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Order

July 28, 2023

160469-71

Michigan Supreme Court
Lansing, Michigan

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

ANTHONY JOSEPH VEACH,
Defendant-Appellant. /

SC: 160469-71
COA: 342394, 342395, 342396
Macomb CC:
2017-000447-FC
2017-001859-FC
2017-001865-FC

On March 1, 2023, the Court heard oral argument on the application for leave to appeal the October 15, 2019 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals and REMAND this case to the Macomb Circuit Court for a new trial.

The Court of Appeals erred by holding that defendant's right to a public trial was not violated. The right to public trial is secured by the United States and

Michigan Constitutions but is not unlimited. *People v Davis*, 509 Mich 52, 66 (2022). Generally speaking, "an accused [individual] is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged." *In re Oliver*, 333 US 257, 272 (1948). But the courtroom may still be closed over a defendant's objection where the party seeking closure advances "an overriding interest that is likely to be prejudiced, the closure [is] no broader than necessary to protect that interest, the trial court [considers] reasonable alternatives to closing the proceeding, and [the trial court makes] findings adequate to support the closure." *Davis*, 509 Mich at 66 (quotation marks omitted), quoting *People v Vaughn*, 491 Mich 642, 653 (2012), quoting *Waller v Georgia*, 467 US 39, 48 (1984). See also *Presley v Georgia*, 558 US 209, 214 (2010).

Prior to trial, the prosecutor, relying on MRE 611(a), moved to close the courtroom during the complainant's testimony and to allow a victim advocate to be present for support. Defendant stipulated to the victim advocate's presence but objected to closure of the courtroom on the basis that family members who would not otherwise be sequestered as witnesses and potentially, unaffiliated members of the public, wanted to attend. The trial court granted the prosecutor's motions. In closing the courtroom, the entirety of the trial court's reasoning consisted of the following:

> The Court reviewed the motion in this matter. I also reviewed the preliminary exam transcript from . . . I think it was February 3, 2017.

> Just about six or seven months ago. There was no objection at that time to closing the courtroom [during the preliminary hearing] raised by counsel. I see no reason not to close the courtroom in this case in particular, since the other witnesses are family members or the other family members may be called as witnesses and be sequestered anyway.
>
> Based on that, I will go ahead and grant the motion to close the courtroom for the purpose of the complaining witness testimony.

The courtroom was closed to all but the parties, their attorneys, the complainant, and the victim advocate during the complainant's trial testimony. The victim advocate, as an employee of the prosecutor's office, is not a member of the public, much like attorneys and courtroom staff. This was a total closure of the courtroom to the public during a critical phase of the defendant's trial. See *Davis*, 509 Mich at 68-70; *Waller*, 467 US at 42; *Presley*, 558 US at 211.

The trial court did not consider any reasonable alternatives to closure on the record as required by *Vaughn* and *Waller*. *Vaughn*, 491 Mich at 653. "[T]rial courts are required to consider alternatives to closure even when they are not offered by the parties. . . ." *Presley*, 558 US at 214; see also *Weaver v Massachusetts*, 582 US 286, 297 (2017).[1] "[E]ven assuming, *arguendo*,

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[1] The dissent's analysis mischaracterizes this factor. It is not enough that an appellate court can discern whether it believes that there were reasonable alternatives after the fact, instead, "*the trial court must* consider reasonable alternatives to closing

that the trial court had an overriding interest" in closing the courtroom during the complainant's testimony, "it was still incumbent upon it to consider all reasonable alternatives to closure. It did not, and that is all this Court needs to decide." *Presley*, 558 US at 216.[2] Post-hoc rationalizations for courtroom closure made by an appellate court are not sufficient. See *Waller*, 467 US at 49 n 8.[3]

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the proceeding. . . ." *Davis*, 509 Mich at 66 (emphasis added). We also disagree with the dissent that a complete courtroom closure during the complainant's testimony was the only reasonable course of action. For example, it may have been reasonable to exclude some, but not all, members of the public during the complainant's testimony. But because the trial court never discussed any alternatives, the record is insufficient for us to conclude which alternatives may have been reasonable. Further, the trial court did not merely make "less than exhaustive" findings, as the dissent argues, it made no findings regarding this factor.

[2] *Presley*'s holding on this point was based on clear precedent and not limited to its facts. See also *Weaver*, 582 US at 298 ("[a] public-trial violation can occur, moreover, as it did in *Presley*, simply because the trial court omits to make the proper findings before closing the courtroom, even if those findings might have been fully supported by the evidence.").

[3] Contrary to the dissent's suggestion, we are not at liberty under our precedent to transform the mandatory *Vaughn*/*Waller* factors into a test approximating substantial compliance in the eyes of the reviewing court. Nor can we overlook the trial court's failure to make record findings in favor of a view that the record contains substantial support.

The caselaw from the lower federal courts cited by the dissent is not binding. *Abela v General Motors Corp*, 469 Mich 603, 606 (2004). Further, this caselaw is distinguishable from the procedural posture and facts of this case as well as the state of the law in Michigan. See, e.g., *Charboneau v United States*, 702 F3d 1132, 1136-1138 (CA 8, 2013) (involving a postjudgment challenge to

Moreover, the trial court's findings of an overriding interest were inadequate to support closure. *Davis*, 509 Mich at 66. The court must identify "the particular interest, and threat to that interest . . . along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Presley*, 558 US at 215-216 (quotation marks and citations omitted). As an initial matter, the trial court did not identify an overriding interest.[4] In providing its ruling, the trial court remarked that defendant did not object to courtroom closure at the February 3 preliminary examination. We can only speculate as to the purpose of this remark.[5] Moreover, the mere fact of closure

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closure that was neither preserved nor raised on direct appeal); *United States v Yazzie*, 743 F3d 1278, 1287, 1289-1290 (CA 9, 2014) (rejecting a defendant's argument that other preferred alternatives should have been considered where the trial court made record findings on reasonable alternatives to closure); *United States v Farmer*, 32 F3d 369, 371 (CA 8, 1994) (involving a partial closure, noting that "specific findings by the district court are not necessary if we can glean sufficient support for a partial temporary closure from the record"); *United States v Williams*, 974 F3d 320, 347-348 (CA 3, 2020) (involving the plain-error standard for unpreserved error); *United States v Doe*, 63 F3d 121, 128-129 (CA 2, 1995) (involving the standard for denial of a defendant's motion to close the courtroom).

[4] The prosecutor, who bears the burden as movant to advance an overriding interest that is likely to be prejudiced, see *Davis*, 509 Mich at 66, also failed to cite controlling caselaw in its motion to close the courtroom.

[5] The Court of Appeals noted that "[t]he trial court did not rule that defendant had forfeited or waived the right to a public trial by previously stipulating to the courtroom closures at the preliminary examinations. The court merely observed that the circumstances that justified the closures for the victim's testimony at the preliminary examinations had not changed in the six

during preliminary examination is insufficient to support closure at trial.[6] Finally, the trial court's sole discernable rationale for closure—that some unidentified observing family members may be sequestered as witnesses—lacks specificity and is thus insufficient to support appellate review. Again, post-hoc justifications by an appellate court cannot be substituted for the trial court's findings, or lack thereof. See *Waller*, 467 US at 49 n 8. The Court of Appeals erred by failing to assess whether the *Vaughn/Waller* requirements were satisfied.

The prosecution urges us to find that the closure was partial and remand for the trial court to supplement the record with findings and reasoning to support the closure during the complainant's testimony. See *People v Kline*, 197 Mich App 165 (1992). Given our conclusion that the courtroom was completely closed to the public during a critical phase of the trial, *Kline* is

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or seven months since then." *People v Veach*, unpublished per curiam opinion of the Court of Appeals, issued October 15, 2019 (Docket Nos. 342394, 342395, and 342396), p 3. This is an overly generous reading of the trial court's remarks, which say nothing about a lack of changed circumstances justifying closure. Nor is it apparent that this reference was to "emphasize the reasonability of the court's position" as the dissent suggests.

[6] In its motion to close defendant's preliminary examination, the prosecution relied on MCL 600.2163a. It is unclear from the record whether there was a valid statutory basis for the closure but for defendant's stipulation. See MCL 600.2163a(16) and (17); MCL 600.2163a(1)(g). Further, defendant's stipulation to closure at the preliminary examination did not waive or forfeit his ability to challenge closure during the trial itself. See *People v Warren*, 122 Mich 504, 508 (1899) (explaining that the right to a speedy and public trial cannot be waived except by guilty plea).

not applicable, and the Court of Appeals did not rely on it.[7] We further note that neither the United States Supreme Court nor this Court have endorsed a remedy akin that that ordered in *Kline* for courtroom closure.[8]

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[7] Some of the lower-federal-court caselaw cited by the dissent misses the mark because it involves the standard for "partial closures" of the courtroom. See, e.g., *United States v Simmons*, 797 F3d 409, 415-416 (CA 6, 2015) (reversing and remanding for new trial where the trial court "made no findings whatsoever" under the fourth prong of *Waller*); *United States v Galloway*, 937 F2d 542, 545-547 (CA 10, 1991). Under the federal "modified *Waller*" standard, a partial closure need only be supported by a "substantial reason," rather than an "overriding interest." *Simmons*, 797 F3d at 414. "[W]hether a closure is total or partial . . . depends not on how long a trial is closed, but rather who is excluded during the period of time in question." *Id.* at 413. Our Court has not recognized whether there is a distinction between partial and full closures. *Davis*, 509 Mich at 93 n 30 (ZAHRA, J., concurring in the result). Given our conclusion that this was a complete closure, we do not reach this issue.

[8] The dissent likewise suggests that a remand for additional findings is the appropriate remedy should the majority believe that "the trial court could have provided more-exhaustive reasons for limited closure of the courtroom." As an initial matter, that is a mischaracterization of our rationale. See, e.g., note 1 of this order. Moreover, the remedy under Michigan law for preserved structural error due to the deprivation of a defendant's public-trial right is a new trial. See *Davis*, 509 Mich at 67 (noting that denial of a defendant's public-trial right is a structural error that entitles the defendant to "automatic relief"). The remand remedy in *Waller* is distinguishable, as the closure occurred during a pretrial suppression hearing and the necessity for reversal could be determined after the outcome of a do-over hearing. *Waller*, 467 US at 49-50. In contrast, the complainant's trial testimony occurred during a "critical point[] when the constitutional protections of a public trial are at their zenith." *Davis*, 509 Mich at 94 (ZAHRA, J., concurring in the result). Further, ordering a remand in this case would contradict *Waller*'s warning that post-hoc

Defendant timely objected to the courtroom closure during trial, preserving the issue for appellate review. When preserved, the erroneous denial of a defendant's public-trial right is a structural error entitling the defendant to automatic relief. *Davis*, 509 Mich at 67; *Weaver*, 582 US at 295-297, 301-303. Since the trial court did not consider any alternatives to closure during the complainant's testimony, defendant's public-trial right was violated and we reverse and remand for a new trial. See *Presley*, 558 US at 216 (closure during jury voir dire, reversing and remanding for further proceedings); *Davis*, 509 Mich at 78-79 (closure for nearly the entire trial, reversing and remanding for a new trial); *People v Murray*, 89 Mich 276, 293 (1891) (closure during trial, same); *People v Micalizzi*, 223 Mich 580, 585 (1923) (closure before charging jury, same) ("If a portion of the trial may be conducted behind barred doors, it may all be conducted behind barred doors.").

CLEMENT, C.J. (*concurring*).

I agree with the majority order that the instant erroneous denial of defendant's right to a public trial is a preserved structural error and thus requires automatic reversal. *People v Davis*, 509 Mich 52, 67 (2022). However, though I believe reversal is required, I do not relish the practical result of a new trial in this

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assertions by an appellate court cannot satisfy the deficiencies in a trial court's record. *Waller*, 467 US at 49 n 8.

instance. I believe the closure was very likely justified insofar as there was an overriding interest that was likely to be prejudiced and the closure was no broader than necessary; the error here consists only of a failure by the trial court to make an adequate record by considering reasonable alternatives to closure and by making findings adequate to support the closure. *Waller v Georgia*, 467 US 39, 48 (1984). I question whether reversal in cases such as this is the result the United States Supreme Court intended when it required courts to consider alternatives to closure and to make findings adequate to support the closure in order to close a courtroom constitutionally. Nevertheless, the rule that preserved structural errors require automatic reversal is clear, and I see no viable basis in the caselaw to avoid the rule's application in this instance. Therefore, despite that a new trial will exact considerable costs on all the parties involved, particularly on the victim, I believe that reversal is legally required. I therefore concur with the majority.

