APPENDIX

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No. 22-1348

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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DEBORAH S. HUNT, Clerk

PHILLIP CHARLES GIBBS,
Petitioner-Appellant,

v.

BECKY CARL, Warden,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

OPINION

Before: BOGGS, CLAY, and WHITE, Circuit Judges.

BOGGS, Circuit Judge. Phillip Charles Gibbs, a Michigan prisoner, appeals the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. We affirm.

I

In October 2010, Tyrell Henderson and Phillip Gibbs robbed Costas and Nancy Anagnostopoulos's pawnshop in Flint, Michigan. Henderson had entered the store to return a video game that he had purchased earlier that day. While Costas was examining the game, Henderson struck him in the head with a gun. Gibbs, who was not armed, approached Nancy and took her jewelry, purse, and identification. He also took an iPod and some laptop computers from the store. A police search of Gibbs's home uncovered items stolen from the store. After his arrest, Gibbs admitted his involvement but claimed that he robbed the store owners out of fear of, and under orders from, Henderson.

Gibbs and Henderson had a joint trial with separate juries. In 2011, just before the start of Gibbs's voir dire proceedings, the state trial judge said that "if any spectators would like to come

in [for jury selection] they're welcome but they do have to sit over here by the law clerk, not in the middle of the pool." The court then proceeded to pick the jury, which ultimately convicted Gibbs of two counts of armed robbery pursuant to Mich. Comp. Laws § 750.529, one count of unarmed robbery pursuant to Mich. Comp. Laws § 750.530, and one count of conspiracy to commit armed robbery pursuant to Mich. Comp. Laws §§ 750.157a and 750.529.

After his sentencing, Gibbs learned that his mother, sister, and brother-in-law had tried to enter the courtroom during jury selection but had been denied entry. These family members supplied sworn affidavits in support of Gibbs's direct appeal to the Michigan appellate court, stating that they were "turned away at the door" and consequently "waited in the hallway." Their affidavits further explained that they eventually left the courthouse "after being told that jury selection would take all day," but were able to enter the courtroom the next day, "after the jury had been picked."

Gibbs appealed his conviction to the Michigan Court of Appeals, arguing that his sentence was incorrectly calculated and that the state trial court violated his Sixth Amendment right to a public trial when it prevented his family members and other members of the public from entering the courtroom during voir dire. The Michigan Court of Appeals remanded the case to the trial court for Gibbs to file a motion for resentencing and a motion for a new trial and ordered the trial court to conduct an evidentiary hearing on the courtroom-closure issue. *People v. Gibbs*, 830 N.W.2d 821, 824 (Mich. Ct. App. 2013) (per curiam).

On remand, the trial judge did not hold an evidentiary hearing but instead explained her practice of closing the courtroom to members of the public that arrive after voir dire has begun:

> [O]nce we start with the [jury] selection in filling the seats, I do not allow anybody to come or go. . . . If they came after we started then they would not have been allowed in. I absolutely agree. . . . So I don't think there's much else I can say of that. I can't troll in the halls for spectators.

> . . .
>
> I'm telling you, after we start, when the panel is in the room, you're absolutely right no one would be coming or going. I agree with that. If that's a violation, then I violated. I don't have them in afterwards of that period nobody comes and goes. And if a juror has to go to the bathroom, the deputy or court clerk has to take them. We can't do that during jury selection. It's much too confusing.

R.8-17, PageID 1218–20. Subsequently, the state trial court denied Gibbs's motion for a new trial and motion for resentencing.

Gibbs appealed again, arguing that he is entitled to an "automatic reversal" based on the court's violation of his right to a public trial. The Michigan Court of Appeals agreed that the trial court had not held an evidentiary hearing as directed, but held that Gibbs was not entitled to a new trial or an evidentiary hearing. *Gibbs*, 830 N.W.2d at 824–25. Because Gibbs did not object to the closure at trial, the court applied plain-error review to his constitutional claim and concluded that Gibbs had not established any error from the trial court's closure of the courtroom once jury selection began, let alone an error that entitled Gibbs to a new trial. *Id.* at 824–25. The Michigan court reasoned that there was no error because "venire itself was present" and "both parties engaged in vigorous voir dire, there were no objections to either party's peremptory challenges, and each side expressed satisfaction with the jury." *Id.* at 825. The Michigan Supreme Court denied leave to appeal. *People v. Gibbs*, 838 N.W.2d 875 (mem.) (Mich. 2013).

Following his state-court proceedings, Gibbs petitioned for habeas relief, claiming that the courtroom closure denied him the right to a public trial. The district court denied relief, holding that, under *Bickham v. Winn*, 888 F.3d 248 (6th Cir. 2018), Gibbs had procedurally defaulted his claim by failing to object during voir dire to the state trial court's courtroom closure. The district court granted a certificate of appealability.

On appeal, we held that Gibbs's failure to object did not constitute procedural default if he was not and could not reasonably have been aware of the courtroom closure. *Gibbs v. Huss*, 12 F.4th 544, 554–55 (6th Cir. 2021). We remanded for the district court to determine: (1) whether Gibbs knew or should have known of the courtroom closure, and (2) whether, if Gibbs procedurally defaulted his claim, he had cause and prejudice to excuse the default. *Id.* at 555.

On remand, the district court held an evidentiary hearing and concluded that Gibbs had procedurally defaulted his claim because his trial attorney, Jeffrey Skinner, had been aware of the courtroom closure. Skinner testified that he had appeared before Gibbs's trial judge "[m]any times" and was aware of her voir dire policy. Skinner also stated that he did not think that the policy was objectionable because he did not "want any distractions" during voir dire, when "a hundred percent of [his] attention is directed at" the proceedings.

The district court also held that ineffective assistance of counsel did not exist to excuse Gibbs's procedural default. According to the court, Skinner's failure to object to the courtroom closure was not deficient performance for two reasons. First, the court did not think it "obvious" that "any reasonable attorney in Skinner's position would have spotted" the state trial court's alleged violation of Supreme Court courtroom-closure precedent and "would have immediately objected" to the closure. Second, the court noted that even if the courtroom closure was an obvious constitutional violation, Skinner's failure to object did not amount to deficient performance because Skinner had a "reasonable strategic reason" for withholding his objection. The court also held that Gibbs had not shown prejudice from Skinner's failure to object. Gibbs had not shown actual prejudice—that is, a reasonable probability that the outcome on direct appeal would have been different if Skinner had objected during voir dire—because the Michigan appellate court had found no error at all with the trial court's closure. Nor had Gibbs distinguished his case from

Weaver v. Massachusetts, 137 S. Ct. 1899 (2017), to show that the courtroom closure rendered his trial fundamentally unfair.

The district court granted Gibbs a certificate of appealability, and Gibbs timely appealed.

II

Gibbs claims in his § 2254 petition that the state trial court violated his Sixth Amendment right to a public trial by closing the courtroom during voir dire to members of the public who arrived after proceedings had begun. The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. However, "the right to an open trial may give way in certain cases to other rights or interests." *Waller v. Georgia*, 467 U.S. 39, 45 (1984). To justify the partial closure of a courtroom, "the trial court must balance the interests favoring closure against those opposing it." *Drummond v. Houk*, 797 F.3d 400, 404 (6th Cir. 2015).

We review de novo a district court's denial of habeas relief. *Chase v. MaCauley*, 971 F.3d 582, 591 (6th Cir. 2020). However, we "will not entertain a procedurally defaulted constitutional claim . . . absent a showing of cause and prejudice to excuse the default." *Dretke v. Haley*, 541 U.S. 386, 388 (2004). On appeal, Gibbs concedes procedural default but argues that the ineffective assistance of his trial counsel provides sufficient cause and prejudice to excuse the default.

Ineffective assistance of counsel in state court can excuse procedural default. *See Williams v. Burt*, 949 F.3d 966, 973 (6th Cir. 2020). Whether Skinner was ineffective is a question that we review de novo. *Hall v. Vasbinder*, 563 F.3d 222, 236 (6th Cir. 2009).

To establish ineffective assistance, Gibbs must show both that his trial counsel's performance was so deficient that it "fell below an objective standard of reasonableness" and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 688

(1984). In this context, where Gibbs "raises a public-trial violation via an ineffective-assistance-of-counsel claim, *Strickland* prejudice is not shown automatically." *Weaver*, 137 S. Ct. at 1911. Rather, he must show either "a reasonable probability of a different outcome" in his case or show that the public-trial "violation was so serious as to render the trial fundamentally unfair." *Williams*, 949 F.3d at 978 (quoting *Weaver*, 137 S. Ct. at 1911). We "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697.

