INDEX OF APPENDICES

APPENDIX A

Supreme Court of Georgia
March 15, 2022
313 Ga. 521
FINAL COPY

S21G0112. ALEXANDER v. THE STATE

BETHEL, Justice.

A Banks County jury found Stephen Alexander guilty of several sexual offenses against his stepdaughters, both of whom were minors during Alexander's trial. At trial, the two victims and a child advocate testified in a courtroom that was partially closed to spectators at the direction of the trial court.

As discussed below, the improper closure of a courtroom is considered a "structural" error that results in reversal of a defendant's conviction on direct appeal if the error was committed over objection. Alexander's trial counsel, however, did not object. Thus, this case involves a criminal defendant who is seeking to challenge the closure of a courtroom solely through a Sixth Amendment claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U. S. 668 (104 SCt 2052, 80 LE2d 674) (1984).

Relying on this Court's decision in *Reid v. State*, 286 Ga. 484, 488 (3) (c) (690 SE2d 177) (2010), the trial court and the Court of Appeals determined that the proper *Strickland* analysis requires a defendant in this posture to demonstrate actual prejudice to prevail and rejected Alexander's claim of ineffective assistance of

counsel for failure to show any such prejudice. See *Alexander v. State*, 356 Ga. App. 392, 394-395 (2) (a) (847 SE2d 383) (2020). Alexander maintains that post-*Reid* authority from the Supreme Court of the United States requires a different analysis, see *Weaver v. Massachusetts*, ___ U.S. ___ (137 SCt 1899, 198 LEd2d 420) (2017), and urges us to revisit the question of what a defendant must demonstrate when challenging a courtroom closure through a claim of ineffective assistance of counsel. We granted certiorari to determine the soundness of *Reid* in light of *Weaver*.

Although *Weaver* discussed a "fundamental unfairness" test as a potential alternative to demonstrating prejudice arising from counsel's failure to object to a courtroom closure, the United States Supreme Court neither adopted that test in *Weaver* nor held that such a test was satisfied in the case before it. In short, *Weaver*'s discussion of a fundamental unfairness test was merely dicta, and it created no binding Sixth Amendment precedent. Moreover, we view our decision in *Reid* as a faithful application of *Strickland* and its requirement that the defendant demonstrate a reasonable probability that an alleged error by counsel affected the outcome of his trial. Thus, as discussed more fully below, we adhere to the holding of *Reid* that a showing of actual prejudice is required to establish a claim of ineffective assistance of counsel arising from the failure to object to a courtroom closure and affirm.

1. *Factual Background*

We briefly recount facts of this case that are relevant to the issue before us. Alexander was charged with multiple sexual offenses against his two stepdaughters, both of whom were under the age of 16 at the time of Alexander's trial. Before trial, the State requested that the "courtroom be cleared" during the victims' testimony without stating any grounds for this request. Alexander's counsel replied, "I certainly don't oppose that. I think it would be appropriate." The trial court immediately announced that the courtroom gallery would be cleared when those witnesses testified. The prosecutor then informed the trial court that the victims requested that their uncle be permitted to remain in the courtroom during their testimony. After the uncle was identified in the courtroom gallery, the trial court replied, "Okay. All right."

After opening statements, the trial court excused the jury and then announced, "I am going to, on request from counsel from both sides, go ahead and ask that the gallery be cleared, except for the uncle, and we'll go from there." The older victim testified first, followed by the child advocate who had interviewed her after she disclosed the abuse. Then the younger victim testified. During the testimony of these three witnesses, the courtroom's gallery was cleared of all spectators except the victims' uncle. Alexander's parents were among those who were asked to leave the courtroom.[1]

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[1] Alexander testified at the hearing on his motion for new trial that he thought other members of his family — including his

The victims testified at length about a years-long history of sexual abuse by Alexander. The child advocate, who was qualified as an expert in forensic interviewing and child sexual abuse, testified generally about the process of conducting forensic interviews of suspected victims of child sexual abuse and specifically about his interview of the older victim after she disclosed the abuse. An audio and video recording of the interview was admitted during the advocate's testimony and played for the jury. The advocate testified that, based on his experience, it was his opinion that the older victim's "disclosure and interview are consistent with a child who's experienced sexual abuse."

After the testimony of the younger victim, the spectators who had been asked to leave the gallery were invited back into the courtroom.[2] The remaining

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sister, brother, and son – were present and had been asked to leave the courtroom but that he was "not sure."

[2] The trial court stated, "I know we had cleared the gallery. . . . Well, they're welcome to come back in. . . . [T]hose who were in the gallery, if they want to come back in, then they can come back in." Later, at the close of the day's proceedings, the trial court stated the following on the record:

> I do want to perfect the record with respect to one other matter. It becomes a little sensitive from time to time. Let me just pull this out. You know, this is one of those cases where there can be an exception to one of the major rules that we hold near and dear to criminal cases, criminal trials, and that is open courtrooms. And, of course, we had here — in this case we had witnesses who were under the age of 16, who were called upon to testify — two of them, and by agreement of counsel, we invited the folks in the gallery to leave for those witnesses. The Court had absolutely no intention

witnesses for the State and defense testified with the courtroom open.[3] The jury ultimately found Alexander guilty of multiple counts of rape, statutory rape, aggravated child molestation, aggravated sexual battery, incest, and false imprisonment, and the trial court sentenced him to serve life in prison without the possibility of parole plus 125 years.

Alexander thereafter moved for a new trial. At the hearing on the motion, Alexander testified that he asked one of his trial attorneys why his family members had to leave the courtroom. Alexander testified

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> to require anyone to remain outside of the courtroom beyond those two witnesses, as the statute suggests and requires, really, and frankly was unaware as to whether there were still folks here. But I do want to point out that the Court certainly had no intention of preventing anyone from — who otherwise could be in the gallery from being in the gallery. And I would ask — and I don't know what remains or if there's a possibility that anyone might be recalled, especially some of these witnesses who are minors, but I would ask that counsel, and for that matter court security officers, just assist the Court to make sure that the courtroom is not inadvertently closed off to the public, who have a right to be here.

[3] The State called seven additional witnesses: a forensic biologist from the GBI, a different child advocate (who was also admitted as an expert in forensic interviewing and child sexual abuse) who had interviewed the younger victim, the victims' mother (Alexander's former wife), two investigators from the Banks County Sheriff's Office, a digital forensic investigator from the GBI, and a sexual assault nurse examiner. The defense presented the testimony of four witnesses: a co-worker of the victims' mother, one of the investigators called by the State, a medical doctor who specialized in forensic pathology, and Alexander.

that his attorney said "We'll check into it." Alexander testified that he wanted his family members to be in the courtroom and did not want them to be removed. Alexander also testified that his mother and father, who were asked to leave the courtroom, had "a good relationship" with the victims and that he believed their presence in the courtroom "would have helped maybe get the truth out."

One of Alexander's trial attorneys likewise testified that "[Alexander] wanted his family to be in the courtroom at all times." Counsel explained that he "should have objected to [the partial closure] because . . . I knew then and I know now what the law is and I should have objected, but I did not." Counsel also testified that there was no strategic reason to withhold an objection and that "[i]t just did not occur to [him]."

Relying on this Court's decision in *Reid*, the trial court rejected Alexander's claim of ineffective assistance arising from the failure to object to the partial courtroom closure. Alexander appealed, but, also relying on *Reid*, the Court of Appeals affirmed that ruling. See *Alexander*, 356 Ga. App. at 394-395 (2) (a). We granted Alexander's petition for a writ of certiorari.[4]

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[4] The Court of Appeals also rejected other claims raised by Alexander. He did not seek this Court's review of those issues, and we do not address them.

2. *The Right to a Public Trial, Structural Error, and Ineffective Assistance of Counsel*

The Sixth Amendment to the United States Constitution provides that "the accused shall enjoy the right to a . . . public trial[.]" Before excluding the public from any stage of a criminal trial, the party seeking to close the courtroom "must advance an overriding interest that is likely to be prejudiced" if the courtroom remains open. (Citation omitted.) *Presley v. Georgia*, 558 U. S. 209, 214 (130 SCt 721, 175 LEd2d 675) (2010). In addition, "the closure must be no broader than necessary to protect that interest," and "the trial court must consider reasonable alternatives" to the closure, even "when they are not offered by the parties." (Citation omitted.) Id. The trial court "must make findings adequate to support the closure." (Citation omitted.) Id. The Sixth Amendment right to a public trial is applicable to the states. See *Purvis v. State*, 288 Ga. 865, 866 (1) (708 SE2d 283) (2011).