VIVIANO, J., joins the statement of CLEMENT, C.J.

ZAHRA, J. (*dissenting*).

This is a difficult case involving heinous crimes committed against a vulnerable young girl who could not effectively defend herself. The jury heard the available evidence, heard the defendant's argument and

numerous witnesses, observed defense counsel's cross-examination of the victim, and returned verdicts of guilty after receiving proper instructions under the law. The convictions in this case were supported by record evidence and were received after a vigorous adversarial process. But there is a snag, according to the majority order. The trial court allowed the victim to present her testimony without the presence of defendant's family or noninterested public in the court gallery. With a young victim almost at the point of a mental breakdown while recounting the horrible abuse inflicted upon her, and who was caught between sides in a torn family with little social support, the trial court responded to the needs of the case and individuals before it. The trial court, which stands on the front lines of litigation battles and is granted broad discretion to ensure a fair proceeding, took what it viewed as the best action for the pursuit of justice and closed the courtroom while the victim was testifying. Defendant, his attorney, court staff, the judge, and jury were all still present, and a full and accurate record was prepared, which was available for public inspection. The closure protected the victim from intimidation, harassment, and embarrassment, which was a clear and demonstrable concern based on the victim's prior testimony and the record. Without the trial court's action, I believe there would have been a serious risk that the victim could not effectively recount her story to the jury or would have been unable to do so, in part or whole.

Nonetheless, the majority order reverses a judgment entered upon the jury's verdict and remands for retrial, solely because the trial court took steps to protect a child victim of sexual abuse. Although one can hope that the victim has the strength and willingness to go through another trial, there is a very real possibility that now, seven years after the events at issue occurred, the victim will not want to recount on a courtroom witness stand, yet again, the abuse that she suffered, forcing her to relive the trauma. No doubt many victims in her place would decline that opportunity, knowing very well that one purported error, dissected with the benefit of hindsight from an ivory appellate tower, could result in reversal and yet another retrial. If the victim nonetheless proceeds, the trial court would have the discretion, and very well could, order the same courtroom closure that the majority order relies on to reverse the instant convictions. The ultimate result might be the same. The anxiety forced upon the victim for testifying to her assailant's abuse now a fifth time, after three preliminary examinations and a trial, cannot be undone.

I disagree with the interpretation of caselaw provided in the majority order and the conclusion that reversal for a new trial is necessary. Because the closure at issue is justified under the record and, to the extent there is concern regarding the adequacy of the trial court's reasoning, the more prudent course of action would be to remand to the trial court for additional findings, I dissent.

I. FACTS AND PROCEEDINGS BELOW

The victim in this case came from a difficult background.[9] Her parents divorced when she was young, she had developmental problems, and she was raised in a tension-filled and unwelcoming atmosphere. At the age of four, she lived with defendant, her biological father. Defendant began dating Christina Pecorilli in 2004, and soon thereafter the two married. They had several children, and the victim lived primarily in their household. In 2013, defendant and Pecorilli separated and eventually filed for divorce. The victim initially lived with Pecorilli and her children. Due to defendant's inability to find housing, Pecorilli allowed defendant to live with his new girlfriend in Pecorilli's house. This situation did not last long, as by 2014, Pecorilli and defendant moved and entered separate housing arrangements. Pecorilli's children stayed with her, and the victim moved in with defendant and several other members of his family, including defendant's mother, sister, niece, and girlfriend. Defendant was arrested on unrelated charges, and Pecorilli was given power of attorney over the victim, who was then 14 years old. The victim lived with defendant after his release from jail until the spring of 2015. At that point, the victim lived with Pecorilli due to increased problems the victim had with defendant. The victim thereafter split time between her primary residence with Pecorilli and with

[9] For the sake of the victim's privacy, and to limit any possible harassment, I do not use her real name.

defendant, who continued to live with several family members.

In July 2016, the victim and Pecorilli began to have a private conversation about her relationship with defendant's family. Pecorilli initiated the conversation after hearing secondhand that defendant's mother had instructed the victim and her siblings to lie to Pecorilli about conditions at the residence of defendant's family. The victim on a park bench began to break down, hyperventilate, and sob. The victim later testified that she was "terrified" and told Pecorilli that she "didn't know if she should [talk] because it was going to hurt a lot of people and it was going to ruin her family." Specifically, the victim was worried about her dad and that she "didn't keep the secret like my dad wanted me to." After much insistence from Pecorilli, the victim recounted to Pecorilli a series of horrific sexual assaults that defendant had inflicted on her, including rape and forced oral sex at multiple locations at multiple times. Pecorilli reported defendant to the authorities, and defendant was arrested soon thereafter.

In August 2016, the prosecution filed a criminal complaint against defendant, and by May 2017, defendant was charged with extensive acts of criminal sexual conduct against the victim. He was charged in three separate cases, signifying the three different municipalities in which he sexually abused the victim from March 2015 to July 2016. During that period, the victim was between 14 and 16 years old.

In February and May 2017, defendant received a preliminary examination in each of his three criminal cases. In all three the victim was called to testify. And in all three the prosecution requested that the court close the courtroom out of concern of the sensitive nature of the testimony and the difficulty for the victim in recounting the events in court. In addition, the victim was allowed to testify with a victim's support person at her side to help her provide clear and cogent answers. Defendant did not object to these measures, and for good reason.[10]

At the February 2017 preliminary examination hearing, the victim began her testimony by explaining that defendant had come back home after his incarceration "to punish" her for alleged misbehavior while he was gone. According to the victim, defendant told her that she could choose one of three "punishments," which defendant labeled "A, B, or C," although he did not identify what the punishments were. The next morning, the victim testified that defendant isolated her in her brother's room while the other children were in another room. Defendant made the victim strip and then told the victim that she had to go to another room so that the door could be locked. According to the victim, defendant then commanded her to hit him while he forced her to the bed and molested her. The incident

[10] The victim encountered extraordinary difficulties in delivering her testimony. Thus, there was substantial justification for the closure, even in the preliminary examinations. In light of the difficulties experienced by this youthful victim, defense counsel in all likelihood reasonably presumed any objection to the limited closure of the trial court would be rejected.

stopped when the victim fell off the bed and "cried that [she] wanted [her] dad" to stop "whatever he was doing." The victim recounted another incident in which defendant entered her room and raped her while the other children and members of the household were asleep in other rooms. Asked to explain why she did not report the abuse earlier, the victim began to speak in broken and halting phrases when the prosecutor ended questioning.[11] Defense counsel engaged in vigorous cross-examination of the victim, and the court held that probable cause existed to take the case to trial.

The victim's emotional state and ability to provide testimony only got worse at the next preliminary examinations in May 2017. At the second preliminary examination, before a second judge, the court again closed the courtroom to allow the victim to provide testimony audibly and effectively. When the victim was called and provided her name, the trial court immediately injected and warned the victim that she needed to speak up for the court reporter to pick up her testimony. The victim provided testimony that she had tried to tell Pecorilli about the sexual abuse but Pecorilli did not fully understand what the victim was saying; word got back to defendant that the victim had attempted to report him.[12] Therefore, according to

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[11] The victim testified: "I had—my depression was getting really, really bad; I had been having really bad nightmares. And all the support I was using to hold it in was going away, so—" At that point, the prosecution ended the questioning.

[12] As the victim explained, "I just said [to Pecorilli] that he had punished me in a not comfortable way. I didn't say it was sexual. I just pretty much said that he kind of attacked me."

the victim, defendant made the victim go to a room isolated from the rest of her family to "punish" her. At that point, the victim interrupted her testimony for a need to catch her breath. She paused in her answer, stopped talking, and told the prosecutor she was "taking a breather." The prosecutor assuaged the victim, reassuring her that "[i]t's okay." When the victim began again, she abruptly explained that defendant had "shoved my mouth onto his privates." The prosecutor pulled back, "Let's back up just a little bit, okay?" and the questions continued.

After a few short answers, the victim failed to provide audible testimony:

> *Q.* Did his underwear stay on, did they come off, partially off, or something else?
>
> *A.* I cant remember.
>
> *Q.* Okay. You said that, um, he forced you on his privates; is that right?
>
> *A.* (no audible response given)
>
> *Q.* Okay. What—
>
> *The Court*: Okay. Hold on.

The trial judge then intervened. The judge stopped the questioning and talked directly to the victim. He reiterated, as he did when the victim began her testimony, that she had "to speak every answer" and that he knew it was "going to be tough." Observing the victim in person, he emphasized to her that she could take as much time as she needed.

The victim continued to provide testimony and occasionally stopped speaking in favor of hand movements to answer questions. She recounted another episode of defendant raping her. When explaining why she did not tell her siblings or grandmother who were also in the house, the victim stated that she was "scared." When she finished direct examination, the prosecutor again reiterated to the victim that she "need[ed] to make sure you keep your voice up[.]" Defense counsel again cross-examined the victim. When recounting the abuse, the victim's testimony again vacillated between direct language, pauses, and stutters.[13] On cross, the victim was again asked why she did not report the abuse, and again the victim became distressed and stopped answering questions. The court intervened and stopped the questioning. The judge asked if the victim needed a break; the victim explained that she "just felt sick for a second." After a short break, the victim continued and finished her testimony. At the end of the hearing, the trial court was "more than satisfied that [defendant] is in fact an abuser of his child" and bound defendant over for trial.

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[13] The following exchange occurred during cross-examination:

Q. Okay. And then what happened?

A. Then he had shoved his privates into my mouth.

Q. Did he say anything to you before he did that, [the victim's name]?

A. I can't remember what he said, but he did say something—something.

The next day, the victim testified for a third time at a preliminary examination. For the third time before a third trial judge, the courtroom was again closed so that the victim could effectively recount testimony with her support personnel. The prosecution felt the need to reiterate to the victim the need to audibly speak and verbalize her answers instead of resorting to body motions. The victim recounted yet another case of abuse where defendant isolated the victim in a room to "be away" from other family members who might observe. At that point, the victim testified that defendant raped her. The victim also explained that, in yet another incident, defendant told her to go into a separate room to be away from other family members. According to the victim, defendant then raped her again. For a third time, defendant was bound over for trial following preliminary examination.

The three cases were consolidated and, as would be expected, the prosecution moved to close the courtroom to allow the victim to provide testimony and do so in an understandable manner. The trial court noted the prosecution's arguments, which included the fact that the victim was recounting serial sexual abuse by her biological father while at a young age. The victim testified that defendant had repeatedly pressured and commanded her to hide the abuse from others in her family. In response, defense counsel noted the strength and merits of the closure motion, indicated in addition that several members of the victim's family planned to testify as defense witnesses, and argued that some other small number of family members should be allowed to

enter. The trial court cited the prior closures at the preliminary examination hearing and granted the prosecution's motion.

Before the courtroom was closed, it was accepted that the victim's brother, aunt, cousin, and grandmother would all be called as defense witnesses, along with defendant's ex-girlfriend with whom the victim had spent significant amounts of time. Their intended testimony, in line with the victim's description of defendant isolating the victim and working intentionally to keep the abuse secret, was that the family members were not aware of any abuse to the victim. As shown in the preliminary-examination testimony, the lack of disclosure and the family's ignorance of the victim's trauma were triggering issues for the victim that caused pressure, anxiety, and difficulty in recounting her story. From the family, only Pecorilli and the victim testified for the prosecution.[14] And before the victim testified, Pecorilli described in detail the difficult and disruptive home life from which the victim came. Pecorilli testified about the victim's highly unstable home life, including the separation of the victim's biological parents at an early age; the victim's biological mother leaving her with defendant despite having custody; defendant's sister leaving the victim with Pecorilli after defendant was arrested on unrelated charges; defendant's divorce from Pecorilli and the splitting of the family based on household; personal tensions with defendant and the victim leaving defendant's house due

[14] A third prosecution witness was a detective assigned to the case.

to conflict; and the fact that the victim had lived in at least four different houses during a two-year period. Along the lines of her appearance at the preliminary examinations, Pecorilli also testified that the victim broke down crying, and was unable to speak or properly communicate when she recounted the abuse to Pecorilli.

