APPENDICES

Appendix A

UNITED STATES of America, Plaintiff - Appellee,

v.

Kevin Patrick MALLORY, Defendant - Appellant.

No. 19-4385

United States Court of Appeals, Fourth Circuit.

Argued: March 8, 2022

Decided: July 11, 2022

Background: In prosecution for conspiracy to gather or deliver defense information to aid a foreign government, delivery of defense information to aid a foreign government, attempted delivery of defense information to aid a foreign government, and making material false statements, the United States District Court for the Eastern District of Virginia, T. S. Ellis, III, Senior District Judge, 2020 WL 13327353, ruled on Government's objections under Classified Information Procedures Act (CIPA) to defendant's notice of intent to use classified information, and, after defendant was convicted of charged offenses, defendant's motion for judgment of acquittal was granted as to delivery and attempted delivery counts, 2018 WL 3587718, Government's motion for reconsideration was denied, 337 F.Supp.3d 621, and defendant's motion for new trial was denied, 343 F.Supp.3d 570. Defendant appealed.

Holdings: The Court of Appeals, Niemeyer, Circuit Judge, held that:

(1) as a matter of first impression, assuming that application of silent witness rule to publicly available documents implicated defendant's Sixth Amendment right to public trial, district court's pretrial findings regarding need to limit public's access to documents were adequate;

(2) as a matter of first impression, compelling government interest justified any limited impingement of defendant's public-trial right;

(3) instructions did not diminish the scienter requirement for the conspiracy charge; and

(4) evidence did not warrant instruction that simple buyer-seller relationship could not amount to conspiracy.

Affirmed.

1. Privileged Communications and Confidentiality ⚿360

The "silent witness rule," as a supplement to the Classified Information Procedures Act (CIPA), is a technique by which the parties present classified information to each other, to the jury, and to the court but not to the public. Classified Information Procedures Act, § 1 et seq., 18 U.S.C.A. App. 3.

See publication Words and Phrases for other judicial constructions and definitions.

2. Criminal Law ⚿635.2

The Sixth Amendment's guarantee of a public trial in criminal prosecutions serves as a safeguard against any attempt to employ the courts as instruments of persecution, reflecting the belief that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings. U.S. Const. Amend. 6.

3. Criminal Law ⚿635.2, 635.9(8)

While the press and public have a qualified First Amendment right to attend a criminal trial, the Sixth Amendment public-trial right is for the benefit of the accused, ensuring that the public may see he is fairly dealt with and not unjustly condemned, and keeping his triers keenly

alive to a sense of their responsibility. U.S. Const. Amends. 1, 6.

4. Criminal Law ⚿635.11(4), 1166.7

In light of the foundational nature of the Sixth Amendment right to a public trial, there is a presumption in favor of open trials, and a violation of the right to a public trial is a structural error, i.e., an error entitling the defendant to automatic reversal without any inquiry into prejudice. U.S. Const. Amend. 6.

5. Criminal Law ⚿635.6(2, 5)

The Sixth Amendment right to a public trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information, but such circumstances are rare. U.S. Const. Amend. 6.

6. Criminal Law ⚿635.5(2, 3), 635.11(5)

Before a trial court closes the courtroom to the public, as an exception to the Sixth Amendment right to public trial, it must: (1) make a finding that the party seeking to close the proceeding has advanced an overriding interest that is likely to be prejudiced; (2) make a finding that the closure would be no broader than necessary to protect that interest; and (3) consider reasonable alternatives to closing the proceeding. U.S. Const. Amend. 6.

7. Criminal Law ⚿635.11(5)
Privileged Communications and Confidentiality ⚿360

Assuming that application of silent witness rule, as supplement to Classified Information Procedures Act (CIPA), to publicly available documents implicated defendant's Sixth Amendment right to public trial, in prosecution for conspiracy to gather or deliver defense information to aid a foreign government, district court's pretrial findings regarding need to limit public's access to documents were adequate; district court stated that, given the testimony that had already been elicited, publishing public-source documents in open court would allow people to "connect the dots" and therefore would be likely to disclose classified information for which district court had ordered protection by use of silent witness rule. U.S. Const. Amend. 6; 18 U.S.C.A. § 794(c); Classified Information Procedures Act, § 1 et seq., 18 U.S.C.A. App. 3.

8. Criminal Law ⚿635.6(5)
Privileged Communications and Confidentiality ⚿360

Assuming that application of silent witness rule, as supplement to Classified Information Procedures Act (CIPA), to publicly available documents implicated defendant's Sixth Amendment right to public trial, in prosecution for conspiracy to gather or deliver defense information to aid a foreign government, any limited impingement of defendant's public-trial right was justified by government's compelling interest in preventing disclosure of classified information; given the testimony that had already been elicited, publishing public-source documents in open court would allow people to "connect the dots" and therefore would be likely to disclose classified information for which district court had ordered protection by use of silent witness rule. U.S. Const. Amend. 6; 18 U.S.C.A. § 794(c); Classified Information Procedures Act, § 1 et seq., 18 U.S.C.A. App. 3.

9. Privileged Communications and Confidentiality ⚿360

Application of silent witness rule, as supplement to Classified Information Procedures Act (CIPA), to publicly available documents did not deprive defendant of his constitutional right to a meaningful opportunity to present a complete defense, in prosecution for conspiracy to gather or

deliver defense information to aid a foreign government; while defendant was limited in eliciting oral testimony from witnesses on contents of publicly available documents, those documents were provided to jury while witnesses were testifying. U.S. Const. Amends. 5, 6; 18 U.S.C.A. § 794(c); Classified Information Procedures Act, § 1 et seq., 18 U.S.C.A. App. 3.