The Georgia Constitution also limits the authority of the trial court to close a courtroom. Article I, Section I, Paragraph XI (a) provides that, in criminal cases, the defendant "shall have a public . . . trial[.]" As we discussed in *Purvis*,

> Georgia law regarding the public aspect of hearings in criminal cases is more protective of the concept of open courtrooms than federal law. Our state constitution point-blankly states that criminal trials *shall* be public. We see no friction between these state and federal constitutional provisions, properly

> interpreted, since the objectives of both are identical: access to judicial hearings for the public and fair trials for criminal defendants.

(Citation and punctuation omitted; emphasis in original.) Id. at 866 (1).

Georgia statutory law mandates the partial closure of a courtroom when a person under the age of 16 testifies in a criminal case concerning a sexual offense, although the statute permits certain individuals, including the defendant's immediate family members, to remain in the courtroom. See OCGA § 17-8-54;[5] see also *Scott v. State*, 306 Ga. 507, 513 (832 SE2d 426) (2019) (Peterson, J., concurring) (noting that OCGA § 17-8-54 imposes a mandatory closure rule and discussing concerns about the constitutionality of such a rule).[6]

Here, Alexander argues that his counsel performed deficiently by failing to object to the trial court's partial closure of the courtroom. He argues that the

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[5] OCGA § 17-8-54 provides:

> In the trial of any criminal case, when any person under the age of 16 is testifying concerning any sexual offense, the court shall clear the courtroom of all persons except parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, victim assistance coordinators, victims' advocates, and such other victim assistance personnel as provided for by [OCGA § 15-18-14.2], jurors, newspaper reporters or broadcasters, and court reporters.

[6] No issue regarding the constitutionality of OCGA § 17-8-54 is presented in this case.

partial closure deprived him of his public-trial right under the Sixth Amendment when the trial court failed to conduct any inquiry or make any findings pursuant to *Presley* regarding the interests to be advanced by the closure, whether the closure was broader than necessary to advance those interests, and whether there were alternatives to closure. See *Weaver*, 137 SCt at 1909 (II) (B) (noting that a public-trial violation can occur "simply because the trial court omits to make the proper findings before closing the courtroom, even if those findings might have been fully supported by the evidence" (citing *Presley*, 558 U. S. at 215)); *Jackson v. State*, 339 Ga. App. 313, 319 (2) (b) (793 SE2d 201) (2016) (holding that the closure of the courtroom in that case "did not comply with [federal] constitutional requirements because the trial court made no findings adequate to support the closure, including a consideration of reasonable alternatives").

Moreover, Alexander argues, had his trial counsel objected to the partial closure and had the objection been overruled, Alexander would have been entitled to have his convictions reversed on direct appeal without the need to show actual harm because a courtroom closure during witness testimony in violation of a defendant's right to a public trial under the Sixth Amendment is a "structural" error. See *Reid*, 286 Ga. at 488 (3) (c).

> Structural error is a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. As such, structural errors are not

> subject to harmless error analysis [when properly raised at trial and on direct appeal].

(Citation and punctuation omitted) *Berry v. State*, 282 Ga. 376, 378 (3) (651 SE2d 1) (2007).[7]

When no objection to an alleged error is raised at trial and the error is raised only through a claim of ineffective assistance of counsel, however, *Strickland* ordinarily requires the defendant to show not only that his counsel performed deficiently by not objecting but also that the deficiency caused prejudice, meaning a reasonable probability that, but for the deficiency, the outcome of the trial would have been different. See *Strickland*, 466 U. S. at 694 (III) (B). Applying *Strickland*, this Court held in *Reid* that even when a courtroom closure would necessitate reversal had an objection been preserved, in order to satisfy the prejudice prong of the *Strickland* test, the defendant is required to demonstrate a reasonable probability that the outcome of the trial would have been different had his counsel objected to the closure. See *Reid*, 286 Ga. at 487-489 (3) (c).

In *Reid*, the trial court temporarily closed the courtroom for the trial testimony of two witnesses. See id. at 487 (3) (c). The defendant did not object but later challenged the courtroom closure through a claim of

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[7] Alexander also argues that the partial closure of the courtroom violated OCGA § 17-8-54 and his right to a public trial under the Georgia Constitution. But Alexander makes no argument that a different test applies to claims of ineffective assistance of counsel arising from the failure to object to a courtroom closure on those grounds, so we do not analyze that question further.

ineffective assistance of counsel. See id. In reviewing the defendant's claim, this Court stated that, assuming the failure to object constituted deficient performance, the defendant "still must show that he was prejudiced by counsel's decision not to object to the brief closing of the courtroom. . . . [P]rejudice will not be presumed." Id. at 487-488 (3) (c). Thus, this Court stated that even though "[t]he improper closing of a courtroom is a structural error requiring reversal . . . if the defendant properly objected at trial and raised the issue on direct appeal," when challenged in the context of a claim of ineffective assistance of counsel, the defendant "must prove a reasonable probability of a different result" had counsel objected. Id. at 488 (3) (c). Because the defendant in *Reid* had not done so, his claim of ineffective assistance failed. See id. at 488-489 (3) (c).[8]

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[8] This Court and the Court of Appeals have applied *Reid* in the context of claims of ineffective assistance of counsel arising from the failure to object to courtroom closures occurring at various stages of trial proceedings, including during jury selection, witness testimony at trial, closing arguments, the trial court's final charge to the jury, and witness testimony at a sentencing hearing. See, e.g., *Morris v. State*, 308 Ga. 520, 530-531 (6) (842 SE2d 45) (2020) (closure of courtroom during trial court's final charge to jury); *Walker v. State*, 308 Ga. 33, 41 (3) (c) (838 SE2d 792) (2020) (closure of courtroom during closing argument and final jury charge); *Benson v. State*, 294 Ga. 618, 622 (3) (a) (754 SE2d 23) (2014) (closure of courtroom during jury voir dire); *State v. Abernathy*, 289 Ga. 603, 609-611 (5) (715 SE2d 48) (2011) (jury voir dire conducted partially in private room); *Whatley v. State*, 342 Ga. App. 796, 801-804 (3) (b) (805 SE2d 599) (2017) (exclusion of public from courtroom during jury selection); *Freeman v. State*, 328 Ga. App. 756, 760-761 (4) (760 SE2d 708) (2014) (closure of courtroom during witness testimony at sentencing hearing); *Davis v. State*, 323 Ga. App. 266, 269-270 (3) (746 SE2d 890) (2013)

As noted previously, both the trial court and the Court of Appeals relied on *Reid* in denying Alexander's claim of ineffective assistance. See *Alexander*, 356 Ga. App. at 394-395 (2) (a). Alexander argues that, despite *Reid*, *Weaver* allows him to establish his claim of ineffective assistance by showing that his counsel's failure to object to the partial courtroom closure rendered his trial fundamentally unfair. We turn now to that question.

3. *The Scope and Applicability of Weaver*

Weaver involved a criminal case in Massachusetts in which "the courtroom was occupied by potential jurors and closed to the public for two days of the jury selection process." 137 SCt at 1905.[9] "Defense counsel

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(defendant's family excluded from courtroom during victim's testimony).

[9] As the United States Supreme Court detailed:

> The pool of potential jury members was large, some 60 to 100 people. The assigned courtroom could accommodate only 50 or 60 in the courtroom seating. As a result, the trial judge brought all potential jurors into the courtroom so that he could introduce the case and ask certain preliminary questions of the entire venire panel. Many of the potential jurors did not have seats and had to stand in the courtroom. After the preliminary questions, the potential jurors who had been standing were moved outside the courtroom to wait during the individual questioning of the other potential jurors. The judge acknowledged that the hallway was not "the most comfortable place to wait" and thanked the potential jurors for their patience. The judge noted that there was simply not space in the courtroom for everybody. As all of the seats in the courtroom were

neither objected to the closure at trial nor raised the issue on direct review." Id. at 1905.[10] The Court noted that *Weaver* came before the court "on the assumption that, in failing to object, defense counsel provided ineffective assistance." Id.

The Court suggested, however, that a defendant's failure to demonstrate a reasonable probability that the lack of objection to the courtroom closure affected the outcome of his trial might not always be fatal to his claim of ineffective assistance of counsel. The Court recognized a disagreement among federal courts of appeal and state courts of last resort about whether a defendant must demonstrate prejudice in a case in which an objection to a structural error is not preserved. See id. at 1907 (I). The Court explained that "[s]ome courts have held that when a defendant shows that his attorney unreasonably failed to object to a structural error,

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> occupied by the venire panel, an officer of the court excluded from the courtroom any member of the public who was not a potential juror. So when petitioner's mother and her minister came to the courtroom to observe the two days of jury selection, they were turned away.