Gibbs fails to establish *Strickland* prejudice. Gibbs does not argue a reasonable probability that the outcome of his trial would have been different had his trial counsel objected to the closure order. And, as the district court noted, the courtroom was open during most of Gibbs's trial. Members of the public present at the start of voir dire proceedings were permitted to stay, and Gibbs's trial was otherwise open to the public. The partial pre-trial courtroom closure did not render the trial unfair.

Gibbs claims prejudice from Skinner's failure to object to the courtroom closure, arguing that he would have otherwise prevailed on appeal. Had Skinner objected, Gibbs argues, the Michigan appellate court would have reviewed Gibbs's public-trial claim de novo, not for plain error, which "made a critical difference" in the outcome of Gibbs's appeal. When a petitioner asserts ineffective assistance of appellate counsel, we ask whether, but for that counsel's errors, the petitioner might have prevailed on appeal. *See Chase*, 971 F.3d at 595. However, since Gibbs claims ineffective assistance of trial counsel, he must show a reasonable probability that the outcome of his *trial* would have been different. *See Weaver*, 137 S. Ct. at 1912 (describing "prejudice in the ordinary sense" as "a reasonable probability that the jury would not have convicted him if his attorney had objected to the closure"); *Jones v. Bell*, 801 F.3d 556, 563 (6th

Cir. 2015) ("We rather look to the record to determine if the outcome *of the trial* would have been different."). Even if we agreed with Gibbs that the reasonable probability of a different outcome on appeal suffices, Gibbs has not met that burden. The Michigan appellate court held that the partial courtroom closure did not deny Gibbs his right to a public trial. *Gibbs*, 830 N.W.2d at 825. That the appellate court found no error at all suggests that it would have also rejected Gibbs's public-trial claim de novo.

Gibbs also suggests that we can presume prejudice in his case because a courtroom closure is a "structural error," one "so serious as to render his . . . trial fundamentally unfair." We find unconvincing Gibbs's efforts to distinguish his case from binding precedent that prevents us from presuming prejudice.

In *Weaver*, the Supreme Court refused to presume prejudice for a defaulted public-trial claim. 137 S. Ct. at 1911 ("[N]ot every public-trial violation will in fact lead to a fundamentally unfair trial . . . . [W]hen a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, *Strickland* prejudice is not shown automatically."). Gibbs offers three reasons to distinguish his case from *Weaver*: (1) the closure in Gibbs's case was a "routine, unconstitutional practice," unlike the "simple one-time error" in *Weaver*; (2) court officers, not the judge, decided to close the courtroom in *Weaver*; and (3) Gibbs raised his public-trial claim on direct appeal. The district court rejected these reasons, and we reject them too. We agree with the district court that Gibbs's first two reasons "merely restate what the alleged violation in this case was" and do not explain why they made Gibbs's trial fundamentally unfair. As to his third point, Gibbs glosses over the fact that he failed to preserve his public-trial claim at trial, just as Weaver did. *Weaver*, 137 S. Ct. at 1913. Gibbs also raises his ineffective-assistance claim on habeas, placing him on equal—if

not weaker—procedural footing with the unsuccessful petitioner in *Weaver* who claimed ineffective assistance on direct review. *Id.* at 1913–14.

Because Gibbs has not established prejudice from his trial counsel's failure to object to the courtroom closure, he cannot excuse his procedural default and we may not review his habeas claim on the merits.

III

For the reasons above, the judgment of the district court is **AFFIRMED**.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PHILLIP CHARLES GIBBS,

Petitioner,

Case No. 14-cv-14028
Hon. Matthew F. Leitman

v.

JEFFREY WOODS,

Respondent.
_____/

OPINION AND ORDER (1) DETERMINING THAT PETITIONER PHILLIP GIBBS' PUBLIC TRIAL CLAIM IS PROCEDURALLY DEFAULTED; (2) DETERMINING THAT THE PROCEDURAL DEFAULT IS NOT EXCUSED; (3) DENYING HABEAS RELIEF ON GIBBS' PUBLIC TRIAL CLAIM; AND (4) GRANTING A CERTIFICATE OF APPEALABILITY

In 2014, Petitioner Phillip Gibbs filed a Petition for a Writ of Habeas Corpus in this Court. He later amended the Petition. In the Amended Petition, Gibbs claimed, among other things, that the state trial court violated his right to a public trial when it prevented members of the public from entering the courtroom during *voir dire*. Respondent countered that this claim was procedurally defaulted because Gibbs had not objected to the state trial court's closure of the courtroom.

The Court had serious questions about whether Gibbs' failure to object could be considered a procedural default because there was no indication in the record that Gibbs was (or reasonably could have been) aware of the state trial court's closure of

the courtroom. The Court did not believe that a party's failure to object to an unknown act by a state trial court could amount to a procedural default. Nonetheless, the Court reluctantly concluded that the Sixth Circuit's decision in *Bickham v. Wynn*, 888 F.3d 248 (6th Cir. 2018), compelled the conclusion that even if Gibbs was not aware that the state trial court closed the courtroom, Gibbs' failure to object constituted a procedural default of his public trial claim. The Court granted Gibbs a certificate of appealability on this claim.

On appeal, the Sixth Circuit vacated this Court's judgment. *Gibbs v. Huss*, 12 F.4th 544 (6th Cir. 2021). The Sixth Circuit held that Gibbs' failure to object would not constitute a procedural default of his public trial claim if he was not (and could not reasonably have been) aware of the courtroom closure. The Sixth Circuit then remanded the case with instructions that this Court should determine "whether Mr. Gibbs was aware of the courtroom closure or whether there were other circumstances that should have put him on notice of the closure." *Id.* at 554. The Sixth Circuit further directed that "if [this Court] finds that Mr. Gibbs' claim is procedurally defaulted [because Gibbs was or should have been aware of the courtroom closure and did not object], then it will need to address" whether Gibbs can show cause and prejudice to excuse the default. *Id.*

The Court has now completed the tasks ordered by the Sixth Circuit. The Court held an evidentiary hearing to determine whether Gibbs was or should have

been aware of the courtroom closure. For the reasons explained below (and as Gibbs now concedes), his attorney was aware of the closure, and thus his public trial claim is procedurally defaulted. As further explained below, the Court concludes that Gibbs has not shown cause and prejudice sufficient to excuse the default. Accordingly, the Court **DENIES** relief on Gibbs' public trial claim – the sole remaining claim in the Amended Petition. However, the Court will **GRANT** Gibbs a certificate of appealability so that he may obtain review of the Court's ruling.

I

The Court reviewed the factual and procedural background of Gibbs' case in detail in its prior Opinion and Order denying relief on Gibbs' Amended Petition. (*See* Op. & Order, ECF No. 40, PageID.1745–1754.) The Court will not repeat this background in detail here and, instead, sets forth only what is essential to the present motion.

A

The charges against Gibbs arose from an armed robbery of a store in Flint, Michigan on October 26, 2010. Gibbs' trial began in the Genesee County Circuit Court on June 28, 2011. Just prior to the start of *voir dire*, the state trial court said that "if any spectators would like to come in [for jury selection] they're welcome." (6/28/2011 Trial Tr., ECF No. 8-11, PageID.250.) The court then proceeded to pick the jury.

After trial, Gibbs learned that his mother, sister, and brother-in-law were not allowed to enter the courtroom during *voir dire*. Those family members said in sworn affidavits that they were told by a "male official in [the state trial judge's] courtroom that since a jury was being picked, [they] could not enter and watch the proceedings." (Courtney Jones Aff. at ¶ 3, ECF No. 8-18, PageID.1289; Elverta Theresa Gibbs Aff. at ¶¶ 3–4, ECF No. 8-18, PageID.1288; Seandra Davidson-Coleman Aff. at ¶ 3, ECF No. 8-18, PageID.1290.) Gibbs did not object to their exclusion during *voir dire*.

At the conclusion of the trial, the jury convicted Gibbs of "two counts of armed robbery and one count of unarmed robbery." *People v. Gibbs*, 830 N.W.2d 821, 828 (Mich. Ct. App. 2013)

B

Gibbs then filed an appeal of right in the Michigan Court of Appeals. Gibbs argued, among other things, that the state trial court violated his Sixth Amendment right to a public trial when it prevented his family members and other members of the public from entering the courtroom during *voir dire*.

Gibbs' appointed appellate counsel filed a motion to remand to the state trial court so that that court could create a full record related to the closure of the courtroom. (*See* Mot. to Remand, ECF No. 8-18, PageID.1317–1347.) The Michigan Court of Appeals granted the motion to remand on June 20, 2012. (*See*

Order, ECF No. 8-18, PageID.1376.) In the order granting the motion, the Michigan Court of Appeals specifically instructed the state trial court that it "*shall* conduct an evidentiary hearing based on the closure of the courtroom during *voir dire*." (*Id.* (emphasis added).)

