Gessner	R1797	R1822	R1824	
Tim Lehman	R1825			
Eric Penrod	R1828	1833		

R1841 Defense Rests

VOLUME RP12

VOLUME RP13

R2191	Report of Proceedings - April 16, 2014 Continuance for Motion to Reconsider
R2194	Report of Proceedings - May 6, 2014 Hearing on Motion to Reconsider
R2195	Motion Denied

Exhibit 1 - Manila Envelope
Exhibit 2 - Manila Envelope

In the Circuit Court of the Twenty-first Judicial Circuit
in the
County of Kankakee
and
State of Illinois

123975

THE PEOPLE OF THE STATE OF ILLINOI S

VS

TAVARIUS D. RADFORD

CASE NO: 11-CF-662

3-14-0404

INDEX

2018 IL App (3d) 140404

Opinion filed July 13, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois.
Plaintiff-Appellee,	
v.	Appeal No. 3-14-0404 Circuit No. 11-CF-662
TAVARIUS D. RADFORD,	
Defendant-Appellant.	Honorable Clark Erickson, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court, with opinion.
Justice Wright concurred in the judgment and opinion.
Justice McDade dissented, with opinion.

OPINION

¶ 1 A jury convicted defendant, Tavarius D. Radford, of felony child endangerment (720 ILCS 5/12-21.6(a) (West 2010)), for which the trial court sentenced him to 42 months in prison. Defendant now appeals his conviction. First, defendant argues that the State's evidence failed to prove his guilt beyond a reasonable doubt. Second, he contends that the trial court plainly erred by issuing a child endangerment jury instruction that misstated the requisite *mens rea* or, in the alternative, counsel provided ineffective assistance by not objecting to the instruction. Finally, defendant claims the trial court violated his right to a public trial by partially closing the

courtroom during *voir dire* and, later in the trial, asking journalism students in the audience to find a seat or leave the courtroom. For the following reasons, we affirm defendant's conviction.

¶ 2 BACKGROUND

¶ 3 The State charged defendant with murder and child endangerment after his 26-month-old daughter died from traumatic head injuries on October 26, 2011. Around 10 a.m. that morning, Kayleigh Reardanz found her daughter, M.R., unresponsive in their Bourbonnais apartment. By the time she reached the hospital, M.R. had fallen into cardiac arrest. After attempting to resuscitate her, the treating physician pronounced M.R. dead shortly after 11 a.m. The forensic pathologist who performed M.R.'s autopsy concluded that blunt head trauma from child abuse caused her death. M.R.'s death certificate described her manner of death as homicide due to child abuse. Defendant's jury trial began November 18, 2013.

¶ 4 Prior to *voir dire*, the trial court recognized that, although jury selection is a public proceeding, the courtroom could not accommodate over 90 potential jurors and spectators present for the proceedings. The record indicates that M.R.'s family members and other members of the public regularly attended pretrial hearings. Due to the nature of the case, the trial court also noted that the large congregation of spectators with "emotions running high" risked contaminating the jury pool.

¶ 5 The court observed that the spectators appeared equally divided between those who supported defendant and those who did not. In an effort to preserve defendant's public trial right and proceed with jury selection, the court asked all spectators, except two who supported defendant and two who did not, to leave the courtroom. The court let the spectators decide who would remain in the courtroom. Neither defendant nor his counsel objected to this partial closure.

¶ 6 Kayleigh testified that she, defendant, and M.R. lived in the Bourbonnais apartment for approximately one month before M.R.'s death. They lived in the apartment with Kayleigh's grandparents, Cheryl and David Heather, and close friends, Kimberly and Echo Brewington. On October 26, 2011, Kayleigh found M.R. unresponsive around 10 a.m. Her skin was blue in color and very cold. Kayleigh became upset and yelled for help. She called 911 and handed the phone to Kimberly. Before the ambulance arrived, David attempted to resuscitate M.R. by performing CPR. Doctors pronounced M.R. dead just after 11 a.m.

¶ 7 Kayleigh spoke with police at the hospital and again days after M.R.'s death. During these conversations, Kayleigh did not disclose M.R.'s prior falls or medical history. She testified that she believed M.R. died from sudden infant death syndrome (SIDS), so she did not think to disclose M.R.'s prior falls to police. After M.R.'s autopsy revealed that she died from head trauma caused by child abuse, police interviewed Kayleigh a third time. This time, she informed police of M.R.'s prior falls and medical history.

¶ 8 Kayleigh testified that M.R. was born in August 2009. Soon after, M.R. developed a blue sclera and grew to be unusually large for her age. Her pediatrician believed these symptoms were consistent with osteogenesis imperfecta (brittle bone disease) and recommended a blood test and appointment with a geneticist. When Kayleigh and defendant received M.R.'s blood test results, they decided not to consult the geneticist.

¶ 9 In January or February 2011, M.R. fell down and hit her head while defendant babysat her. Defendant took M.R. to the emergency room; Kayleigh met him there. M.R.'s computed tomography (CT) scans were negative, and the treating physician discharged her. Kayleigh noticed a "knot" on M.R.'s forehead at the hospital.

¶ 10 Kayleigh also testified that M.R. "split her eyebrow open" later in 2011 while Kayleigh's friend babysat. Then, on Easter in 2011, M.R. slipped in Kayleigh's mother's bathtub and "busted her chin." M.R. went to the emergency room after both falls.

¶ 11 In September 2011, M.R.'s pediatrician diagnosed her with mild anemia. On October 13, Kayleigh again took M.R. to her pediatrician due to a large rash on her chest. Kayleigh pointed out bite marks on M.R.'s arm where she bit herself. The pediatrician believed that capillary hemangiomas caused M.R.'s rash. M.R.'s self-harm stemmed from a behavioral issue unrelated to the rash. The rash subsided the next day, so defendant and Kayleigh never took M.R. to undergo bleeding and bruising panels that her pediatrician ordered.

¶ 12 On October 22, M.R. fell and hit her head on the pavement while playing outside with Kayleigh. Kayleigh examined M.R.'s head but saw no injury; she did not take M.R. to the hospital. However, she kept M.R. awake for at least one hour after the fall in case she sustained a concussion.

¶ 13 Kayleigh also testified that M.R. fell the day before her death. She threw herself backwards during a tantrum and hit her head on the pavement. After the incident, M.R. complained of head pain. While Kimberly and Kayleigh were styling M.R.'s hair later that night, M.R. complained of pain when they touched the back of her head. Cheryl, Kimberly, and Kayleigh examined M.R.'s head but did not see any indication of injury. Although Kayleigh stated these events occurred the day before M.R.'s death, Echo testified that it occurred on October 23, three days before M.R.'s death.

¶ 14 Kayleigh stated that she worked from 3 p.m. until 11 p.m. on October 25. When she returned to the apartment after work, she noticed M.R. whimpering and shaking. Kayleigh asked M.R. if she was in pain; she indicated that she was not. M.R. commonly shook when she became

impatient, so Kayleigh was not alarmed by M.R.'s behavior. Kayleigh discovered M.R. unresponsive the next morning.

¶ 15 Cheryl testified that Kayleigh took her to the grocery store in the early afternoon on October 25. M.R. was asleep when Cheryl and Kayleigh returned to the apartment before 3 p.m. After quickly getting ready, Kayleigh left for work around 3 p.m. At around 5 p.m., Cheryl agreed to watch M.R., who was still asleep, while defendant and Echo biked to Kankakee.

¶ 16 Echo testified that she and defendant were gone for at least two hours—they biked to a friend's house, purchased marijuana, and smoked it in a nearby park. M.R. was still asleep when defendant and Echo returned to the apartment around 7 p.m.

¶ 17 Although defendant did not testify on his own behalf, the jury viewed his videotaped police interview. Before the jury viewed the interview, journalism students from a local university entered the courtroom to observe the proceedings, specifically the interview. The trial court asked the students to "find a place to sit" or they would have to leave the courtroom. The record does not indicate whether any of the students left the courtroom.

¶ 18 During the interview, defendant told police that he tucked M.R. in for a nap before 3 p.m. on October 25. A few minutes later, defendant returned to check on M.R. She was playing with a wooden unicorn plaque instead of sleeping. Defendant grew angry at M.R.'s insubordination and tucked her in "kind of roughly." He immediately apologized to M.R. and told her that he loved her.