Weaver, 137 SCt at 1906 (I).

[10] The Court noted that "in the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to automatic reversal regardless of the error's actual effect on the outcome." (Citation and punctuation omitted.) *Weaver*, 137 SCt at 1910 (III). However, the Court noted the critical distinction between a case in which the claim was properly preserved as error and raised on direct appeal and a case like *Weaver* in which there was no objection at trial and the error is raised only through a claim of ineffective assistance of counsel. See id.

the defendant is entitled to a new trial without further inquiry, whereas other courts, including this Court in *Reid*, "have held that the defendant is entitled to relief only if he or she can show prejudice." *Weaver*, 137 SCt at 1907 (I) (citing *Reid*, among other cases). The Court noted that it granted certiorari in *Weaver* "to resolve that disagreement" but would do so "specifically and only in the context of trial counsel's failure to object to the closure of the courtroom during jury selection," which is the stage of the proceedings at which the closure occurred in that case. Id.

The Court recognized that under *Strickland*, a defendant generally must show that his counsel's deficient performance prejudiced him in that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," but noted *Strickland*'s caution that the prejudice inquiry should not be applied in a "'mechanical'" fashion and that claims of ineffective assistance must ultimately concentrate on "'the fundamental fairness of the proceeding.'" *Weaver*, 137 SCt at 1911 (III) (quoting *Strickland*, 466 U. S. at 694 (III) (B), 696 (IV)).

The Court said that Weaver therefore argued that, "even if there is no showing of a reasonable probability of a different outcome, relief still must be granted if the convicted person shows that attorney errors rendered the trial fundamentally unfair." *Weaver*, 137 SCt at 1911 (III) Without deciding whether Weaver's proposed alternative way of showing prejudice was an appropriate test, the Court "assume[d]" for "analytical

purposes of this case" that Weaver's interpretation of *Strickland* was correct, emphasizing that "[i]n light of the Court's ultimate holding, . . . the Court need not decide that question here." Id. Thus, the rest of the discussion in *Weaver* regarding a "fundamental unfairness" test was plainly dicta — application of a legal standard that the Court merely assumed and explicitly did not adopt, as two Justices who joined the Court's opinion expressly noted. See id. at 1914 (Thomas, J., concurring, joined by Gorsuch, J.) ("*Strickland* did not hold, as the Court assumes, that a defendant may establish prejudice by showing that his counsel's errors rendered the trial fundamentally unfair. Because the Court concludes that the closure during petitioner's jury selection did not lead to fundamental unfairness in any event, no part of the discussion about fundamental unfairness is necessary to its result." (citations and punctuation omitted)); see also *Ordonez Azmen v. Barr*, 965 F3d 128, 133 (2d Cir. 2020) (explaining that "assumptions [regarding legal issues] are mere dicta"); 3 Wayne LaFave, Criminal Procedure § 11.10 (d) (4th ed. 2021) (noting that *Weaver*'s statements about "fundamental unfairness" were dicta). And "dicta is not binding on anyone for any purpose." *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (V) (C) (11th Cir. 2010).

This dicta began with the Court noting that

> not every public-trial violation will in fact lead to a fundamentally unfair trial. Nor can it be said that the failure to object to a public-trial violation always deprives the defendant of a reasonable probability of a different outcome.

> Thus, when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, *Strickland* prejudice is not shown automatically. Instead, the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or, as the Court has assumed for these purposes, to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair.

(Citations omitted.) *Weaver*, 137 SCt at 1911 (III).

Applying that assumed standard, the Court first held that Weaver had not shown "prejudice in the ordinary sense, i.e., a reasonable probability that the jury would not have convicted him if his attorney had objected to the closure." *Weaver*, 137 SCt at 1912 (IV). The Court noted that it was "possible that potential jurors might have behaved differently if [Weaver's] family had been present" and that "the presence of the public might have had some bearing on juror reaction." Id. However, the Court noted that Weaver "offered no evidence or legal argument establishing prejudice in the sense of a reasonable probability of a different outcome but for counsel's failure to object." (Citations and punctuation omitted.) Id. at 1912-1913 (IV).

The Court then suggested that

> [i]n other circumstances a different result might obtain. If, for instance, defense counsel errs in failing to object when the government's main witness testifies in secret, then the defendant might be able to show prejudice with

> little more detail. Even in those circumstances, however, the burden would remain on the defendant to make the prejudice showing, because a public-trial violation does not always lead to a fundamentally unfair trial.

(Citations omitted.) Id. at 1913 (IV). The Court ultimately determined — "[i]n light of [its] assumption that prejudice can be shown by a demonstration of fundamental unfairness" — that Weaver had failed to show that his counsel's deficient performance had rendered the trial fundamentally unfair. Id.

As this recounting of *Weaver* shows, despite the Supreme Court's theorizing about how a defendant might establish a claim of ineffective assistance of counsel in the context of a courtroom closure, neither the test assumed in *Weaver*, nor anything else stated in *Weaver* about it, is binding upon this Court. In addition, nothing in *Weaver* displaced our holding in *Reid* that a showing of actual prejudice is required in order to establish a claim of ineffective assistance arising from trial counsel's failure to object to a courtroom closure.

4. *We Adhere to Reid*

Alexander urges this Court to adopt the test assumed in *Weaver* and, in a supplemental brief filed after oral argument, asks us to overrule *Reid*. He contends that he could establish his claim of ineffective assistance of counsel based on a showing of fundamental unfairness without demonstrating a reasonable

probability of a different outcome. However, as noted above, *Weaver* did not actually establish any new test for evaluating claims of ineffective assistance of counsel, and there are sound reasons to continue applying *Reid*'s holding to such claims. Thus, as we discuss below, we adhere to *Reid* and reject any application of the test assumed in *Weaver* to this case.

We have cited *Weaver* in only one case addressing a defendant's claim of ineffective assistance arising from a courtroom closure. See *Walker v. State*, 308 Ga. 33, 41 (3) (c) (838 SE2d 792) (2020). In *Walker*, the trial court ordered that spectators not be permitted to move in and out of the courtroom during closing arguments and the final jury charge. See id. Trial counsel failed to object, and the defendant argued that the failure constituted ineffective assistance under *Strickland*. See id. We concluded that the claim failed under both *Reid* and *Weaver*'s assumed test because the defendant had "not shown that the trial court's order rendered his trial fundamentally unfair or that it somehow altered the outcome of trial." Id. Although our holding might suggest that a defendant could establish a claim of ineffective assistance through a showing of fundamental unfairness, we never analyzed or adopted that test; instead, like the Supreme Court in *Weaver*, we simply determined that the defendant failed to satisfy that test, if it even applied at all. See id.

We see no reason for the dicta in *Weaver* to disturb this Court's square holding in *Reid* regarding claims of ineffective assistance arising from the failure to object to a courtroom closure. We are mindful that "dicta from

the Supreme Court is not something to be lightly cast aside." (Citation and punctuation omitted.) *Schwab v. Crosby*, 451 F3d 1308, 1326 (II) (B) (11th Cir. 2006). Such dicta may be of "considerable persuasive value, especially [when] it interprets the Court's own precedent." *United States v. City of Hialeah*, 140 F3d 968, 974 (III) (A) (11th Cir. 1998). However, the Court's dicta is less persuasive to us where, as it did in *Weaver*, the Court merely considered an assumption proposed by a litigant for the sake of argument. Establishing a new legal test based on dicta regarding legal assumptions made by the Supreme Court comes with risks, and we should not presume that, if the Supreme Court actually decided the issue it assumed in *Weaver*, its holding would match its assumption. See, e.g., *Campbell-Ewald Co. v. Gomez*, 577 U. S. 153, 161-62 (136 SCt 663, 193 LEd2d 571) (2016) (explaining that the Court had previously "simply assumed, without deciding" a legal issue and deciding the issue contrary to the previous assumption).