C

On remand, however, the state trial court did not hold an evidentiary hearing. Instead, the trial judge said to the lawyers who appeared for the hearing that it was her policy (1) to admit members of the public to observe *voir dire* if they enter the courtroom before *voir dire* begins and (2) to preclude members of the public from entering the courtroom if they arrive after *voir dire* has begun. The judge explained her policy (the "*Voir Dire* Policy") as follows:

> *[O]nce we start with the selection in filling the seats, I do not allow anybody to come or go.* So if that clarifies it and I'm suppose to stop and let people come and go. If they came after we started, then they would not have been allowed in. I absolutely agree. […] So I don't think there's much else I can say of that. I can't troll in the halls for spectators. And if someone wants in, we have special arrangements for them to sit at the side out of the jury pull. And if someone comes after we've started selecting the jury, they will not be allowed in, that's absolutely right.
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> *I'm telling you, after we start, when the panel is in the room, you're absolutely right no one would be coming or going.* I agree with that. If that's a violation, then I violated. I don't have them in afterwards of that period nobody comes and goes. And if a juror has to go to the bathroom,

> the deputy or court clerk has to take them. We can't do that during jury selection. It's much too confusing.

(*See* 7/16/2012 Hr'g Tr., ECF No. 8-17, PageID.1218–1219, 1220 (emphases added).) The state trial court thereafter denied Gibbs' motion for a new trial.

D

Gibbs then returned to the Michigan Court of Appeals. That court acknowledged that the state trial court did not hold an evidentiary hearing as it had been ordered to do. But the court nonetheless denied relief on Gibbs' public trial claim.

The court first held that plain-error review applied to Gibbs' public trial claim because Gibbs did not object to the state trial court's closure of the courtroom pursuant to *Voir Dire* Policy. *Gibbs*, 830 N.W.2d at 824. The court then explained that Gibbs could obtain relief on his public trial claim under plain-error review only if he showed: "(1) that the error occurred, (2) that the error was 'plain,' (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quoting *People v. Vaughn*, 821 N.W.2d 288, 297 (Mich. 2012)). Finally, the court held that Gibbs was not entitled to relief because he had not established the first or fourth prongs of the plain error test. The court reasoned as follows:

> Gibbs contends that his family and members of the public were prevented from entering the courtroom during jury selection. The record reveals that before jury selection began, the trial court stated, "And if any spectators would like to come in they're welcome but they do have to sit over here by the law clerk, not in the middle of the pool." Gibbs submitted affidavits indicating that individuals were not allowed to enter the courtroom during jury selection. *Even accepting Gibbs's contention as true, we find no error given the trial court's statement.* It appears that the courtroom was opened to the public initially, but then closed once jury selection began. On remand, the trial court did not conduct a full hearing and acknowledged that once jury selection had begun, the courtroom was closed and suggested that it was "too confusing" to allow individuals to come and go during jury selection. *Even if we were to find error on the basis of the trial court's admitted refusal to allow individuals to enter once jury selection began, Gibbs is not entitled to a new trial or evidentiary hearing.* As in *Vaughn*, both parties engaged in vigorous *voir dire*, there were no objections to either party's peremptory challenges, and each side expressed satisfaction with the jury. Further, the venire itself was present. *Accordingly, Gibbs fails to satisfy the fourth prong as set forth in Vaughn and is not entitled to a new trial.*

Gibbs, 830 N.W.2d at 825 (emphases added). Gibbs then filed an Application for Leave to Appeal with the Michigan Supreme Court. That court denied the Application. *See People v. Gibbs*, 838 N.W.2d 875 (Mich. 2013).

E

In 2014, Gibbs filed his Petition for a Writ of Habeas Corpus in this Court. (*See* Pet., ECF No. 1.) After the Court temporarily stayed the case to permit Gibbs to attempt to exhaust one of his claims, Gibbs filed his Amended Petition. (*See*

Order, ECF No. 14.) In his Amended Petition, Gibbs claimed, among other things, that the courtroom closure during *voir dire* "denied [him] a Public Trial[.]" (Amended Petition, ECF No. 13, PageID.1562.) In his Answer, Respondent countered that Gibbs' public trial claim was procedurally defaulted. (*See* Ans., ECF No. 15.) The Court thereafter appointed counsel for Gibbs and directed the parties to file supplemental pleadings on the public trial claim. Both parties did so. (*See* Supp'l Brs., ECF No. 25, 26.)

On June 9, 2020, the Court issued an Opinion and Order denying relief on all of Gibbs' claims. (*See* Op. & Order, ECF No. 40.) As noted above, the Court reluctantly determined that the Sixth Circuit's decision in *Bickham* compelled the conclusion that Gibbs procedurally defaulted his public trial claim because he did not object to the courtroom closure during his trial. (*Id.*, PageID.1759.) The Court granted Gibbs a certificate of appealability on his public trial claim. (*Id.*, PageID.1772–1774.) Gibbs filed a Notice of Appeal on September 30, 2020. (*See* Notice of Appeal, ECF No. 43.)

F

On appeal, the Sixth Circuit vacated this Court's ruling that Gibbs had procedurally defaulted his public trial claim. *Gibbs*, 12 F.4th 544. The Sixth Circuit explained that Gibbs' failure to object to the courtroom closure did not necessarily render his public trial claim procedurally defaulted under *Bickham*. Instead, the key

issue under *Bickham* was whether Gibbs "knew" or "reasonably should have known" of the closure. *Id.* at 554. If he knew or reasonably should have known of that closure, then, under *Bickham*, his failure to object would amount to a procedural default. *See id.* If he was not (or should not reasonably have been) aware of the closure, then his failure to object "would be an inadequate state procedural ground for a default," and his public trial claim would not be defaulted. *Id.*

The Sixth Circuit noted that it was "unclear from the record whether Mr. Gibbs was aware of or reasonably should have been aware of" the courtroom closure. *Id.* at 546. Accordingly, the Sixth Circuit remanded the case back to this Court for further proceedings. *Id.* The Sixth Circuit explained this Court's inquiry on remand as follows:

> The district court shall determine in the first instance whether Mr. Gibbs was aware of the courtroom closure or whether there were other circumstances that should have reasonably put him on notice of the closure. If he was not—and could not reasonably have been—aware of the closure, then *Bickham* does not control his case. Rather, the contemporaneous-objection rule would not have been an adequate state procedural ground to default Mr. Gibbs's claim, and there would be no procedural default.

Id. at 554. The Sixth Circuit further instructed that if this Court determined Gibbs' claim was defaulted, then this Court to address whether that default was excused. *Id.*

G

Following remand from the Sixth Circuit, this Court held an evidentiary hearing on November 9, 2021. The purpose of the evidentiary hearing was to determine if Gibbs was "aware" or "should he reasonably have been aware" of the courtroom closure. (11/9/21 Hr'g Tr., ECF No. 54, PageID.1831.) The Court heard testimony from two witnesses: (1) Gibbs' trial counsel, Jeffrey Skinner; and (2) Gibbs.

Skinner testified first. Skinner said that he had been trying criminal cases, largely in Genesee County, for approximately thirty years. (*See id.*, PageID.1837–1838.) He noted that he had appeared before Gibbs' trial judge "[m]any times." (*Id.*, PageID.1838.) He testified that he was aware of the *Voir Dire* Policy and understood that it would be enforced in connection with Gibbs' trial. He understood that under that Policy, "if you're in, you can stay in," but that "[o]nce [*voir dire*] start[s], people aren't going to be coming in and out." (*Id.*, PageID.1851.) He explained that his experience in the trial judge's courtroom, and in Genesee County Circuit Court generally, was that, once *voir dire* began, "there would be a deputy, one or more deputies, at th[e] door into the courtroom and if someone attempted to enter," that they would not be permitted "to enter during jury selection." (*Id.*, PageID.1835–1836.)

Skinner also testified that he did not find the *Voir Dire* Policy to be objectionable. (*See id.*, PageID.1846–1847.) He explained that during *voir dire*, "a hundred percent of my attention is directed at what's going on in that courtroom." (*Id.*, PageID.1851–1852.) Thus, he doesn't "want any distractions" during *voir dire*. (*Id.*, PageID.1851.) He said that it was "very much" distracting to have people entering and exiting the courtroom "especially during *voir dire*." (*Id.*)

Finally, Skinner testified that he did not recall whether Gibbs' family members told him that they intended to be in courtroom during *voir dire*. (*See id.*, PageID.1836.)

Gibbs testified next. Gibbs said that he was not aware that the state trial closed the courtroom during *voir dire*. (*See id.*, PageID.1856.) He also testified that he did not talk to his family about whether they planned to attend his trial. (*See id.*, PageID.1859–1860.) He added that he first learned that his family members were prevented from entering the courtroom during *voir dire* only after he was sentenced. (*See id.*, PageID.1861.)