¶ 19 Defendant told police that he did not believe M.R. could have been injured when he tucked her in. He speculated that she may have hit her head on the wooden plaque, but he was uncertain. However, when defendant demonstrated his action toward M.R. on a stuffed bear, he

told police the demonstration was less aggressive than how he tucked M.R. in because he did not want to hurt the bear.

¶ 20 Defendant also told police that M.R.'s naps would typically last between 60 and 90 minutes; on October, 25, she slept for at least 4 hours. She seemed to have no appetite and ate very little at dinner after she awoke from her nap. Defendant also told police that M.R. may have vomited after dinner, but he could not remember for certain.

¶ 21 Two experts presented crucial testimony regarding M.R.'s manner of death. Dr. Valerie Arangelovich, the forensic pathologist who performed M.R.'s autopsy, opined that abuse caused M.R.'s fatal head trauma. Dr. Shaku Teas, an experienced forensic pathologist, disagreed with Arangelovich's conclusion and criticized her methods. Teas found no signs of child abuse in M.R.'s autopsy record.

¶ 22 Specifically, Teas disagreed with Arangelovich's conclusion that M.R.'s fatal injuries occurred within 24 hours of her death. Arangelovich found subgaleal and subdural injuries in M.R.'s brain—both experts agreed that the subdural injuries directly caused M.R.'s death. Both experts also agreed that the subgaleal injuries were likely old injuries. Arangelovich found iron when she sampled M.R.'s subgaleal injuries. Iron in adult injuries indicates the injury is at least three days old; there is no accepted iron-testing scale for children.

¶ 23 Arangelovich also observed "very rare" fibroblasts in M.R.'s subdural injuries. In adults, fibroblasts do not appear until at least three days after sustaining an injury. In children, fibroblasts can occur naturally or in response to an injury. Arangelovich could not determine whether the fibroblasts presented naturally or in response to M.R.'s subdural injuries; nor could she opine with reasonable certainty whether the adult fibroblast timeline also applies to children.

However, Arangelovich opined that M.R.'s subdural injuries occurred within 24 hours of her death due to their color and lack of healing.

¶ 24 Teas testified that it was impossible to determine when M.R. sustained her subdural injuries because Arangelovich failed to take blood and tissue samples from the periphery of M.R.'s injuries, where healing typically begins. According to Teas, taking samples exclusively from the center of an injury does not provide necessary data to determine the injury's age. Teas noted multiple signs of healing in Arangelovich's samples of M.R.'s subdural injuries. Teas opined that these signs of healing in the center of M.R.'s subdural injuries indicate that the injuries' periphery would likely show additional healing that would more accurately determine their age. From this evidence, Teas opined that M.R.'s subdural and subgaleal injuries were "definitely" more than 24 hours old when she died—M.R. sustained them before defendant "roughly" tucked her in on October 25. Teas also opined that Arangelovich's autopsy file did not definitively show that abuse, rather than accidental falls, caused M.R.'s fatal injuries.

¶ 25 At the close of evidence, the State tendered a jury instruction on involuntary manslaughter. Defense counsel conceded that defendant had no basis to object because involuntary manslaughter is a lesser-included offense of murder. The trial court issued the instruction. The jury acquitted defendant of murder and involuntary manslaughter but convicted him of child endangerment.

¶ 26 Defendant was 17 years old when M.R. died. His presentence report contained letters from friends, relatives, neighbors, and teachers who stated that defendant was a good kid who would never hurt anyone. Although defendant admitted during his police interview that he smoked marijuana, he had no criminal history. No witness testified that defendant abused M.R. prior to October 25, 2011. The trial court sentenced him to 42 months in prison. After

defendant's sentencing hearing, the trial court denied his motion to reconsider. This appeal followed.

¶ 27 ANALYSIS

¶ 28 Defendant makes three arguments challenging his conviction. First, he claims that the State failed to prove him guilty beyond a reasonable doubt. Specifically, defendant argues that even if his actions proximately caused M.R.'s death (which he disputes), the State failed to prove defendant willfully or knowingly endangered M.R.'s life. Second, defendant asserts that the trial court erred by instructing the jury that child endangerment's state-of-mind element requires "willfully," rather than "knowingly," causing or permitting a child's life or health to be endangered. Defendant argues the trial court's misleading instruction constituted plain error or, in the alternative, his counsel provided ineffective assistance by failing to object. Finally, defendant claims the trial court denied him a public trial when it partially closed the courtroom during *voir dire* and, later in the trial, when it instructed journalism students to find a seat or leave the courtroom. We address each argument in turn.

¶ 29 I. Sufficiency of the Evidence

¶ 30 When a defendant challenges the sufficiency of the evidence supporting his conviction, the standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the offense's essential elements proven beyond a reasonable doubt. *People v. Pollock*, 202 Ill. 2d 189, 217 (2002). Reviewing courts do not retry defendants, reweigh trial evidence, or otherwise undermine the fact finder's judgment. *People v. Tenney*, 205 Ill. 2d 411, 428 (2002). A conviction will stand unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of the defendant's guilt. *People v. Evans*, 209 Ill. 2d 194, 209 (2004).

¶ 31 The State charged defendant with felony child endangerment. The State had to prove that (1) M.R. was in defendant's care or custody, (2) defendant willfully caused or permitted M.R.'s life to be endangered, and (3) defendant's acts proximately caused M.R.'s death. See 720 ILCS 5/12-21.6 (West 2010). Defendant claims that the State failed to prove that his actions proximately caused M.R.'s death or that he willfully endangered M.R.'s life.

¶ 32 A. Proximate Cause

¶ 33 In support of his proximate cause argument, defendant claims that he "presented a strong case that M.R.'s death was caused by an accidental fall," not by his action. He emphasizes Kayleigh's trial testimony stating that M.R. suffered head injuries from accidental falls before her death. He also highlights Dr. Teas's opinion that M.R.'s fatal injuries occurred more than 24 hours prior to her death, before defendant tucked her in "kind of roughly." Teas also opined that M.R.'s injuries did not show signs of abuse.

¶ 34 On the other hand, Dr. Arangelovich opined that M.R.'s fatal injuries occurred within 24 hours of her death. She also opined that abuse caused M.R.'s injuries. Combining Arangelovich's opinion with defendant's police interview, the State presented an "eggshell skull" theory; M.R.'s prior falls and medical issues made her more susceptible to fatal head trauma but did not cause her death. According to the State, defendant's admittedly aggressive act, tucking M.R. in "roughly," endangered her life and proximately caused her death.

¶ 35 Essentially, this issue turned on the jury's perception of opposing expert opinions. Other trial evidence and testimony did not overwhelmingly support either expert's opinion. Although testimony regarding M.R.'s prior falls tends to support Dr. Teas's opinion, Kayleigh did not disclose M.R.'s prior falls to police until her autopsy report concluded she was abused. The jury could have reasonably discredited this testimony. Moreover, Arangelovich agreed with Teas that

M.R. had preexisting head injuries when she died; the experts disagreed as to whether new injuries caused her death.

¶ 36 The jury apparently agreed with Dr. Arangelovich. We do not find her expert opinion to be improbable, unsatisfactory, or inconclusive. See *Evans*, 209 Ill. 2d at 209. Viewing the evidence in the light most favorable to the State, we hold that the evidence sufficiently supported the jury's finding that defendant's actions proximately caused M.R.'s death.

¶ 37 B. State of Mind

¶ 38 Defendant argues that his videotaped police interview clearly demonstrates that, even if his actions proximately caused M.R.'s death, he did not willfully harm her. As defendant points out, acting "willfully," to satisfy the requisite mental culpability for child endangerment, is synonymous with acting "knowingly." *People v. Jordan*, 218 Ill. 2d 255, 270 (2006); see also 720 ILCS 5/4-5(b) (West 2012). A person acts "knowingly" when he or she knows that his or her conduct is practically certain to cause the result. *People v. Dorsey*, 2016 IL App (4th) 140734, ¶ 34 (citing *People v. Psichalinos*, 229 Ill. App. 3d 1058, 1067 (1992)). The jury may infer intent from circumstantial evidence. *People v. Williams*, 165 Ill. 2d 51, 64 (1995). "The defendant is presumed to intend the natural and probable consequences of his acts ***." *People v. Terrell*, 132 Ill. 2d 178, 204 (1989).