At trial, the victim testified with a closed courtroom, and the result tracked the victim's testimony at the preliminary examination. The victim had difficulty recounting the testimony at times, and her voice drifted to the inaudible.[15] The court had to again intervene and ask the victim to not rely upon hand motions and to provide clear testimony given that her sound "levels [were] way down." The court reporter repeatedly had difficulties picking up the direct examination, and the court reiterated that the victim's voice was "barely getting picked up at all." The victim's inability to effectively articulate her story was discussed at multiple points, and the court stopped questioning after a point and asked if the victim needed a break. Similar problems continued through cross-examination. Eventually, the jury heard testimony from the victim's aunt, brother, cousin, and grandmother, with the latter three assertively denying the existence of sexual abuse by defendant. Nonetheless, the jury found defendant

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[15] For example the victim testified: "He (indiscernible) the door. And the kids were waking up. So they are coming out. He is moving them in here and my little sister Gabby, she knows how to get breakfast for everybody. (Indiscernible) breakfast. I was moved into mom room [sic] because mom was (indiscernible)."

guilty on all counts: seven counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(b)(*ii*), and two counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(b)(*ii*).

The trial court sentenced defendant to 20 to 60 years' imprisonment for each CSC-I conviction and 10 to 15 years of imprisonment for each CSC-II conviction. Defendant appealed, presenting multiple challenges to his convictions and sentences. At issue here, defendant challenged the trial court's decision to close the courtroom while the victim testified. In a unanimous decision, the Court of Appeals affirmed defendant's conviction, but vacated the sentence due to an error in calculating the advisory guidelines range.

II. ANALYSIS

A. THE RIGHT TO A PUBLIC TRIAL AND THE PROTECTION OF CHILD VICTIMS OF SEXUAL ABUSE

It is well established that "a trial court has broad discretion in controlling the course of a trial."[16] This

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[16] *People v Banks*, 249 Mich App 247, 256 (2002); accord *Geisler v Folsom*, 735 F2d 991, 997 (CA 6, 1984) ("The trial judge has, and must have, broad discretion in the conduct of a trial."); see also *Maldonado v Ford Motor Co*, 476 Mich 372, 376 (2006) ("[T]rial courts possess the inherent authority . . . to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."); *Dietz v Bouldin*, 579 US 40, 47 (2016) (explaining that trial courts have "inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases").

includes the "broad discretion to control the manner in which witnesses are called."[17] Thus, with their on-the-ground observations, professional knowledge, and acuity in responding to challenges at trial, trial judges can control the occupancy and behaviors of those in their courtroom. While trial courts have the authority to respond to the needs of the case, there are targeted areas of constitutional law that guide the manner in which their discretionary tasks are performed. One such area is the constitutional demand of a public trial.[18]

The Founders were very cognizant of the need for an open trial to ensure the proper administration of law, equal application of the law, and sufficient evidentiary bases for a determination of guilt. The medieval and early modern history of Europe was riddled with abuses of kings and executives trying defendants in shadowy private tribunals, only to announce their sentence and judgment to the public.[19] Such hidden

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[17] *People v Martin*, 271 Mich App 280, 336 (2006); *People v Stevens*, 230 Mich App 502, 507 (1998) ("[D]ecisions regarding the order and mode of presentation of evidence are within the discretion of the trial court.").

[18] See *Richmond Newspapers, Inc v Virginia*, 448 US 555, 562 n 4 (1980) (explaining how the constitutional right to a public trial can serve to "limit the exercise of the discretion" otherwise conferred on a trial court); *Globe Newspaper Co v Superior Court for Norfolk Co*, 457 US 596, 609 (1982) (critiquing a per se bar on the admission of testimony in public, noting that the trial court may have kept the courtroom open if it had "been permitted to exercise its discretion").

[19] See *In re Oliver*, 333 US 257, 268-269 (1948) ("The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber,

proceedings were rife for misconduct and preordained conclusions of guilt.[20]

Yet, like most constitutional guarantees, the right to a public trial is not inflexible, running roughshod over reasonable and well-accepted public interests.[21] One of those foundational interests is the protection of child victims of sexual abuse. As the Supreme Court of the United States explained in *Maryland v Craig*:

> We have of course recognized that a State's interest in "the protection of minor victims of sex crimes from further trauma and embarrassment" is a "compelling" one. *Globe*

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and to the French monarchy's abuse of the lettre de cachet."); see also Conquest, *The Great Terror: A Reassessment* (Oxford: Oxford University Press, 1990), p 74 (describing secret trials held in Communist Russia to identify subversive activities and jail opponents of the state).

[20] See *Gannett Co, Inc v DePasquale*, 443 US 368, 380 (1979) (explaining that the right to public trial serves as "a safeguard against any attempt to employ our courts as instruments of persecution") (quotation marks and citation removed).

[21] See, e.g., *Maryland v Craig*, 497 US 836, 849 (1990) ("In sum, our precedents establish that the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial . . . , a preference that must occasionally give way to considerations of public policy and the necessities of the case. . . .") (quotation marks omitted); *United States v Richardson*, 780 F3d 812, 817 (CA 7, 2015) ("Like most constitutional rights, the right to a speedy trial is not absolute; it yields in the face of compelling circumstances."); *Barker v Wingo*, 407 US 514, 531 (1972) (explaining that, for speedy-trial-right considerations, "a valid reason, such as a missing witness, should serve to justify appropriate delay"); *Riley v California*, 573 US 373, 381-382 (2014) (reasoning that the Fourth Amendment "generally requires the obtaining of a judicial warrant," but circumstances may command a "specific exception").

Newspaper Co. v. Superior Court of Norfolk County, 457 U. S. 596, 607 (1982); see also *New York v. Ferber*, 458 U. S. 747, 756-757 (1982); *FCC v. Pacifica Foundation*, 438 U. S. 726, 749-750 (1978); *Ginsberg v. New York*, 390 U. S. 629, 640 (1968); *Prince v. Massachusetts*, 321 U. S. 158, 168 (1944). "[W]e have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *Ferber, supra*, at 757. In *Globe Newspaper*, for example, we held that a State's interest in the physical and psychological well-being of a minor victim was sufficiently weighty to justify depriving the press and public of their constitutional right to attend criminal trials, where the trial court makes a case-specific finding that closure of the trial is necessary to protect the welfare of the minor. *See* 457 U. S., at 608-609. This Term, in *Osborne v. Ohio*, 495 U. S. 103, we upheld a state statute that proscribed the possession and viewing of child pornography, reaffirming that "'[i]t is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling."'" *Id.*, at 109 (quoting *Ferber, supra*, at 756-757).[22]

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[22] *Craig*, 497 US at 852-853, 855 (holding that the state could limit the defendant's right to cross-examine the victim in person at trial given the potential for harm); see also *Giles v Schotten*, 449 F3d 698, 703-706 (CA 6, 2006) (concluding that barring the defendant from arranging an independent physical and

Thus, while other less direct and tangible state interests may not sufficiently justify government actions, protection of abused children lays at the heart of the public's interest and can serve as significant justification upon which the state can respond and provide services. "Shame and loss of dignity, however unjustified from a moral standpoint, are natural byproducts of an attempt to recount details of a rape before a curious and disinterested audience. The ordeal of describing an unwanted sexual encounter before persons with no more than a prurient interest in it aggravates the original injury."[23]

B. CLOSURE OF THE COURTROOM DURING THE VICTIM'S TESTIMONY WAS JUSTIFIED, AND THE TRIAL COURT'S DECISION SHOULD BE AFFIRMED

In a series of cases derived mostly from press challenges to closed hearings, the Supreme Court set out the standard for public-trial claims. The Supreme Court explained that to close a courtroom, four factors must be met: there must be "[1] an overriding interest that is likely to be prejudiced [by a public hearing], [2] the closure must be no broader than necessary

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psychological evaluation of child victims of sexual abuse in order to protect them from embarrassment and trauma did not violate the defendant's due-process rights).

[23] *United States ex rel Latimore v Sielaff*, 561 F2d 691, 694-695 (CA 7, 1977); *Coker v Georgia*, 433 US 584, 597 (1977) ("Short of homicide, [rape] is the ultimate violation of self.") (quotation marks and citations omitted).

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."[24] The facts of this case demonstrate that the constitutional demands of public trial were met.

This is a case of substantial and repeated instances of sexual abuse and rape of a young girl by her biological father. The record, as established through hours of testimony by the victim at three different preliminary examinations, demonstrates the victim's recounting of defendant repeatedly isolating her and moving her away from family. Then, according to the victim, defendant would engage in extraordinarily violative acts, against her will and over her complaints to stop, and tell her to "clean up" before anyone else in the family could notice. The victim also testified under oath that defendant would repeatedly "punish" her by means of sexual violence. When the victim attempted to tell Pecorilli about the abuse but was not sufficiently precise to describe the true nature of the atrocities, word got back to defendant and he "punished" the victim again, by means of rape. Under the victim's account, defendant was clearly manipulating the victim, removing her from the rest of the family, and pressuring or forcing her to remain quiet about the abuse. This all while the victim was experiencing an unstable home life, transiting between multiple homes with different supervising authority figures, and experiencing

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[24] *Waller v Georgia*, 467 US 39, 48 (1984), citing *Press-Enterprise Co v Superior Court of California*, 464 US 501, 511-512 (1984) (*Press-Enterprise I*).

separation from her siblings. Despite the victim's repeated objections and physical resistance, the victim testified that the abuse continued until she one day decided to tell her full story to Pecorilli, at which point the victim broke down and became despondent.

These emotional problems persisted. The victim experienced serious and conspicuous difficulties in recounting her testimony at all three preliminary examinations. Her voice would repeatedly drift, she experienced difficulty breathing when describing the gruesome nature of the abuse, she often resorted to body movements instead of expressing herself in words, and she had a clear triggering point that especially caused the victim stress: her inability to report the abuse before she did. The lack of prior reporting was intensified and made an even greater point of focus given that many of the victim's own family members, with whom the victim had lived for years, planned to testify in favor of defendant. Specifically, the victim's aunt, grandmother, and cousin reported assertively and unambiguously that they had observed no evidence of abuse against the victim by defendant. This lack of contemporaneous awareness is unsurprising if the victim is a young girl being abused by her father, especially when the father is intentionally acting to intimidate the child and suppress disclosure. The victim was not only required to testify against her biological father for heinous crimes inflicted on her, but also required her to testify against the word of several close family members with whom she resided for years. The

jury observed all the witnesses in person and credited the victim over her family.

The prosecution requested closure of the courtroom to protect the child victim from excessive trauma and embarrassment in testifying to the abuse by her father, which would support the victim in being able to remain as articulate as she could and effectively communicate to the jury. The prosecution depended on the victim's testimony. If she could not testify, or could not do so clearly or effectively to be understood by the jury, there would be no basis upon which to convict, especially when almost all present family members were providing testimony contrary to the victim. The Supreme Court has emphatically stated that protection of child sex-abuse victims, and their ability to recount testimony, is a compelling interest justifying often extraordinary actions otherwise not permitted.[25] The first factor is met.

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[25] *Globe Newspaper*, 457 US at 607 (explaining that "the physical and psychological well-being of a minor [sex-crime victim]" is a "compelling" interest that can justify closure); *Press-Enterprise Co v Superior Court of California*, 478 US 1, 9 n 2 (1986) (*Press-Enterprise II*) ("The protection of victims of sex crimes from the trauma and embarrassment of public scrutiny may justify closing certain aspects of a criminal proceeding."); accord *Craig*, 497 US at 852-853.

Federal courts applying United States Supreme Court caselaw agree. *United States v Yazzie*, 743 F3d 1278, 1287 (CA 9, 2014) ("[E]nsuring a child victim's ability to effectively communicate" is a compelling interest justifying courtroom closures); accord *Bell v Jarvis*, 236 F3d 149 (CA 4, 2000); *United States v Ledee*, 762 F3d 224 (CA 2, 2014).

Simply because there is a compelling interest sufficient to justify closure in some instances does not mean that a courtroom closure is per se required in all cases of child sexual abuse. A per se rule is of course, overbroad and does not adequately account for the rights of a specific defendant in a specific case, nor does it adequately consider the needs of a specific juvenile. Requiring a case-specific need for a government action and not just relying on categorical determinations detached from any facts existing in an individual case is well accepted in constitutional law.[26] What is required in the instances of courtroom closure is an individualized determination of the need for closure on a "case-by-case basis," considering "the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives."[27] Courts cannot simply issue

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[26] See, e.g., *Maryland v Pringle*, 540 US 366, 372-373 (2003) ("Where the standard is probable cause, a search or seizure of a person must be supported by probable cause *particularized with respect to that person.* This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.") (quotation marks and citations omitted; emphasis added); *Navarette v California*, 572 US 393, 396-397 (2014) (reasonable suspicion occurs "when a law enforcement officer has a *particularized and objective basis for suspecting the particular person* stopped of criminal activity" not a "mere hunch") (quotation marks and citations omitted; emphasis added); *Coy v Iowa*, 487 US 1012, 1021 (1988) (concluding that broad legislative presumptions of trauma, when they are not "individualized" to the witness at issue, do not justify restrictions on the right to confrontation).