10. War and National Emergency ⚿1125

Use of phrase "with intent or reason to believe," in instruction that it was a substantive crime to transmit to foreign government or agent thereof information relating to national defense, with intent or reason to believe that it was to be used to injury of United States or to advantage of foreign nation, did not "water down" the scienter element by allegedly allowing conviction under an objective standard of negligence, with respect to conspiring to commit the substantive offense; district court gave instructions cautioning jury that the standard did not mean that defendant acted negligently and that defendant had to act willfully, and instructions defined "willfully" for jury. 18 U.S.C.A. § 794(a, c).

11. Criminal Law ⚿770(2), 814(8)

A court should instruct the jury on the defendant's theory of the defense when such instructions have an evidentiary foundation and are accurate statements of the law.

12. Conspiracy ⚿116, 202

Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act.

13. Conspiracy ⚿204

The crime of conspiracy may exist and be punished whether or not the substantive crime ensues.

14. War and National Emergency ⚿1125

Evidence did not warrant instruction that a simple buyer-seller relationship could not amount to a conspiracy, in prosecution for conspiracy to gather or deliver defense information to aid a foreign government; there was no evidence that defendant's relationship with agent of foreign government was limited to a buyer-seller transaction, and instead, government presented overwhelming evidence that defendant operated with agent of foreign government in joint enterprise to transmit national defense information to foreign government or other agents within foreign government's intelligence service. 18 U.S.C.A. § 794(c).

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. T. S. Ellis, III, Senior District Judge. (1:17-cr-00154-TSE-1)

ARGUED: Geremy C. Kamens, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Alexandria, Virginia, for Appellant. Jennifer Kennedy Gellie, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. ON BRIEF: Frances H. Pratt, Assistant Federal Public Defender, Todd M. Richman, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Alexandria, Virginia, for Appellant. G. Zachary Terwilliger, United States Attorney, John T. Gibbs, Assistant United States Attorney, Daniel T. Young, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Before WILKINSON, NIEMEYER, and QUATTLEBAUM, Circuit Judges.

Affirmed by published opinion. Judge NIEMEYER wrote the opinion, in which Judge WILKINSON and Judge QUATTLEBAUM joined.

NIEMEYER, Circuit Judge:

A jury convicted Kevin Patrick Mallory of conspiring to transmit national defense information to Chinese agents, in violation of 18 U.S.C. § 794(c), and making materially false statements to FBI agents, in violation of 18 U.S.C. § 1001(a)(2).

On appeal, Mallory challenges the district court's application during trial of the "silent witness rule" — under which sensitive evidence is disclosed to the jury and the trial's other participants but not to the public — contending that it violated his right to a public trial, in violation of the Sixth Amendment, and his right to present a complete defense, in violation of the Fifth and Sixth Amendments. He also mounts two distinct challenges to the district court's instruction of the jury.

We reject his challenges, as explained herein, and affirm.

I

A

Kevin Mallory spent 20 years working in the U.S. intelligence community, during which time he served as, among other positions, a case officer and a contractor for the Central Intelligence Agency ("CIA") and as an intelligence officer with the Defense Intelligence Agency ("DIA"). In connection with these positions, Mallory received a top-secret security clearance and also had access to sensitive compartmented information. While an employee of the DIA, Mallory's responsibilities included serving as the handling case officer for a pair of covert human assets, referred to for the purposes of this case by the pseudonym "the Johnsons." Mallory left the intelligence community in 2012 and became self-employed, operating a consulting business from his home.

Several years later, in February 2017, Mallory was contacted on LinkedIn, a professional networking site, by someone who presented himself as a Chinese business recruiter and who told Mallory that he had leads about possible consulting work in China. Mallory — who was experiencing serious financial difficulties at the time, having missed at least two mortgage payments — expressed an interest in this work. The recruiter arranged for Mallory to contact a man identified as Michael Yang, who purportedly worked for a Chinese think tank, and on February 21, Mallory had a video call with Yang. Mallory's handwritten notes from that call indicate that Yang expressed an interest in, among other things, the United States' THAAD defense system, an antiballistic missile defense system.

On March 10, 2017, Mallory traveled to China to meet Yang. In advance of the trip, Mallory requested that Yang provide him with a cell phone when he arrived, specifying that Yang should "put it in an envelope, initial around the seals, tape over [the] initials, and put that envelope in another envelope" to "make sure that it has not been tampered with." And on the day before Mallory left for China, he went to a FedEx store in Washington, D.C., where he purchased an SD memory card and scanned nine pages of documents onto it. Shortly after arriving in Shanghai, Mallory sent Yang an email, attaching three documents that totaled nine pages, which he stated were "examples." While the documents were unclassified, they included a list of "military intelligence related acronyms" and a document bearing the CIA's seal that described "[a]nalytic [t]radecraft [s]tandards." According to the DIA's former Director of Operations, Mallory's act

of emailing these documents to Yang was consistent with a potential asset demonstrating to a suspected intelligence officer that he had access to information with intelligence value.

Mallory later told federal investigators that during his March 2017 trip to Shanghai, he met for several hours with Yang and a man who was introduced as Yang's supervisor, "Mr. Ding." Mallory further stated that he came to understand during these meetings that Yang and Ding were Chinese intelligence officers who were looking for U.S. government secrets.