¶ 39 The trial evidence, viewed in the light most favorable to the State, showed that defendant knew his aggressive physical act toward his 26-month-old daughter endangered her life or health. Defendant acted on his own volition when he "roughly" tucked M.R. into her daybed. During his police interview, he demonstrated tucking M.R. in by using a stuffed teddy bear. After defendant's first demonstration, he admitted that he tucked M.R. in harder than in the

demonstration because he did not want to hurt the bear. During the second demonstration, defendant applied noticeably more force.

¶ 40 Defendant became frustrated because M.R. would not lie down for her nap, so he "roughly" forced her into her daybed. His apology to M.R. after forcing her into her daybed indicates that he knew he could have injured her. He also knew M.R.'s medical history and understood she might be more susceptible to injury than other infants. Based on the evidence, the jury could reasonably conclude that defendant willfully endangered M.R.'s life or health.

¶ 41 II. Jury Instruction

¶ 42 Defendant also argues that the trial court denied him a fair trial by issuing an erroneous child endangerment jury instruction. Following Illinois Pattern Jury Instructions, Criminal, Nos. 11.29, 11.30 (4th ed. 2000) (hereinafter IPI Criminal 4th), the instruction stated that defendant should be found guilty of child endangerment if the jury concluded, beyond a reasonable doubt, that he assumed care or custody over M.R., "willfully caused or permitted" M.R.'s life to be endangered, and his acts proximately caused M.R.'s death. The trial court did not tender IPI Criminal 4th No. 5.01B, which states: "Conduct performed knowingly or with knowledge is performed willfully." Defense counsel made no objection. Defendant claims that the instruction's use of "willfully" rather than "knowingly" in the absence of IPI Criminal 4th No. 5.01B was plain error. Alternatively, defendant argues that counsel provided ineffective assistance by not objecting to the allegedly erroneous instruction.

¶ 43 Illinois Supreme Court Rule 451(c) (eff. July 1, 2006) states that "substantial defects" in jury instructions "are not waived by failure to make timely objections thereto if the interests of justice require." Rule 451(c) is coextensive with the plain-error clause in Illinois Supreme Court Rule 615(a). *People v. Keene*, 169 Ill. 2d 1, 32 (1995); *People v. Jackson*, 2015 IL App (3d)

140300, ¶ 53 n.3. Defendant must demonstrate that the trial court's instruction constituted "clear or obvious error" that denied him a fair trial. *People v. Downs*, 2015 IL 117934, ¶¶ 14-15; see also Ill. S. Ct. R. 615(a). A fair trial is not necessarily a perfect trial. *People v. Herron*, 215 Ill. 2d 167, 177 (2005).

¶ 44 For over a decade, Illinois courts have held "willful" conduct to be synonymous with "knowing" conduct for child endangerment offenses. *Jordan*, 218 Ill. 2d at 270. Between M.R.'s date of death (October 26, 2011) and defendant's trial (November 18, 2013), the General Assembly codified *Jordan* by changing the requisite state of mind for child endangerment from "willful" to "knowing." Pub. Act 97-1109, §§ 1-5 (eff. Jan. 1, 2013); compare 720 ILCS 5/12-21.6 (West 2010), with 720 ILCS 5/12C-5 (West 2012). However, the amendment did not substantively change the law; "willful" and "knowing" reflect the same state of mind for child endangerment offenses.

¶ 45 At its core, defendant's challenge argues that the jury reached inconsistent verdicts. The crux of defendant's argument is that the term "willfully" conveyed to the jury a less culpable state-of-mind requirement than "knowingly." By finding defendant not guilty of murder, the jury concluded defendant did not "know" his actions would likely kill M.R. or cause her great bodily harm. Based on the murder verdict, defendant claims the jury would not have concluded he "knowingly" endangered M.R.'s life or health.

¶ 46 Defendants may not challenge a jury's verdict by claiming it is inconsistent. *People v. Jones*, 207 Ill. 2d 122, 133-34 (2003). When a jury's verdict is inconsistent, "it is unclear whose ox has been gored." *United States v. Powell*, 469 U.S. 57, 65 (1984). A court can only speculate as to the jury's rationale in reaching its verdict without impermissibly injecting itself into the

jury's deliberations. *Id.* at 65-66. Further, appellate courts' authority to independently review the sufficiency of the prosecution's evidence guards against unlawful convictions. *Id.* at 67.

¶ 47 Here, we determined the State's evidence sufficiently supported defendant's child endangerment conviction. We decline defendant's invitation to speculate as to whether the jury would have reached a different verdict had the instruction said "knowingly" rather than "willfully." In fact, the evidence sufficiently supported a murder conviction; we cannot know whether the verdict was the result of juror lenity to defendant's benefit or the jury's interpretation of an instruction to his detriment. Regardless, the trial court's instruction accurately stated the law—"willfully" and "knowingly" are synonymous in child endangerment cases. We do not find the trial court's instruction to be "clear or obvious error." *Downs*, 2015 IL 117934, ¶ 15. Nor do we find that counsel provided ineffective assistance by failing to object to a jury instruction that accurately stated the law.

¶ 48 III. Public Trial

¶ 49 Defendant's final argument asserts that the trial court violated his right to a public trial (U.S. Const., amend. VI) when it partially closed the courtroom during *voir dire* and, while the State presented its evidence, asked journalism students to find a seat or leave the courtroom.

¶ 50 Prior to bringing over 90 potential jurors into the courtroom, the trial court recognized that jury selection is a public proceeding but the courtroom could not accommodate the potential jurors and the large congregation of citizens attending the proceedings. The trial court also expressed concern that the citizens with "emotions running high" risked contaminating the jury pool. The court ordered a partial closure during jury selection; two people who supported defendant and two who did not could remain in the courtroom and sit behind the potential jurors.

¶ 51 Later in the trial, prior to the State playing defendant's videotaped police interview, the court asked journalism students in attendance to find a seat or leave the courtroom. The record does not indicate whether any student left the courtroom; we cannot know whether a closure occurred. We find that without proof a student left the courtroom, the court's admonishment cannot support defendant's public trial claim. We address only the partial closure during *voir dire* below.

¶ 52 Defendant admits that neither he nor his counsel objected to the court's partial closure. He maintains that his failure to object creates neither a knowing and voluntary waiver of his public trial right nor a forfeiture of the issue on appeal. Even if he forfeited the issue, defendant argues the partial closure constituted second-prong plain error, an error so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. Ill. S. Ct. R. 615(a); *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007).

¶ 53 Defendant's multilayered argument requires some unpeeling before addressing the fruit of its merit. First, we agree that defendant's failure to object to the trial court's partial closure did not amount to a knowing, intelligent, and voluntary waiver of his right to a public trial. See *Walton v. Briley*, 361 F.3d 431, 433-34 (7th Cir. 2004). Had defendant waived his public trial right, our analysis would be complete. See *People v. Bannister*, 232 Ill. 2d 52, 71 (2008).

¶ 54 Although defendant did not waive his right to a public trial, he forfeited the issue on appeal by not contemporaneously objecting or raising the issue in a posttrial motion. *People v. Thompson*, 238 Ill. 2d 598, 611-12 (2010). We must determine whether our plain-error doctrine excepts defendant's forfeiture. To constitute second-prong plain error, the alleged error must deprive the defendant of a fundamentally fair trial or undermine the integrity of the judicial process. Ill. S. Ct. R. 615(a); *Piatkowski*, 225 Ill. 2d at 564-65.

¶ 55 Because public trial rights are "structural," violations are not subject to harmless error analysis. *Weaver v. Massachusetts*, 582 U.S. ___, ___, 137 S. Ct. 1899, 1907-08 (2017); *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984). However, other than the government's prohibition from arguing an error was harmless, "the term 'structural error' carries with it no talismanic significance as a doctrinal matter." *Weaver*, 582 U.S. at ___, 137 S. Ct. at 1910.

¶ 56 Despite not being subject to harmless error analysis, public trial violations are subject to a "triviality standard." *Peterson v. Williams*, 85 F.3d 39, 42 (2d Cir. 1996). "A triviality standard, properly understood," looks to "whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant—whether otherwise innocent or guilty—of the protections conferred by the Sixth Amendment." *Id.* The protections conferred by the public trial guarantee are (1) to ensure a fair trial, (2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, (3) to encourage witnesses to come forward, and (4) to discourage perjury. *Waller*, 467 U.S. at 46-47. Not every courtroom closure results in an unfair trial, nor does each closure affect the values underlying the sixth amendment's public trial guarantee. See *Weaver*, 582 U.S. at ___, 137 S. Ct. at 1910.