Moreover, *Reid* is a sound precedent which faithfully applies the two-pronged *Strickland* test. See *Weaver*, 137 SCt at 1914 (Alito, J., concurring in judgment) (rejecting the *Weaver* majority's analysis and noting that cases involving courtroom closures "[call] for a straightforward application of the familiar standard for evaluating ineffective assistance of counsel claims" under *Strickland*). In our view, the *Strickland* test properly places a heavy burden on the defendant to prove that his counsel's deficient performance negatively impacted the outcome of the trial. See *State v.*

Mobley, 296 Ga. 876, 877 (770 SE2d 1) (2015). In doing so, *Strickland* requires the defendant to show how the closure of the courtroom affected the outcome of his trial. See *Morris v. State*, 308 Ga. 520, 531 (6) (842 SE2d 45) (2020); see also *Weaver*, 137 SCt at 1915 (Alito, J., concurring in the judgment) ("[A]n attorney's error 'does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.'" (quoting *Strickland*, 466 U. S. at 691 (III) (B)). Because we believe *Reid* faithfully applies *Strickland*, we see no reason to depart from it or add to it here.

Finally, *Reid* rightly recognized that allowing a defendant to establish a claim of ineffective assistance without demonstrating that the failure to object affected the outcome of the trial "would encourage defense counsel to manipulate the justice system by intentionally failing to object in order to ensure an automatic reversal on appeal." 286 Ga. at 488 (c; see also *Weaver*, 137 SCt at 1912 (III) (noting that "an ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, thus undermining the finality of jury verdicts" (citation and punctuation omitted)); *Freeman*, 328 Ga. App. at 760-761 (4) (760 SE2d 708) (noting that a defendant should "not be allowed to induce an asserted error, sit silently hoping for acquittal, and obtain a new trial when that tactic fails" (citations and punctuation omitted)). *Reid*, like *Strickland*, incentivizes defense counsel to perform professionally and competently in the first instance and eliminates any

impetus for defense counsel to strategically withhold an objection to a courtroom closure that violates the defendant's right to a public trial.

In light of the foregoing, we view *Reid* as a sound precedent, and we see no reason to adopt a separate "fundamental unfairness" test as a new avenue for establishing a claim of ineffective assistance of counsel in the context of a courtroom closure. *Weaver* does not command otherwise. We therefore decline Alexander's invitation to overrule *Reid*.[11]

5. *We Affirm the Judgment of the Court of Appeals*

Applying *Reid* here, Alexander has not carried his burden of showing a reasonable probability that the outcome of his trial would have been different but for his counsel's failure to object to the closure of the courtroom during the witnesses' trial testimony. In his testimony at the hearing on his motion for new trial, Alexander suggested that, had his parents remained in the courtroom, the victims might have testified differently. But we routinely conclude that such speculation is insufficient to establish prejudice in a claim of ineffective assistance of counsel. See *Strickland*, 466 U. S. at 693 (III) (B) ("It is not enough for the defendant to show that [counsel's] errors had some conceivable

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[11] Because we conclude that *Reid* was correctly decided, "it is unnecessary for us to consider whether we should retain that decision under the doctrine of stare decisis." *Elliott v. State*, 305 Ga. 179, 209 (III) (C) (ii) n. 21 (824 SE2d 265) (2019).

effect on the outcome of the proceeding."); *Green v. State*, 304 Ga. 385, 391 (2) (a) (818 SE2d 535) (2018) ("Mere speculation on the defendant's part is insufficient to establish *Strickland* prejudice." (citation and punctuation omitted)). Thus, because Alexander has not made the requisite showing of prejudice, we see no error in the Court of Appeals' determination that Alexander's claim of ineffective assistance of counsel must be rejected under *Reid*.[12] See *Alexander*, 356 Ga. App. at 395 (2) (a). Accordingly, the judgment of the Court of Appeals is affirmed.

Judgment affirmed. All the Justices concur, except McMillian and Colvin, JJ., disqualified.

Decided March 15, 2022.

Certiorari to the Georgia Court of Appeals — 356 Ga. App. 392.

The Steel Law Firm, Brian Steel, for appellant.

J. Bradley Smith, District Attorney, Erica P. Shepley, Assistant District Attorney, for appellee.

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[12] Because we determine that Alexander has not shown that he was prejudiced by counsel's failure to object to the partial courtroom closure in this case, we need not consider whether his counsel performed deficiently. See *Lupoe v. State*, 300 Ga. 233, 240 (2) (794 SE2d 67) (2016) ("[I]n examining an ineffectiveness claim, a court need not 'address both components of the inquiry if the defendant makes an insufficient showing on one.' " (quoting *Strickland*, 466 U. S. at 697 (IV))).

APPENDIX B

FIFTH DIVISION
REESE, P. J.
MARKLE and COLVIN, JJ.

NOTICE: Motions for reconsideration must be physically received in our clerk's office within ten days of the date of decision to be deemed timely filed.

https://www.gaappeals.us/rules

DEADLINES ARE NO LONGER TOLLED IN THIS COURT. ALL FILINGS MUST BE SUBMITTED WITHIN THE TIMES SET BY OUR COURT RULES.

August 17, 2020

In the Court of Appeals of Georgia

A20A0855. ALEXANDER v. THE STATE

COLVIN, Judge.

On appeal from his conviction for multiple counts of rape, statutory rape, aggravated child molestation, aggravated sexual battery, incest, and false imprisonment arising from his attacks on his two daughters, Stephen Alexander argues that trial counsel was ineffective. We find no error and affirm.

"On appeal from a criminal conviction, we view the evidence in the light most favorable to the verdict, with the defendant no longer enjoying a presumption of innocence." *Reese v. State*, 270 Ga. App. 522, 523 (607 SE2d 165) (2004). We neither weigh the evidence nor judge the credibility of witnesses, but determine only

whether, after viewing the evidence in the light most favorable to the prosecution, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis omitted.) *Jackson v. Virginia*, 443 U. S. 307, 319 (III) (B) (99 SCt 2781, 61 LEd2d 560) (1979).

Thus viewed in favor of the verdict, the record shows that the victims, ages seven and five, were living with their mother, their stepbrother, and their stepfather Alexander in Habersham County when Alexander forced the older victim to give him oral sex, touched her vagina, and attempted to penetrate her vagina with his penis. He also threatened to have the victim taken away from her mother if she told anyone about the abuse. The abuse continued after the family moved to Banks County, where Alexander came into the bedroom shared by the victims, told them that it was "time for [them] to be a woman and grow up" and asked which one of them was "going to go first." Alexander penetrated the younger victim's vagina with his penis and then told her to shower and give him her clothes to wash. Alexander then raped the older victim as well. Afterward, Alexander apologized to his stepdaughters and swore on a Bible that he would not attack them again.

When the attacks on the victims escalated in June 2014 to include forced oral sex and intercourse from behind, and with both girls showing signs of mental trauma, the younger victim told her mother about the abuse. She extended her outcry to a police investigator that same evening. Alexander's computer showed that

he had visited pornographic sites presenting images of incest. A medical examination showed that the younger victim's genitals were lacerated, and Alexander's DNA was found in her vagina. The mother later signed a recantation, later read to the jury, asserting that the girls had taken a used condom from the trash and put its contents on the younger victim's bed and body.

Alexander was charged with four counts of rape, four counts of statutory rape, eight counts of aggravated child molestation, two counts of aggravated sexual battery, four counts of incest, and two counts of false imprisonment. After some of the counts were nolle prossed, and after a trial at which both victims testified, the jury found Alexander guilty of three counts of rape, three counts of statutory rape, one count of aggravated child molestation, two counts of aggravated sexual battery, three counts of incest, and both counts of false imprisonment. After merging some of these counts, the trial court sentenced Alexander to life in prison without the possibility of parole plus 125 years. His motion for new trial was denied.

1. Although Alexander has not asserted that the evidence was insufficient, we have reviewed the record, and conclude that the evidence was indeed sufficient to sustain his conviction. See OCGA §§ 16-6-1 (defining "rape"), 16-6-3 (defining "statutory rape"), 16-6-4 (defining "aggravated child molestation"), 16-6-22.2 (defining "aggravated sexual battery"), 16-6-22 (defining "incest"), 16-5-41 (defining "false imprisonment"); *Tinson v. State*, 337 Ga. App. 83, 84-86 (1) (785 SE2d 914)

(2016) (evidence including victim's testimony was sufficient to sustain a conviction for rape, incest, sexual battery, and aggravated child molestation); *Jackson*, supra.

2. On appeal, Alexander argues that trial counsel was ineffective when he (a) failed to object to the exclusion of Alexander's immediate family from the courtroom during the victims' testimony, and the general public during the testimony of a child advocate interviewer; (b) failed to object to bolstering by two of the State's witnesses; (c) abandoned his objection to the court's instruction on the proper use of the victims' out-of-court statements; and (d) failed to contest the State's expert testimony concerning the DNA result. We disagree.