Mallory returned to China in the middle of April 2017 and again met with Yang. On this trip, Yang provided Mallory with a Samsung Galaxy Note 4 smartphone that had been customized so that Mallory could send encrypted communications to a corresponding phone kept by Yang. Mallory later referred to the phone as a "covert communications" device (a "covcom" device) and acknowledged that Yang had trained him on how to use it.

On his return from this second trip to China on April 21, 2017, Mallory was inspected in Chicago by Customs and Border Protection agents, who found $16,500 in cash in his carry-on luggage, even though he had stated on his customs declaration that he was not carrying more than $10,000 in cash. Mallory also told the agents falsely that the covcom device was a new phone that he had purchased for his wife as a gift, and the only person with whom he reported meeting in China was a church acquaintance regarding an anti-bullying program. The agents later testified that Mallory appeared aggravated during the inspection but that his demeanor changed completely when he was told that the only consequence was that he had to pay a duty on the items he had purchased in China.

A few days after his return, Mallory visited a FedEx store again — this time one that was close to his home in Leesburg, Virginia — and paid to have a FedEx clerk scan nine documents totaling 47 pages onto an SD memory card and then shred the documents. During a later search of Mallory's house pursuant to a warrant, law enforcement agents recovered two SD memory cards, each of which had nine documents totaling 47 pages. Evidence from the FedEx store's surveillance footage helped confirm that the documents on the cards were the ones that Mallory had scanned at the FedEx store.

Government witnesses testified later that each of the nine documents that Mallory scanned contained classified information. Some of the information was classified because it "discusse[d] specific intelligence sources and methods," including "specific mechanisms [that U.S. intelligence] would use to gather the information ... from foreign nationals" and "specific methods and targets that [U.S. intelligence was] interested in in this other country." At least two of the documents contained markings indicating that material within them was classified at the "top secret" level, reflecting the determination that the unauthorized disclosure of the information "reasonably could be expected to cause exceptionally grave damage to the national security" interest of the United States. And a government expert witness testified to her determination that these documents had been "properly classified at the top secret level."

Starting on May 1, 2017, Mallory used the covcom device to transmit to Yang two of the nine documents that he had scanned at the FedEx store. The first transmitted document was a handwritten page entitled "Table of Contents" that listed the titles and page counts for the eight other docu-

ments, listing the first as "S&T [Science & Technology] Target[ ]ing Opportunity." The second transmitted document corresponded to that descriptor and consisted of a handwritten cover page with the title "S&T Target[ ]ing in China," a typed page entitled "White Paper" that contained classified information, and two pages of handwritten notes from a yellow legal pad. Text messages between Mallory and Yang indicated that Yang received the two documents, and Yang then pressed Mallory to send additional documents. Mallory indicated that he would do so once Yang confirmed he had received authorization to make an additional payment to Mallory.

Evidence later showed that the transmitted "White Paper" discussed a proposed DIA operation that would have involved the Johnsons and included information about that intelligence relationship. It was derived from and summarized a PowerPoint that Mallory had used during a presentation to DIA supervisors when he was a DIA employee, in which he had proposed an operation "to do something unique and sensitive" targeting China. Mallory had scanned the first 13 pages of the PowerPoint presentation at the FedEx Store, and it was the second item listed in the transmitted "Table of Contents." The first five of those pages were later recovered from the covcom device, along with evidence indicating that, on May 5, 2017, Mallory had completed the steps necessary to send that document, as well as the third document listed on the "Table of Contents," which was a CIA document also containing classified information. In addition, data recovered from the covcom device indicated that Mallory had at least tested the covcom device with two of the other documents listed in the "Table of Contents," both of which pertained to the intelligence service capabilities of a foreign country and contained information classified at the top-secret level.

Around the same time period that he was scanning documents containing classified information onto an SD card at his local FedEx store and using the covcom device provided to him by Yang, Mallory also asked an acquaintance who worked at the CIA to put him in touch with CIA security, indicating to the acquaintance that he had been approached by Chinese intelligence agents on a recent business trip and wanted to "get [it] on the record." On May 12, 2017, Mallory met with a CIA investigator and on May 24, with FBI agents. In these interviews, Mallory described some of his contacts with Yang, and he showed the covcom device to the FBI agents, describing how it worked. He denied ever using the covcom device to send classified documents to Yang, stating that he had only sent a test message. But when Mallory was demonstrating the device, he appeared "very visibly surprised" when certain secure chat messages he had exchanged with Yang appeared on the phone's screen, including one that referenced a foreign country's intelligence service. According to one of the FBI agents who was present, "it was a fairly significant moment" as "we realized there was something very different going on here than we first thought."

On July 27, 2017, a grand jury returned a four-count indictment charging Mallory with conspiracy to transmit national defense information to a foreign nation, in violation of 18 U.S.C. § 794(c); delivering such information, in violation of § 794(a); attempting to do so, also in violation of § 794(a); and making materially false statements to government agents, in violation of § 1001(a)(2).

B

[1] In advance of trial, the district court received briefing and held several

sealed pretrial hearings under the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3 §§ 1–16, which addresses the handling of classified information in criminal cases. During the course of these proceedings, the government requested that the court admit into evidence the nine classified documents that were found on the SD memory cards in Mallory's home, as well as the classified information contained in the chat messages that Mallory and Yang exchanged, using the "silent witness rule." The silent witness rule is a technique by which the parties present classified information to each other, to the jury, and to the court but not to the public. *See United States v. Zettl*, 835 F.2d 1059, 1063 (4th Cir. 1987).