¶ 57 Defendant argues that automatic reversal is required where a court excludes anyone from a public proceeding unless (1) the party seeking to close the proceedings advances an overriding interest that is likely to be prejudiced, (2) the closure is no broader than necessary to protect that interest, (3) the trial court considers reasonable alternatives to closing the proceeding, and (4) the trial court makes findings adequate to support the closure. See *Waller*, 467 U.S. at 48. Further, defendant cites *People v. Evans*, 2016 IL App (1st) 142190, ¶ 18, for the proposition that a courtroom's limited seating is not an "overriding interest" justifying excluding any citizen from a proceeding. However, *Evans* is distinguishable from this case in two ways. First, defense counsel

in *Evans* contemporaneously objected to the closure. Second, the *Evans* trial court maintained a standard practice of closing the courtroom during *voir dire*. Here, counsel did not object to the partial closure, and the trial court's partial closure was, according to the record, prompted by unusually large public attendance in this specific case.

¶ 58 The United States Supreme Court has recently recognized that the problems trial courts face "in deciding whether some closures are necessary, or even in deciding which members of the public should be admitted when seats are scarce, are difficult ones." *Weaver*, 582 U.S. at ___, 137 S. Ct. at 1909. The Court also recognized that potential errors in making these difficult decisions can be cured or more thoroughly addressed when a defendant contemporaneously objects to a courtroom closure. *Id.* at ___, 137 S. Ct. at 1909-10. In other words, without contemporaneous objection, the trial court would not likely cure a violation or formally express its findings on the record.

¶ 59 In this case, the trial court's partial closure neither deprived defendant of a fair trial nor undermined the integrity of the judicial process. The partial closure implicated none of the values underlying defendant's right to a public trial. Four citizens, not including the jury, remained in the courtroom during *voir dire*, and the courtroom was open to all citizens for the remainder of defendant's trial. Defendant raises "no suggestion that any juror lied during *voir dire*; no suggestion of misbehavior by the prosecutor, judge, or any other party; and no suggestion that any of the participants failed to approach their duties with the neutrality and serious purpose that our system demands." *Id.* at ___, 137 S. Ct. at 1913.

¶ 60 We hold that the trial court's partial closure during *voir dire* was trivial. Defendant does not suggest, nor does the record indicate, that the partial closure implicated a single value the public trial guarantee aims to protect. Defendant's claim that a courtroom's available seats can

never justify a closure defies reality and would, if accepted, stifle courts' duty to administer justice. Absent clear error, defendant is not entitled to automatic reversal based upon a constitutional claim for which we have little record due to his failure to object: "Due regard generally for the public nature of the judicial process does not require disregard of the solid demands of the fair administration of justice in favor of a party who, at the appropriate time and acting under advice of counsel, saw no disregard of a right, but raises an abstract claim only as an afterthought on appeal." *Levine v. United States*, 362 U.S. 610, 619-20 (1960). We see no clear error in this case.

¶ 61 CONCLUSION

¶ 62 For the foregoing reasons, we affirm the judgment of the circuit court of Kankakee County.

¶ 63 Affirmed.

¶ 64 JUSTICE McDADE, dissenting:

¶ 65 Defendant argues, *inter alia*, that his right to a public trial was violated when the trial court excluded all but four members of the public from the *voir dire* proceeding and, later, ordered journalism students to leave the courtroom during the trial. I agree with the majority that we cannot determine if a closure occurred when the court ordered the journalism students to leave the courtroom because the record is unclear on whether they actually left. However, I disagree with the majority's finding that defendant's right to a public trial was not violated when the trial court excluded members of the public from *voir dire*.

¶ 66 The facts show that the trial court decided—without a request from either party or the consent of the defendant—to close the entire *voir dire* proceedings to members of the public except two individuals from defendant's family and two individuals from the victim's family.

The court reasoned that, because of its preference to seat the entire jury venire in the courtroom at once, there were only enough remaining seats to accommodate four members of the public.

¶ 67 Our society has a strong interest in public trials. *Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979). In a public trial, " 'the public may see [a defendant] is fairly dealt with and not unjustly condemned, and *** the presence of interested spectators may keep his triers keenly alive to a sense of their responsibilities and to the importance of their functions.' " (Internal quotation marks omitted.) *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (quoting *In re Oliver*, 333 U.S. 257, 270 n.25 (1948)). A public trial also "encourages witnesses to come forward and discourages perjury." *Id.* The sixth amendment's right to a public trial was created for the benefit of the defendant, and a court cannot deprive defendant of this right without his consent. *Id.* at 46; *People v. Harris*, 302 Ill. 590, 592-93 (1922). The right to a public trial extends to *voir dire* proceedings. *Presley v. Georgia*, 558 U.S. 209, 212-13 (2010).

¶ 68 "While all trials are presumed to be open, the right is not absolute." *People v. Burman*, 2013 IL App (2d) 110807, ¶ 51. To justify closing a trial proceeding, we examine whether (1) there exists an "overriding interest that is likely to be prejudiced," (2) the closure is no broader than necessary to protect that interest, (3) the trial court considered "reasonable alternatives" to closing the proceeding, and (4) the trial court made adequate findings to support the closure. (Internal quotation marks omitted.) *People v. Evans*, 2016 IL App (1st) 142190, ¶ 10 (quoting *People v. Willis*, 274 Ill. App. 3d 551, 553 (1995), quoting *Waller*, 467 U.S. at 48). The overriding interest required by *Waller* also applies to partial closures. *People v. Cooper*, 365 Ill. App. 3d 278, 282 (2006) (citing *People v. Taylor*, 244 Ill. App. 3d 460, 464 (1993)). The majority touches on *Waller*'s overriding interest and other factors in addressing defendant's

argument, but I believe additional analysis is necessary in determining whether the closure was justified.

¶ 69 Considering the *Waller* factors, I would find that the closure was not justified for three reasons. First, the reason the court gave for deciding to exclude nearly all members of the public from *voir dire* was that it wanted to seat the entire venire in the courtroom and "[t]here's only so many seats." This is not an overriding interest. Having the entire venire in the courtroom at the same time is a function of the court's preference and convenience—factors that surely do not override a defendant's constitutional right to a fair and public trial. Moreover, the issue of the number of seats in a courtroom is "solely a matter of logistics and convenience for courtroom personnel" and "has no positive effect on the fairness of the trial." *Evans*, 2016 IL App (1st) 142190, ¶ 12. Also, although defendant challenges the trial court's closure solely as violative of his rights under the sixth amendment, the excluded spectators, who had chosen to attend and to observe the proceedings, also had a constitutional interest in an open trial. The Supreme Court has held that the right to a public trial "extends beyond the accused and can be invoked under the First Amendment." *Presley*, 558 U.S. at 212 (citing *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984)). It is also well established that the "Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." *Waller*, 467 U.S. at 46.

¶ 70 Second, the court did not articulate adequate findings to support the closure. Indeed, it articulated *no* findings; it removed the public because it wanted to do so. The court cannot arbitrarily burden a defendant's right to a fair trial or the implicit first amendment right of the public and press to an open trial. It must identify an interest that overrides those rights and articulate " 'findings specific enough that a reviewing court can determine whether the closure

order was properly entered.' " *Presley*, 558 U.S. at 215 (quoting *Press-Enterprise Co.*, 464 U.S. at 510). Here, the court's stated reason does not even pretend to identify an "overriding" need served only by having the entire venire present in the courtroom at the same time and moving the public out because of the resulting lack of seats. Nor does the court indicate how such an interest would be prejudiced by, for example, working with panels, or other smaller configurations, of jurors. It is impossible to ascertain from the court's simple statement what overriding interest was at stake and how that interest would be prejudiced without the nearly total exclusion of the public from the jury selection proceedings.