At the end of the hearing, the Court requested post-hearing briefing from both parties. Gibbs filed his brief on December 6, 2021. (*See* Post-Hr'g Br., ECF No. 55.) Responded filed a response on January 10, 2022 (*see* Post-Hr'g Resp., ECF No. 57), and Gibbs replied on January 27, 2022. (*See* Post-Hr'g Reply, ECF No. 58.) The Court heard oral argument on February 25, 2022.

II

The first question before the Court is whether Gibbs procedurally defaulted his public trial claim. To answer that question, the Court must determine whether Gibbs "was aware of the courtroom closure or whether there were other circumstances that should have reasonably put him on notice of the closure." *Gibbs*, 12 F. 4th at 554. In his post-hearing brief, Gibbs concedes that Skinner's testimony at the evidentiary hearing "supports the finding that the defense was aware or reasonably could have been aware of the courtroom closure in this case during trial." (Post-Hr'g Br., ECF No. 55, PageID.1874.) Indeed, Skinner testified that the *Voir Dire* Policy was well-known to him. Accordingly, the Court concludes that Gibbs knew or reasonably should have known about the courtroom closure under the *Voir Dire* Policy at his trial. Under these circumstances, Gibbs' failure to object to the closure of the courtroom pursuant to that policy amounts to a procedural default of his public trial claim.

III

The Court's inquiry does not end there, however. As the Sixth Circuit noted, even if Gibbs' public trial claim is defaulted, this Court must still address whether Gibbs can show sufficient cause and prejudice to excuse the default. The Court turns to that issue below.

A

Gibbs argues that his attorney's failure to object to the state trial court's enforcement of the *Voir Dire* Policy constituted ineffective assistance of counsel and that counsel's ineffectiveness constitutes sufficient cause and prejudice to excuse the procedural default. "Generally speaking, counsel's deficient performance in state court can serve as grounds for excusing a petitioner's procedural default." *Williams v. Burt*, 949 F.3d 966, 973 (6th Cir. 2020). "[T]o show ineffective assistance of counsel excusing a procedural default," Gibbs must "show that his [ ] counsel's failure to raise the claim rose to the level of a constitutional violation under *Strickland v. Washington*, 466 U.S. 668 (1984)." *Chase v. MaCauley*, 971 F.3d 582, 592 (6th Cir. 2020) (internal quotation marks omitted). "Satisfying the *Strickland* standard, however, is difficult." *Williams*, 949 F.3d at 974. "*Strickland* sets forth a two-prong analysis for assessing ineffective-assistance-of-counsel claims: 1) 'the defendant must show that counsel's performance was deficient[,]' and 2) 'the defendant must show that the deficient performance prejudiced the defense.'" *Chase*, 971 F.3d at 592 (citing *Strickland*, 466 U.S. at 687).

This Court reviews *de novo* whether ineffective assistance of counsel exists to excuse Gibbs' procedural default. As the Sixth Circuit explained recently:

> "An argument that ineffective assistance of counsel should excuse a procedural default is treated differently than a free-standing [habeas] claim of ineffective assistance of counsel." *Hall v. Vasbinder*, 563 F.3d 222, 236 (6th Cir.

> 2009). In particular, "[t]he latter must meet the higher AEDPA standard of review, while the former need not." *Id.* at 237; *see also, e.g., Smith v. Warden, Toledo Corr. Inst.*, 780 F. App'x 208, 225 (6th Cir. 2019); *Joseph v. Coyle*, 469 F.3d 441, 459 (6th Cir. 2006). Thus, we review *de novo* the question of whether ineffective assistance of appellate counsel excuses [the petitioner's] procedural default.

Chase, 971 F.3d at 592.

B

The Court first addresses whether Gibbs has demonstrated that Skinner's failure to object to the courtroom closure under the *Voir Dire* Policy constituted deficient performance. To meet this prong, Gibbs must establish that Skinner's performance "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. And he must overcome the "strong presumption that counsel's conduct f[ell] within the wide range of reasonable professional assistance; that is, [Gibbs] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689.

Gibbs argues that Skinner's failure to object to the courtroom closure under the *Voir Dire* Policy was deficient because "[t]he constitutional violation here should have been obvious to Skinner," based on the leading court closure cases, *Waller v. Georgia*, 467 U.S. 39 (1984) and *Presley v. Georgia*, 558 U.S. 209 (2010). (Post Hr'g Br., ECF No. 55, PageID.1876.) In those cases, the Supreme Court held that a trial court may not exclude the public from the courtroom during trial or voir dire

unless and until the court makes a series of findings as to why the closure is required. *Waller*, 467 U.S. at 48; *Presley*, 558 U.S. at 213. Gibbs says that the state trial court plainly violated *Waller* and *Presley* by closing the courtroom pursuant to the *Voir Dire* Policy without making any of the findings required to support a closure. Gibbs contends that any reasonable attorney in Skinner's position would have spotted the state trial court's patent violation of *Waller* and *Presley* and would have immediately objected to the closure. The Court disagrees.

First, the Court is not convinced that it would have been "obvious" to any reasonable attorney that *Waller* and *Presley* required the state trial court to make findings before enforcing the *Voir Dire* Policy. *Waller* and *Presley* both dealt with situations where the public was excluded *entirely* from certain courtroom proceedings. *Waller*, 467 U.S. at 42 (concerning seven-day suppression hearing "closed to all persons other than witnesses, court personnel, the parties, and the lawyers."); *Presley*, 588 U.S. at 210 (concerning *voir dire* proceedings where trial court removed defendant's uncle, the lone member of the public present, from the courtroom). In contrast, the *Voir Dire* Policy did not result in the exclusion of all members of the public from the courtroom. Under that policy: (1) members of the public could observe *voir dire* proceedings if they arrived in the courtroom prior to the beginning of said proceedings; but (2) once those proceedings began, members of the public not already in the courtroom would not be allowed in (and those already

in the courtroom would not be allowed out). Thus, only late-arriving members of the public were prevented from entering the courtroom. At oral argument, the Court asked Gibbs' counsel whether he could identify a case holding that a trial court is obligated to make the findings required under *Waller* and *Presley* when, as under the *Voir Dire* Policy, it (1) allows members of the public to enter the courtroom (and to remain in the courtroom) if they arrive before proceedings begin and then (2) excludes members of the public who attempt to enter the courtroom after the commencement of proceedings. Gibbs' counsel could not do so. In the absence of such authority, the Court is not persuaded that it would have been *obvious* to every attorney that the state trial court was required to make findings under *Waller* and *Presley* before closing the courtroom under the *Voir Dire* Policy.[1]

Second, even if the state trial court's closure of the courtroom under the *Voir Dire* Policy was an obvious constitutional violation, it does not follow that Skinner's failure to object to the closure necessarily amounted to deficient performance. Indeed, a defense attorney may reasonably decide that there is a strategic reason to withhold an objection to a patent constitutional violation. For instance, it could be a reasonable strategy for a defense attorney to withhold an objection (under the

[1] To be clear, the Court is not concluding that the state court was free to close the courtroom pursuant to the *Voir Dire* Policy without making the findings required by *Waller* and *Presley*. The Court concludes only that it would not have been obvious to every reasonable attorney that the state trial court was required to make those findings before implementing the *Voir Dire* Policy.

Confrontation Clause) to the admission of a confession by a non-testifying co-defendant if aspects of the co-defendant's confession supported a defense that counsel was attempting to pursue. Likewise, in this case, Skinner had a reasonable strategic reason for withholding an objection to the closure of the courtroom under the *Voir Dire* Policy. As he testified before the Court, he found it distracting when members of the public entered and exited the courtroom during *voir dire*. Thus, the exclusion of late-arriving members of the public pursuant to the *Voir Dire* Policy helped him to focus on the all-important selection of the jury. Under these circumstances, Gibbs has not shown that Skinner's failure to object to the courtroom closure under the *Voir Dire* Policy was not a permissible judgment call. *See Williams*, 949 F. 3d at 975 ("Absent other indicators, counsel's failure to object [to a public trial right violation] could fairly be described as a judgment call by counsel, something that rarely amounts to constitutionally ineffective assistance."). Simply put, Gibbs has not overcome the *Strickland* presumption that Skinner's decision to withhold an objection to the implementation of the *Voir Dire* Policy was within the boundaries of what "might be considered sound trial strategy." *Strickland*, 466 U.S. at 689.