Mallory objected to the use of the silent witness rule, at least with respect to the one-page "White Paper" that he admittedly transmitted to Yang, because the rule would, he argued, "unfairly prejudice[ ] [his] ability to present a defense." He noted his intent at trial to "cross-examine government witnesses, and perhaps elicit testimony from his own witnesses, that information of the sort discussed in that document is so openly known that it could not be considered closely held" and argued that the use of the silent witness rule would limit his ability to "effectively elicit this testimony."

In a sealed order dated April 27, 2018, the district court approved the government's request to use the silent witness rule at trial, finding that "there [was] an overriding and indeed compelling reason for closing portions of the trial related to the classified information [Mallory] allegedly passed or attempted to pass to the Chinese"; that "[t]he government's use of the [silent witness rule] [was] also narrowly tailored to meet this interest"; and that "there [was] no reasonable alternative to use of the [rule]." The court concluded that use of the rule "in this context" would not only "allow the government to safeguard its compelling interest in avoiding disclosure of national security secrets [but would also] preserv[e] [Mallory's] public trial rights and allow[ ] [him] to present substantially the same defense." The court noted that Mallory would be able to "cross-examine witnesses using items in the public record to show that the information contained in the documents is widely known and not a closely-held government secret," although it also advised counsel in advance of trial that the government could object "if the cross-examination ... beg[an] to make clear what the protected information was."

During trial, immediately prior to Mallory's cross-examination of the government's penultimate witness, the government made such an objection. Specifically, the government noted that Mallory's counsel had presented it with "a binder of open source material" that he intended to use during the cross-examination of one of the government's classification experts, and the government expressed concern that "if portions are read in open court combined with what [the witness had already] testified to[,] [it] [would] create classified facts." Mallory's counsel confirmed that he wanted to ask the witness "some general questions about a couple of classified documents" and then wanted to "ask him to read into the record things from public domain documents, things that are indisputably public domain off the internet [and] declassified." The government argued, however, that, "[e]specially with the media spectators' presence [in the courtroom] ..., even if [defense counsel] does not ask a direct question, ... based on [the expert's] testimony and the specifics that they have heard, they will be able to link up that the reasons he's now reading this into the public record is to drop parallels between those open source documents

and the words he could not say out loud in court." The government noted that "[c]urrently, as they sit in that binder, [the publicly available documents] are unclassified," but it argued that "[t]he minute you start lining them up with the jury, ... those become classified facts because," by doing so, "any member of the public ... would be able to figure out what [the classified] documents [were] talking about." The government proffered that "[t]he solution ... would be to use the silent witness rule *with the open source documents* as we have with the classified documents." (Emphasis added). The court agreed with the government and required Mallory's counsel to use the silent witness rule when using the designated publicly available documents to cross-examine the government's expert.

To implement this ruling, each juror was provided with a binder containing several public documents that were admitted into evidence. The jurors were then able to examine the documents while Mallory's counsel asked the witness questions about them without publicly revealing what the documents were or their particular contents. Mallory's counsel later repeated the same basic procedure when examining Mallory's expert witness on classification and national defense information.

The lengthy transcript from the 9-day trial includes approximately 25 pages (probably covering about one-half hour's time) in which Mallory's counsel was required to use the silent witness rule with respect to 17 publicly available documents that were admitted into evidence.

At the conclusion of the trial, the court conducted a hearing with respect to the instructions it intended to give the jury, with much of the hearing focusing on the *mens rea* required for a conviction under § 794(a), which makes it a crime to transmit to any foreign government or agent thereof any "information relating to the national defense" "*with intent or reason to believe* that it is to be used to the injury of the United States or to the advantage of a foreign nation." (Emphasis added). The debate centered around the instruction to be given the jury on the meaning of the italicized words, with the court ultimately adopting an instruction closer to that proposed by the government than that proposed by Mallory. In addition, Mallory requested that the court instruct the jury that "[p]roof of a simple buyer-seller relationship is insufficient to prove a conspiracy to communicate, deliver, or transmit information relating to the national defense." The court denied that request.

The jury found Mallory guilty of all four counts, but the court granted Mallory's motion for judgment of acquittal on Counts Two and Three, which charged actual transmission and attempted transmission of national defense information, respectively, finding insufficient evidence of venue.

The district court sentenced Mallory on the remaining two counts to a total of 240 months' imprisonment, consisting of 240 months for the § 794(c) conspiracy offense and a concurrent 60 months for making materially false statements to government agents.

From the judgment dated May 17, 2019, Mallory filed this appeal, contending that his convictions should be vacated and the case remanded for a new trial on the grounds (1) that his constitutional rights to a public trial and to present a complete defense were violated by the district court's ruling requiring the use of the silent witness rule *with respect to certain publicly available documents*; (2) that the court's instructions impermissibly "reduced the significant mens rea element required to establish a violation of § 794"; and (3) that the court erred by refusing "to

instruct the jury on the buyer-seller theory of defense."

II

Mallory contends first that by applying the "silent witness rule" to publicly available documents during trial, the district court denied him the right to a public trial, in violation of the Sixth Amendment, and the right to present a complete defense, in violation of the Fifth and Sixth Amendments. He notes that his trial appears to be the first time that the silent witness rule had been applied to publicly available documents, and he argues that the district court failed to make the findings necessary to justify keeping those documents from the public.