To show ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Smith v. Francis*, 253 Ga. 782, 783 (1) (325 SE2d 362) (1985), citing *Strickland v. Washington*, 466 U. S. 668 (104 SCt 2052, 80 LEd2d 674) (1984). As to deficient performance, "every effort must be made to eliminate the distorting effects of hindsight," and the trial court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (Citation and punctuation omitted.) *White v. State*, 265 Ga. 22, 23 (2) (453 SE2d 6) (1995). As to prejudice, a defendant need only show "a reasonable probability of a different outcome" due to trial counsel's deficient performance. (Citation and punctuation omitted.) *Cobb v. State*, 283 Ga. 388,

391 (2) (658 SE2d 750) (2008). Finally, the question of ineffectiveness is a mixed one of both law and fact: "we accept the trial court's factual findings and credibility determinations unless clearly erroneous, but we independently apply the legal principles to the facts." *Suggs v. State*, 272 Ga. 85, 88 (4) (526 SE2d 347) (2000).

(a) The record shows that before the victims' testimony, the trial court cleared the courtroom, including Alexander's relatives, with the exception of the victims' uncle. Trial counsel did not object to this closure, which also encompassed the testimony of the child advocate interviewer.

OCGA § 17-8-54 provides:

> In the trial of any criminal case, when any person under the age of 16 is testifying concerning any sexual offense, the court shall clear the courtroom of all persons except parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, victim assistance coordinators, victims' advocates, . . . jurors, newspaper reporters or broadcasters, and court reporters.

See generally *Presley v. Georgia*, 558 U. S. 209, 214-216 (130 SCt 721, 175 LEd2d 675) (2010) (trial courts are required to consider alternatives to closure even when they are not offered by the parties).

As a preliminary matter, we note that although Alexander testified at the hearing on his motion for new trial that he told his own counsel that he objected to

this closure, the trial court did not mention this testimony in its order denying the motion. We are obliged to construe the trial court's silence on this subject as an implicit finding that Alexander's testimony as to it was not credible. See *Hughes v. State*, 296 Ga. 744, 747 (1) (770 SE2d 636) (2015) ("where, as here, the trial court has made extensive findings of fact, we generally must presume that the absence of a finding of a fact that would tend to undermine the conclusion of the trial court reflects a considered choice to reject the evidence offered to prove that fact").

Even assuming that trial counsel performed deficiently by failing to object to the exclusion of Alexander's immediate family from the courtroom, moreover, Alexander cannot show that he was prejudiced thereby because he cannot show that there was "a reasonable probability that the trial result would have been different if not for the deficient performance." (Citation and punctuation omitted.) *Reid v. State*, 286 Ga. 484, 485-486 (690 SE2d 177) (2010). Specifically, "[t]he improper closing of a courtroom is a structural error requiring reversal only if the defendant properly objected at trial and raised the issue on direct appeal[.]" (Citation omitted.) Id. at 488 (2) (c). "[W]here, as here, the issue of a courtroom closure is raised in the context of an ineffective assistance of counsel claim, prejudice will not be presumed." (Citation omitted.) Id. Here, Alexander has not demonstrated any "reasonable probability that the outcome of the trial would have been different had spectators remained in the courtroom during such testimony." Id. Thus the trial court did not err when it

denied Alexander's motion for new trial on this ground. Id. at 489 (2) (c).

(b) The record shows that when the mother defended her daughters' truthfulness during her cross-examination, Alexander's trial counsel impeached the mother by introducing her written recantation, which was the centerpiece of his defense. This strategy was objectively reasonable, and trial counsel did not perform deficiently in implementing it by choosing cross-examination over a bolstering objection. *Damerow v. State*, 310 Ga. App. 530, 538 (4) (a) (ii) (714 SE2d 82) (2011) (trial counsel's strategic decision to cross-examine a victim's mother in accordance with the defense's strategy "was not patently unreasonable").

(c) The record shows that the trial court originally instructed the jury that they were "entitled to consider the alleged victims' out-of-court statements as substantive evidence of the defendant's guilt." Trial counsel objected to this portion of the charge on the ground that it was incomplete without the additional instruction that the jury should also consider any inconsistent statements by the victims. The trial court then recharged the jury that it could consider not only the victims' out-of-court statements, but also "a witness's inconsistent statements as [they] may relate to the defendant's innocence." Alexander did not object to the recharge.

Although Alexander now complains that the recharge failed to specify that the term "witness" included the victims in this case, the victims and their

interviewers were available for cross-examination, and there was no reasonable possibility that the jury could have been misled by the recharge, which stated the law accurately. See OCGA § 24-8-820 (a) (authorizing the admission of a child victim's hearsay statements if notice is given, "such child testifies at the trial," and "the person to whom the child made such statement is subject to cross-examination"); *Latta v. State*, 341 Ga. App. 696, 703 (3) (802 SE2d 264) (2017) (a victim's out-of-court statement "does not require a showing" of reliability, and "statements admissible under the Child Hearsay Statute do not need to meet the admissibility requirements for prior consistent statements"). There was no deficient performance here. See id. at 705 (5) (b) (pretermitting whether a former pattern charge's language was "a more precise or comprehensive statement of the law than the current pattern charge," a defendant had not shown deficient performance in requesting the current charge concerning a victim's prior inconsistent statements).

(d) Although Alexander also complains that trial counsel was deficient in failing to refute the State expert's testimony that the DNA found in the younger victim's vagina was from semen, we have pointed out that Alexander's strategy was to argue that the victims had obtained a used condom and planted this evidence themselves. There was no deficient performance in choosing this strategy over one consisting of contesting the expert's opinion as to the DNA's origin. See *Dority v. State*, 335 Ga. App. 83, 105 (4) (h) (780 SE2d 129) (2015) (when counsel could show that an expert's

testimony was consistent with defendant's innocence, a decision not to refute that testimony with other testimony was not ineffective).

Judgment affirmed. Reese, P. J., and Markle, J., concur.

APPENDIX C

IN THE SUPERIOR COURT OF BANKS COUNTY
STATE OF GEORGIA

STATE OF GEORGIA, v. STEPHEN FLOYD ALEXANDER, Defendant.	Case No.: 14-CR-487

ORDER DENYING MOTION FOR NEW TRIAL

(Filed Jun. 25, 2019)

The above-styled comes before the Court on Defendant's Motion for New Trial, which was properly and timely filed. Assistant District Attorney Erica Shepley represents the State. Attorney Brian Steel represents the defendant. Two separate hearings were held on the Motion for New Trial and its subsequent amended versions on August 10, 2018 and November 15, 2018. The parties submitted briefs to the Court following the second hearing. The Court has reviewed the entire record, including the testimony presented at the hearings and the arguments presented by the State and Defendant. The Court finds as follows:

FACTUAL BACKGROUND

I. Trial

The defendant was tried in Banks County on all counts of the indictment, except Counts 9-12, 14, and 22. At trial, the State was represented by ADA Shepley

and the defendant was represented. by Attorney Tim Healy with an associate of Mr. Healy's assisting.

The Court asked preliminary statutory questions to the venire panel in the jury assembly room outside the presence of the defendant, trial counsel, and the State. During voir dire, no bench conferences were held outside the presence of the defendant where jurors were excused. The defendant was able to hear some, but not all prospective jurors during individual voir dire.

The State moved for the courtroom to be closed during the testimony of the victims pursuant to O.C.G.A. § 17-8-54. Trial counsel made no objection, and in fact consented to the courtroom being closed, save the victims' uncle.

The State called its first witness, Midajah Alexander, hereafter "M.A." She testified that, prior to living in Banks County, she lived with the defendant, her mother Anna Alexander, her younger sister Madilynn Alexander, and her stepbrother Eli Alexander in Habersham County. M.A. testified that it was in Habersham County that the Defendant first sexually abused her while her mother was away on vacation with friends. The defendant took M.A. into a bedroom, showed her pornography, and instructed her to do what the girl on the screen was doing, which was to suck the defendant's penis, while the defendant touched M.A.'s vagina. M.A. testified that the defendant inserted his penis into her vagina. The defendant told M.A. not to

tell anyone about these actions or else she would be removed from her mother.