Gibbs counters that even if Skinner's goal of limiting distractions during *voir dire* was reasonable, Skinner's decision to withhold an objection to the closure of the courtroom under the *Voir Dire* Policy was not reasonable. Gibbs says that

Skinner should have asked the state trial court to explore options that would have simultaneously (1) avoided distractions during *voir dire* and (2) allowed late-arriving members of the public to observe *voir dire*. He contends, for example, that Skinner could have asked the state trial court to periodically pause *voir dire* to allow members of the public to enter and exit the courtroom in a manner that would not have interrupted in-progress jury selection. This is a reasonable suggestion, and it may have been preferable for Skinner to have proceeded in this manner. However, the Court cannot conclude that Skinner's withholding of an objection altogether was so unreasonable as to constitute deficient performance.

For all of the foregoing reasons, the Court concludes that Gibbs has not established that Skinner's failure to object to closure of the courtroom under the *Voir Dire* Policy constituted deficient performance.

C

The Court next turns to whether Gibbs has demonstrated prejudice from Skinner's failure to object to the courtroom closure under the *Voir Dire* Policy. He has not.

1

The Sixth Circuit recently explained that a habeas petitioner who invokes ineffective assistance of counsel to excuse a procedural default for "failure to object to a potential public trial violation" bears the "heavy" burden of demonstrating

Strickland prejudice. *Williams*, 949 F.3d at 978. In *Williams*, the court explained that a petitioner seeking to demonstrates prejudice in this context bears the burden of showing either (1) "a reasonable probability of a different outcome in [his] case" (*i.e.*, "Actual Prejudice"); or (2) that the "violation was so serious as to render the trial fundamentally unfair," (*i.e.*, "Presumed Prejudice"). *Id.* (quoting *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017)). Gibbs contends that he has demonstrated both types of prejudice here. The Court disagrees.

2

a

The Court begins with Gibbs' theory of Actual Prejudice. That theory proceeds as follows:

> 1. Skinner's failure to object to the state trial court's enforcement of the *Voir Dire* Policy "led directly to the Michigan Court of Appeals applying plain-error review to Gibbs' public- trial claim;"
>
> 2. Plain error review is much more demanding than *de novo* review because, unlike *de novo* review, plain error review requires an appellant to demonstrate that he is actually innocent or that the claimed error seriously affected the fairness, integrity, or public reputation of judicial proceedings;

> 3. The Court of Appeals denied relief on the basis that Gibbs failed to show that he was actually innocent or that the claimed error seriously affected the fairness, integrity, or public reputation of judicial proceedings against him. This demonstrates that the application of plain error review was fatal to Gibbs' public trial claim;
>
> 4. On *de novo* review, the Court of Appeals would have held that the state trial court violated Gibbs' Sixth Amendment right to a public trial when it enforced the *Voir Dire* Policy; and
>
> 5. Therefore, but for Skinner's failure to object to the enforcement of the *Voir Dire* Policy at Gibbs' trial, the Court of Appeals "would have reversed [Gibbs'] conviction."

(Post-Hr'g Br., ECF No. 55, PageID.1879–1880.)

The problem with this theory of prejudice is that it ignores a key independent basis on which the Court of Appeals rejected Gibbs' public trial claim. In addition to holding that the claim failed because Gibbs did not show that he was innocent and/or that the proceedings were fundamentally unfair, the Court of Appeals held that Gibbs was not entitled to relief because the state trial court committed "no error" when it closed the courtroom pursuant to the *Voir Dire* Policy. *Gibbs*, 830 N.W.2d at 825. This no-error finding demonstrates that the Court of Appeals would have rejected Gibbs' public trial claim even if the court had reviewed the claim *de novo*. Accordingly, the Court cannot conclude that there is a reasonable probability that the outcome on direct appeal would have been different if Skinner had secured *de novo* review of Gibbs' public trial claim by objecting to the courtroom closure.

At oral argument, Gibbs countered that the Court of Appeals' no-error finding was, itself, erroneous and would have been reversed, at the very least, on habeas review. Thus, Gibbs argued, he showed prejudice by demonstrating that if Skinner had objected to the courtroom closure and thereby preserved his public trial claim for federal habeas review, he would have obtained federal habeas relief on the claim. However, Gibbs has not cited any case in which any court has recognized such a relief-on-later-federal-habeas-review theory of Actual Prejudice. Moreover, Gibbs has not persuaded the Court that – given the deferential standard of review under AEDPA – there is a "reasonable probability" that he would have obtained federal habeas relief on his public trial claim if the claim had not been procedurally-defaulted by Skinner's failure to object. *See Williams*, 949 F.3d at 978.

For all the foregoing reasons, the Court concludes that Gibbs has not established Actual Prejudice resulting from Skinner's failure to object to the courtroom closure under the *Voir Dire* Policy.

b

The Court turns now to Gibbs' Presumed Prejudice argument. Gibbs contends that Presumed Prejudice exists in this case because the state trial court's enforcement of the *Voir Dire* Policy was a "structural error" that rendered his trial "fundamentally unfair." (Post-Hr'g Br., ECF No. 55, PageID.1880 (quoting *Weaver*, 137 S. Ct. at 1908).) Once again, the Court is not persuaded.

As Gibbs acknowledges, "not every public-trial violation will in fact lead to a fundamentally unfair trial." (*Id.* (quoting *Weaver*, 137 S. Ct. at 1911).) Indeed, in *Weaver*, the Supreme Court held that a complete closure of the courtroom during *voir dire* did not render petitioner's trial fundamentally unfair. It reasoned as follows:

> Although petitioner's mother and her minister were indeed excluded from the courtroom for two days during jury selection, petitioner's trial was not conducted in secret or in a remote place. The closure was limited to the jury *voir dire*; the courtroom remained open during the evidentiary phase of the trial; the closure decision apparently was made by court officers rather than the judge; there were many members of the venire who did not become jurors but who did observe the proceedings; and there was a record made of the proceedings that does not indicate any basis for concern, other than the closure itself.
>
> There has been no showing, furthermore, that the potential harms flowing from a courtroom closure came to pass in this case. For example, there is no suggestion that any juror lied during *voir dire*; no suggestion of misbehavior by the prosecutor, judge, or any other party; and no suggestion that any of the participants failed to approach their duties with the neutrality and serious purpose that our system demands.

Weaver, 137 S. Ct. at 1913.

Many of these circumstances exist here, as well. Gibbs' trial, apart from *voir dire*, was open to the public. And, during *voir dire* itself, the courtroom was open to members of the public who arrived before *voir dire* proceedings began. Moreover, Gibbs does not contend that, apart from the state trial court's enforcement of the *Voir*

Dire Policy itself, there was any misconduct during *voir dire*, or at any other point in trial, that "flow[ed] from" the *Voir Dire* Policy. *See id.* These factors suggest that, as in *Weaver*, the closure under the *Voir Dire* Policy did not render Gibbs' trial fundamentally unfair.

Nonetheless, Gibbs insists that *Weaver* is distinguishable for three reasons: (1) the closure of the courtroom under *Voir Dire* Policy was a routine practice, rather than a one-off decision; (2) the *Voir Dire* Policy originated from the state court judge, rather than a courtroom employee; and (3) Gibbs challenged the closure on direct appeal, rather than on collateral review, and defendants who raise properly preserved public trial claims on direct appeal are "generally [] entitled to automatic reversal regardless of the error's actual effect on the outcome." (Post-Hr'g Br, ECF No. 55, PageID.1880–1882 (quoting *Weaver*, 137 S. Ct. at 1910 (internal quotation marks omitted).) Gibbs insists these distinctions warrant "presum[ing] prejudice in Gibbs' case." (*Id.*, PageID.1880.)

The Court is not convinced that these distinctions establish that the closure here rendered Gibbs' trial fundamentally unfair. The first two distinctions merely restate what the alleged violation in this case was – the closure under the *Voir Dire* Policy. They do not explain how that closure led to a fundamentally unfair trial for Gibbs. As for the third distinction, this argument is foreclosed by *Williams*. There, as here, petitioner raised his public trial claim on direct review. *Williams*, 949 F.3d

at 971. And there, even after agreeing that petitioner's counsel was deficient for failing to object to a public trial violation, the Sixth Circuit saw "no basis to conclude that [petitioner] was prejudiced by the closure of the courtroom such that his procedural default should be excused." *Id.* at 979. Thus, the fact that Gibbs raised his public trial claim on direct appeal does not warrant a presumption of prejudice. Accordingly, Gibbs has not persuaded the Court that the enforcement of the *Voir Dire* Policy rendered his trial fundamentally unfair, and he has therefore failed to establish Presumed Prejudice.

D

For all of the reasons explained above, Gibbs has neither demonstrated that Skinner's failure to object to the courtroom closure under the *Voir Dire* Policy constituted deficient performance nor that it caused him prejudice. For these two independent reasons, he has failed to show that his default of his public trial claim is excused by ineffective assistance of counsel.

