STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 29, 2013
v	No. 305243 Saginaw Circuit Court
ANGELA ALLEN BLACKWELL, Defendant-Appellant.	LC No. 10-034179-FC

Before: TALBOT, P.J., and WILDER and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right from her jury trial convictions for first-degree criminal sexual conduct (CSC I), MCL 750.520b; second-degree criminal sexual conduct (CSC II), MCL 750.520c; pandering, MCL 750.455; and possession of cocaine under 25 grams, MCL 333.7403(2)(a)(v). Defendant's CSC convictions were based on a theory of her aiding and abetting Johnnie Griffin in his sexual assault of defendant's granddaughters. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent terms of three to 15 years for possession and of 25 to 40 years for the remaining convictions. We affirm.

I.

Defendant was a crack cocaine user who obtained cocaine from her friend Johnnie Griffin. Defendant regularly cared for her 11-year-old granddaughter and had also cared for her 15-year-old granddaughter. In March 2010, defendant was arrested for possession of cocaine and aiding and abetting several acts of criminal sexual conduct perpetrated by Griffin against the children while they were in defendant's care.

At trial, the 15-year-old granddaughter testified that Griffin had bought her a bus ticket to come stay at defendant's house. She also testified that defendant had sent her into Griffin's house, where Griffin groped her and gave her drugs to deliver to defendant. Further, the 15-year-old stated that defendant told her to get inside Griffin's truck on another occasion and that Griffin groped her at that time as well. The 11-year-old granddaughter, however, had difficulty testifying about the specific sexual acts Griffin performed on her during direct examination by the prosecutor. The prosecutor requested a recess and following the recess moved, pursuant to MCL 600.2163a(13), that the courtroom be closed to the public. The prosecutor advised that the 11-year-old had told him during the recess that the number of people in the courtroom, the subject matter of the testimony, and the non-verbal conduct of some of the members of the

gallery made her unable to continue her testimony. Defendant objected to the motion for closure on the basis that it was untimely, in that MCL 600.2163a(13) required the motion for closure to be brought before the preliminary examination. The trial court granted the prosecution's motion:

> THE COURT: Well, given the fact that--first of all, the prosecutor probably could not have anticipated whether the witness was going to have problems with this, but definitely the age is a factor. At least if she testifies to what's in the Information, it certainly would be the type of information that you wouldn't want to be talked about in front of other people. And on the representation of counsel, it's the witness and her family's desire that the courtroom be closed.
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> * * *
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> If we could--other than the support person and, I guess, the detective, everybody goes out I guess, until –
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> Which [victim] is this?
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> MR. DONKER: [the 11-year-old child].
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> THE COURT: – Until [the 11-year-old child] is done and then we'll open the courtroom again.

After the courtroom was closed, the 11-year-old testified that defendant took her to Griffin's bedroom on several occasions. She explained that while in the bedroom, defendant told her to take off her clothes and to lie on the bed. Defendant would then watch Griffin penetrate the girl with his finger and penis. The 11-year-old also testified that at the conclusion of those acts, Griffin gave her money and gave defendant cocaine. She explained that, afterwards, defendant instructed her not to tell anyone because if others found out about the acts, Griffin and defendant would go to jail. Prosecution witnesses testified that the 11-year-old girl tested positive for trichomonas, a sexually transmitted infection. Defendant denied having any knowledge of improper contact between Griffin and her granddaughters.

After deliberating, the jury convicted defendant of CSC I, MCL 750.520b; CSC II, MCL 750.520c; pandering, MCL 750.455; and possession of cocaine under 25 grams, MCL 333.7403(2)(a)(v). Defendant appeals as of right.

II.

Defendant first argues that her state and federal constitutional right to a public trial was violated by the trial court's decision to close proceedings to the public during a portion of the 11-year-old victim's testimony. We disagree. Defendant objected at trial to the closure of the courtroom on the basis that, because the prosecutor had not made a motion before the

preliminary examination as provided in MCL 600.2163(a)(13)[1] for special arrangements, the motion was untimely. Defendant did not object on the basis that the courtroom closure violated the Michigan or United States Constitution. Therefore, this constitutional issue is not preserved. See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993) ("[a]n objection based on one ground is insufficient to preserve an appellate attack based on a different ground"). We therefore review this unpreserved issue that the closed courtroom violated defendant's constitutional rights for plain error. *People v Vaughn*, 491 Mich 642, 654-655; ___ NW2d ___ (2012). Thus, "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 Sixth Amendment guarantees every criminal defendant a "speedy and public trial." US Const, Am VI; Const 1963, art 1, § 20. The right to an open trial is not absolute, but that right will only rarely give way to other interests. *Waller v Georgia*, 467 US 39; 104 S Ct 2210; 81 L Ed 2d 31 (1984). The *Waller* Court outlined the requirements for the total closure of trial: (1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure. *Id*. at 48.

The first two requirements under *Waller* are easily met. First, the prosecution advanced protecting a young witness as an overriding interest that would be prejudiced by the failure to close the trial. This Court has recognized that the government may have a substantial or compelling interest in protecting young witnesses who are called to testify in cases involving allegations of sexual abuse. *People v Kline*, 197 Mich App 165, 171; 494 NW2d 756 (1992). Second, the closure was limited to the portion of the 11-year-old victim's testimony dealing with the details of her sexual abuse, which was not broader than necessary to protect the witness.

