

No. 1-12-0533

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 5784
)	
BILLY MURPHY,)	Honorable
)	Maura Slattery Boyle,
Defendant-Appellant.)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Harris and Justice Pierce concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where the record did not establish that defendant's family members were barred from the courtroom during jury selection, defendant did not show that his right to a public trial was violated.
- ¶ 2 Following a jury trial in 2011, defendant Billy Murphy was convicted of possession of a controlled substance (heroin) with intent to deliver while within 1,000 feet of a school, which is a Class X felony (720 ILCS 570/407(b)(1) (West 2010); 720 ILCS 570/401(c)(1) (West 2010)). The trial court sentenced defendant to 12 years in prison. On appeal, defendant contends that his

right to a public trial was violated when the trial judge excluded two members of defendant's family from the courtroom during *voir dire* without considering any reasonable measures to accommodate them. Defendant also challenges the imposition of the \$200 DNA analysis fee in this case. We affirm defendant's conviction and sentence and vacate the DNA analysis fee.

¶ 3 On the day of jury selection in defendant's trial, the court addressed defense counsel:

"THE COURT: Mr. Nathan, are the parties instructed that when I'm picking a jury[,] there is no additional room.

MR. NATHAN [defense counsel]: Judge, I have told Mr. Murphy, his wife and sister, who are both present in the gallery, that they may not be permitted to remain in the courtroom during *voir dire* per our order.

THE COURT: I wish they could. I mean, as people leave, they are more than welcome to stay. I am not prohibiting anybody. I just have no place to put people, so that's my problem. I am like on a plant facility [*sic*].

MR. NATHAN: Judge, we, of course, would ask that they be permitted to remain in the room during *voir dire*.

THE COURT: You know, if Char and Debbie Degelski [] can find room for them, fine, but I'm not going to sit here and have jurors stand."

¶ 4 The court then addressed pre-trial motions and proceeded to *voir dire*, during which the court questioned two panels of 14 prospective jurors each. It is not clear from the record if defendant's wife and sister were seated in the courtroom during jury selection.

¶ 5 As a threshold matter, we address the State's contention that defendant has forfeited any challenge to the trial court proceedings. The State points out that defense counsel did not object to the trial judge's remarks or argue to the judge that defendant's right to a public trial was being violated. The State further contends defendant's attorney did not set out his current claim in counsel's written motion for a new trial.

¶ 6 To preserve a claim for review, a defendant must ordinarily object at trial and include the alleged error in a post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The colloquy set out above indicates defense counsel asked that defendant's relatives "be permitted to remain in the room during *voir dire*." In defendant's post-trial motion, counsel asserted, among other claims of error, that "the [c]ourt erred in finding that the courtroom gallery would not accommodate the [d]efendant's wife and sister during jury selection." Defendant's motion cited the United States Supreme Court case of *Presley v. Georgia*, 558 U.S. 209 (2010), which involved the trial court's exclusion of the defendant's family member from *voir dire* proceedings.

¶ 7 Even had defendant's post-trial motion made no reference to his current claim, the issue would not be forfeited. *Enoch* includes a forfeiture exception for constitutional issues that were raised at trial but not preserved in a post-trial motion, since such issues may later be raised in a post-conviction petition. See *People v. Cregan*, 2014 IL 113600, ¶ 18 (applying the forfeiture exceptions from *Enoch* to all criminal cases, not just capital proceedings). We therefore proceed to the merits of defendant's contention.

¶ 8 On appeal, defendant contends his right to a public trial was violated. Defendant argues that after the trial court noted the courtroom's inadequate seating and observed there might not be room for all persons present, the court did not consider any reasonable measures to accommodate

his family members in the courtroom. Defendant asserts this court should remand for a new trial or, in the alternative, remand for further findings on this issue.

¶ 9 The State responds that the record does not indicate defendant's relatives were excluded from the courtroom. The State points out that the trial court remarked defendant's wife and sister were "more than welcome to stay" and that it was "not prohibiting anybody" from the courtroom.

¶ 10 The Sixth Amendment to the United States Constitution and article I, section 8 of the Illinois Constitution both provide that a person accused in a criminal prosecution be afforded the right to a public trial. U.S. Const, amend. VI; Ill. Const. 1970, art. I, § 8. "The public-trial requirement benefits the defendant, discourages perjury, and ensures that judges, lawyers and witnesses perform their duties responsibly." *State of Rhode Island v. Torres*, 844 A.2d 155, 158 (2004), citing *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (applying the Sixth Amendment right to a public trial to a suppression hearing). The public's right of access to criminal trials has been extended to *voir dire* proceedings. *Presley*, 558 U.S. at 213.

¶ 11 While exceptions to the general rule of trial access are made, for example, to protect the defendant's right to a fair trial or the government's interest in non-disclosure of sensitive information, those circumstances are rare "and the balance of interests must be struck with special care." *Waller*, 467 U.S. at 45. The Supreme Court in *Presley* noted that courtroom closure is warranted in some circumstances where the court abides by the following standards:

"[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."

¶ 12 *Id.* at 214, quoting *Waller*, 467 U.S. at 48.

¶ 13 A public trial is one at which the doors of the courtroom are open and the public is admitted. *State v. Cyrulik*, 214 A.2d 382, 383 (S. Ct. R.I. 1965). Federal courts have held that the denial of a defendant's right to a public trial requires some affirmative act by the trial court that is meant to exclude persons from the courtroom. *Torres*, 844 A.2d at 159, citing *United States v. Al-Smadi*, 15 F.3d 153, 154 (10th Cir. 1994). However, other cases have found no overt act is required for proceedings to effectively be closed to the public. See *Walton v. Briley*, 361 F.3d 431, 433 n.1 (7th Cir. 2004) (holding that whether the closure of proceedings was intentional or inadvertent is not relevant). The Supreme Court noted in *Presley* that the public's right to be present does not depend on whether or not any party has asserted the right. *Presley*, 558 U.S. at 214. Accordingly, either an affirmative action by the court or an inadvertent circumstance not in the court's direct purview could potentially violate a defendant's right to public proceedings.