IV

For the foregoing reasons, the Court concludes that Gibbs' public trial claim is procedurally defaulted, and that neither cause nor prejudice exist to excuse it. Accordingly, the Court **DENIES** habeas relief on Gibbs' public trial claim.

Before Gibbs may appeal the Court's decision, a certificate of appealability must issue. *See* 28 U.S.C. § 2253(c)(1)(a); Fed. R. App. P. 22(b). A certificate of

appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a court denies habeas relief on the merits, the substantial showing threshold is met if the petitioner demonstrates that reasonable jurists would find the court's assessment of the claim debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). "A petitioner satisfies this standard by demonstrating that [...] jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When a court denies relief on procedural grounds without addressing the merits, a certificate of appealability should issue if it is shown that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the court was correct in its procedural ruling. *See Slack*, 529 U.S. at 484-85.

The Court concludes that Gibbs has met this standard here. Accordingly, the Court **GRANTS** Gibbs a certificate of appealability with respect to the ruling set forth in this Opinion and Order.

s/Matthew F. Leitman
MATTHEW F. LEITMAN
UNITED STATES DISTRICT JUDGE

Dated: April 14, 2022

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on April 14, 2022, by electronic means and/or ordinary mail.

s/Holly A. Ryan
Case Manager
(313) 234-5126

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v PHILLIP CHARLES GIBBS, Defendant-Appellant.	FOR PUBLICATION February 14, 2013 9:05 a.m. No. 306124 Genesee Circuit Court LC No. 11-028140-FC
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v TYRELL HENDERSON, Defendant-Appellant.	No. 306127 Genesee Circuit Court LC No. 11-028141-FC Advance Sheets Version

Before: K. F. KELLY, P.J., and MARKEY and FORT HOOD, JJ.

PER CURIAM.

In Docket No. 306124, defendant, Phillip Charles Gibbs, was convicted by a jury of two counts of armed robbery, MCL 750.529, one count of unarmed robbery, MCL 750.530, and one count of conspiracy to commit armed robbery, MCL 750.157a and 750.529. Gibbs was sentenced to 17½ to 30 years' imprisonment for each count of armed robbery, 100 months to 15 years' imprisonment for the unarmed robbery conviction, and 17½ to 30 years' imprisonment for the conviction of conspiracy to commit armed robbery.

In Docket No. 306127, defendant, Tyrell Henderson, was convicted by a jury of three counts of armed robbery, MCL 750.529, one count of conspiracy to commit armed robbery, MCL 750.157a and 750.529, one count of assault with intent to rob while armed, MCL 750.89, one count of carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Henderson was sentenced to 225 months to 40 years' imprisonment for each count of armed robbery, 225 months to 40 years' imprisonment for the conviction of conspiracy to commit armed robbery, 225 months to 40

years' imprisonment for the conviction of assault with intent to rob while armed, 24 to 60 months' imprisonment for the conviction of carrying a concealed weapon, and 2 years' imprisonment for the felony-firearm conviction.

Defendants were tried together in front of separate juries. They both appeal as of right.[1] We vacate Henderson's conviction for assault with intent to rob while armed, but otherwise affirm both defendants' convictions and sentences.

I. BASIC FACTS AND PROCEDURAL HISTORY

A. TRIAL

This case arises from an armed robbery that occurred at a store called Wholesale 4 U in Flint, Michigan, on October 26, 2010. Nancy Anagnostopoulos and her husband, Costas Anagnostopoulos, owned the store and were present at the time of the robbery. Also present was employee Jeremy Kassing. Defendants had been to the store together numerous times that day. Originally, they had hoped to pawn some jewelry. After finding out that the jewelry had no value, Henderson purchased a video game. He later decided to return it. Defendants entered the store and told Costas that the game did not work. As Costas attempted to help determine what was wrong with the game, Henderson struck him in the head with a gun. Gibbs, who was not personally armed during the incident, approached Nancy and removed her necklaces and ring. He took her identification and purse. Gibbs also took an iPod from the store, as well as a number of laptop computers. In the meantime, Henderson took Costas's jewelry, wallet, and money. He ordered Costas to open the store's register and then took Costas to a back room where a safe was kept. Part of Costas's ear was cut off as a result of the blow he received, and he received stitches for the injury. Kassing's wallet was also taken. A subsequent search of the home Gibbs shared with his mother uncovered a sandwich bag containing jewelry, a sandwich bag containing papers and the identifications of the three victims, and several watches identified as those taken from the store.

In separate police interviews, both defendants admitted their involvement. However, Gibbs told the officer that his involvement was involuntary. Gibbs believed that they were going to the store to return the video game and had no idea that Henderson was planning a robbery. Gibbs stated that Henderson ordered him to take the victims' belongings and other store items. Gibbs testified at trial that he complied only because he did not want anything to happen to him.

The juries convicted defendants and they were sentenced as outlined previously.

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[1] On September 14, 2011, Henderson filed a claim of appeal, and on September 16, 2011, Gibbs filed his claim of appeal. On December 7, 2011, this Court entered an order consolidating the appeals. *People v Gibbs*, unpublished order of the Court of Appeals, entered December 7, 2011 (Docket Nos. 306124 and 306127).

B. GIBBS'S MOTION FOR REMAND

On May 23, 2012, Gibbs filed a motion to remand with this Court in order to make two objections to his sentencing, develop his argument that he was denied the right to a public trial, and, alternatively, argue that his counsel was ineffective. We granted Gibbs's motion to remand and remanded for Gibbs to file a motion for resentencing regarding prior record variable (PRV) 5 and PRV 6 and to file a motion for a new trial. *People v Gibbs*, unpublished order of the Court of Appeals, entered June 20, 2012 (Docket No. 306124). We ordered the trial court to hold an evidentiary hearing concerning the closure of the courtroom during voir dire. *Id.*

On remand, Gibbs argued that his right to a public trial was violated by the closing of the courtroom and the exclusion of his family from jury selection. Gibbs also argued that he was entitled to resentencing on the basis of the incorrect scoring on PRV 5 and PRV 6. The trial court declined to conduct a full hearing on the court-closure issue. The trial court admitted that its procedure is that, after jury selection begins, it does not allow people to enter or leave the courtroom. The trial court stated that if individuals came after jury selection started, then they would not have been allowed in the courtroom. The trial court denied the motion for a new trial. The trial court also found that Gibbs had a relationship to the criminal justice system on the date of the offenses for purposes of scoring PRV 5 and PRV 6 and denied the motion for resentencing.

II. GIBBS'S APPEAL

A. RIGHT TO A PUBLIC TRIAL

Gibbs argues that the trial court violated his right to a public trial and that he is entitled to automatic reversal. We disagree.

Gibbs did not object to the closure at trial. The Michigan Supreme Court recently held that the plain-error standard applies to a defendant's forfeited claim that the trial court violated the defendant's Sixth Amendment right to a public trial. *People v Vaughn*, 491 Mich 642, 664, 674-675; 821 NW2d 288 (2012).

> [I]n order to receive relief on [a] forfeited claim of constitutional error, [a] defendant must establish (1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. [*Id.* at 664-665.]

The *Vaughn* Court concluded that the first two prongs of the analysis were satisfied because the trial court ordered the courtroom closed before voir dire without advancing "an overriding interest that is likely to be prejudiced" and the error was "clear or obvious" because it was "readily apparent" that the trial court closed the courtroom and it is "well settled" that the right to a public trial extends to voir dire. *Id.* at 665 (citations and quotation marks omitted). The Court also concluded that the third prong was satisfied because the closure of the courtroom was "a plain structural error." *Id.* at 666. However, the Court held that the fourth prong was not satisfied because "both parties engaged in a vigorous voir dire process," "there were no objections to either party's peremptory challenges of potential jurors," and "each party expressed

satisfaction with the ultimate jury chosen." *Id.* at 668-669. Additionally, the Court noted that the presence of the venire—members of the public—lessened the extent to which the closure implicated the defendant's right and guaranteed that the proceedings were subject to a substantial degree of public review. *Id.* at 668. The Court concluded that the defendant was not entitled to a new trial. *Id.* at 669.