Contrary to its responsibility, the trial court did not make explicit findings regarding the final two *Waller* requirements.[2] Nevertheless, we find that the record establishes that these requirements were satisfied. Although the trial court did not specifically consider any alternatives to clearing the courtroom during the 11-year-old's testimony on the record, the trial court referenced the victim's tender age and concluded that it was reasonable for someone that young to have difficulties testifying regarding the details of the sexual assaults in the presence of many strangers. See *Kline*, 197 Mich App at 171. Moreover, immediately prior to the

[1] 2012 PA 170 subsequently revised the statute, such that MCL 600.2163a(13) is now found in MCL 600.2163a(14). The subsection provides: "If, upon the motion of a party made before the preliminary examination, the court finds on the record that the special arrangements specified in subsection (14) [(15) in current version] are necessary to protect the welfare of the witness, the court shall order those special arrangements. . . ."

[2] A trial court must make "findings adequate to support the closure [of the courtroom]." *Waller*, 467 US at 48

prosecutor bringing the motion, the witness was incapable of answering the question, "Where did he touch you?" with the courtroom open. As such, though the trial court erred by not making all of the *Waller* findings on the record, we conclude that the trial court's failure to consider alternative options on the record does not require reversal. Defendant has failed to establish that she was actually innocent or that any error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

Defendant, in her brief on appeal, argues that "[t]he jury could have reasonably concluded that the public was excluded due to the inappropriate conduct of Defendant-Appellant." We interpret this argument to mean that the jury could have concluded that the reason the courtroom was cleared was because defendant actually committed the alleged acts. However, we find that such conclusions are not only speculative, but are entirely contrary to common sense. The courtroom was cleared when the witness answered "yes" to whether she needed "a minute" to compose herself after she was unable to respond to the prosecutor's question of "Where did [Griffin] touch you?" Thus, we find no basis for defendant's argument that the jury could infer that the reason the courtroom was cleared was because defendant was necessarily guilty.[3] Rather, the context is patently clear that the witness was unable to proceed with the sensitive testimony in front of the entire gallery. Therefore, because defendant has failed to establish that the temporary closure "seriously affected the fairness, integrity, or public reputation of judicial proceedings," defendant is not entitled to any relief.

III.

Next, defendant argues that she was denied a fair trial due to improper remarks made by the prosecution during closing argument. We disagree. We review unpreserved issues of prosecutorial misconduct for outcome-determinative plain error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

During closing arguments, the prosecution made the following comments:

> To show that Miss Blackwell was an aider and abettor, we have to show, number one, that crimes were actually committed, that Mr. Griffin actually performed the sexual acts with [the 11-year-old victim]. Number two, that Miss Blackwell did something to assist in the commission of those crimes. And three, that either she intended it to happen or that she knew it was going to happen. One of those three.
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> And I would assert as far as knowledge, that when this happens seven or eight times and the same thing happens over and over again, that is certainly knowledge.

[3] We also note that this assertion is even more dubious when considering that the trial court instructed the jury that defendant is "presumed to be innocent" and that it was "free to believe all, none, or part of any person's testimony."

> Now, the amount of assistance that she has to give, that's required by law, is very minimal. But let's think about the evidence that we have in this case. The first thing she did to assist was to take [the 11-year-old victim] from a place of relative security, which was her house, over to [Griffin's place]. Transportation is a form of assistance.
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> Second-most in a sentence that will forever be edged [sic] in my memory, take your clothes off. When a grandmother tells her granddaughter to take your clothes off, that is an overt act of assistance in the commission of a crime. Staying in the bedroom, seeing this take place, is assistance. Now you'll be getting an instruction that says knowledge plus presence isn't assistance.
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> But put yourselves back, I had the privilege of knowing my grandmothers, both of them, think about doing something in the presence of your grandmother. If you could do it when grandma was there, it was all right. It was the thing to do. Because if it wasn't, we would expect grandma to stop it. Not the fact here. Miss Blackwell stayed, her presence alone is assistance. Also telling [the 11-year-old victim] not to contact the police, don't say anything about this or we'll go to jail, helping her, keeping her, from announcing this to somebody else or to tell somebody else what had happened, that is assistance.

Defendant argues that the prosecution engaged in blatant misconduct by telling the jury to ignore the fact that "knowledge plus presence isn't assistance," and asserting a "grandma exception" to the applicable law. Indeed, the trial court correctly instructed the jury that "[the mere fact that [defendant] was present when [the crime] was committed is not enough to prove that she assisted in committing it." Thus, while the prosecutor's argument that defendant's "presence alone is assistance" contradicted the jury instruction, any error is harmless. The jury was properly instructed with regard to the law of aiding and abetting, and jurors are presumed to follow their instructions. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Defendant has not shown that this isolated comment deprived her of a fair trial. Furthermore, the evidence of defendant's assistance in the commission of Griffin's sexual assaults was overwhelming. Defendant was shown to have received consideration from Griffin in the form of money and drugs, in exchange for defendant making arrangements for Griffin to have access to her granddaughters so that he could assault them. Defendant has failed to show how any error was outcome determinative, and she is not entitled to any relief.

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Riordan