Because Mallory was charged with conspiracy to transmit to Chinese agents documents "relating to the national defense," in violation of 18 U.S.C. § 794(c), the trial proceedings implicated CIPA, which "was designed to establish procedures to harmonize a defendant's right to obtain and present exculpatory material ... [with] the government's right to protect classified material" in the interest of national security. *United States v. Pappas*, 94 F.3d 795, 799 (2d Cir. 1996) (citation omitted). To this end, the statute includes a provision authorizing the trial court to order the "substitution for ... classified information" if the substitution would "provide the defendant with substantially the same ability to make his defense," 18 U.S.C app. 3 § 6(c), as well as a provision authorizing the court to admit into evidence "only part" of a document containing classified information or "the whole" of the document with redactions of some or all of the classified information, "unless the whole ought in fairness be considered," *id.* § 8(b).

As a supplement to CIPA, courts have fashioned what has been called the "silent witness rule," by which classified documents may, without redaction, be disclosed to both the defendant and the jury but not to the public. As we have explained more completely:

> Under such a rule, the witness would not disclose the information from the classified document in open court. Instead, the witness would have a copy of the classified document before him. The court, counsel and the jury would also have copies of the classified document. The witness would refer to specific places in the document in response to questioning. The jury would then refer to the particular part of the document as the witness answered. By this method, the classified information would not be made public at trial but the defense would be able to present that classified information to the jury.

Zettl, 835 F.2d at 1063.

Mallory does not contend that the district court erred in applying the silent witness rule in this case *with respect to the classified documents.* Rather, his claim is that the court erred by not limiting application of the rule to the classified documents and instead extending it to the publicly available documents. He states, "[A]pparently for the first time in any trial[,] the district court prohibited the defense from adducing evidence and questioning witnesses *in open court* as to ... *unclassified documents and information*" (first emphasis added), and he maintains that the court did so "[w]ithout making specific findings as to the need to prevent public access to the documents themselves." He argues primarily that the court's application of the silent witness rule to unclassified documents violated his Sixth Amendment right to a public trial and thus amounted to a structural error that entitles him to a new trial without any inquiry into prejudice.

[2–4] The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial." U.S. Const. amend. VI. As the Supreme Court has long recognized, this guarantee serves "as a safeguard against any attempt to employ our courts as instruments of persecution," *In re Oliver*, 333 U.S. 257, 270, 68 S.Ct. 499, 92 L.Ed. 682 (1948), reflecting the belief "that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings," *Waller v. Georgia*, 467 U.S. 39, 46 n.4, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (quoting *Estes v. Texas*, 381 U.S. 532, 588, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965) (Harlan, J., concurring)). Thus, while "the press and public have a qualified First Amendment right to attend a criminal trial," the Sixth Amendment public-trial right "is for the benefit of the accused," ensuring "that the public may see he is fairly dealt with and not unjustly condemned . . . [and] keep[ing] his triers keenly alive to a sense of their responsibility." *Id.* at 44–46, 104 S.Ct. 2210 (citation omitted). Indeed, history is marked by regimes using secret tribunals as a key tool of oppression, from "the notorious use of [the] practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*," to say nothing of current tyrannical systems where trials are conducted in secret. *Estes*, 381 U.S. at 539, 85 S.Ct. 1628 (quoting *In re Oliver*, 333 U.S. at 268–69, 68 S.Ct. 499). In light of the foundational nature of this right, the Supreme Court has made clear both that there is a "presumption" in favor of open trials, *Waller*, 467 U.S. at 45, 104 S.Ct. 2210 (citation omitted), and that "a violation of the right to a public trial is a structural error," "*i.e.*, an error entitling the defendant to automatic reversal without any inquiry into prejudice," *Weaver v. Massachusetts*, —— U.S. ——, 137 S. Ct. 1899, 1905, 1908, 198 L.Ed.2d 420 (2017).

[5, 6] But the defendant's right to a public trial is not absolute. There are some circumstances in which closing the courtroom to the public is justified and does not amount to a violation of the right. *See Waller*, 467 U.S. at 45, 104 S.Ct. 2210; *see also Weaver*, 137 S. Ct. at 1909; *Bell v. Jarvis*, 236 F.3d 149, 165 (4th Cir. 2000) (en banc). Thus, "the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial *or the government's interest in inhibiting disclosure of sensitive information.*" *Waller*, 467 U.S. at 45, 104 S.Ct. 2210 (emphasis added). "Such circumstances will be rare, however." *Id.* And before a trial court closes the courtroom to the public, it must make findings that "[1] the party seeking to close the hearing [has] advance[d] an overriding interest that is likely to be prejudiced [and] [2] the closure [would] be no broader than necessary to protect that interest," and it must "[3] consider reasonable alternatives to closing the proceeding." *Id.* at 48, 104 S.Ct. 2210; *see also Bell*, 236 F.3d at 166.

In this case, the government contends that the Sixth Amendment right to a public trial was not even implicated by the district court's application of the silent witness rule. Indeed, it argues that the application of the rule actually "preserved, rather than abrogated, [Mallory's] public-trial rights" because it allowed the public to remain present in the courtroom when exhibits revealing — or that in context would reveal — classified information were presented to the jury. It notes that the public was "able to observe the entirety of the proceedings and testimony" and that "[t]he *only* aspect of trial the public was excluded from was the ability to see" and learn details about the limited number of exhibits to which the rule was applied.

Thus, according to the government, the application of the rule was a "trial management decision[ ]" regarding how to handle sensitive national security information and was "not tantamount to [a] courtroom closure[ ]." And it argues further, "Even if the district court's use of the silent witness rule [were] deemed to have caused a partial courtroom closure," the court "appropriately applied *Waller* in balancing the overriding government interest with [Mallory's] trial rights."