The sexual abuse continued after the family moved to Banks County. On one occasion, M.A. and Madilynn were sleeping in Madilynn's room. The defendant came into the room and told the girls that it was time for them to be women and grow up. The defendant first inserted his penis into Madilynn's vagina and then instructed Madilynn to shower while he moved on to M.A. Over M.A.'s objection, the defendant inserted his penis into her vagina. Then the defendant instructed M.A. to shower.

On another occasion, the Defendant attempted intercourse with M.A. He was sweating during this encounter and could not fit his penis into her vagina, so the defendant inserted his finger into M.A.'s vagina. After one of these encounters, the defendant apologized to the girls and promised on the Bible that these sexual abuses would not happen again.

After the girls told their mother about the abuse, M.A. attended counseling and wrote a handwritten account of the abuse, which was read into evidence and marked as State's Exhibit 35. Trial counsel made no objection to State's Exhibit 15.

Mr. Jason Simpson, Director of Forensic Services for child advocacy center. The Treehouse testified next. Mr. Simpson conducted the forensic interview of M.A. Mr. Simpson was accepted as an expert in forensic interviewing and child sexual. abuse. His interview with M.A. was recorded and played for the jury. Mr. Simpson

informed the jury about coaching and some techniques to detect coaching in a forensic interview, such as looking for contextual details. The presence of contextual details could indicate that a child had not been coached. The interviewer could also seek clarification on a point, and if the child offers no finer details, this may indicate coaching as it is uncommon for children to be coached to give finer details when pressed, Mr. Simpson concluded that, based on his experience, training, and education, M.A.'s disclosure and interview were consistent with those of a child who had experienced sexual abuse.

Madilynn testified that on one occasion, the defendant came into her room and made her and M.A. remove their clothes. Then the defendant touched Madilynn's vagina with his penis and penetrated her vagina. The defendant made Madilynn take a shower. The defendant told the girls that this was a secret and he would hurt their family if they told anyone. He promised on the Bible. On another occasion, the defendant made Madilynn place her mouth on the defendant's penis. Then the defendant made Madilynn get into a "doggy style" position and the defendant inserted his penis into Madilynn's vagina. Madilynn told her mother about the abuse later that day.

At the conclusion of Madilynn's testimony, the courtroom was no longer closed and the trial continued with the testimony of GBI Forensic Biologist Kimberly Turpin, Ms. Turpin was qualified as an expert in forensic DNA analysis and forensic biology. She received a bachelor's degree in health sciences from Brenau

University and a master's degree in forensic sciences from Drexel University, College of Medicine. At the time of trial, Ms. Turpin had been qualified as an expert in Georgia so times. She testified that as a forensic biologist for the GBI, she receives evidence from state and local agencies and examines the evidence for the presence of biological fluids like blood, semen, or saliva. If one of these is present, a DNA analysis is performed. She performed a male DNA screening on the vaginal cervical swabs, rectal swabs, oral swabs, and buccal swabs and DNA testing was conducted using those samples. The male DNA located on the vaginal cervical swabs matched the defendant's DNA.

Ms. Page Sanders, the Child Services Program Manager at The Treehouse, conducted the forensic interview of Madilynn and was her counselor. Ms. Sanders was accepted as an expert in forensic interviewing, child sexual abuse, and counseling in the Trauma Focused Cognitive Behavioral Therapy Model. She also testified that the presence of contextual details in an interview indicate that it is less likely a child has been coached, or is otherwise fabricating the allegations. Ms. Sanders testified that Madilynn's interview was full of contextual details. It was her opinion that, based on her training, experience, and education, Madilynn's disclosures were consistent with those of a child who had experienced sexual abuse. Ms. Sanders explained the Trauma Focused Cognitive Behavioral Therapy Model for the jurors and explained what happens during a counseling session

at The Treehouse and how far Madilynn went in the program.

Outside the presence of the jury, the State and the Defendant stipulated to the chain of custody of the Defendant's computer. At this time, the Court also discussed the closure of the courtroom and put on the record that the courtroom had been open from the time the child victims' testimony had concluded and would remain open thereafter.

Ms. Anna Alexander, the mother of the two victims, testified that she was married to the defendant. M.A. and Madilynn did not have a relationship with their biological father and knew the defendant "Dad." Ms. Alexander testified that the defendant adopted M.A. and Madilynn. On June 30, 2014, M.A. and Madilynn told. Ms. Alexander about the abuse. M.A. told her mother that the defendant had been abusing her since she was seven. Madilynn told her mother that the defendant "did it with me." Ms. Alexander called 911. Ms. Alexander's testimony described how M.A. bottled everything up and kept her thoughts and feelings about the abuse inside. She also described how Madilynn became scared of all men and began having nightmares. She testified that in the weeks leading up to the outcry, the two girls slept together and wanted to go to work with Ms. Alexander. She also testified that the defendant wanted M.A. to be on birth control.

Ms. Alexander also testified regarding Defense Exhibit 4, a recantation affidavit signed by Ms. Alexander stating M.A. and Madilynn admitted to Ms. Alexander

that the allegations against the defendant were untruthful. The defendant had entailed Ms. Alexander asking her to write a statement that the allegations were untrue, and that in exchange, the defendant would provide for M.A. and Madilynn. The referenced, alleged email was never tendered into evidence. Pursuant to the defendant's request, the Court instructed the jury to disregard any of Ms. Alexander's testimony regarding the existence or nonexistence of any email. Ms. Alexander testified that the girls would not make up allegations and did not recant. She also said she regretted signing Defense Exhibit 4.

Investigator Bryan Lord of the Banks County Sheriff's Office was present for the Sexual Assault Nurse Examination (SANE exam) and testified that he transported the SANE kit to the GBI Crime Lab. The defendant had previously been employed as an officer with the Baldwin City Police Department and had worked on cases involving theft, child molestation, and homicide.

Investigator Josh White, also with the Banks County Sheriff's Office, was the on-call investigator for the case. He responded to the Alexander home on June 30, 2014, around 10:20 p.m. following the 911 call made by Ms. Alexander. He spoke with Madilynn, who told him that earlier that same day, the defendant made Madilynn put his penis in her mouth and had sex with her. He described Madilynn's demeanor as nervous. The defendant was arrested the next day. A search warrant was obtained for the defendant's residence. During the execution of the search warrant,

Investigator White located unused condoms and a Dell Inspiron computer, which was taken. A search warrant for the computer was secured.

GBI Child Exploitation and Computer Crimes Unit Digital Forensic Investigator Diane Michelle Johnson was accepted as an expert in the field of digital forensic analysis. She analyzed the Dell Inspiron computer and located searches on the defendant's computer for "barely legal Asian," "Asian kid nudist," "teen nude naturalist," "stepdad f**** stepdaughter," and "dad and daughter f***." She also located pornography URLs entitled "Asian Teen Does First Porn, Redtube Free Facials Porn Videos, Teens, Movies, and Amateur Clips," "Dad Teaching Cute Teen Daughter About Sex," "Dads and Daughter F*** While Mom is in the Kitchen," and "Big Booty Daughter F***** by Dad." She also located pornographic images of females performing oral sodomy.

Martha "Mimi" Dodd is a family nurse practitioner for Children's Healthcare of Atlanta. In June 2014, she was employed as a sexual assault nurse examiner for Athens-Clarke County. She was qualified as an expert in sexual assault forensic medical exams and pediatric sexual abuse. Ms. Dodd described for the jury how sexual assault exams are conducted and that she performed sexual assault exams on both M.A. and Madilynn. She collected vaginal, anal, oral, and buccal swabs from Madilynn and turned those over to Investigator Lord. Madilynn described pain and bleeding after the initial sexual assault. Ms. Dodd noted that Madilynn had a laceration at the 6 o'clock position on

the fossa and described the finding as an indication of recent sexual abuse. Ms. Dodd further testified that M.A.'s sexual assault examination was normal, which does not confirm or deny sexual abuse. She described how it is possible for a penis or finger to go between the lips of the vagina and not damage the hymen. Both girls were going through puberty at the time the exams were conducted.

Following this evidence, the State rested its case. The Court denied the defendant's Motion for a Directed Verdict as to the incest charges. The Court then advised the defendant of his Constitutional right to testify or not testify at trial.

The defendant called as his first witness Ms. Sharon Wilkins. Ms. Wilkins was a coworker of Ms. Alexander. She notarized Ms. Alexander's signature on Defense Exhibit 4. The defendant then called Investigator White, who testified that all family members had access to the Dell Inspiron computer that was seized.