¶ 71 Third, the court failed to consider any reasonable alternative to its partial closure. "Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." *Id.* Here, if a larger courtroom that could seat the venire and the public was unavailable, the court could have called the jurors into the room in smaller groups or asked individuals to stand until the size of the venire was reduced and seating became available. See *Evans*, 2016 IL App (1st) 142190, ¶ 15. If the courthouse has no courtrooms large enough to accommodate the public, the press, and the entire venire, perhaps the county should look into enhanced audio or other technology.

¶ 72 The majority finds *Evans* inapplicable because the defense counsel in *Evans* objected to the closure whereas no objection was made in this case.[1] *Evans*, 2016 IL App (1st) 142190, ¶ 3. I do not see how this distinction is relevant. A failure to object does not preclude this court from reviewing defendant's constitutional claim for plain error. See *People v. Jones*, 2014 IL App

[1]The majority also states that *Evans* is inapplicable to this case because "the *Evans* trial court maintained a standard practice of closing the courtroom during *voir dire*." *Supra* ¶ 57. My reading of *Evans* does not reveal any basis for this statement. In *Evans*, the reviewing court speaks of one instance in which the defendant's step-grandmother was asked to leave the courtroom before *voir dire* proceedings. *Evans*, 2016 IL App (1st) 142190, ¶¶ 3-4. There is no reference to the trial court's standard practice of closing the courtroom in *Evans*.

(1st) 120927, ¶ 40 (although defendant failed to object to the closure, the reviewing court analyzed defendant's constitutional challenge for plain error). Furthermore, the trial court has a responsibility to ensure defendant receives a fair trial, and defendant's failure to object should not relieve it of this responsibility. See *Evans*, 2016 IL App (1st) 142190, ¶ 14 ("Given the seriousness of the potential harm, each trial judge must be alert and proactive in managing his or her courtroom to prevent violations of this core constitutional right, regardless of whether attorneys assist in the process.").

¶ 73 The majority also finds that the partial closure was trivial because defendant did not provide evidence that he was denied the constitutional protections listed above. The majority further states that the record is devoid of evidence that the partial closure violated defendant's constitutional protections. Illinois courts have found that a temporary closure was "trivial" when the closure was brief or minimal. See *Jones*, 2014 IL App (1st) 120927, ¶ 45 (finding that the trial court's brief *in camera* questioning of two potential jurors was trivial); *People v. Webb*, 267 Ill. App. 3d 954, 959 (1994) (holding that the closure was trivial because spectator missed "a few minutes of discussion" at trial); see also *Peterson v. Williams*, 85 F.3d 39, 44 (2d Cir. 1996) (ruling that defendant's sixth amendment rights were not violated because the closure was "extremely short," the spectators were given a follow-up summation, and the closure was inadvertent). However, closure is not trivial when it occurs for the entirety of the *voir dire* proceedings. See *Evans*, 2016 IL App (1st) 142190, ¶ 17 ("What occurred here is in no way a 'trivial' closure. Ms. Peterson missed the entirety of jury selection, including questioning of potential jurors and a number of peremptory challenges.").

¶ 74 Here, the trial court excluded all spectators except four individuals prior to the *voir dire* proceedings, and the excluded spectators were denied an opportunity to view any portion of the

proceedings. This closure was not trivial or *de minimis*; it was a nearly complete denial of defendant's right to have the public present for the *voir dire* of prospective jurors. *Id.* Therefore, I would hold that an error occurred, enabling plain-error review because the trial court violated defendant's right to a public trial.

¶ 75 Defendant asserts that the trial court's violation constituted second-prong plain error. The majority applies the *Weaver* Court's ruling to defendant's challenge under the second prong of plain-error review and finds that defendant did not show that the partial closure affected the fairness of his trial and the integrity of the judicial process. See *Weaver v. Massachusetts*, 582 U.S. ___, ___, 137 S. Ct. 1899, 1911 (2017). I disagree with the majority's decision. The Court in *Weaver* determined that, although a violation of the right to a public trial is structural error, the automatic reversal requirement does not extend to the *Strickland* test because the violation does not always lead to a fundamentally unfair trial as is necessary to meet the prejudice prong. *Id.* at ___, 137 S. Ct. at 1911 ("when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, *Strickland* prejudice is not shown automatically").

¶ 76 The *Strickland* test is not at issue in this case. It is well-established that a violation of a defendant's right to a public trial is structural error. The United States Supreme Court established that a violation of a public trial is structural because of the " 'difficulty of assessing the effect of the error.' " *Id.* at ___, 137 S. Ct. at 1910 (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 (2006)). The Court further found that the violation is structural error because it protects the interest of the public at large, the press, and the defendant. *Id.* at ___, 137 S. Ct. at 1910 (citing *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 508-10 (1984)). The Illinois Supreme Court also recognized that a violation of the right to a public trial is structural

error (*Thompson*, 238 Ill. 2d at 609) and that automatic reversal is required when an error is deemed "structural" (*People Glasper*, 234 Ill. 2d 173, 197 (2006)).

¶ 77 Our supreme court "equated the second prong of plain-error review with structural error." *Thompson*, 238 Ill. 2d at 613. The court further classified structural error as "a systemic error which serves to 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.' " (Internal quotation marks omitted.) *Id.* at 614 (quoting *Glasper*, 234 Ill. 2d at 197-98). In other words, a violation of the right to a public trial, in essence, affects the fairness of the defendant's trial and undermines the integrity of the judicial process as required under the second prong of plain-error review. As stated previously, I would find that the trial court violated defendant's right to a public trial and that this violation is structural error. Based on our supreme court's ruling, I would find that defendant met the second prong of plain-error review. Because automatic reversal is required when an error is deemed structural and because the evidence, reviewed in the light most favorable to the State, was sufficient to find defendant guilty beyond a reasonable doubt, I would reverse defendant's conviction and remand for a new trial. *People v. Willis*, 274 Ill. App. 3d 551, 554 (1995) ("The sixth amendment protects all portions of the trial, including *voir dire*, and the appropriate remedy for improper closure is a new trial.").

and I don't recall it in real specific detail, then testifying that the -- the defendant confessed to slamming versus the defendant stated in his interview that he slammed. You know? I mean which is the case? Do you know? Do you have the grand jury testimony?

MS. LANDWEHR: Actually I have the actual transcript of the audio done by Detective Bukowski.

THE COURT: No. No. I mean of the -- of the grand jury. You said it was used at the grand jury.

MS. LANDWEHR: Yeah. I'm not sure I have the grand jury right now.

THE COURT: Well, I would need to see it. Let's -- anyway, this one we'll do at 1:30.

MS. LANDWEHR: Okay.

THE COURT: Now I'm gonna bring jurors up here folks. We have a lot of --

MR. DICKENSON: We have a lot of witnesses we'll need to have subpoenas continued and things and that nature, Judge. There are --

THE COURT: Yeah. We're gone do that. We'll have to do that right now. What I'm gonna do during jury selection, it's gonna be difficult -- it's a public proceeding, jury selection, but here's the problem. There's only so many seats, and I am going to allow during jury

selection say two individuals from -- I -- I take it the -- the courtroom appears to be divided, okay, between perhaps people here in support of the defendant and individuals here more or less in -- in -- not in support of the defendant, and I will allow two individuals from the victim's family and two individuals from the defendant's family to be present during jury selection and there may not even be room for you, but you cannot talk to any particular -- any jurors. You'll have to sit at the back of the courtroom, not as an insult to you, but in recognition of the fact that we are about to go into jury selection and the emphasis is going to be on the jurors. Okay? Also if you are behind the jurors, you are -- they are -- there's less risk that you might inadvertently -- you know, you wouldn't have like some sort of facial expression to something that's said that could potentially influence the jurors. We don't want that to happen. Okay? Certainly, you know, I want to commend everybody in the courtroom for -- that's here in the courtroom right now for your patience this morning and your demeanor, and I'm gonna ask that throughout the trial which could involve, obviously, considering the nature of the case emotions running high. I'm gonna appreciate it if you remember that it's inappropriate to display those emotions because that can have an affect on the jury and it can --

and it can have an affect on whether or not the trial is ultimately able to even take place or whether or not a mistrial would have to occur, and nobody wants to see that happen. Okay?

So at this time we're gonna bring the jurors up. I am going to clear the courtroom with the exception of two people from each side but first -- but first before the jurors come into the courtroom, before you leave the courtroom, what witnesses, State, do you have for me extend subpoenas on?