In response, Mallory argues that because the admission of evidence via the silent witness rule "prevent[ed] the public from seeing" the same evidence as the jury, the application of the rule constituted "*a total closure* with respect to that evidence." (Emphasis added). Moreover, while the district court made the findings required by *Waller* to justify application of the silent witness rule *to classified documents*, Mallory argues that the court "never made such findings with respect to its wholesale exclusion of the public-source documents at issue."

To begin, we question, as does the government, whether the application of the silent witness rule in this case even implicated the Sixth Amendment right to a public trial. No member of the public was actually excluded from the courtroom at any point during the trial, and thus there was no *literal* closure of the courtroom. This fact sets this case markedly apart from *every decision* finding a violation of the constitutional right to a public trial that Mallory has identified or that we have found. *See, e.g., Weaver*, 137 S. Ct. at 1905 (all members of the public excluded from the courtroom during jury selection); *Presley v. Georgia*, 558 U.S. 209, 210, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (per curiam) (same); *Waller*, 467 U.S. at 42, 104 S.Ct. 2210 (suppression hearing lasting 7 days closed to the public); *cf. Bell*, 236 F.3d at 155–56 (claim that public-trial right was violated by the temporary closure of the courtroom during testimony of sexual assault victim).

But focusing more on Mallory's argument that there was a *total* closure with respect to those documents handled under the silent witness rule — because the public was not able to see those documents — we conclude that any such closure was in fact far from complete. The trial transcript reveals, for example, that when Mallory's counsel used the public-source documents governed by the silent witness rule during the direct examination of his expert witness, members of the public were able to hear, repeatedly, that the exhibits were public government documents that "refer[red] to the method of collection at issue in the White Paper" and that they helped form the basis for the defense expert's opinion that the White Paper did not contain national defense information. Thus, while members of the public, unlike members of the jury, did not learn about the specific contents of these defense exhibits, the ability of interested members of the public to remain in the courtroom during the approximately 30 minutes of trial proceedings at issue still helped to ensure "that the public [could] see" that Mallory was being "fairly dealt with and not unjustly condemned" in a secret proceeding — the core purpose of the Sixth Amendment public-trial right. *Waller*, 467 U.S. at 46, 104 S.Ct. 2210 (citation omitted). Such an arrangement, we conclude, was far from effecting a complete closure of the proceedings to the public. *Cf. United States v. Osborne*, 68 F.3d 94, 98–99 (5th Cir. 1995) (explaining that the partial closure of a trial during minor's testimony, where "all but one of the existing spectators [were allowed] to remain" but new spectators were not allowed to enter, did "not implicate the same fairness and secrecy concerns as total closures" "because an

audience remain[ed] to ensure the fairness of the proceedings").

We do not suggest that the use of the silent witness rule could never implicate a defendant's Sixth Amendment right to a public trial, as reliance on the silent witness rule has the potential to interfere meaningfully with the public's ability to understand what is happening in the proceedings, despite their physical presence in the courtroom. But we doubt that the limited use of the silent witness rule as it was applied in this case amounted to a sanctionable closure of the courtroom.

Moreover, even were we to accept that some degree of closure occurred, it was certainly much more analogous to a partial closure, rather than a full one, suggesting that "a less demanding test" than the one announced in *Waller* for total courtroom closures should apply. *Osborne*, 68 F.3d at 98–99 (noting that it was joining the Second, Eighth, Ninth, Tenth, and Eleventh Circuits in finding "that *Waller*'s stringent standard does not apply to partial closures" and adopting in its place "a less demanding test requiring the party seeking the partial closure to show only a 'substantial reason' for the closure," rather than a compelling reason); *see also United States v. Simmons*, 797 F.3d 409, 413–14 (6th Cir. 2015); *United States v. DeLuca*, 137 F.3d 24, 34 (1st Cir. 1998) (concluding that a "spectator-screening procedure resulted at most in a 'partial' closure" and that therefore "the government was not required to establish that it furthered a 'compelling' interest but simply a 'substantial' one"). But here, the district court *did* apply the more stringent *Waller* test before utilizing the silent witness rule.

[7, 8] Mallory contends, however, that the district court failed to make the requisite findings prior to applying the silent witness rule to his public-source documents and that a closure as to those documents was therefore unjustified. In this regard, Mallory does not challenge the adequacy of the district court's pretrial findings to support its application of the silent witness rule *to the government's classified exhibits*. Instead, he focuses on the court's ruling, made during the course of trial, that expanded the use of the silent witness rule *to include certain public-domain documents* that Mallory was introducing to show that the two allegedly classified documents that he admittedly transmitted to the Chinese agent did not, in fact, contain "information relating to the national defense."

But the district court fully explained the need for this expansion of the rule at trial. It stated that, given the testimony that had already been elicited, publishing Mallory's public-source documents "in open court ... would allow people to connect the dots" and would thus be likely to "disclose [the] classified information" that the court had previously determined had to be protected with use of the silent witness rule. Thus, it recognized a compromising relationship between the public-source documents and the classified documents that would tend to reveal the substance of the classified documents, which were the subject of its previous ruling.

We conclude that in the circumstances of this case, the district court's pretrial findings regarding the need to limit the public's access to the classified exhibits were adequate to support the extension of the silent witness rule to the defense's open-source exhibits and that any limited impingement of Mallory's public-trial right was justified by the government's compelling interest in preventing the disclosure of the classified information at issue. Accordingly, we conclude that Mallory's Sixth Amendment right to a public trial was not violated by the use of the silent witness rule.