The defendant next called Dr. Joseph Burton, who was a medical doctor, consultant in forensic and environmental pathology and medicine, and Chief Medical Examiner Emeritus for DeKalb County. Dr. Burton began working in 1972 and retired as an active medical examiner from DeKalb, Cobb, and Gwinnett Counties in 2000. He was also the lead investigator, called upon by the FBI, to investigate the Atlanta Child Murders. He has been an instructor at Emory University School of Medicine and lectured police, prosecutors, and SANE nurses in the 1990s. From 1996 to 1997, Dr.

Burton was part of the Georgia Statewide Child Abuse Prevention Panel. Dr. Burton consulted with both state and federal prosecutors, and trial counsel, and testified roughly 1000 times in various states and three foreign countries. Dr. Burton has reviewed dozens of cases similar to the instant case, and has reviewed medical records, police reports, and witness statements for such cases. Dr. Burton was accepted as an expert in child sexual and physical abuse.

Prior to trial, Dr. Burton viewed photographs of the vaginas and hymens of M.A. and Madilynn. Dr. Burton also reviewed police reports, Athens-Clarke County medical examination records from both girls, synopses from interviews with both girls, the report of Dr. Jordan Greenbaum, affidavits from the victims' mother and from each victim, and Childrens' Healthcare of Atlanta records. He also testified that he reviews numerous journals and periodicals each month. He discussed peer-reviewed articles and studies for the jury, and described a female genitalia diagram to the jury. Dr. Burton opined that M.A.'s SANE evaluation and Madilynn's SANE evaluation were both normal. He explained that Madilynn's laceration was very small and could have been caused by nonsexual contact such as scratching an itch. He also explained that Madilynn's bleeding could have been from her starting her period and not from the laceration as there was no evidence of healing during her second SANE exam a few days later. He further testified that the findings in Madilynn's exam were not diagnostic of sexual abuse. Trial counsel then asked Dr. Burton

about Defense Exhibit 3, a recantation affidavit signed by Madilynn. Dr. Burton testified that he has seen cases where girls have falsely accused adult males of abusing them, and that a supposed victim could "plant" semen on the inside of the vagina by using a used condom. Dr. Burton also opined that, based on the medical findings, M.A. was not abused as she had described. If she had been abused as alleged, her hymen would not be intact. In conclusion, Dr. Burton testified that there was no medical evidence that either girl was sexually abused, especially not multiple times by an adult.

The defendant then testified in his own defense. During his testimony, the defense admitted the recantation affidavits of Madilynn and Ms. Alexander (Defense Exhibits 3 and 4). The defendant denied having any involvement in creating defense Exhibits 3 and 4. Madilynn's recantation alleges that she and her sister devised a plan to get a used condom out of their parents' trashcan and put the semen on her bed and her. She further alleges in the affidavit that after watching a crime-based TV show, she and her sister decided to tell her mom that the defendant molested them so that her mom would leave the defendant. The defendant denied searching for the above pornography terms, and stated multiple people had access to his computer. He also denied having any sexual conduct with M.A. or Madilynn.

Defendant then rested his case. The State called Ms. Dodd for rebuttal, who explained a hymen could remain intact even when a person is pregnant. She

also testified that the medical findings were highly suggestive of sexual abuse.

The State rested, evidence was closed, closing arguments were presented, and the jury was charged. The defendant was convicted of Counts 1, 3-4: Rape; 5, 7-8: Statutory Rape; 15: Aggravated Child Molestation; 17-18 Aggravated Sexual Battery; 19-21: Incest; and 23-24: False Imprisonment.

II. Motion for New Trial Hearings

Defendant's Motion for New Trial was properly filed. Two separate hearings were held on August 10, 2018 and November 15, 2018.

At the motion hearings, Mr. Timothy Healy, who was defense counsel during the trial, testified about his legal and educational background. He graduated from Woodrow Wilson College of Law in 1979. He then clerked for Judge Jack N. Gunter between 1979 and 1980 before working with Robert F. Oliver in Habersham County for five years. In 1985, Mr. Healy went out on his own before joining a firm in Toccoa in 1988. Beginning in 1990, Mr. Healy practiced solo until 1997 when Nina Svoren joined him. The majority of his practice has been criminal law. He represented Defendant at trial with Nina Svoren and Drew Crumpton assisting.

Mr. Healy testified that, at the time of the trial, he did not believe that GBI expert Turpin's testimony, stating that the defendant's semen was found in the

vagina of one of the victims, was fatal to the defendant. This was because part of the trial strategy focused on the girls lying and fabricating the allegations as evidenced by the recantation affidavits that trial counsel entered into evidence. Mr. Healy testified that had the jury believed the defense's theory of the case. Ms. Turpin's statements would not have been damaging at all. However, Mr. Healy also testified that after the trial he felt that Ms. Turpin's testimony had been detrimental to the case.

Ms. Turpin testified about why she believed that the defendant's DNA. Found on vaginal swabs, was from sperm. Ms. Turpin testified that the screening method for semen involves doing an acid phosphatase test (AP), followed by examining that sample with a microscope, and then performing a P-30 test. She testified that the GBI's validated procedure for identifying semen would be through conducting these three steps. She testified that she did not perform these tests, but rather, that when swabs are sent to the crime lab, they undergo a male DNA screening. If male DNA is present, a DNA typing will be performed, which is where a differential extraction is performed so that the non-sperm cells (E-1 Fraction) are isolated from the sperm cells (E-2 Fraction). In this case, Defendant's DNA was found in the E-2 Fraction. Ms. Turpin testified that on the E-1 Fraction, only female DNA was present, but on the E-2 Fraction, a major profile came from a male donor with a minor presence of DNA from a female donor. The female donor was present because, although the analyst performs washes to remove the

female DNA from the male DNA, there will inevitably he a few traces left behind. Ms. Turpin testified that her results in this case were consistent with the results she had found in other cases where the AP, microscope examination, and P-30 tests are performed. She came to this conclusion because, where a sample is not sperm (saliva or skin cells, for example), she would expect a higher male DNA presence in the E-1. Fraction or for the female DNA to be just as dominant in the E-2 Fraction.

The Defendant also presented testimony from DNA expert Dr. Greg Hampikian, who explained that there was potential contamination in the collection of the DNA evidence by the SANE nurse, as well as possible contamination within the GBI crime lab. Dr. Hampikian testified that he found it shocking that Ms. Turpin would opine that semen was present where none of the validated tests were done. He also testified that the results reached by Ms. Turpin are consistent with results one would expect to reach in a sexual assault case.

The defendant testified that he could not hear everything that was said at the bench. Defendant also testified that part of the defense's trial strategy was to use the recantation affidavits. He also testified that he remembered discussing the affidavits as a possible defense to provide an explanation for why his DNA was present in Madilynn's vagina.

At the second motion for new trial hearing, the defendant testified that he never told anyone that he

could not hear all of the questions being asked by the Court. He also never told the Court that he did not approve of the procedure for individual voir dire.

FINDINGS OF LAW

Defendant brings forth several arguments in his Motion for New Trial. The Court will address each in turn:

I. Preliminary Questions and Voir Dire

Defendant contends that his Constitutional right to be present at every critical stage of the proceedings was violated at two separate times: first, when the Court communicated with potential jurors during preliminary qualifying, and second, when he could not hear at certain times during jury selection.

First, the defendant argues that his rights were violated when, without lawful authority, Defendant's trial counsel waived Defendant's right to be present while the Court held discussions with the venire panel, which included the standard preliminary questions. During the trial, the judge said that he would go into the jury assembly room and ask the standard prequalification questions, then bring the prospective jurors into the courtroom in panels. Trial counsel for the defendant responded that he did not have a problem with that. The trial judge then went to the jury assembly room to ask preliminary questions to prospective

jurors separate from where trial counsel, the defendant, and the State were.

All voir dire should take place in the courtroom in the presence of all parties. *Robertson v. State*, 268 Ga. 772, 774 (1997); *House v. State*, 237 Ga. App. 504 (1999). The practice of the trial judge asking prospective jurors general qualifying questions outside the presence of the defendant is not condoned. *Id.* However, "fundamentally, the entry of individuals summonsed for jury duty and the preliminary qualifying questions by the [trial court judge] to the venire was nether a trial nor a pre-trial procedure involving any specific defendant." *Neale v. State*, 344 Ga. App. 448, 452 (2018). "[T]he trial does not begin until the jury has been impaneled and sworn." *Ferguson v. State*, 219 Ga. 33, 35 (1963). A defendant's right to be present at all critical stages "does not extend to any and all communications between the trial courts and potential jurors." *Payne v. State*, 290 Ga. App. 589, 593 (2008), overruled in part on other grounds by *Reed v. State*, 291 Ga. 10, 14 (2012).