MR. DICKENSON: I've got Kayleigh Reardanz. I'm sorry, Kayleigh Reardanz.

THE COURT: As you hear your name, step forward please.

MR. DICKENSON: Valerie Kuchel.

THE COURT: All right.

MR. DICKENSON: David Heather. Cheryl Heather. Is she in the courtroom?

THE COURT: Please -- and this is the time. If they're gonna have their subpoena extended, they gotta be in the courtroom.

MR. DICKENSON: Kevin, can you call for Cheryl Heather, please? She has -- she has medical issues, Judge, that's why she's out there.

THE COURT: Godwin?

MS. GODWIN: Uh-huh. G-O-D-W-I-N?

THE COURT: All right, Miss Godwin.

MR. BRYSON: Alonzo Bryson.

THE COURT: Alonzo Bryson. Okay, Mr. Bryson, same date and time. Okay?

MR. BRYSON: Got it.

THE COURT: All right. Folks, at this time I'm gonna ask that with the exception -- the very limited exception of those who are permitted to remain in the courtroom, I'm gonna ask that everyone else step out and make room for the jurors who are now coming in. Thank you very much.

MS. LANDWEHR: Judge, I think this are a couple of people that we subpoenaed that we didn't catch from the fire department because they were sitting in the courtroom and we didn't -- our witness person didn't catch them.

THE COURT: Yes? Well, who -- are you here with -- anybody else have a subpoena this morning and you haven't stepped forward? Please step forward. Please step forward. Sooner we get to the jurors, the sooner we'll get out. Okay. And subpoenaed by the defense or the State?

MS. LANDWEHR: These are defense witnesses I believe.

to November 25 at 10:30. Okay. Okay. If there's gonna be anybody in the courtroom, I'm gonna ask that you go way in the back. Way in the back. Anybody on the defense side, you gotta go way in the back. I said two people.

MR. DICKENSON: I know -- I mean I believe in a motion to exclude I -- I know you said two people but she's -- she's a listed witness, Judge.

THE COURT: Oh, okay. All right. We can bring the jurors in. We don't have a bailiff.

MR. DICKENSON: Well, John's right out there.

THE COURT: We can bring the jury in. You can let him know.

(Whereupon, the venire was so brought into open court.)

Come in. Just have a seat anyplace. Just have a seat. If you'd fill in both sides of the courtroom. Both sides. Okay. Just fill in both sides. Okay. We're kind of out of space. Everybody else step up here and come up to the jury box. If there's not a seat for you, come up into the jury box. Gary, do you have an extra list? Okay. Great.

All right. We're dealing -- I'm gonna -- I'm only gonna introduce the parties, read the Bill of

(Whereupon, the jury was so taken out of open court.)

Okay. We're gonna now recess until tomorrow at 10:30 in the morning. I've got a -- more than enough jurors -- as a matter of fact, I've got 62 jurors coming back tomorrow morning so I'm quite sure we'll be able to pick another two and then alternates -- at least three alternates. Hopefully we can do that by bringing up one panel, another panel of 14, and get it done and also we've got a -- I've got to hear the motion in limine filed by the defense.

MS. LANDWEHR: How many alternates did you say?

THE COURT: Well at least three.

MS. LANDWEHR: Okay.

THE COURT: Well do you think it should be more?

MS. LANDWEHR: Three weeks.

THE COURT: Well I may pick four.

MS. LANDWEHR: I'd say four would make me more comfortable but --

THE COURT: I'm just looking at how much room there is for chairs but I -- I was thinking three and maybe four. So I've been kind of thinking the same thing so if there aren't any questions or issues, we'll see you tomorrow at

THE COURT: All right. Let's show that the case is recalled for further jury selection. Now the rule I had yesterday was that two people from -- so I'm gonna limit it to two people for jury selection. So I'm about ready to bring up jurors so does anybody --

MR. DICKENSON: Well Judge I believe the only exception to the motion to exclude also was for -- and the way I interpreted your remarks was they had said they were only having one person in who was gonna be a witness.

THE COURT: Yeah.

MR. DICKENSON: And I -- I note that there's a different gentlemen back there whose subpoena was continued yesterday and --

MS. LANDWEHR: Well I didn't know that a motion to exclude had been actually been made. There was a motion about the motion to exclude.

THE COURT: No. I -- I tell you what, two -- two -- two individuals from -- associated with the defendant's family, two individuals associated with the alleged victim's family can be in the courtroom. Okay. And I don't think I got real specific about whether those two individuals had to be witnesses or nonwitnesses so it's just two persons.

MR. DICKENSON: Okay.

THE COURT: And they -- they need to sit in the back

row. So if we've got more, they have to leave. Each side do some policing? Two people. Only two people.

Okay. All right. So the appearances are the same. Defendant -- same attorneys defendant is dressed for trial and not in custody -- not in cuffs or shackles and we are bringing the remaining jurors -- I've got -- I'm gonna bring 35 jurors just so there's no question. Remind the defense you have no -- no peremptory challenges left. The State has --

MR. RIPLEY: I think we have four, Judge.

THE COURT: Yeah. You know while we're just -- you know Mr. Wright was here yesterday and made sort of a curious approach toward the bench and said something about pro bono and I said I can't talk about it without everybody being here. The court reporter was gone and the defendant was gone. So I'm just mentioning it. I don't see him here now. I didn't really know what he was talking about. All right.

(Whereupon, the jury was so brought into open court.)

Good morning, ladies and gentlemen. I've called you into court this morning for completion of jury selection on a case that will actually begin this

while we're doing this, I guess I was -- I want to make sure I'm not trying to play dumb or ignorant here but in terms of your -- I mean we had rules about the exclusionary stuff during jury selection. Is that still in play? Two witnesses allowed in at this point or --

THE COURT: No. No. From this point on the motion to exclude applies.

MR. DICKENSON: Okay. All right.

THE COURT: Yeah. Thank you for bringing that up. The motion to exclude witnesses is -- is applicable from this point on. So if you're a potential witness, you have to leave the courtroom unless -- unless -- no. Unless you were listed as an exception and I think there is only one.

MR. DICKENSON: And I think there was one for each side that you were allowing the defendant's mother in and I think also the victim's mother.

THE COURT: Well, let's wait till everybody is back here, okay?

MR. DICKENSON: I'm sorry. I thought Dawn was still in here.

THE COURT: Okay. On the motion to exclude witnesses, now it strikes me that it might be somewhat -- the State is saying that I ruled -- Mr. Dickenson, it was your impression that I ruled that Kayleigh Reardanz could

3-17-0404

STATE OF ILLINOIS)
) SS:
COUNTY OF KANKAKEE)

ORIGINAL

IN THE CIRCUIT COURT OF THE 21ST JUDICIAL CIRCUIT
IN THE COUNTY OF KANKAKEE AND STATE OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,
vs.
TAVARIUS RADFORD,
Defendant.

No. 11-CF-662

REPORT OF PROCEEDINGS of the trial before CIRCUIT JUDGE CLARK E. ERICKSON (and a jury), on December 2nd, 2013.

APPEARANCES:

MR. WILLIAM S. DICKENSON, and MR. SCOTT RIPLEY,
Assistant State's Attorneys of
Kankakee County,
for the People of the State of
Illinois.

MS. DAWN LANDWEHR and MR. ROBERT REGAS,
Assistant Public Defenders,
for the Defendant.

FILED
JUN 30 2014
CIRCUIT COURT CLERK

Anna Maria Castle, C.S.R., R.P.R.
CSR# 084-004148
Official Court Reporter
Kankakee County Courthouse
Kankakee, Illinois 60901
(815) 937-8506

detected at the site of the new injury. So there you really have it. It's not a dispute in this case that Michelle hit her head some days before. No one really knows how hard or exactly when. Kayleigh told you it was the Saturday before from when Michelle died. And that's when the iron process began, with that injury that did occur several days before. That's when the iron started collecting in the back of her head. And then after that process was underway for a few days, that's when the defendant threw Michelle down, and her head struck the plaque. The old iron showed up in a test of the subgaleal hemorrhage. And Dr. Arangelovich then was able to explain why some of the colors and things like that also looked more recent. Because there was a new injury on top of the old injury. In this case the only expert opinion supported by the facts is the opinion of Dr. Arangelovich. It's the only way it works. Because this was not a new -- this was not an old subdural hemorrhage. This was a new subdural hemorrhage.