[9] In addition to his public-trial argument, Mallory also contends that the application of the silent witness rule deprived him of his constitutional right to "a meaningful opportunity to present a complete defense." (Quoting *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)).

First, he maintains that his effort to show that the documents he transmitted to the Chinese agent did not contain national defense information was impaired by the rule. As he argues more particularly, "the district court's application of the [rule] . . . impeded [his] ability to present his defense through cross-examination of the government's experts and direct examination of [his] expert."

But a review of the record reveals that the silent witness rule denied *the jury* none of the information on which Mallory based his defense. While it is true that the application of the rule limited him from eliciting *verbal testimony* on the contents of the publicly available documents, the *documents themselves* were provided to the jury while the witnesses in question were testifying, enabling jurors to follow along while the witnesses were asked questions to establish, for example, that the government had previously referenced in publicly available documents the same method of intelligence collection that was discussed in the "White Paper."

Mallory argues further that his defense was unconstitutionally impeded because the use of the rule "unmistakably communicated to the jury that the information in the [t]ransmitted documents was so significant that even referring in open court to the same words . . . was forbidden." But this argument is undercut by the fact that the jury was told again and again that the defense exhibits at issue, which contained the terms in question, were indeed *public* documents.

At bottom, our review of the record leaves us firmly convinced that the limited use of the silent witness rule did not meaningfully impair Mallory's ability to present evidence and argue to the jury that the two documents he transmitted to Chinese agents did not actually contain national defense information.

III

Mallory also challenges the district court's instruction of the jury in two respects. First, he contends that with respect to Count One — charging him under § 794(c) with conspiracy to transmit national defense information to a Chinese agent in violation of § 794(a) — the district court "watered down" the mens rea element to allow him to be convicted under a negligence standard. Second, he contends that the district court erred in denying his request to instruct the jury that "[p]roof of a simple buyer-seller relationship is insufficient to prove a conspiracy." We address each argument in order.

A

[10] As to the argument that the district court "watered down" the mens rea requirement for the conspiracy offense, Mallory maintains that under the instructions, the jury "could find [him] guilty based upon an objective, rather than subjective, determination as to whether information would be used to harm the United States or aid another country." He focuses in particular on the sentence in the instructions that informed the jury that "[i]n determining whether a defendant has reason to believe, the question [is] whether *a reasonable person* in defendant's position would have" concluded that the information related to the national defense was to be used to the injury of the United States or to the advantage of a foreign nation.

(Emphasis added). This portion of the instruction, he argues, impermissibly allowed him to be convicted under a negligence standard.

We find Mallory's reasoning unpersuasive, as he focuses too narrowly on one small segment of the instructions without context. The instructions that the court actually gave were more fulsome.

In Count One, Mallory was charged with conspiracy to violate § 794(a), which provides:

> Whoever, *with intent or reason to believe that it is to be used* to the injury of the United States or to the advantage of a foreign nation, ... transmits ... to any foreign government ... or to any representative, officer, [or] agent ... thereof, ... information relating to the national defense, shall be punished ....

18 U.S.C. § 794(a) (emphasis added). In instructing the jury on the § 794(a) offense, the district court told the jury that proof of the crime requires (1) that the defendant have transmitted information to a foreign government or agent thereof; (2) that the information have related to the national defense; (3) that the defendant have had "intent or reason to believe" that the information was to be used to injure the United States or benefit a foreign nation; and (4) that he have transmitted the information "willfully." It also instructed that to establish the conspiracy offense under § 794(c), the government had to prove that Mallory "acted with the same intent." With respect to the "reason to believe" aspect of the third element, the court instructed the jury as follows:

> Now, a defendant has reason to believe, as I've use[d] that phrase, a defendant has reason to believe if the defendant knows facts from which he concluded or reasonably should have concluded that the information related to the national defense was to be used for prohibited purposes. It does not mean that the defendant acted negligently.
>
> In determining whether a defendant has reason to believe, the question [is] whether a reasonable person in defendant's position would have reached the same conclusion.

This instruction on the "reason to believe" aspect accurately parroted the instruction that we approved in *United States v. Truong Dinh Hung*, 629 F.2d 908, 918–19 (4th Cir. 1980), over the defendants' argument that the instructions had "diluted the important scienter requirement." Moreover, the district court here cautioned the jury in its instruction that the standard "does not mean that the defendant acted negligently," just as the court in *Truong Dinh Hung* told the jury. *See id.* at 919.

In addition, the court went further in describing the mens rea for a violation of the substantive crime, instructing the jury that the defendant must also have acted "willfully in communicating, delivering, or transmitting information related to the national defense." And in defining "willfully" for the jury, it stated:

> An act is done willfully if it is done voluntarily and intentionally with the specific intent to do something that the law forbids, that is to say with a bad purpose either to disobey or to disregard the law *with respect to the offenses that are charged in the indictment.*
>
> * * *
>
> To establish specific intent, the government must prove that the defendant knowingly did an act which the law forbids.

(Emphasis added). This addition also echoed the instruction we approved in *Truong Dinh Hung*, 629 F.2d at 919, and finds support from the Supreme Court's statement in *Gorin v. United States*, 312 U.S. 19, 28, 61 S.Ct. 429, 85 L.Ed. 488 (1941),

that the statute "requires those prosecuted to have acted in bad faith." These additional instructions are fatal to Mallory's argument that the court's instructions allowed him to be convicted based on an improperly low scienter requirement.