[27] *Globe Newspaper*, 457 US at 608.

categorical and imprecise closures of courtrooms without specific and individualized needs of the victim at issue.[28]

In *this specific case* there was a substantial need for this particular victim to be protected. This victim testified to repeated and gruesome sexual abuse by her biological father. According to the victim, defendant also acted covertly and often isolated her so that the abuse occurred without detection by other family members, and he manipulated and pressured the victim so that she would not report the criminal actions inflicted upon her. Despite having to testify in a court

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[28] *Id.* (concluding that a state law categorically closing all victim testimony, without regard to the specific case, was unconstitutional); *Richmond Newspapers*, 448 US at 580-581 (holding that closure of an entire trial due to considerations of undue bias of witnesses and juror, without specific consideration of whether closure was needed for individual witnesses and jurors, given the opportunity for sequester, violated the constitution); *Waller*, 467 US at 48-49 (holding that a court's closure of a seven-day suppression hearing for broad interests of privacy of undefined individuals was unconstitutional, noting that the court did not identify whose privacy would have been impacted, how it would have been impacted, and the interests were only relevant to 2.5 hours of the seven-day hearing); *Presley v Georgia*, 558 US 209 (2010) (holding that the exclusion of the public from voir dire due to general concerns of improper influence of the jury was not justified); see also *People v Davis*, 509 Mich 52, 59-60 (2022) (holding that a broad and categorical closure of several days of a jury trial, including at least 14 different witnesses, based solely on the trial court's generalized concern of a single observer talking briefly to a single juror, which the trial court itself admitted was short and unrelated to the case, and in which the trial court threatened to "lock up" the observer and on remand declined to even defend that a closure was justified, was unwarranted).

of law about the abuse, the victim testified that she was horribly "punished" for attempting to disclose prior abuse by defendant. She had a very disruptive childhood, and many in her family, the ones with whom she spent the most time and toward whom she expressed the most regret for not informing, testified in favor of defendant. Furthermore, this victim broke down repeatedly during her preliminary-examination testimony when the courtroom was already closed and there were no public onlookers. This victim demonstrated extreme difficulty recounting the events in an audible manner and repeatedly needed help and intervention from attorneys and the court. No doubt a full trial on the merits would present substantially more emotional demands than the pretrial examinations. The trial court in this case did not institute a closure that would categorically apply to all witnesses or all child abuse victims, regardless of their individual needs or circumstances.[29] Instead, the highly case-specific

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[29] *See Globe Newspapers*, 457 US at 611, n 27 ("We emphasize that our holding is a narrow one: that a rule of mandatory closure respecting the testimony of minor sex victims is constitutionally infirm. In individual cases, and under appropriate circumstances, the First Amendment does not necessarily stand as a bar to the exclusion from the courtroom of the press and general public during the testimony of minor sex-offense victims. But a mandatory rule, requiring no particularized determinations in individual cases, is unconstitutional."); *Bell*, 236 F3d at 167 (explaining that the Supreme Court has struck down laws that "required trial judges, without exception, to close the courtroom during the testimony of minor victims of specified sexual offenses," as well as "per se" rules of closure by the trial court); *United States v Ledee*, 762 F3d 224, 229 (CA 2, 2014) ("Here, however, we are not dealing with a generally applicable law that mandates closure

facts apparent in this victim's testimony and the record demonstrate a compelling need for temporary closure of the courtroom in this isolated instance.

The second and third factors, requiring that the closure be no greater than necessary and that no reasonable alternatives be available, support the trial court's decision in this case. As was done in each of the three preliminary examinations, the courtroom was closed solely while the victim was providing in-court testimony. Prior to the victim's testimony and immediately thereafter, the courtroom was open for access to the public. An impartial judge oversaw the proceedings; defendant was present with the assistance of counsel; the bailiff and court security remained in the room; a certified court reporter was present and actively recorded the victim's testimony; and a victim support person and the jury were present for the entire proceeding. The victim confronted defendant in person and face-to-face, was subject to substantial cross-examination, and was subject to direct

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in every case, but rather a tailored closure as applied to one eight-year-old sex-abuse victim (ten years old at the time of trial) under the circumstances of this case."); see also *Latimore*, 561 F2d at 694 ("[The] exclusion of spectators during the testimony of an alleged rape victim is a frequent and accepted practice when the lurid details of such a crime must be related by a young lady."), quoting *Harris v Stephens*, 361 F2d 888, 891 (CA 8, 1966); accord *United States v Kobli*, 172 F2d 919, 923 (CA 3, 1949) (explaining that closures in sex-crime prosecutions for "public morals" may have been used in earlier American history but were not sufficient justification now; noting that the same does not apply to child abuse victims who have frequently been permitted to testify in a closed courtroom in given cases).

juror observation. There is no dispute that the record and trial transcript are correct, properly compiled, and were subject to public review after the victim testified. The trial was conducted using all standard and accepted methods of due process. The closure simply allowed the victim to testify with substantially reduced agony and embarrassment, while still affording defendant the full panoply of constitutional rights. The integrity and validity of the proceedings, and the evidence supporting defendant's guilt, were readily confirmable by the public at large. Furthermore, there is no record evidence or transcript that any third party or member of the public attempted or sought permission to enter the courtroom during the victim's testimony. Even defendant recognized the strength of the prosecution's motion and asked only to allow certain family members in the hearing room without any mention of the need of or interest from unrelated members of the public to attend.[30] Thus, the temporary closure at issue here was no broader than necessary.[31]

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[30] Defense counsel indicated that, reviewing the prosecution's motion, he "wouldn't normally" advocate strongly against closure but other family members and "one or two" of defendant's friends indicated an interest in watching the victim's testimony. Counsel acknowledged that most of defendant's family, at a minimum, were sequestered as witnesses. Like in many cases, criminal defendants often do not want increased public attention on the trial out of concerns it may prejudice their case. *See Press-Enterprise II*, 478 US at 5 (noting the defendant argued for closure of the courtroom out of concern that public access "would result in prejudicial pretrial publicity").

[31] *See Yazzie*, 743 F3d at 1285, 1287, 1289, 1291 (concluding that a closure during a child rape victim's testimony "was

There were also no reasonable alternatives. The jury was present, the judge presided over the examination of the victim, and defendant and his counsel could cross-examine the victim face-to-face for the jury to observe and assess credibility. In order to continue with the prosecution, the victim needed to testify, and she had shown substantial difficulties recounting her experiences *with a fully closed courtroom* at several preliminary examinations, prior to the actual trial on the merits and without the presence of a jury drawn from

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narrowly tailored to the asserted interest because the district court closed the courtroom only when the child victims took the stand"; noting also that "all portions of the trial other than the minor witnesses' testimony were public" and contrasting that with the closure in *Waller* "where the trial court closed the courtroom for the entire seven-day suppression hearing without considering the specific need for privacy" for a two-hour long wiretap); *Bell*, 236 F3d at 168 (given the compelling interest in protecting the child victim, the temporary closure was "imminently tailored to serve that interest"; "[c]ourt personnel, the attorneys, and the court reporter remained and, of course, the jury, comprised of the public, was present"; and the "entire proceedings were recorded [and] the recording was available for transcription to the public"); *Ledee*, 762 F3d at 230 ("Although the closure barred the general public, it applied only during [the victim's] testimony, not to any other aspect of the trial, and the government did not object to the transcript of [the victim's] testimony being made available to the public."); *Ayala v Speckard*, 131 F3d 62, 72 (CA 2, 1997) ("The closure is limited not only because it lasts only for the testimony of one witness, albeit an important witness, but also because there is no limitation at all on the right of the public or the press to examine the transcript of the officer's testimony."); see also *Press-Enterprise I*, 464 US at 512 (explaining that "the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time").

the public. The court could have installed a wall or screen so as to lessen the burden on the victim, but that could impose a greater burden on defendant's fundamental right to cross-examine the victim face-to-face. In addition, the jury would lack the ability to perceive the victim and her demeanor as she described the abuse. Such credibility determinations were vital to the jury's ultimate conclusion of guilt over conflicting testimony from the victim's relatives. The same applies to having the victim testify through a separate channel, such as closed-circuit television, in another location or at another time.[32]

Almost all of defendant's family were called as witnesses. They were appropriately sequestered and could not attend the victim's testimony in any event. Defense

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[32] See *Coy*, 487 US at 1020-1021 (holding that placing a screen in front of the victim violated the Sixth Amendment, noting that the Constitution guarantees "a right to meet face to face all those who appear and give evidence at trial") (quotation marks, citation, and emphasis omitted); *Craig*, 497 US at 846 (1990) (explaining that the Confrontation Clause "permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility") (quotation marks and citation omitted); *Yazzie*, 743 F3d at 1290 ("Here, a two-way closed circuit television or videotaped depositions, such as [one of the defendants] now recommends, would materially change the nature of the proceedings. These alternatives prohibit face-to-face confrontation during cross-examination and raise substantial Confrontation Clause issues."); *Ayala*, 131 F3d at 72 ("Even if *Waller* requires a trial judge to consider alternatives to complete closure, we do not believe that the Supreme Court wanted trial judges selecting the alternative of limited closure to consider further alternatives that themselves pose substantial risks to a fair trial for the defendant.").

counsel admitted as much, explaining that while the family would like to attend, "they are all going to testify except for *maybe* one or two of them." Those remaining "one or two" family members were properly subject to sequestration, as defense counsel informed the court it was only a *possibility* ("maybe") that they would not be called as witnesses at trial. Even assuming that there were remaining family members who would not be called as witnesses, the record clearly demonstrates substantial discord and divisions within the family, all of which underlay the victim's serious distress. The victim did not testify to abuse by a stranger; she testified to serious abuse by her biological father. According to her testimony, defendant intimidated and coerced her to not disclose the abuse to her family and to not seek their help; this strategy of "punishment" and manipulation was effective in preventing the victim from reporting the abuse. As a consequence, several of her closest family members testified against her story. When the victim attempted to recount the abuse to a close family member, Pecorilli, the victim became despondent and broke down. In line with this behavior, at the preliminary examinations, the victim repeatedly demonstrated distress and concern with the apparent inability to properly communicate the abuse to her family. The young victim's testimony itself was soft, often inaudible, and plainly showed significant emotional distress. Allowing to be present additional members of a divided family, who were at the center of highly traumatic events underlying years of abuse, and adding other onlooking eyes in addition to a father whom she was accusing of sexual

abuse, was not a reasonable alternative. Defense counsel indicated that two unrelated individuals "*may* want to sit in" at the trial, explaining that they were "friendly" with defendant. (Emphasis added.) Given all the facts described above, the highly sensitive and disturbing nature of the testimony, and the serious difficulty the victim had in providing effective and audible testimony when the proceedings were closed to the public at the preliminary examinations, exclusion of only family members was not sufficient to protect the youthful victim at trial. This is especially true when the potential observers were not merely random court watchers from the public, but "friend[s]" of defendant who knew him, were associated with him, and would attend out of respect and consideration for defendant.[33]

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[33] Associates willing to attend a trial for defendant out of friendship and support carried the apparent and serious risk of affecting the victim's testimony above that of random observers, as would the presence of family members. Their mere presence gave rise to a compelling interest in protecting the victim from pressure and intimidation. Their presence while the victim recounted her story would have provided to the victim yet more in-person examples of those associated with her father, an authority figure, who in the victim's account inflicted extraordinary abuse out of the sight and detection of others and by means of intimidation and "punishment" of the victim. The victim's background, abuse, and conflict with those that supported defendant and claimed to have not noticed any abuse, would have been all the more accentuated. Even without *any* member of the public at the preliminary examinations, the victim had substantial difficulties in providing testimony. Allowing defendant's friends and family to attend, those at the center of the trauma underlying this case, would have only made that challenge greater.