The defense is very fond of saying in this case that their expert testimony would be an

ORIGINAL

IN THE CIRCUIT COURT OF THE 21ST JUDICIAL CIRCUIT
KANKAKEE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	No. 11 CF 662
vs.	)	
TAVARIUS D. RADFORD,	)	
Defendant.	)	

BE IT REMEMBERED, that on the 4th day of March, 2014, the above-entitled cause came on for hearing before the Honorable Clark E. Erickson, Circuit Judge, presiding, at the Kankakee County Courthouse, Kankakee, Illinois.

The following proceedings were had of record.

APPEARANCES:

MR. WILLIAM DICKENSON
MR. SCOTT RIPLEY
Assistant State's Attorney
Appearing on behalf of the People.

MS. DAWN LANDWEHR
MR. ROBERT REGAS
Appearing on behalf of the Defendant.

Brenda J. Gray, CSR, RPR
Certified Shorthand Reporter
Kankakee County Courthouse
Kankakee, Illinois 60901

in and jumbling it all up together because we didn't have anyone to prove that through -- through --

THE COURT: Okay.

MS. LANDWEHR: You know, I mean, the defendant can sit up there and say this was a false confession I didn't do it. That's going to hold no weight with the Court so we would have needed an expert to do it in the first motion, but we weren't ready there. We -- we were doing it on the basis of, you know, the Miranda, the attorney not being there. We -- you know, we had two separate motions on two different issues and this would have been the third motion to suppress.

THE COURT: Yeah. Well, at -- like I say, I -- this is a changing area of the law. I mean, this is not the first case where a witness -- law enforcement officers have testified as to the Reed Technique and how useful it is and how effective it is, but they haven't mentioned that in Great Britain the Reed Technique isn't permitted anymore. There's a -- there's a protocol that's been developed by

police agencies in all of Great Britain that required -- that prohibit the techniques that are specifically authorized apparently in the Reed Technique from being used. I mean, you cannot -- you're not permitted to lie to a defendant. The questioning has to be of an open-ended type and not accusatory and they -- and Great Britain actually allows for -- I forget the term for them -- but they're sort of disinterested cons -- disinterested individuals are -- are required to be present besides the police and the suspect -- but that's Great Britain and -- so now on the post-trial motions, Mr. Dickenson.

MR. DICKENSON: Thank you, Judge. I think I'm going to go in reverse order. With regards to the motion to continue, my recollection is when that was filed there were a couple other bases in there, also -- but with regard to the expert there was some discourse between Your Honor and defense about some of the law about whether these experts are actually allowed to testify in Illinois or not, and my notes specifically reflect and my memory as well

remember them being shown a unicorn plaque. Were they?

MR. DICKENSON: I don't know if she -- I don't recall showing it to her in court.

THE COURT: Did she testify to -- to ever examining it?

MR. DICKENSON: I don't recall if she testified to that or not, Judge. So I don't -- I mean, I know what she did and I don't want to necessarily mention it if I didn't -- I don't recall that coming from her testimony.

THE COURT: I don't remember -- and I don't think Dr. Tese did either. I don't know, did either of the doctors in court look at the unicorn plaque or examine it or state anything about it?

MR. DICKENSON: Not to my recollection, no.

THE COURT: So I mean this is -- do you think maybe it's too strong to say that the unicorn plaque was the instrument of death when neither pathologist actually looked at it?

MR. DICKENSON: I know it, Judge, because the defendant in his admission said that her head struck that item, and the doctor testified

that that there was blunt force trauma that -- to the back of the head -- so no I don't think that's a stretch based on -- you know, the photographs of the room and everything else, I don't think it's a stretch to suggest that.

THE COURT: Do you think it would have been good police work for -- and good investigation for the pathologist to have been shown the unicorn plaque, to handle it?

MR. DICKENSON: Well, Judge, I -- again, I'm not saying she didn't because I --

THE COURT: There's new evidence I don't think that she did.

MR. DICKENSON: And I understand, that's why it's kind of a difficult -- you're asking me in general is that a good thing.

THE COURT: Well, I -- and we can only go on the evidence. All right.

MR. DICKENSON: Well, that's a different question than the police work.

THE COURT: It is a different question. It's maybe an unfair question. I don't want you to address something that's not a matter of evidence. I'm going on what the evidence is.

Strikes me that it might be too strong a statement just to call the unicorn plaque the instrument of death when I didn't hear a pathologist say that. I mean, we're not quite there yet maybe. I am interested in exactly what facts or what evidence the State feels -- well, maybe we are there. I mean, the motion for judgment notwithstanding the verdict -- given the fact that the jury found the defendant not guilty of first degree murder, not guilty of involuntary manslaughter where your argument to the jury was that the child was killed as a result of contact between the child's head and the unicorn plaque what do you feel the evidence -- what do you feel the jury based its -- what evidence do you feel the jury based its verdict on in finding the defendant guilty of endangerment?

MR. DICKENSON: If I could just look at my instructions for a moment, Judge --

THE COURT: Sure.

MR. DICKENSON: -- because I believe -- if you look at the instructions for --

THE COURT: Well, what -- I mean, what do

you think the jury --

MR. DICKENSON: I'm getting --

THE COURT: -- this verdict says happened? I'm just --

MR. DICKENSON: Well, I'm getting -- I'm getting to that if I could, please.

THE COURT: Okay. Go ahead.

MR. DICKENSON: If you look at the -- if you look at the instruction for involuntary manslaughter which is probably -- well, at least in terms of classification of felony, it's the same as the endangering, okay. And if you look at the way that instruction reads:

To sustain the charge of involuntary manslaughter the State must prove the following propositions:

The defendant performed the acts which caused the death of Michelle Radford,

And that the defendant performed those acts recklessly,

And that the Third Proposition is that the those acts were likely to cause death or great bodily harm.

My belief is -- and obviously I wasn't

sitting in the back room with them -- but my belief is that the jury looked at that and did not believe that the defendant throwing the child down on the bed was an act likely to cause death or great bodily harm, which is different than the defendant actually doing it, and having that act proximately cause the death. I -- I -- I mean, my guess is the jury believed that he didn't necessarily think he was doing anything that bad when he threw the child down, but in fact he did and that causes the -- the -- the -- that's what caused the third verdict. That's my belief. Because when you look at the propositions we had to chose for endangering the life or health of a child -- the defendant had care or custody of Michelle Radford -- which he did -- the defendant willfully caused or permitted the life of Michelle Radford to be endangered -- which he did by throwing the child down -- and that the acts of the defendant proximately caused death -- which I believe the -- was borne out. He indicated that her head hit, you know, that he did -- there was some slamming done there. I forget all the

phraseology that he used -- but when you look at those I think it sets a -- when you compare those two sets of instructions and those two sets of propositions --

THE COURT: Uh-huh.

MR. DICKENSON: -- I believe that it shows a -- a slightly less mental culpable state in the endangering the life or health of a child than it does involuntary manslaughter. And I don't know. You never know what goes on back there, Judge. They may have -- you know, they may have bargained for something to get to that point. I don't know. I wasn't back there and, of course, they're permitted to do that, but just because they found not guilt on the other charges does not make that legally inconsistent went this verdict which I think was supported by the evidence.

THE COURT: Okay. Well, I mean, is this sort of the egg shell scull case then you're talking about? Would that be an example of what you're talking about? I mean, if you had a child with a normal thickness of scull that you would -- was -- was -- was placed down hard as

opposed to a child with a very -- you know, with a very thin brittle scull and the very same surface with the very same amount of force. Would serious injury resulted in -- I mean, is that kind of what you're talking about?

MR. DICKENSON: I mean, I guess it's a derivative of that. I mean, that's more tort law --

THE COURT: Okay.

MR. DICKENSON: -- I -- I believe then what we're dealing with.

THE COURT: So -- all right. So you -- what you -- what -- do you have a view on this defense? I mean, you don't have to have a view.

MS. LANDWEHR: You mean on what the jury was doing? Well --

THE COURT: Or wasn't -- what the jury was or wasn't doing.

MS. LANDWEHR: You know, I spoke to them after at length so I know what they were thinking and I don't think I can bring that up in this courtroom --

THE COURT: Right. I don't think so, yeah.