The Court acknowledges that the practice of asking statutory preliminary questions outside the courtroom and outside of the presence of the defendant and counsel is not best practice. However, the Court finds no violation of Defendant's Constitutional rights by the Court's having asked the statutory preliminary questions of the jurors outside the presence of Defendant and counsel. Because the jury had not yet been impaneled and sworn, asking preliminary qualifying questions to the venire was neither a trial nor a pre-trial

procedure involving this specific defendant, and Defendant's Constitutional right to be present at critical stages of the trial does not extend to all communications between the Court and potential jurors. The motion for new trial on this ground is therefore **DENIED**.

Second, the defendant argues that he was not at the bench during individual voir dire despite wanting to take an active role in the proceedings, and that trial counsel waived Defendant's right to be present without lawful authority to do so. The Court voir dired individual jurors at the bench. Defendant was seated at counsel table along with an associate of lead trial counsel. Defendant claimed that he could not hear all of the conversation going on between the Court and jurors, and that his request to hear all potential jurors went unresponded to.

Proceedings involving jury selection, including bench conferences at which a juror is discussed and dismissed, are considered critical stages at which the defendant is entitled to be present. See Murphy v. State, 299 Ga. 238, 240 (2016). This right belongs to the defendant, and the defendant is free to relinquish that right, if he or she so chooses, by personally waiving such right in court, by counsel waiving the right at a defendant's express direction, by counsel waiving the right in open court while the defendant is present, or by counsel waiving the right while a defendant is present and the defendant subsequently acquiescing in the waiver. *Id.* at 240-41. "Acquiescence may occur when counsel makes no objection and a defendant remains silent after he or she is made aware of the

proceedings occurring in his or her absence." *Id.* at 241. In this case, individual voir dire occurred in open court. The defendant was present in the courtroom when the Court explained how individual voir dire would occur. The defendant never mentioned to the Court that he could not hear prospective jurors. In fact, the Court inquired as to whether the defendant could hear, and both assistant counsel and the Defendant responded that they could hear from where they were sitting in the courtroom.

The Court finds that the defendant was present for all critical stages including jury selection. He was able to hear what was being said, and he relinquished his right to challenge the trial on this ground as he acquiesced by remaining silent and not addressing this issue with the Court. The motion for new trial on this ground is therefore **DENIED**.

II. Courtroom Closure

Defendant argues that closing the courtroom during the testimony of the two victims and one forensic interviewer violated his Constitutional right to a public trial. Under O.C.G.A. 17-8-54, when a person under the age of 16 testifies concerning any sexual offense, the Court should clear the courtroom of all persons except parties to the case and other enumerated persons, including the immediate families of the parties. The State requested that the courtroom he cleared for the victims' testimony and trial counsel made no objection. The defendant argues that the closure was a structural

error and a new trial must be granted, but the Supreme Court of Georgia makes it clear that the improper closing of a courtroom is a structural error requiring reversal only if the defendant properly objected at trial and raised the issue on direct appeal." *Reid v. State*, 286 Ga. 484 (2010). When the defendant does not object at trial, the only way this claim can be argued on appeal is through an ineffective assistance of counsel claim. See *Lane v. State*, 324 Ga. App. 303 (2013).

Here, the only people who were present and excused under this rule were members of the defendant's immediate family. In order to prevail on a claim of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984), a defendant must prove "both that his trial counsel's performance was deficient and that there was a reasonable probability that the trial result would have been different if not for the deficient performance." See *Reid*, 286 Ga. at 485-86 (citing *Hill v. State*, 284 Ga. 521, 522(2) (2008)). Here, the issue of a courtroom closure has been raised in the context of an ineffective assistance of counsel claim, and therefore prejudice will not be presumed. Id. In *Reid*, the court found that failing to object to the closure did not prove a reasonable probability of a different result or that it actually had an adverse effect on the defense, and to hold otherwise would be to encourage defense counsel to manipulate the justice system by intentionally failing to object in order to ensure an automatic reversal on appeal. In this case, as in Reid, the defendant has failed to demonstrate how the

failure of trial counsel to object to the closure of the courtroom resulted in harm. The Court cannot find a reasonable probability that the outcome of this trial would have been different had the defendant's immediate family been permitted to remain in the courtroom, The Motion for New Trial on this ground is **DENIED**.

III. Victim's Written Statements

The defendant argues that trial counsel was ineffective for not objecting to the writings that one of the alleged victims created during her counseling meetings. The writing was entered into evidence as State's Exhibit 15. The defendant also argues that a written statement does not qualify under the child hearsay statute because it is not a statutory statement, but rather improper bolstering.

The Court finds that trial counsel was not ineffective for failing to object to State's Exhibit 15. The Court finds that the statement was admissible as a prior inconsistent statement under O.C.G.A. § 24-6-613. A prior consistent statement is admissible where the veracity of a witness's testimony has been placed in issue at trial, the witness is present at trial, and the witness is available for cross-examination. O.C.G.A. § 24-6-613. If allegations of recent fabrication, improper influence, or improper motive are raised during cross-examination, then the prior statement must predate the alleged fabrication, influence, or motive. *Id.* Here, though the prior consistent statement was admitted before the

witness was subject to cross-examination, it was not improperly admitted. See *Pate v. State*, 315 Ga. App. 205 (2012). In *Pate*, the defendant argued that the trial court erred in permitting a witness to testify about allegations of sexual assault made to him by the alleged victim prior to the alleged victim being called to the stand for cross-examination. The Court of Appeals found the testimony admissible because the allegations were made to the witness prior to the alleged fabrication, influence, or motive, and because the alleged victim was subsequently called for cross-examination. Accordingly, because the statement was made prior to the alleged fabrication, influence, or motive, and because the witness's veracity was subsequently placed at issue, the Court finds no error in trial counsel's failure to object. The defendant's Motion for New Trial on this ground is **DENIED**.

IV. Child Hearsay Notice

The defendant argues in his motion that the State failed to provide notice to the defendant that it would seek to introduce child hearsay statements pursuant to O.C.G.A. § 24-8-820. The Defendant further argues that trial counsel was ineffective for not objecting and the child hearsay should have been excluded. The defendant waived this argument during the first motion hearing.

V. Testimony Regarding Contextual Details

The defendant argues that trial counsel was ineffective for failing to object when the forensic interviewer explained that the presence of contextual details makes it less likely that the victim is fabricating allegations. Defendant argues that this invaded the province of the jury.

"A witness does not improperly bolster a victim's credibility-by testifying that the witness saw no evidence of coaching." *Dority v. State*, 335 Ga. App. 83 (2015) (citing *Conley v. State*, 329 Ga. App. 96, 102 (2014)). The Court finds that the counselors were explaining what to look for when conducting an interview so as to guard against coaching. The counselors explained that one such method would be to look for contextual details, as the presence of contextual details indicates it is less likely that a child has been coached. Further comments by the counselors pertained to whether the child's statements revealed evidence of coaching, which is not improper bolstering. *Id.* Accordingly, the Court finds that the counselors' comments did not impermissibly bolster the testimony of the victims or invade the province of the jury. Trial counsel's failure to object did not constitute ineffective assistance of counsel, and Defendant's Motion for New Trial on this ground is **DENIED**.

VI. Victim Impact Evidence

The Defendant argues that trial counsel was ineffective for failing to object to the victim impact evidence that the victims went to counseling.

In *Robinson v. State*, evidence that a victim underwent therapy after a sexual encounter with the defendant was determined by the Court of Appeals to be relevant and admissible to corroborate her claim. Robinson v. State, 342 Ga. App. 624, 633 (2017). Accordingly, the Court finds that the testimony that the girls underwent counseling provided corroboration and was permissible evidence. Trial counsel's failure to object did not constitute ineffective assistance of counsel. Therefore, the defendant's motion for new trial on this ground is **DENIED**.

VII. Testimony of GBI Forensic Biologist

Defendant argues that trial counsel was ineffective for failing to put forth competent evidence that the GBI forensic biologist gave testimony not scientifically accepted, specifically that the DNA found came from semen.

The Court finds that trial counsel did not render ineffective assistance by failing to put forth such evidence against the testimony of GBI biologist Kimberly Turpin. As outlined more thoroughly in the factual background section above, Ms. Turpin testified that while she did not complete the validated GBI tests for identifying sperm, she did conduct the type of testing