The serious personal and familial divisions, the extent and embarrassment of the abuse, the shame in not reporting sooner, and the trauma in recounting the events in a courtroom, among other factors, would be no less compelling if the observers were defendant's family or friends. Moreover, there is no record that any member of the public or press ever sought or indicated interest in attending the victim's testimony in person, let alone a record that the trial court denied an actual request by a third party to attend the trial. Nothing in the record indicates that any individual came to court, attempted to enter the courtroom, and were denied access. In all, there were no reasonable alternatives to the limited and narrowly tailored closure that occurred in this case.[34]

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[34] See *Yazzie*, 743 F3d at 1289-1290 (concluding that testimony from a child sex-abuse victim, who clearly exhibited trauma in prior recountings of the events, was properly subject to courtroom closures; comparing it to *Waller*, where the court could have closed the courtroom for "only those parts of the hearing that jeopardized the interests advanced" and not the entire seven-day suppression hearing, and *Presley*, where the court could have found additional space for jurors rather than close all of voir dire) (quotation marks and citation omitted); *Ledee*, 762 F3d at 230-231 (explaining that, when a victim demonstrated emotional distress and difficulty recounting the incidents, the closure of the courtroom during the victim's testimony was justified and had no effective alternatives; holding that "[e]xcluding all of the public, including [the defendant's] parents, allowed the district judge to tell [the victim] when she took the stand that 'all the people who are here are people who have to be here . . . [;] otherwise, everyone's been excluded', as was reasonably necessary to encourage [the victim's] effective communication") (citation and alterations omitted); *Bell*, 236 F3d at 155, 169-170 (asking a young girl to recount a series of sexual abuse inflicted upon her by "a family member and

Finally, the fourth factor requires a statement of reasoning on the part of the trial court, including the other factors of the public-trial inquiry such as the existence of reasonable alternatives.[35] This is well in line

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trusted adult figure in [the victim's] life, known to [the victim] since birth," when the defendant threatened her not to disclose the abuse, supported a limited and tailored closure; and finding that no justifiable alternative was available to the court); *Ayala*, 131 F3d at 72 (holding that closure during testimony of a confidential witness whose identity could be disclosed was properly tailored and necessary for the case); *Presley*, 558 US at 210-211, 215 (holding that closing the courtroom for the entirety of voir dire to prevent ambiguous concern of juror prejudice and courtroom space was unjustified given the reasonable alternatives of simply having separate rows available for the public, separating the potential jurors in different rooms, or giving the jurors instructions and explaining that if the closure in that case were allowed voir dire could be closed in "every criminal case") (quotation marks, citation, and emphasis omitted); *Press-Enterprise I*, 464 US at 512-513 (holding that closure of almost an entire voir dire session for "an incredible six weeks" where most the questioning was "dull and boring" was not warranted given the reasonable alternatives of allowing jurors to identify areas of concern with their privacy and questioning, allowing public disclosure of transcripts, or closing the public records only for those specific jurors in need of protection of their "valid privacy interests") (quotation marks and citation omitted).

[35] This statement in no way objects to the conclusion that trial court reasoning is a factor required under Supreme Court precedent. See majority order at note 1. This requirement includes reasoning on alternatives. See notes 29 through31 and 41 of this statement (collecting cases on the lack of reasoning on reasonable alternatives for demonstrably broad and unjustified closures). As thoroughly explained below, if the record fully supports closure and there are not reasonable alternatives, appellate courts do not reverse valid convictions simply because the trial court could have provided more extensive reasoning. See note 32 of this statement. If the record and reasoning available to the

with standard appellate court practice, which is to allow the appellate court to understand the purpose of the closure and "determine whether the closure order was properly entered."[36] This requirement plays into and is largely symbiotic with the other requirements. When a court closure on the record appears broad and excessive, or applies categorical closures unwarranted by the specific needs of the case, appellate courts must rely on the reasoning of the trial court to explain why the closure was necessary. If a court closes an entire six weeks of voir dire for a concern that some jurors may be embarrassed by the questioning,[37] or if a court closes seven days of voir dire to protect the privacy of third parties implicated in a mere 2½ hours of the hearing,[38] or if a court closes all of voir dire out of a generalized concern of juror prejudice or overcrowding,[39] appellate

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appellate court permit it to conclude that the closure is justified, the closure should be affirmed.

[36] *Waller*, 467 US at 45 (quotation marks and citation omitted); see also *Woods v Kuhlmann*, 977 F2d 74, 77-78 (CA 2, 1992) (explaining the basis for the rule and noting that the discussions between the attorneys, testimony of the witness, and arguments made to the court were sufficient to provide reasoning to the appellate court); *United States v Binford*, 818 F3d 261, 267 (CA 6, 2016) (stating, in the context of a decision to suppress evidence under the Constitution, that an "appellate court may affirm on any ground supported by the record and may consider trial evidence in addition to evidence considered at the suppression hearing").

[37] *Press-Enterprise I*, 464 US at 513.

[38] *Waller*, 467 US at 42-43, 48-49.

[39] *Presley*, 558 US at 215-216 (explaining that if the closure in that case were allowed voir dire could be closed in "every criminal case").

courts will reasonably demand that the trial court provide an explanation why this otherwise unwarranted closure was made. When reasonable alternatives are apparent, there is simply no way for the appellate court to conclude that the closure was justified. As a natural corollary, federal courts have repeatedly held that a courtroom closure will be affirmed if the "glean sufficient support" for the decision "from the Defendant record" separately from the trial court's reasoning.[40] This is well in line with established standards of

[40] *Charboneau v United States*, 702 F3d 1132, 1137 (CA 8, 2013) (noting that even if defense counsel had objected to the trial court's lack of reasoning for complete closure, such an objection would have been futile; applying well established public-trial rights caselaw and coming to its conclusion, despite that the trial court "did not articulate more explicit findings regarding [the victim's] psychological well-being . . . or explicitly consider other alternatives"), quoting *United States v Farmer*, 32 F3d 369 (CA 8, 1994) (affirming a closure to assist a child rape victim and explaining that, even without detailed statements from the trial court, there was "evidence in the record" of abuse, threats, and victim vulnerability that were "more than enough to justify the decision"); *Yazzie*, 743 F3d at 1289-1290 (refusing to reverse the trial court's decision to order closure for child sex victim, rejecting the trial court's need to expressly address and reject more imposing alternatives or state why closure was necessary to facilitate the child's testimony, relying upon "context" and the record to conclude that closure was justified; citing *Farmer*, 32 F3d 369, even in a case of complete closure); *Bell*, 236 F3d at 170-173 (noting the extensive record supporting the closure before the court including serious abuse and intimidation and the emotional effect on the victim, rejecting the argument that an appellate court must "ignore facts of record which fully support the decision and belie a claim that [the defendant's] right to a public trial was actually violated," and concluding that no public-trial violation occurred simply due to the "absence of more detailed findings," including detailed description of insufficient alternatives); *United States v Osborne*, 68

appellate review, which allows a court to "affirm on any ground supported by the record."[41]

F3d 94, 99 (CA 5, 1995) (affirming closure of a courtroom for a child sexual assault victim despite the lack of clear findings as to what the compelling reason was, let alone alternatives because the appellate court could "infer" from the record that the closure was justified to protect the child from increased trauma and embarrassment); *United States v Simmons*, 797 F3d 409, 415 (CA 6, 2015) (restating the same standard and explaining that a broad and generalized concern that acquaintances of the adult witness may make the witness uncomfortable was insufficient to justify closure under the available record); *Bowers v Michigan*, unpublished order of the United States Court of Appeals for the Sixth Circuit, entered April 28, 2017 (Case No 16-2325) (concluding that no reasonable jurist would dispute that the protection of a child witness subject to sexual abuse warranted closure of the courtroom, and the lack of express additional findings on inadequate alternative did not warrant reversal); *Woods*, 977 F2d at 77-78 (similarly reviewing the record and party arguments and concluding that closure was justified).

Contrary to defendant's claim at oral arguments, there is no indication in any of these cases that the Constitution requires trial courts to receive in-court testimony, thereby risking additional trauma to the victim, simply to establish the need for closure in the first instance. If supported by the record, the trial court can close the courtroom.

[41] *Binford*, 818 F3d at 267; *Naylor Farms, Inc v Chaparral Energy, LLC*, 923 F3d 779, 793 (CA 10, 2019) ("That is, we have a preference for affirmance—one that follows from the deference we owe to the district courts and the judgments they reach, many times only after years of involved and expensive proceedings.") (quotation marks and citation omitted); *United States v Gricco*, 277 F3d 339, 362 (CA 3, 2002) ("[W]e will not remand simply for the district court to make findings of fact that are implicit in the record."), overruled in part on other grounds by *United States v Cesare*, 581 F3d 206, 208 n 3 (CA 3, 2009); *Richter SA v Bank of America Nat'l Trust & Savings Ass'n*, 939 F2d 1176, 1194 (CA 5, 1991) (explaining that the lack of explicit findings does not justify

Here, the trial court expressly indicated that it had reviewed arguments from the prosecution, which emphasized the brutal and intimate nature of the abuse, the victim's testimony about intimidation at the preliminary examination, the fact that defendant was the victim's biological father, and the reality that the victim would be subject to embarrassment and trauma in conveying the testimony. Defense counsel emphasized to the trial court that most of the victim's family were testifying; the witness list filed by defendant confirmed that those family members were defense

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reversal "if a full understanding of the issues on appeal can nevertheless be determined by the appellate court") (quotation marks and citation omitted); 5 Am Jur 2d, *Appellate Review*, § 718, p 562 ("The court of appeals is entitled to affirm on any ground appearing in the record, including theories not relied upon or rejected by the district court."); see, e.g., *Whole Woman's Health v Hellerstedt*, 579 US 582; 132 S Ct 2292, 2313 (2016) (reviewing the record underlying the trial court's conclusions and holding that it supports those conclusions), overruled on other grounds by *Dobbs v Jackson Women's Health Org*, 598 US ___; 142 S Ct 2228 (2022); *Seymour v Freer*, 75 US 202, 216-217 (1868) (reviewing the record and concluding that it supported the lower court's decision).

There is no indication in the caselaw that basic standards of appellate review concerning whether appellate courts can affirm on the basis of the record apply differently depending on whether the defendant claims on appeal that the trial court improperly excluded some ("partial closure") or all members of the public ("complete closure"), reviewing the same public-trial right. The majority order's decision to decline application of these holdings on standard appellate procedure by distinguishing them on non-controlling grounds, in my view, "misses the mark." Majority order at note 7. Respectfully, I do not agree with the disputable bases upon which the majority declines to apply this caselaw, and instead, I rely on the recognized principles applied in the cases themselves.

witnesses. Finally, the court cited the prior preliminary examinations, which were available on the record.[42]

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[42] It almost goes without saying that the preliminary examinations were on the record, entered on the docket in ordinary course of the proceedings. On appeal, an appellate court can review proceedings of record, including transcripts from those proceedings, especially when they are directly referenced by the trial court. See, e.g., MCR 7.210 (discussing rules for the Court of Appeals and noting that "the record consists of . . . the transcript of any testimony or other proceedings in the case appealed"); *People v Armstrong*, 490 Mich 281, 291 (2011) (reviewing in detail events occurring in the lower court transcript to resolve an ineffective assistance claim). Those transcripts were repeatedly discussed and cited to by the parties and were attached in full to the record before this Court.

Defendant focuses much of his argument on the fact that the trial court referenced his earlier concessions of closure for the preliminary examination. But this is off the mark, and largely irrelevant. The circuit court did not conclude that the defendant was *barred* from opposing closure through doctrines such as judicial estoppel or waiver. In no portion of the government's arguments, the preliminary-examination transcripts, or the trial court's findings did the court state that the defendant waived his arguments because he previously conceded closure was appropriate in the past. The sole reason why the trial court cited the prior position was to note that defendant previously understood and agreed that closure was appropriate in the preliminary examination, and nothing had changed in the facts and circumstances to warrant a different decision. That concession by defendant in the preliminary examinations was abundantly reasonable given, as explained above, closure of the courtroom was a narrowly tailored and necessary action to facilitate the victim's testimony. The citation to defendant's prior concession was to emphasize the reasonability of the court's position. It is an incredibly common way of analyzing the law. See, e.g., *Waller*, 467 US at 49 (noting in support of its position that public trial does not require proof of prejudice the party's agreement on the point); *Richmond Newspapers*, 448 US at 579 (citing the party's argument and using it to support the court's reasoning because it has a common theme

The preliminary examinations gave substantial and direct evidence of trauma and the difficulties presented to the victim in recounting her version of events in court, in the presence of her father, whom the victim identified as the perpetrator of the crimes against her. Thus, in three different preliminary examinations before three different judges, the courts unanimously concluded that closure was justified.[43] The trial court also responded to defendant's arguments, which were minimal, and rejected the alternative of allowing defendant's family to attend, noting correctly that "the other family members may be called as witnesses and be sequestered anyways."[44]

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to prior arguments); *United States v Dingwall*, 6 F3d 744 (CA 7, 2021) (providing a long description of contrary legal positions the government has taken in order to support the defendant's argument in the case).