MS. LANDWEHR: -- but I -- I do think --

THE COURT: -- or are we just getting speculative as to the jury deliberation process?

MR. DICKENSON: Well, I think that's getting speculative. Also, I mean, the defense -- well, it came in though the evidence that there were -- that the child had had other falls. I suppose it's possible the jury could have believed the defendant's acts in combination with those earlier falls were what caused the death of the child.

THE COURT: Uh-huh.

MR. DICKENSON: And then in that case it would certainly fit. If that's -- if that's what they believed, then that's certainly within this definition of proximate cause.

THE COURT: Okay. Is that consistent with the subgaleal having iron and the subdural hematoma not?

MR. DICKENSON: It would certainly --

THE COURT: I mean, are these different aged injuries?

MR. DICKENSON: Yeah. I believe one or both of us -- I know I argued that to the jury. I don't recall if Mr. Ripley did or not.

this is a case that judgment notwithstanding the verdict should be entered in.

THE COURT: Okay. Okay. Well, while I don't agree with the State that the evidence supports referring to the unicorn plaque as the instrument of death, especially in view of the fact that to my recollection neither pathologist was even shown the plaque -- and oddly thinking back on the -- the way the evidence came in the -- when the defendant in his interview described the plaque I guess it was communicated to the fellow -- to fellow police officers that the plaque should be recovered and the plaque -- I guess the plaque was recovered at that time, but the plaque was never brought -- the plaque was never brought to the interview room for the defendant to be asked to do any type of demonstration with the plaque. And from the evidence -- and I -- you know, I'm not going to try to imagine what might or might not have happened, but from the evidence the plaque was never even looked at by -- by a pathologist, but it was -- it seems to me that it would have been helpful in the investigation for the plaque to

be brought back to -- immediately back to the police department and made part of that interview rather -- I think rather than using, you know, some sort of little stuffed doll or stuffed animal or whatever was used in the interview. The -- but that said the -- I have to agree that there is from the evidence that was presented a -- the possibility that the jury using the definition of proximate concluded that the defendant's action with respect to the victim caused the death of Michelle Radford. Again, we have to look at the definition of the word proximate which was given to the jury. And proximate once again means any cause which produces the death of a child. It need not be the only cause, nor the last, nor the nearest cause. It is sufficient if it concurs with some other cause which in combination with it causes the death of the child.

There was in this case substantial testimony regarding previous falls to the child. One -- there was a description of one fall in which the child was running and fell and struck her head on the curb. There was evidence of the child

going into the emergency room and being treated for previous falls. So it certainly is -- it certainly is possible that the jury concluded that the actions of the defendant although not rising to the level of man -- manslaughter or murder may in concert with -- or even alone -- but may in concert with other previous injuries may have caused the death of the child. And I -- and I kind of hesitate on saying even alone because if the jury felt that the cause of death was the result of actions by Mr. Radford alone it's hard to see how the jury could find the defendant not guilty not only of first degree murder, but also of involuntary manslaughter. It leads me from the evidence to infer that this jury -- that a likely result of what this jury did is conclude that the defendant's actions in concert with other actions -- other injuries to the child caused the death of the child.

In any event I'm going to deny the motion. So State and defense, do you have any corrections as to the presentence investigation or anything to add?

MR. DICKENSON: We do not, Judge. No.

the Court to sentence the defendant.

Well, I suppose to anybody who followed the trial or has been present during the sentencing hearing, it certainly would have been a cleaner resolution of this case if there had not even been this count, endangering count. The defendant was charged with first degree murder and -- and the endangering count, I guess, from the beginning. The -- the jury found the defendant not guilty of first degree murder and involuntary manslaughter and that -- that finding was certainly, I think, supported by the evidence that was presented at trial. There was a strong defense presentation through the testimony of Dr. Teas attacking the -- the testimony of Dr. Arangelovich, the State's pathologist, and no doubt the jury concluded that it was unclear with regard to those charges, but the jury did find the defendant guilty of endangering the health of Michelle and that the acts in the endangerment constituted a proximate cause to the death of Michelle. Again, it's -- we are -- we're left to speculate somewhat on just what the jury based that on

given that the jury found the defendant not guilty of first degree murder and involuntary manslaughter. The -- the most logical explanation for the jury's verdict is that the -- the jury felt that the defendant in his actions as described in the defendant's own interview played a role in the death of Michelle, but that there were other causes. Because it's hard to see that -- it would be hard to understand if the jury thought there were -- there were no other causes why the jury wouldn't have found the defendant guilty of involuntary manslaughter. In any event we do have the jury's verdict. It -- there is sufficient evidence in the record to support the -- the jury's verdict. The law does not require that the jury supply a narrative explanation -- written explanation behind their verdict when they return a verdict. We simply have the verdict.

The -- the lack of -- the State argues lack of remorse. That's a tricky thing when somebody feels that they're are not guilty. I mean, clearly the defendant is expressing no remorse,

but the defendant says that he didn't commit any crime and that he was convicted as a result of the use of an interview technique by the interviewing detective, the Reed Technique. The -- the State -- Mr. Dickenson says that -- argues that the interview was not a tricky interview. I -- I would say that I don't agree with that. I think it was a tricky interview. Did it rise to the level of creating an involuntary statement? I would say no, but how could it not be a tricky interview when the police officer leaves at one point after interviewing the defendant and -- and not obtaining any type of admission and he comes back in with a -- a foot-high stack of stuff just grabbed out of some -- you know, out of a bookcase -- having nothing to do with the case and throws it on the table and says, you know, I've got all this stuff here and this -- this tells me that you did it. You're responsible for Michelle's death. How could that not be tricky? It is tricky. And the defendant's response is almost heartbreaking. He says because -- is this because I'm a 7? The

detective had asked him -- or I think he said he was a 7 or a 6. The detective earlier at the interview had asked him to rate himself as a parent and he had rated Kayleigh as a 9 1/2 -- or a 9 -- not a 10 only because she worked at night and she couldn't be with Michelle all the time and he gave himself a 7. And so his response -- is this because I'm a 7? That suggests a -- a -- a sort of innocence on the part of the defendant in response to the -- the detective putting this foot-high stack of materials down in front of him. Because in fact that foot-high stack of materials meant nothing -- there was nothing there. It didn't constitute any evidence. It was a tactic. And unfortunately the law is now replete with examples of false confessions. I mean, they're out there. They -- they -- they abound. The -- the -- there is a popular movie, The Central Park Five, where I think it's four -- four juveniles, you know, ages 13 to 18, are all arrested and questioned through the night -- nobody's beaten up, but they're all questioned through the night and by the end of the night

they're all willing to go and give videotaped detailed confessions of a rape and murder of a female jogger in Central Park. It turns out none of them were there, but it took several years and the imprisonment of all of them for varying lengths of time before it was established that somebody with somebody else did the murder. That somebody else -- that somebody else's DNA matched the -- the victim in the jogging case. Yeah, it's clear that people give confessions for various reasons that aren't -- are not -- not accurate. So I do feel that greater scrutiny probably needs to be given to the use of the Reed Technique.

That said, the evidence is what the evidence is and we're -- we've heard in the defendant's statement in allocution that he had nothing to do with Michelle's death and it was the result of trickery, but that statement in allocution is not subject to cross-examination. It's not -- and I mean -- and I am in no way holding it against the defendant that he didn't testify, but the real -- but the reality is the evidence is what the evidence is and the evidence does

No. 123975

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- TAVARIUS D. RADFORD Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-14-0404. There on appeal from the Circuit Court of the Twenty-First Judicial Circuit, Kankakee County, Illinois, No. 11-CF-662. Honorable Clark Erickson, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

Mr. Thomas D. Arado, Deputy Director, State's Attorneys Appellate Prosecutor, 628 Columbus, Suite 300, Ottawa, IL 61350, 3rddistrict@ilsaap.org;

Mr. Jim Rowe, Kankakee County State's Attorney, 450 East Court Street, Kankakee, IL 60901, JRowe@k3county.net;

Mr. Tavarius D. Radford, 909 W. Park Drive, Kankakee, IL 60901

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On March 28, 2019, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Ottawa, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Esmeralda Martinez
LEGAL SECRETARY
Office of the State Appellate Defender
770 E. Etna Road
Ottawa, IL 61350
(815) 434-5531
Service via email will be accepted at
3rddistrict.eserve@osad.state.il.us