¶ 14 In the instant case, the record does not establish that the trial court expressly excluded defendant's wife and sister from the *voir dire* proceedings. There is no indication in the quoted colloquy or elsewhere in the record that defendant's family members were directed to leave the courtroom.

¶ 15 Defendant acknowledges the record's silence as to any facts supporting his claim. Defendant makes no representation to this court that his family members were ultimately prevented from remaining in the courtroom. He contends that defense counsel's request for defendant's relatives to be seated in the courtroom was "implicitly denied" by the trial court when the court responded that the family members could attend if space allowed. We will not

read into or superimpose upon the record a determination that defendant's relatives were barred from the courtroom.

¶ 16 Moreover, defendant has not shown that circumstances within the courtroom prevented his relatives from attending the proceedings such that his right to a public trial was violated.

When a courtroom lacks sufficient seating, the test "is not whether the courtroom is large enough to seat everyone who wants to attend, but whether the public has freedom of access to it." *State v. Jones*, 281 N.W. 2d 13, 17 (S. Ct. Iowa 1979). In the instant case, there is no indication in the record that the public's right to access the courtroom was inhibited. Indeed, the trial judge referred to the ability of defendant's relatives to be seated "as people leave."

¶ 17 The record does not show that defendant's relatives were prevented from sitting in the courtroom. The record does not indicate if the family members were accommodated in the courtroom at some point after jury selection began. The party seeking review has an obligation to make an adequate record and preserve his contentions for review. *People v. Townsend*, 275 Ill. App. 3d 200, 206 (1995); see also *People v. Jones*, 196 Ill. App. 3d 937, 960 (1990) (where a record is incomplete, or is silent, a reviewing court will invoke the presumption that the trial court ruled or acted correctly).

¶ 18 Even if defendant had shown his relatives were not allowed to remain the courtroom due to inadequate seating, the notion that a constitutional violation occurs when family members are denied entry to a courtroom in which no seats are available has been rejected. In *Estes v. Texas*, 381 U.S. 532, 588-89 (1965), Justice Harlan stated in a concurring opinion that "the public trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats." Federal appellate courts also have addressed this point. "[N]o single member of the public has a right to gain admittance to a courtroom if

there is no available seat." *Gibbons v. Savage*, 555 F.3d 112, 116 (2nd Cir. 2009) (further noting that "so long as the public at-large is admitted to the proceedings, the Sixth Amendment does not guarantee access to unlimited numbers; the fact that a particular individual is not admitted does not constitute a violation of the Constitution"). See also *United States v. Shryock*, 342 F.3d 948 (9th Cir. 2003) (a courtroom's size does not amount to a "closure").

¶ 19 As support for his position, defendant refers to the proceedings in *Presley* and *Torres*. However, the trial courts in those cases expressly excluded various individuals from the courtroom. In *Presley*, the trial court told the defendant's uncle he could not "sit out in the audience with the jurors" and would have to leave the floor on which jury selection took place; the court further stated that the "uncle can certainly come back in once the trial starts." *Presley*, 558 U.S. at 210. Similarly, in *Torres*, two of defendant's relatives were asked to leave the courtroom to allow seating space for the potential jurors, the trial court rejected defense counsel's request to accommodate those individuals, and the relatives were not allowed back in the courtroom until the completion of *voir dire*. *Torres*, 844 A.2d at 157 (noting that defense counsel submitted an affidavit to that effect). No express exclusion occurred in this case, and defendant has not shown that that his family members were prevented from sitting in the courtroom when space became available. Therefore, defendant's right to a public *voir dire* proceeding was not violated.

¶ 20 In the alternative, defendant requests a remand to the trial court for findings on this issue, relying on the dissent in *State v. Paumier*, 288 P.3d 1126, ¶ 31 (Wash. 2012). That case involved an analysis to be applied by the trial judge before questioning potential jurors in chambers, and the majority opinion held the trial judge committed structural error in closing the courtroom during the private *voir dire* without first weighing the required factors found in

Washington case law. *Id.* at ¶ 3 n.1 (closure must involve a compelling interest and employ the least restrictive means, among other considerations). The dissent on which defendant relies notes that because the finding of error was based on the trial court's failure to conduct an inquiry, an inquiry on the appellate record or remand for a hearing on the relevant factors was preferable to an automatic finding of structural error. *Id.* at ¶¶ 30-33. The required procedure in *Paumier* is not comparable to the facts at bar, and defendant cites no Illinois authority in favor of such a remand here. Moreover, as we have noted, it is the obligation of the party seeking review of a claimed error to make an adequate record. See *Townsend*, 275 Ill. App. 3d at 206.

¶ 21 Defendant's remaining contention on appeal is that the \$200 DNA analysis fee should be vacated because defendant was already registered in the State DNA data bank due to previous offenses. The State concedes, and we agree, that the charge should be vacated. See *People v. Marshall*, 242 Ill. 2d 285, 301-02 (2011).

¶ 22 Accordingly, we direct the circuit court to vacate the \$200 DNA analysis fee. See *People v. Cotton*, 393 Ill. App 3d 237, 268 (2009) (remand not required for correction of the mittimus). The trial court's judgment is affirmed in all other respects.

¶ 23 Affirmed in part and vacated in part.