B

Finally, as to Mallory's contention that the district court erred in declining to give an instruction that a simple buyer-seller relationship cannot amount to a conspiracy, Mallory argues that "[s]ignificant evidence adduced at trial supported [his] theory of defense" "that his contacts with a foreign agent were entirely at arms-length, and merely between a seller (Mr. Mallory) seeking money and counterintelligence, and a wary buyer (a Chinese agent), rather than as partners in a conspiracy." Based on this type of evidence, he maintains, "the court should have instructed the jury that evidence of an agreement to buy or sell contraband, alone, is insufficient to establish the existence of a criminal conspiracy absent a showing that the alleged conspirators share a mutual stake in a common criminal objective apart from the transmission of contraband itself."

[11] Of course, it is well established that a court should instruct the jury on the defendant's theory of the defense when such instructions "have an evidentiary foundation and are accurate statements of the law." *United States v. Dornhofer*, 859 F.2d 1195, 1199 (4th Cir. 1988). But those requirements, we conclude, were not satisfied in this case.

[12, 13] "Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act." *United States v. Shabani*, 513 U.S. 10, 16, 115 S.Ct. 382, 130 L.Ed.2d 225 (1994) (citation omitted). Accordingly, the crime of conspiracy "may exist and be punished whether or not the substantive crime ensues." *United States v. Jimenez Recio*, 537 U.S. 270, 274, 123 S.Ct. 819, 154 L.Ed.2d 744 (2003) (citation omitted). Thus, to ensure that " 'distribution' [of a controlled substance] under [21 U.S.C.] § 841 and 'conspiracy' [to distribute a controlled substance] under § 846 [remain] distinct crimes," we have recognized that "a conspiracy to commit the distribution offense must involve an agreement separate from the immediate distribution conduct that is the object of the conspiracy." *United States v. Edmonds*, 679 F.3d 169, 174 (4th Cir.), *vacated on other grounds*, 568 U.S. 803, 133 S.Ct. 376, 184 L.Ed.2d 4 (2012). But "any agreement made *in addition to or beyond* the bare buy-sell transaction may be taken to infer a joint enterprise between the parties beyond the simple distribution transaction and thereby support a finding of conspiracy." *Id.* "In short, the mere evidence of a simple buy-sell transaction is sufficient to prove a distribution violation under § 841, but not conspiracy under § 846, because the buy-sell agreement, while illegal in itself, is not an agreement to commit an offense; it is the offense of distribution itself." *Id.* Thus, a *conspiracy* to commit a crime is distinct from the *commission* of the crime.

In this case, Mallory was charged with and convicted of conspiracy in violation of § 794(c), which provides that "[i]f two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy." 18 U.S.C. § 794(c). And the charge alleged that the object of the conspiracy was the distinct crime set forth in § 794(a) (prohibiting the actual transmission of national defense information). Thus, to find Mallory guilty, the jury had to find both an agreement satisfying

§ 794(c) and an overt act in furtherance the distinct crime stated in § 794(a).

[14] The overwhelming evidence at trial showed that Mallory was not engaged in a mere buyer-seller relationship with the Chinese agent but instead operated with that agent *in a joint enterprise* to transmit national defense information to the Chinese government or other agents within the Chinese intelligence service. To instruct the jury that a buyer-seller arrangement is not a conspiracy would suggest to the jury — confusingly — that Mallory simply sold classified information to the Chinese agent for that agent's own consumption and pleasure. But that, of course, is far from what the evidence in the case showed. We agree with the district court when it concluded that "even interpreting the evidence . . . in the light most favorable to [Mallory], there was no evidence in this record to support a theory that [Mallory] and Michael Yang's relationship was limited to a buyer-seller transaction." "Rather," as the district court explained, "the evidence showed overwhelmingly that [Mallory] and Michael Yang agreed to work together *to transmit [national defense information] to Chinese nationals, including Michael Yang's boss*, via a covcom device and repeated trips to [China]." (Emphasis added). A reasonable juror was thus precluded from concluding that "Michael Yang's and [Mallory's] relationship was that of a mere buyer and seller."

At bottom, we conclude that the district court properly rejected Mallory's request for a buyer-seller instruction.

* * *

The judgment of the district court is

AFFIRMED.

Teresa LAVIS, on behalf of herself and others similarly situated, Plaintiff-Appellee,

v.

REVERSE MORTGAGE SOLUTIONS, INC., Defendant-Appellant.

No. 18-2180

United States Court of Appeals, Fourth Circuit.

Argued: May 3, 2022

Decided: July 14, 2022

Background: Mortgagor brought action in state court against mortgagee, seeking rescission of reverse mortgage and alleging mortgagee failed to honor mortgagor's rescission rights under Truth in Lending Act (TILA). Action was removed to federal court. After jury returned verdict for mortgagee, the United States District Court for the Southern District of West Virginia, Irene C. Berger, J., 2018 WL 4624811, granted mortgagor's motion for judgment as a matter of law and held that mortgagor was not required to tender loan proceeds to mortgagee. Mortgagee appealed.

Holdings: The Court of Appeals, Quattlebaum, Circuit Judge, held that mortgagee's failure to voluntarily unwind loan or otherwise respond to mortgagor's notice under TILA of her intent to rescind did not allow mortgagor to avoid tendering loan proceeds as part of rescission.

Vacated and remanded.

1. Finance, Banking, and Credit ⚿1322

Congress passed TILA to help consumers avoid the uninformed use of credit and to protect the consumer against inac-

Appendix B

FILED: August 29, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4385
(1:17-cr-00154-TSE-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

KEVIN PATRICK MALLORY

Defendant - Appellant

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk