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publication in the New York Reports.

No. 137 SSM 2
The People &c.,
Respondent,
v.
Daniel Floyd,
Appellant.

Submitted by Allegra Glashausser, for appellant.
Submitted by Rhea A. Grob, for respondent.

MEMORANDUM:

The order of the Appellate Division should be reversed and a
new trial ordered.

Defendant was convicted of second degree felony murder,
second degree manslaughter, and second degree criminal possession

of a weapon for murdering Leon Hill during the robbery of an underground dice game. Before jury selection, defense counsel informed the judge that defendant's mother was waiting outside, unable to find a seat in the courtroom. Defense counsel observed "[c]ertainly, as a public spectator, she has an absolute right to be present...I can't think of anything else at this particular point about which I might make a record."

The trial judge informed defense counsel that because the jury panel was larger than normal, defendant's mother would need to wait outside the courtroom until he could excuse jurors to create room. Defense counsel replied "right" and informed defendant's mother.

The Appellate Division found that defendant failed to preserve his objection to his mother's exclusion from the courtroom and otherwise upheld his convictions (People v Floyd, 95 AD3d 1138, 1139 [2d Dept 2012]). We reverse.

Defendants have a constitutional right to a "public trial" (US Const Amend VI; Presley v Georgia, 130 S Ct 721, 723-724 [2010]). Mere courtroom overcrowding is not an overriding interest justifying courtroom closure, and the trial judge failed to consider reasonable alternatives before excluding defendant's mother from the courtroom (People v Alvarez, 20 NY3d 75 [2012]; People v Martin, 16 NY3d 607, 612 [2011]). This violation is per se prejudicial and requires a new trial (Martin, 16 NY3d at 613).

Defense counsel properly preserved his objection by raising

the issue to the trial court when given the opportunity to "make a record" before jury selection. His statements "unquestionably apprised" the trial judge of the constitutional rights at issue and the obligation to consider reasonable alternatives (People v Garcia, 95 NY2d 946 [2000]).

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On review of submissions pursuant to section 500.11 of the Rules, order reversed and a new trial ordered, in a memorandum. Chief Judge Lippman and Judges Graffeo, Read, Smith, Pigott and Rivera concur.

Decided April 25, 2013