In *People v Russell*, 297 Mich App 707, 720; 825 NW2d 263 (2012), this Court stated that "the effect of a partial closure of trial does not reach the level of a total closure and only a substantial, rather than a compelling, reason for the closure is required." The Court concluded that the voir dire proceedings were partially closed because of the limited capacity in the courtroom and that the limited capacity was a substantial reason for the closure. *Id.* Accordingly, the partial closure did not deny the defendant his right to a public trial. *Id.*

Gibbs contends that his family and members of the public were prevented from entering the courtroom during jury selection. The record reveals that before jury selection began, the trial court stated, "And if any spectators would like to come in they're welcome but they do have to sit over here by the law clerk, not in the middle of the pool." Gibbs submitted affidavits indicating that individuals were not allowed to enter the courtroom during jury selection. Even accepting Gibbs's contention as true, we find no error given the trial court's statement. It appears that the courtroom was opened to the public initially, but then closed once jury selection began. On remand, the trial court did not conduct a full hearing and acknowledged that once jury selection had begun, the courtroom was closed and suggested that it was "too confusing" to allow individuals to come and go during jury selection. Even if we were to find error on the basis of the trial court's admitted refusal to allow individuals to enter once jury selection began, Gibbs is not entitled to a new trial or evidentiary hearing. As in *Vaughn*, both parties engaged in vigorous voir dire, there were no objections to either party's peremptory challenges, and each side expressed satisfaction with the jury. Further, the venire itself was present. Accordingly, Gibbs fails to satisfy the fourth prong as set forth in *Vaughn* and is not entitled to a new trial.

B. PREARREST SILENCE

Gibbs argues that the prosecutor violated his Fifth Amendment right to remain silent by using his prearrest silence to impeach his testimony and by referring to his prearrest silence during closing argument. We disagree.

Gibbs failed to object to the prosecutor's questions during his cross-examination; therefore, the issue is unpreserved. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). To the extent that Gibbs's argument alleges prosecutorial misconduct, because Gibbs did not object to the prosecutor's statements, the issue is also unpreserved. *People v Cain*, 299 Mich App 27, 35; 829 NW2d 37 (2012). "This Court reviews unpreserved constitutional errors for plain error affecting substantial rights." *Id.* at 40. This Court also reviews unpreserved claims of prosecutorial misconduct for plain error. *Id.* at 35.

During Gibbs's testimony, the prosecutor asked Gibbs when he told his mother what had happened and when he told the police that Henderson made him rob the store. The prosecutor asked Gibbs if he went to the police station on October 26, 2010, or after he talked to his brother the next day. In her closing argument, the prosecutor stated:

> Because remember despite what Phillip Gibbs testified to here in the courtroom about what his knowledge was, what his role or lack thereof was, he doesn't take an opportunity to run out of the store. He doesn't call 911 from inside the store. He doesn't run away separate from Mr. Henderson after this robbery occurred. He doesn't tell his mother. He doesn't go to the police.

The prosecutor again referred during her rebuttal to Gibbs's failure to turn himself in.

Contrary to Gibbs's assertion, the prosecutor did not violate his constitutional right to remain silent by questioning Gibbs about his failure to alert his mother or law enforcement concerning the robbery.

> A defendant's constitutional right to remain silent is not violated by the prosecutor's comment on his silence before custodial interrogation and before *Miranda*[2] warnings have been given. A prosecutor may not comment on a defendant's silence in the face of accusation, but may comment on silence that occurred before any police contact.
>
> "[A] prosecutor may comment on a defendant's failure to report a crime when reporting the crime would have been natural if the defendant's version of the events were true." [*People v McGhee*, 268 Mich App 600, 634-635; 709 NW2d 595 (2005) (citations omitted).]

However, "[w]here it would not have been natural for the defendant to contact the police—where doing so may have resulted in the defendant incriminating himself—the prosecution cannot properly comment on the defendant's failure to contact the police." *People v Dye*, 431 Mich 58, 80; 427 NW2d 501 (1988).

The prosecutor's comments referred to Gibbs's prearrest silence and, therefore, did not violate his right to remain silent. *McGhee*, 268 Mich App at 634. The prosecutor's comments on Gibbs's failure to report the crime suggested that if Gibbs's testimony were true—that his participation in the robbery was coerced—he would have called 911 or gone to the police immediately. Gibbs, however, claims that it would not have been natural for him to contact the police because he would have believed that Henderson might harm him. We conclude that if Gibbs's version of the events were true—that he did not know Henderson was going to rob the store and he was acting under duress by Henderson—then it would have been natural for him to contact the police. Therefore, the prosecutor's comments were proper and there was no plain error.

C. SENTENCING ERRORS

Finally, Gibbs contends that he is entitled to resentencing because of the erroneous scoring of PRV 5, PRV 6, and offense variable (OV) 13.

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[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

> Under MCL 769.34(10), if a minimum sentence is within the appropriate guidelines sentence range, we must affirm the sentence and may not remand for resentencing absent an error in scoring the sentencing guidelines or reliance on inaccurate information in determining the sentence. A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. Scoring decisions for which there is any evidence in support will be upheld. Additionally, we review de novo as a question of law the interpretation of the statutory sentencing guidelines. [*People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006) (citations omitted).]

1. PRV 5

"Prior record variable 5 is prior misdemeanor convictions or prior misdemeanor juvenile adjudications." MCL 777.55(1). The sentencing court must assess 2 points if "[t]he offender has 1 prior misdemeanor conviction or prior misdemeanor juvenile adjudication[.]" MCL 777.55(1)(e). The sentencing court must assess zero points if "[t]he offender has no prior misdemeanor convictions or prior misdemeanor juvenile adjudications[.]" MCL 777.55(1)(f). "'Prior misdemeanor juvenile adjudication' means a juvenile adjudication for conduct that if committed by an adult would be a misdemeanor under a law of this state, a political subdivision of this state, another state, a political subdivision of another state, or the United States *if the order of disposition was entered before the sentencing offense was committed*." MCL 777.55(3)(b) (emphasis added).

Gibbs's presentence investigation report (PSIR) indicates that he pleaded guilty of illegal entry without the owner's permission, a misdemeanor, on August 3, 2010, and was sentenced to probation for the offense on November 9, 2010. This was a juvenile adjudication. The PSIR indicates that the "Disposition Date" was November 9, 2010. The sentencing offense was committed on October 26, 2010. Accordingly, the order of disposition was not entered before the sentencing offense was committed and Gibbs's juvenile adjudication does not constitute a prior misdemeanor juvenile adjudication for purposes of assessing points under PRV 5. MCL 777.55(3)(b). Therefore, the trial court erred by assessing 2 points under PRV 5. However, because a reduction by 2 points from Gibbs's prior record variable score would not change his PRV level, MCL 777.62, resentencing is not required.

2. PRV 6

"Prior record variable 6 is relationship to the criminal justice system." MCL 777.56(1). The sentencing court must assess 5 points if "[t]he offender is on probation or delayed sentence status or on bond awaiting adjudication or sentencing for a misdemeanor[.]" MCL 777.56(1)(d). The sentencing court must assess zero points if "[t]he offender has no relationship to the criminal justice system[.]" MCL 777.56(1)(e).

As mentioned earlier, Gibbs entered a guilty plea to illegal entry without the owner's permission, a misdemeanor, on August 3, 2010, and was sentenced to probation for the offense on November 9, 2010. This was a juvenile adjudication. This Court has held that a defendant's prior juvenile adjudications supported the scoring of PRV 6. *People v Anderson*, 298 Mich App

178, 182; 825 NW2d 678 (2012) ("The phrase 'criminal justice system' is not limited to adversarial criminal proceedings."). Thus, contrary to Gibbs's assertion, points could be assessed under PRV 6 for his relationship with the juvenile justice system.

There is no evidence that Gibbs was on probation, delayed-sentence status, or bond at the time of the sentencing offense. His PSIR indicates only that he was placed on probation at sentencing or disposition, which took place on November 9, 2010. It appears that Gibbs was, however, awaiting adjudication or sentencing at the time he committed the sentencing offense, given that he had already entered a plea. This Court has stated:

> *Endres* suggests that a five-point score for PRV 6 is not improper when the defendant committed the sentencing offense while awaiting adjudication or sentencing for a misdemeanor, regardless of his or her bond status. The case illustrates this Court's refusal to categorize a defendant as having no relationship with the criminal justice system when it is obvious that such a relationship exists. [*People v Johnson*, 293 Mich App 79, 88; 808 NW2d 815 (2011).]

Therefore, the trial court properly assessed 5 points under PRV 6, even if Gibbs was not on bond at the time he committed the sentencing offense.

3. OV 13

"Offense variable 13 is continuing pattern of criminal behavior." MCL 777.43(1). The sentencing court must assess 25 points if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person[.]" MCL 777.43(1)(c). "For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). The sentencing court must assess zero points if "[n]o pattern of felonious criminal activity existed[.]" MCL 777.43(1)(g).