[43] See *Woods*, 977 F2d at 77-78 (citing the record, the assertions made by counsel, and interactions between the defense counsel and the prosecution to conclude that sufficient reasoning was provided); *Charboneau*, 702 F3d at 1137 (explaining that a trial court could reasonably rely on assertions made by a prosecutor about the victim's psychological state); *Yazzie*, 743 F3d at 1291 (rejecting the argument that the trial court erred by relying on a prosecutor's statement, indicating that the trial court's decision was justified based on the evidence of the victim's prior testimony, "the government's assertions, and its commonsense understanding that child victims may have difficulty testifying about sexual abuse in a public setting where the defendant's friends and family are present").

[44] The majority order criticizes the trial court analysis. See, e.g., majority order at notes 1 and 5. Like most hearings, it is possible that the trial court could have provided more extensive reasoning, and could have exhaustively rejected all possible alternatives which were not reasonable under the available record. As

The trial court explanations are helpful, and in addition to the prosecutorial arguments and the evidence included in the referenced preliminary examinations, it is apparent that temporary closure while the victim testified was warranted. Even if the Court holds that the trial court findings were not exhaustive and did not thoroughly refute less restrictive possibilities,[45] there is a substantial record before the Court justifying the trial court's decision.[46] While the trial court could have provided more reasoning, it was the only court on the ground with direct and full oversight of the case. In the trial court's perspective, the closure was warranted, and that decision should be affirmed.[47]

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a court dealing directly with complex and demanding issues of court administration for a highly contested CSC trial, the trial court responded to the arguments and briefing presented before it. Given the record in this case, I believe there was more than enough findings and reasoning to allow this Court to determine why the closure occurred and whether it was justified, as did the Court of Appeals below. See notes 28 through 32.

[45] See note 32 (collecting sources); see, e.g., *Bell*, 236 F3d at 174 (in a case where the trial court reasoned that the testimony of child rape victim, who was intimidated and isolated by a trusted authority figure and demonstrated clear emotional disturbance as a result, was "of apparent delicate nature," public rights under established law were not "violated simply because the trial judge failed to recite exhaustively every fact and inference which justified the obvious").

[46] See *Waller*, 467 US at 45 (explaining that reviewing courts must have sufficient reasoning to "determine whether the closure order was properly entered"); see notes 28 through 31 of this statement.

[47] See notes 32, 33, and 35 of this statement.

In *Presley v Georgia*, the Supreme Court rejected the argument that courts may ignore reasonable alternatives to closure simply because they were not offered by the defendant.[48] If there are reasonable alternatives to closure, the court must consider them and utilize them in lieu of closure. The Court reiterated the established standard that trial courts must provide reasoning sufficient to allow a reviewing court to "determine whether the closure was properly entered."[49] In line with the courtroom closures the Court has disapproved in the past, the Court in *Presley* held that a closure of a courtroom for the entirety of voir dire, simply out of a concern that jurors may talk to the public in the gallery, could not meet constitutional muster.[50] The Court

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[48] *Presley*, 558 US at 214 (rejecting the argument that courts "need not consider alternatives to closure absent an opposing party's proffer of some alternatives").

[49] *Id.* at 215 (quotation marks and citations omitted).

[50] *Id.*; see *Globe Newspaper*, 457 US at 608 (concluding that a state law categorically closing all victim testimony, without regard to the specific case, was unconstitutional; noting that the trial court may have kept the courtroom open if it had "been permitted to exercise its discretion"); *Richmond Newspapers*, 448 US 55 (holding that closure of an entire trial due to considerations of undue bias of witnesses and juror, without specific consideration of whether closure was needed for individual witnesses and jurors given the opportunity for sequester violated the constitution); *Waller*, 467 US at 48-49 (a court's closure of a seven-day suppression hearing for broad interests of privacy of undefined individuals was unconstitutional, noting that the court did not identify whose privacy would have been impacted, how it would have been impacted, and the interests were only relevant to 2.5 hours of the 7 day hearing; noting that the trial court could have applied a more limited closure for "only those parts of the hearing that jeopardized the interests advanced"); *Press-Enterprise I*, 464 US at

513 (closure of almost an entire voir dire session for "an incredible six weeks" where most the questioning was "dull and boring" was not warranted given the reasonable alternatives of allowing jurors to identify areas of concern with their privacy and questioning, allowing public disclosure of transcripts, or closing the public records only for those specific jurors in need of protection of their "valid privacy interests"); *Press-Enterprise II*, 478 US at 14-15 (generalized and "conclusory" concerns of prejudice to the defendant, based on a statute that mandates closure based on a mere "reasonable likelihood" of prejudice, were insufficient to close a 41-day suppression hearing when the court could have considered applying a more tailored closure or simply relying on voir dire to identify prejudiced jurors); see also *Bell*, 236 F3d at 167 (explaining that the Supreme Court has struck down laws that "required trial judges, without exception, to close the courtroom during the testimony of minor victims of specified sexual offenses," as well as "per se" rules of closure by the trial court); *Ledee*, 762 F3d at 229 ("Here, however, we are not dealing with a generally applicable law that mandates closure in every case, but rather a tailored closure as applied to one eight-year-old sex-abuse victim (ten years old at the time of trial) under the circumstances of this case.").

I strongly disagree with the majority order's caselaw analysis. The caselaw from over a century ago is not applicable to this case. *People v Micalizzi*, 223 Mich 580 (1923) (court officers closing a courtroom without justification or reason and without the order of the court was unconstitutional); *People v Murray*, 89 Mich 276 (1891) (same on an apparent miscommunication between the court and court officers). And this case is far removed from the unjustified and categorical closure that occurred in *People v Davis*, 509 Mich 52 (2022), in which the trial court ordered closure of several days of trial and at least 14 witnesses based on vague and generalized concerns of jurors being potentially influenced by observers. *Id.* at 59-60. In *Davis*, the trial court effected a massive and extended restriction on the public-trial access due to a single observer talking to a single juror, in a short comment completely unrelated to the case (i.e., do you work at Hurley Hospital?). *Id.* The trial court also threatened to "lock up" the observer and on remand, declined to defend the closure on the merits, opting instead to claim incorrectly that no closure had occurred. *Id.* This Court recognized the obvious: the trial court could

have easily responded to any concerns of jury influence by removing the only violating observer from the courtroom, the court could have simply reiterated the importance of not interacting with the jury, or it could have assigned more staff to monitor and escort the jury to prevent any improper influence. *Id.* at 70-71. The Court in *Davis* was not asked to review a record with a traumatized child rape victim who was testifying against her biological father, who has been subject to egregious abuse and repeated intimidation, who has had an unstable family life with close family testifying against her story, and who demonstrated substantial difficulty in effectively recounting her story in a clear and audible manner when the courtroom was closed to the public at prior hearings. The Court in *Davis* also did not review or consider a narrowly tailored closure for that single witness, used in order to address the compelling needs of child rape victim, where no other reasonable alternatives exist. Finally, although some of the language used in the *Davis* decision was seemingly broad and categorical when taken out of context, the decision in *Davis* did not concern, and in no way addressed, potential remedies where the closure was fully supported by the record but the trial court, in the eyes of a court on appeal, could have provided more detailed or exhaustive findings. *Brown v Davenport*, ___ US ___, ___; 142 S Ct 1510, 1528; 212 L Ed 2d 463 (2022) ("This Court has long stressed that the language of an opinion is not always to be parsed as though we were dealing with the language of a statute."). It certainly did not address or reject the established caselaw on reviewing the full record in public-trial claims, the remand without reversal condoned in *Waller*, and the caselaw targeting any Sixth Amendment remedy to the specific "taint" of the error, which is discussed more fully below.

The ultimate holding and remedy in *Davis* were supported by established precedent because the closure in that case was clearly overbroad and unnecessary, requiring reversal. In addition, the lower court reasoning, even on remand to allow it to address the public-trial issue, failed to explain why the patently unjustified closure was required. It is not contested that if a courtroom is unjustifiably closed during a trial, reversal is warranted. By contrast, the majority order here expands public-trial jurisprudence beyond what I believe are its recognized contours. Based on examination of the record and lower court reasoning, the closure in

explained that the jury could have been separated into different rooms awaiting selection, the gallery could have been separated to allow designated public seating, or the trial court could have reacted to individual problems of jury communication and directed the communications to stop.[51] Given the expansive, broad, and unsupported nature of the closure, the Court faulted the trial court for failing to examine these alternatives and to explain why they would not have been effective.[52] Because there was nothing in the record to allow the Court to "determine whether the closure was properly entered," the Court held the defendant was entitled to relief, although it did not determine what that relief would be.[53]

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this case was fully warranted and necessary to protect the individual child witness in this case. Given that the trial court decision was supported by the record, the only remedy considered should be a remand for additional trial court statements. Reversal of defendant's convictions provides him a windfall substantially out of proportion to any error occurring in the lower courts.

[51] *Presley*, 558 US at 215.

[52] *Id.* (quotation marks and citation omitted).

[53] Even though it was *possible* that there could have been justifiable reasons for the closure in *Presley*, the broad and imprecise closure of all of voir dire, issued without any indication as to why such closure was justified given apparent alternatives, did not allow the Supreme Court on review to determine that the closure was properly entered. The Supreme Court's short reference to *Presly* along these grounds in a separate and unrelated case on structural error and ineffective assistance of counsel, *Weaver v Massachusetts*, 582 US 286, 298 (2017) (discussed more fully below), fits well within this basic analysis of *Presley*, supporting precedents, and established federal caselaw. *Weaver*, 582 US at 298 (noting that it was *possible* that a closure in *Presly* would

In no way siloed as an outlier, the *Presley* holding fits well within the line of Supreme Court cases that have rejected broad and categorical closures of significant proceedings on the basis of general and imprecise concerns that are not tailored to limit the burden on public-trial rights. The Court's holding that reasonable alternatives to closure cannot be ignored makes abundant sense given that *the court system* is the government actor affecting the defendant's constitutional rights to a public trial, which requires a "compelling government interest."[54] Furthermore, when reviewing administration of evidence and courtroom procedure, appellate courts often rely on the rationales provided by the trial court in making their determinations.[55] Nonetheless, nothing in the per curiam opinion in *Presley* indicates that the Supreme Court intended to rework the established system for appellate review. Even after *Presley*, the Supreme Court has never held

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have been justified, but the lack of trial court findings disallowed effective appellate court review and affirmation, in its discussion on why public-trial violations do not always implicate fundamental fairness).

[54] *Press-Enterprise I*, 464 US at 510 (quotations and citations removed).

[55] See *United States v Tsarnaev*, 595 US ___; 142 S Ct 1024, 1040 (2022) (explaining when reviewing a trial court decision on evidence, a "reviewing court . . . must not substitute its judgment for that of the district court" and "an appellate court must defer to the lower court's sound judgment") (quotation marks and citation omitted); see *Waller*, 467 US at 45 (stating that the appellate court must have a sufficient basis on review to "determine whether the closure order was properly entered"); notes 8 through 9 of this statement (recounting the trial court's authority to respond to the needs of a case and management their courtroom).

that less than exhaustive findings by a trial court, alone, requires automatic reversal. If there is clear and substantial support in the record for a narrowly tailored and reasonable closure, even if the trial court reasoning is not as exhaustive as it could be, the trial court's decision should be affirmed.[56]

This case resembles nothing close to the unfounded and perplexing closure of voir dire done in *Presley*, made without adequate explanation or justification. Nor does this case implicate the broad, categorical, and inadequately tailored closures the Supreme Court has rejected. Here, the court had before it an identifiable victim, with trauma and difficulties specific to her. That victim testified to pervasive and gruesome abuse; the perpetrator was her biological father; the perpetrator used intimidation, threats, and coercion to isolate the victim from her family and prevent disclosure of the abuse; the victim lived in a disruptive homelife and upbringing; the victim experienced extensive divisions within her own family, with several close family members testifying against the victim's version of events; the victim broke down and became despondent when recounting the abuse to others such as Pecorilli; and even with a closed courtroom, the victim struggled to recount her testimony, experienced anxiety and shortness of breath, and repeatedly relied upon court and

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[56] See, e.g., *Charboneau*, 702 F3d at 1137 (providing that standard for a courtroom closure after *Presley*); accord *Yazzie*, 743 F3d at 1289-1290; *Simmons*, 797 F3d at 415 (same); see also *Bell*, 236 F3d at 170-73; *Osborne*, 68 F3d at 99; *Woods*, 977 F2d at 77-78.

attorney intervention at the preliminary examinations. These facts are specific to this case, this defendant, and this victim. The record demonstrates a compelling need for a temporary court closure. The trial court's actions were no broader than necessary to allow the victim to testify, and the court lacked any reasonable alternatives. Given the substantial support for the trial court's decision, the criminal judgment should be affirmed.[57] *Presley* does not require a different result.