Gibbs was convicted of two counts of armed robbery and one count of unarmed robbery, which are all classified under the sentencing guidelines as crimes against a person. MCL 777.16y. Gibbs argues that his convictions arose out of one incident and that he could not have 25 points assessed. However, there is nothing in the language of MCL 777.43(1)(c) to support Gibbs's argument that multiple convictions arising from the same incident cannot be considered for scoring OV 13. In *People v Harmon*, 248 Mich App 522; 640 NW2d 314 (2001), the defendant was convicted of four counts of making child sexually abusive material. He photographed two 15-year-old girls. There were four photos in all—two of each girl, taken on a single date. *Id.* at 524-526. We held that 25 points were properly assessed under OV 13 because of the "defendant's four concurrent convictions . . . ." *Id.* at 532. Similarly, in this case, while the robberies arose out of a single criminal episode, Gibbs committed three separate acts against each of the three victims and these three distinct crimes constituted a pattern of criminal activity. Additionally, although some subsections of MCL 777.43 contain limitations on a trial court's ability to score for more than one instance arising out of the same criminal episode, subsection (1)(c) contains no such limitation. Accordingly, because multiple concurrent offenses arising from the same incident are properly used in scoring OV 13, the trial court did not err by assessing 25 points for that variable.

III. HENDERSON'S APPEAL

A. DOUBLE JEOPARDY

Henderson contends that his convictions for both assault with intent to rob while armed and armed robbery violate double jeopardy protections. The prosecution concedes error and writes: "Plaintiff agrees that [Henderson's] conviction for assault with intent to rob while armed must be vacated because he is also convicted for [sic] armed robbery involving the same victim during the same criminal episode." We agree that for purposes of the "multiple punishment" analysis under double jeopardy, assault with intent to rob while armed is the "same offense" as armed robbery and that Henderson's conviction for the lesser crime must be vacated.

This Court reviews de novo questions of law, such as a double jeopardy challenge. *People v Garland*, 286 Mich App 1, 4; 777 NW2d 732 (2009).

The prohibition against double jeopardy in both the federal and state constitutions protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). The third of these protections exists to "protect the defendant from being sentenced to more punishment than the Legislature intended." *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005). In this case, Henderson claims that he has been punished twice for the same offense.

We have previously held that assault with intent to rob while armed is a lesser included offense of armed robbery. *People v Akins*, 259 Mich App 545, 552; 675 NW2d 863 (2003); *People v Johnson*, 90 Mich App 415, 421; 282 NW2d 340 (1979). A lesser included offense is "a crime for which it is impossible to commit the greater offense without first having committed the lesser." *People v Walls*, 265 Mich App 642, 645; 697 NW2d 535 (2005). Stated differently, for an offense "[t]o be a lesser included offense, the elements necessary for commission of the greater offense must subsume the elements necessary for commission of the lesser offense." *People v Heft*, 299 Mich App 69, 74-75; 829 NW2d 266 (2012). However,

> [i]n *People v Smith*, 478 Mich 292, 315; 733 NW2d 351 (2007), our Supreme Court held that the "same elements" test set forth in *Blockburger v United States*, 284 US 299, 304; 52 SCt 180; 76 L Ed 306 (1932), is "the appropriate test to determine whether multiple punishments are barred by Const 1963, art 1, § 15." . . . The *Blockburger* test focuses on the statutory elements of the offense, without considering whether a substantial overlap exists in the proofs offered to establish the offense. If each offense requires proof of elements that the other does not, the *Blockburger* test is satisfied and no double jeopardy violation is involved. [*People v Baker*, 288 Mich App 378, 381-382; 792 NW2d 420 (2010) (citations omitted).]

Accordingly, it is necessary to consider the elements of each offense.

MCL 750.89 is the statute prohibiting assault with intent to rob while armed and provides:

> Any person, being armed with a dangerous weapon, or any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon, who shall assault another with intent to rob and steal shall be guilty of a felony, punishable by imprisonment in the state prison for life, or for any term of years.

Therefore, in order to obtain a conviction for assault with intent to rob while armed, a prosecutor must demonstrate "(1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed." *Akins*, 259 Mich App at 554 (citation and quotation marks omitted).

The revised armed robbery statute,[3] MCL 750.529, now provides:

> A person who engages in conduct proscribed under [MCL 750.530 (robbery)] and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while violating this section, the person shall be sentenced to a minimum term of imprisonment of not less than 2 years.

Therefore, in order to obtain a conviction for armed robbery, a prosecutor must prove that

> (1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).]

We discern no substantive difference between the elements of the two crimes. Because assault with intent to rob while armed is a lesser included offense of armed robbery and neither crime contains an element the other does not, Henderson could not have been convicted of both. Under the same-elements test that is now applicable to the multiple-punishments strand of double jeopardy under *Smith*, his assault conviction must be vacated. *Meshell*, 265 Mich App at 633-634 ("The remedy for conviction of multiple offenses in violation of double jeopardy is to affirm the conviction on the greater charge and to vacate the conviction on the lesser charge.").

[3] As amended by 2004 PA 128, effective July 1, 2004.

B. SENTENCING ERRORS

Henderson also contends that he is entitled to resentencing, in his case because of the erroneous scoring of OV 3, OV 4, OV 13, and OV 14. We disagree.

Henderson preserved his objection to the scoring of OV 13 by objecting at sentencing. Cf. *Endres*, 269 Mich App at 417. Henderson did not preserve his objections to the scoring of OV 3, OV 4, or OV 14. Cf. *id*. at 422. As noted earlier:

> Under MCL 769.34(10), if a minimum sentence is within the appropriate guidelines sentence range, we must affirm the sentence and may not remand for resentencing absent an error in scoring the sentencing guidelines or reliance on inaccurate information in determining the sentence. A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. Scoring decisions for which there is any evidence in support will be upheld. Additionally, we review de novo as a question of law the interpretation of the statutory sentencing guidelines. [*Id*. at 417 (citations omitted).]

This Court reviews unpreserved claims for plain error affecting a defendant's substantial rights. *Id*. at 422.

1. OV 3

"Offense variable 3 is physical injury to a victim." MCL 777.33(1). The sentencing court must assess 10 points if "[b]odily injury requiring medical treatment occurred to a victim[.]" MCL 777.33(1)(d). "As used in this section, 'requiring medical treatment' refers to the necessity for treatment and not the victim's success in obtaining treatment." MCL 777.33(3). This Court has stated that "'bodily injury' encompasses anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence." *People v McDonald*, 293 Mich App 292, 298; 811 NW2d 507 (2011).

Costas testified that Henderson hit him between his neck and head and on the side of the face. According to Nancy, Costas had blood dripping down his face and neck. Part of Costas's ear was cut off, and he received four stitches at Hurley Medical Hospital. He also sees his physician for frequent headaches. Nancy suffered whiplash and completed seven weeks of physical therapy. Therefore, the trial court properly assessed 10 points for OV 3.

2. OV 4

"Offense variable 4 is psychological injury to a victim." MCL 777.34(1). The sentencing court must assess 10 points if "[s]erious psychological injury requiring professional treatment occurred to a victim[.]" MCL 777.34(1)(a). The sentencing court must also "[s]core 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.34(2).

This Court has determined that depression and personality changes are sufficient to uphold the scoring of OV 4. *People v Ericksen*, 288 Mich App 192, 203; 793 NW2d 120 (2010).

This Court has also held that a victim's "statements about feeling angry, hurt, violated, and frightened support [the] score under our caselaw." *People v Williams*, 298 Mich App 121, 124; 825 NW2d 671 (2012).

Kassing testified that the experience was traumatic and he had bad dreams about it. At sentencing, Nancy stated, "Not to mention what you took from us psychologically." In Costas's victim impact statement, he indicated that he did not feel safe in his store. These statements support a score of 10 points for OV 4.

3. OV 13

As mentioned in part II(C)(3) of this opinion, because multiple concurrent offenses arising from the same incident are properly used in scoring OV 13, the trial court did not err by assessing 25 points for that variable.

4. OV 14

"Offense variable 14 is the offender's role." MCL 777.44(1). The sentencing court must assess 10 points if "[t]he offender was a leader in a multiple offender situation." MCL 777.44(1)(a). In scoring this variable, "[t]he entire criminal transaction should be considered . . . ." MCL 777.44(2)(a); see also *People v Apgar*, 264 Mich App 321, 330; 690 NW2d 312 (2004) (opinion by GAGE, J.).

There was evidence that Henderson was the only perpetrator with a gun, did most of the talking, gave orders to Gibbs, and checked to make sure Gibbs took everything of value. Kassing specifically testified that he believed Henderson was the leader. Further, Gibbs's testimony supports the finding that Henderson was the leader. While neither Nancy nor Costas believed that either defendant was "the leader," "[s]coring decisions for which there is any evidence in support will be upheld." *Endres*, 269 Mich App at 417. Accordingly, the trial court did not err by assessing 10 points for OV 14.

Henderson's conviction of assault with intent to rob while armed vacated. Affirmed in all other respects.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Karen M. Fort Hood