C. TO THE EXTENT THERE IS CONCERN REGARDING THE ADEQUACY OF THE RECORD, THE INITIAL REMEDY SHOULD BE REMAND FOR ADDITIONAL TRIAL COURT REASONING, NOT REVERSAL AND REMAND FOR A NEW TRIAL

For the reasons stated above, I conclude the trial court did not err in this matter. To the contrary, the lower courts handling these proceedings should be commended for the narrow remedy implemented to address the needs of the youthful victim, while protecting the fundamental constitutional rights of defendant to confront and cross-examine his accuser. Nonetheless, reviewing these proceedings with the most critical eye, with the benefit of appellate hindsight, the most that could possibly be said is that the trial court could have provided more exhaustive reasons for the limited short-term closure of the courtroom. In my opinion, the

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[57] See notes 20 through 21, 23 through 24, 26, 32, and 42 of this statement.

remedy in such an instance is not, as a majority of this court has found, reversal of defendant's convictions and a remand for a new trial. Rather, to the extent a majority of this Court demands more exhaustive findings, the remedy is a remand to allow the trial court the opportunity to more fully explain its reasons for closing the courtroom to observers during the victim's testimony.

The Supreme Court of the United States has emphasized that improperly closing a courtroom is structural error, but the Supreme Court has never concluded that the right to an open courtroom is so fundamental to the fairness of a trial that structural error arising from any courtroom closure must necessarily result in reversal of a jury's verdict of guilt and a right to a new trial.[58] Here, a new trial is not warranted, where the lower court proceedings are sufficient to demonstrate that the limited closure of the courtroom did not impact the fundamental fairness of defendant's trial. There was a compelling interest justifying the closure, it was narrowly tailored and no greater than necessary, and there were no reasonable alternatives. The victim testified to her abuse in regular order,

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[58] *Weaver v Massachusetts*, 582 US 286, 298 (2017) ("In the two cases in which the Court has discussed the reasons for classifying a public-trial violation as structural error, the Court has said that a public-trial violation is structural for a different reason: because of the "difficulty of assessing the effect of the error.") (citations omitted); *id.* at 304 (reviewing the facts of the case, noting that the closure was only temporary, was observable by other third parties such as jurors, and was made on the record, thus not infringing the trial's "fundamental fairness").

with a jury, judge, court reporter, and adversarial representation, and there is no viable claim of any other constitutional infirmities in the trial. Defendant was provided all constitutional entitlements sufficient to enable a fair trial, and the trial was on the record in a publicly reviewable and accountable proceeding. The jury reviewed the testimony and the evidence with their own eyes and, as the ultimate finders of fact, concluded that defendant was guilty.[59]

Even if the Court finds error arising from a want for additional reasoning in support of the courtroom closure, a closure that did not impact the fundamental fairness of the adversarial proceedings, there is a clear and defined difference between *prejudice* and *remedy.* Prejudice merely considers whether the error was "harmless" or that the conviction was not obtained by means of the error "beyond a reasonable doubt."[60] In cases of structural error, prejudice is presumed and the

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[59] See *People v Lemmon*, 456 Mich 625, 637 (1998) ("It is the province of the jury to determine questions of fact and assess the credibility of witnesses. As the trier of fact, the jury is the final judge of credibility.") (quotation marks and citation omitted); *People v Carpenter*, 446 Mich 19, 29 (1994) ("[B]oth the Michigan judiciary singularly, and the citizenry whose collective rights and protections it is obligated to protect, have a compelling interest in championing the finality of criminal judgments."); *Musacchio v United States*, 577 US 237, 243 (2016) (explaining in the context of due-process analysis that appellate court review "does not intrude on the jury's role to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts") (quotation marks and citation omitted).

[60] *Chapman v California*, 386 US 18, 23-24 (1967).

defendant is entitled to relief.[61] But prejudice does not define an appropriate remedy.[62] The Supreme Court has expressly distinguished the two concepts in the Sixth Amendment context. Thus, *even if prejudice were proven* as is established in cases of structural error, "Sixth Amendment remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests."[63] The remedy "must neutralize the taint of a constitutional violation . . . while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution."[64] This is because a poorly targeted "reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts,

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[61] *Penson v Ohio*, 488 US 75, 88 (1988) (explaining, in the context of structural error, that the error is "presumed to result in prejudice") (quotations and citation omitted); *United States v Harbin*, 250 F3d 532, 544 (CA 7, 2001) (explaining that structural errors are "conclusively presumed prejudicial").

[62] See *Lafler v Cooper*, 566 US 156 (separating analysis between prejudice and adequate remedy); *Waller*, 467 US at 49-50 (same); see also *Davis v United States*, 564 US 229, 237 (2011) (explaining that, even in the case of a Fourth Amendment violation, there is no mandate for "suppressing evidence" as a remedy, and is thus applied by a court when the deterrent purpose is "most efficaciously served"); *United States v Booker*, 543 US 220 (2005) (concluding that a Sixth Amendment right to jury trial was violated, entitling the defendants to relief, but disputing and crafting a specific remedy to remove the mandatory nature of the sentencing guidelines).

[63] *Lafler*, 566 US at 170 (quotation marks omitted), quoting *United States v Morrison*, 449 US 361, 364 (1981).

[64] *Lafler*, 566 US at 170 (quotation marks and citations omitted).

the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences."[65] After three preliminary examinations, a five-day trial, 10 witnesses, and a child victim experiencing on-the-record anxiety and trauma, those costs are substantial in this case.

The Supreme Court in *Waller* itself applied these basic principles in the public-trial context. Despite the trial court in that case closing the courtroom during a seven-day suppression hearing without adequate justification, and the trial court allowing at least part of the relevant evidence to be admitted, the Supreme Court did not examine if the admitted evidence influenced the verdict and whether the criminal judgment as a whole should be reversed. Instead, the Supreme Court applied a limited remedy, tailored to "neutralize the taint of [the] constitutional violation."[66] The Court emphasized the lack of support for the complete closure of the suppression hearing, directed that only the suppression motion be reheard in open court, and held that reversal of the conviction was warranted only if a new outcome of the hearing would affect the ultimate

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[65] *Id.*, quoting *United States v Mechanik*, 475 US 66, 72 (1986); see also *Herring v United States*, 555 US 135, 141 (2009) (explaining that unnecessary applications of a constitutional remedy can impose a "costly toll upon truth-seeking and law enforcement objectives," and risk "letting guilty and possibly dangerous defendants go free—something that offends basic concepts of the criminal justice system") (quotation marks and citations omitted).

[66] *Lafler*, 566 US at 170 (quotation marks and citations omitted).

conviction.[67] Despite there being structural error, the Supreme Court in *Waller* did not reverse all of the defendant's convictions.[68]

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[67] *Waller*, 467 US at 49-50. The Supreme Court has never held that the analysis as to Sixth Amendment remedy varies depending on whether the closure excluded all spectators or merely some. In either case, the court's actions violated the defendant's public-trial right by unjustifiably limiting public access to the courtroom. The question remaining in both cases is the appropriate remedy to redress the court's unwarranted closure. The injuries are not different in kind sufficient to require a completely different remedy analysis, such as when counsel provided ineffective assistance of counsel at trial as compared to at the plea stage. *See Lafler*, 566 US at 170-171. Federal courts have at times indicated that partial closures can be applied using only a "substantial reason" rather than an "overriding interest." *Simmons*, 797 F3d at 414. That is beside the point given that it is well accepted that protection of child rape victims is a compelling interest. Further, simply because federal courts have at times applied a different standard to partial closures in order to determine whether closure was justified and an *error occurred* says nothing as to the appropriate remedy *after concluding that relief is warranted.* The majority order does not dispute that all public-trial right violations constitute structural error. When the only potential concern is lack of more complete trial court reasoning, there is no apparent explanation why the same concern for the same constitutional right affected by a partial closure would be subject to a remand but a complete closure would be subject to complete reversal.

[68] There is no dispute that the error in *Waller* was structural. If all structural errors require full scale reversal of the criminal convictions notwithstanding the scope or nature of the violation, the remedy in *Waller* would not be possible. I do not find convincing the *Waller* analysis in the majority order. Limiting *Waller* to the facts of the case and its procedural posture, does not in my view adequately recognize *Waller*'s underlying principles, established caselaw on Sixth Amendment remedies, and caselaw on proper remedies for purportedly incomplete trial court findings, as discussed in this opinion. Majority order at note 8.

Unlike *Waller*, the Court in this case is asked to review a courtroom closure that was supported by the record and otherwise constitutionality justified. The closure here was necessary and tailored, and there were no reasonable alternatives. There was substantial evidence and a record of the proceedings upon which appellate courts could determine that the closure was warranted, as the Court of Appeals did just that in a unanimous opinion. The only error that this Court could possibly ascribe to the trial court is a lack of more exhaustive statements of reasoning. To the extent that this Court finds such an error, the remedy should be tailored to the alleged violation. The "taint" is an alleged lack of reasoning, and to remove it, this Court should remand to afford the trial court an opportunity to more fully explain its actions before ordering a new trial. Wholesale reversing nine criminal convictions supported by substantial evidence of guilt, after an in-court jury determination of credibility and traumatic testimony from a child victim, based solely on the closure demonstrated in this record, provides defendant a massive windfall. It undermines countless hours of work and public resources expended to reach the jury's guilty verdict. And it is very possible that the victim will choose not to undergo the demands and anxieties of another criminal prosecution, and defendant may very well be released without any criminal adjudication. Such a result could serve to undermine public confidence in the criminal justice system. Notably, defendant never objected to the purported lack of trial court findings to support the closure at the trial

court, and instead asserted the claim on appeal after receiving an adverse verdict.

The Supreme Court of the United States has never held that reversal of criminal convictions and remand for new trial is *mandated* when the appellate court solely wishes to have more thorough lower court reasoning and the courtroom closure is otherwise justified under the Sixth Amendment. Courts reviewing public-trial claims have repeatedly tailored their remedies and remanded for trial court findings when the purported error is insufficient findings. That is well in line with standard appellate practice.[69] For these reasons, I

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[69] See *Waller*, 467 US at 49-50 (reasoning that if the evidence would be suppressed even with an open court, a new trial would be a "windfall" for the defendant); *Goldberg v United States*, 425 US 94, 111 (1976) (where a district court denied discovery for a defendant on an erroneous legal ground, after the conviction, the Court remanded the case to the district court to determine if the initial decision was warranted under the correct analysis); *Globe Newspapers*, 457 US at 622-623 & n 3 (Stevens, J., dissenting) (discussing disagreements on mootness and noting that if the case had been before the Supreme Court under the ordinary course of appeal, "the Court would either remand for factfinding, or examine the record itself, before deciding whether the order measured up to constitutional standards"); *United States v Galloway*, 937 F2d 542, 547 (CA 10, 1991) (holding that, in a public-trial claim, the appropriate remedy when the trial court did not provide adequate reasoning was to "to remand the case to the district court with directions to supplement the record with the facts and reasoning"; explaining that the remand would "fully protect the defendant's rights"); *People v Kline*, 197 Mich App 165, 172 (1992) (explaining that "where the closure order appears to be narrowly drawn, we do not think that failure to state the findings on the record in and of itself, requires a new trial"; reasoning that remand for findings "fully protect defendant's rights"); *Farmer*, 32 F3d at 371 (noting the possibility of remand in lieu of reversal of

conclude the majority decision to grant defendant's requested relief is not required by the law. It not only overturns a valid trial court decision, but it also gives defendant a chance at relitigation after being unable

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the convictions, but concluding that the court could determine the closure was justified even without more explicit findings); *United States v Ramirez-Ramirez*, 45 F4th 1103, 1112 (CA 9, 2022) (concluding that a failure to announce a finding of guilt publicly with specific findings did not warrant reversal of the conviction but remand for announcement with specific findings); *United States v Canady*, 126 F3d 352, 364 (CA 2, 1997) (concluding the same, reasoning that remand for statement of findings would "fully vindicate the public trial guarantee" even if some may view it as an "unnecessary formality"); *United States v Doe*, 63 F3d 121, 130-131 (CA 2, 1995) (reviewing a defendant's appeal of a trial court's refusal to close the courtroom, noting the lack of any findings under *Press-Enterprise II* sufficient to enable appellate review, but remanding for the trial court to provide findings instead of reversing the conviction); see also *Salem v Yukins*, 414 F Supp 2d 687, 697-698 (ED Mich, 2006) (closing an entrapment hearing on an unjustified basis does not require a new trial but a new entrapment hearing, which can mandate a new trial if the result would be different); *Icicle Seafoods Inc v Worthington*, 475 US 709, 714 (1986) ("If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings."); *United States v Williams*, 974 F3d 320, 347-348 (CA 3, 2020) (concluding that reversal for a new trial not warranted under plain error review given the need to design a "remedy . . . relative to the costs of the error" and noting the "the costs to the fairness, integrity, and public reputation of judicial proceedings" which would result from reversing the conviction and ordering a new trial).

There is no indication in this established caselaw, providing a process of remand for additional statements from the trial court, that such a remedy is dependent on whether the trial court's ultimate decision would prejudice the outcome of the case or implicate structural error.

to convince a jury during his first trial that the victim's testimony was unsubstantiated and untrue. The pressure, yet again, is on the victim to determine whether she will seek accountability for the abuse she has described. Under a close reading of public-trial caselaw and traditional standards of appellate review, such a result is not necessary.

III. CONCLUSION

The majority reverses nine valid convictions on the basis of a court closure that was supported by the record. The proceedings below, including the trial court's explanation and the available transcripts, provide this court more than adequate basis for determining that closure was justified. Nonetheless, a majority of this Court overturns defendant's convictions on what can, at the most, be attributed to the trial court not providing more exhaustive reasoning in support of the closure. The Court should have tailored its remedy to address the taint of any alleged lack of reasoning by simply remanding the case to the trial court to supplement and provide the additional reasoning. Instead, this Court provides defendant the chance to try the entire case on the merits again. If the victim declines to participate in the second trial, the public will never have a full accounting of the acts the victim described.

While this result is extraordinary, it is relieving to know that it is not necessary or warranted under the United States Constitution. The Founders' concern in crafting the right to a public trial, based on centuries

of abuse and tyrannical government, was to prevent persecution and capricious adjudications of guilt. Those who ratified the Constitution understood that governments without public oversight and scrutiny would have the ability to punish disfavored individuals without legal justification, due process, or sufficient evidence. The right to a public trial was neither ratified nor subsequently interpreted by the Supreme Court to provide a windfall for those convicted of heinous crimes, after a legally based, publicly accountable, and fair trial. It was not written to ignore challenges presented to child sex-abuse victims who wish to relay their story in a court of law.

I would affirm the unanimous decision of the Court of Appeals and the trial court. In the alternative, I would remand for the trial court to provide more exhaustive reasoning. Therefore, I dissent from the majority's decision to vacate defendant's convictions and remand for a new trial.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v. ANTHONY JOSEPH VEACH, Defendant-Appellant	UNPUBLISHED October 15, 2019 Nos. 342394, 342395, 342396 Macomb Circuit Court LC Nos. 2017-000447-FC; 2017-001859-FC; 2017-001865-FC

Before: CAVANAGH, P.J., and BECKERING and GADOLA, JJ.

PER CURIAM.

A jury convicted defendant of a total of seven counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(b)(*ii*), and two counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(b)(*ii*), arising from charges in three separate cases that were consolidated for trial. The jury convicted defendant of one count of CSC-I and one count of CSC-II in LC No. 2017-000447-FC; four counts of CSC-I in LC No. 2017-001859-FC; and two counts of CSC-I and one count of CSC-II in 2017-001865-FC. The

trial court sentenced defendant to prison terms of 20 to 60 years for each CSC-I conviction and 10 to 15 years for each CSC-II conviction, to be served concurrently. Defendant appeals as of right in each case. We affirm defendant's convictions, but remand for resentencing.

Defendant was convicted of sexually abusing his daughter in 2015 and 2016, when she was 14 and 15 years old. The abuse began after defendant and his then wife, Christine Pecorilli, had separated. The victim eventually disclosed the abuse to Pecorilli, her stepmother, who then contacted the police. The victim testified that there were multiple episodes of sexual abuse, but she could not recall specific details of each incident. The charges were based on separate incidents that occurred in different homes where defendant lived in Sterling Heights, Eastpointe, and Warren. The victim also testified regarding other uncharged incidents of sexual abuse. Defendant presented several witnesses who testified that he could not have sexually abused the victim because other family members were always around when the alleged abuse occurred.

I. CLOSURE OF THE COURTROOM

A preliminary examination was held in each of the three cases. During each preliminary examination, the court closed the courtroom while the victim, then 16 years old, testified. After defendant was bound over for trial, the prosecutor filed a motion in the trial court to close the courtroom during the victim's testimony at

trial pursuant to MRE 611(a)(3), to protect her from harassment or undue embarrassment. The trial court granted the motion over defendant's objection. Defendant now argues that the trial court violated his constitutional right to a public trial by closing the courtroom during the victim's testimony at trial. This presents a question of constitutional law that we review de novo. *People v Vaughn*, 491 Mich 642, 649-650; 821 NW2d 288 (2012). Defendant also argues that the trial court did not comply with applicable statutory procedures before closing the courtroom. Issues regarding the application of a statute are also reviewed de novo. *People v Rose*, 289 Mich App 499, 505; 808 NW2d 301 (2010).

The Sixth Amendment of the United States Constitution, which applies to states by the Due Process Clause of the Fourteenth Amendment, guarantees a criminal defendant the right to a public trial. *Vaughn*, 491 Mich at 650. Our state constitution also guarantees that a criminal defendant "shall have the right to . . . a public trial. . . ." Const 1963, art 1, § 20. However, this right is not absolute. As explained in *Vaughn*, 491 Mich at 653:

> A defendant's Sixth Amendment right to a public trial is limited, and there are circumstances that allow the closure of a courtroom during any stage of a criminal proceeding, even over a defendant's objection:
>
> > "[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than

> necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."
>
> If there is a timely assertion of the Sixth Amendment public trial right, the remedy for a violation must be "appropriate to the violation," although "the defendant should not be required to prove specific prejudice in order to obtain relief. . . ." [Citations omitted.]

MCR 8.116(D) implements procedures for closing a courtroom:

> (1) Except as otherwise provided by statute or court rule, a court may not limit access by the public to a court proceeding unless
>
> (a) a party has filed a written motion that identifies the specific interest to be protected, or the court *sua sponte* has identified a specific interest to be protected, and the court determines that the interest outweighs the right of access;
>
> (b) the denial of access is narrowly tailored to accommodate the interest to be protected, and there is no less restrictive means to adequately and effectively protect the interest; and
>
> (c) the court states on the record the specific reasons for the decision to limit access to the proceeding.

Initially, contrary to what defendant asserts, the trial court did not order closure of the courtroom under MCL 600.2163a, which generally applies to witnesses under 16 years of age. Rather, the prosecution's motion cited MRE 611(a)(3) as authority for its request to close the courtroom during the victim's testimony. MRE 611(a)(3) provides a court with discretion to implement procedures to protect a witness from harassment or undue embarrassment. Because of the sensitive nature of the victim's testimony, her fear of retaliation from defendant, and the family discord caused by her allegations, the trial court had valid reasons for believing that the victim would be subject to embarrassment or harassment if the courtroom remained open during her testimony.

Defendant argues that it was inappropriate for the trial court to consider that there had not been any objection to the closures of the courtrooms at the preliminary examinations. According to defendant, the trial court erroneously relied on the prior closures to place the burden on him to justify that the courtroom should be opened at trial. We disagree. The trial court did not rule that defendant had forfeited or waived the right to a public trial by previously stipulating to the courtroom closures at the preliminary examinations. The court merely observed that the circumstances that justified the closures for the victim's testimony at the preliminary examinations had not changed in the six or seven months since then.

Defendant also argues that the use of a support person while the victim testified was a reasonable

alternative to closing the entire courtroom to spectators. However, given the victim's expressed fear of defendant retaliating against her, as he had done in the past, and given the family discord stemming from the victim's allegations, allowing defendant's friends and family members to remain in the courtroom during the victim's testimony, even with a support person present, would have still exposed the victim to potential harassment or embarrassment from having to testify about intimate matters before defendant's family and friends. Accordingly, we are not persuaded that the presence of a support person was a less restrictive means to adequately and effectively protect the victim from harassment and embarrassment than closing the courtroom during her testimony. See MRE 611(a); MCR 8.116(D). The trial court narrowly tailored the closure to accommodate the specific interest to be protected by limiting the closure to the victim's testimony only. Under the circumstances, the trial court's closure of the courtroom while the victim testified did not violate defendant's right to a public trial.

II. HEARSAY EVIDENCE

Defendant next argues that the trial court erred by admitting Pecorilli's testimony regarding the victim's disclosure of the sexual abuse. Defendant argues that the testimony was inadmissible hearsay. We disagree. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. Any preliminary questions of law are reviewed de novo.

People v Washington, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

Pecorilli testified that during a car ride to a park, she had a conversation with her children, including the victim, in which she discussed with them the importance of being honest with her for their own safety. Pecorilli initiated the conversation after she learned that defendant's mother had allowed someone she did not approve of to be around the children and then told the children to lie about that person being there. According to Pecorilli, once they were at the park and the other children were playing, the victim became very emotional and revealed that defendant had been sexually abusing her and that it had happened multiple times at many different locations. After this conversation, Pecorilli contacted the police, who began an investigation. Although defendant raised a hearsay objection to the victim's statements to Pecorilli, the prosecutor argued that the statements were admissible under the hearsay exceptions for either an excited utterance, MRE 803(2), or a statement of the declarant's then-existing mental, emotional, or physical condition, MRE 803(3). The trial court overruled defendant's hearsay objection, but did not specify the basis for its ruling.

Hearsay is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v Dendel (On Second Remand)*, 289 Mich App 445, 452; 797 NW2d 645 (2010). "Hearsay is not admissible except as

provided by [the Michigan Rules of Evidence]." MRE 802. However, if the evidence is offered for a purpose other than to prove the truth of the matter asserted, then, by definition, it is not hearsay. *People v Musser*, 494 Mich 337, 350; 835 NW2d 319 (2013). When a statement is offered to explain why certain action was taken, it is not hearsay. *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007).

Preliminarily, we agree that the victim's statements to Pecorilli were not admissible under MRE 803(3), as statements of the victim's then-existing mental, emotional, or physical condition. MRE 803(3) provides that the following statements are not excluded by the hearsay rule, even if the witness is available:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Although the victim was in an emotional state when she made her statements, the statements were not describing her then-existing state of mind or emotions, but rather were statements of her memory of defendant's sexual abuse. Therefore, the statements were not admissible under MRE 803(3). However, even if the trial court erred in admitting the statements under

MRE 803(3), such error was harmless because the record supports the admissibility of the statements under MRE 803(2).

MRE 803(2) provides that an excited utterance is not excluded by the hearsay rule, even if the declarant is available as a witness. An exited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.* The requirements for admitting an excited utterance are "1) that there be a startling event, and 2) that the resulting statement be made while under the excitement caused by the event." *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). "[I]t is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule. The question is not strictly one of time, but of the possibility for conscious reflection." *Id.* at 551. Although the passage of time is a relevant consideration, "there is no express time limit for excited utterances." *Id.* Admissibility depends not necessarily on how much time has elapsed since the startling event, but rather whether the declarant was still under the stress of excitement resulting from that event. "The trial court's determination whether the declarant was still under the stress of the event is given wide discretion." *Id.* at 552.

The victim's statements related to defendant's alleged sexual abuse, which qualifies as a startling event. Defendant argues that the passage of time between the alleged sexual abuse and the victim's statements weighs against admitting the statements as

excited utterances. According to the victim's testimony, the last incident of sexual abuse occurred during her last contact with defendant on July 3, 2016. The victim's disclosure to Pecorilli occurred on July 15, 2016. Thus, there was a passage of about 12 days between the alleged startling event and the victim's disclosure to Pecorilli. In *People v Straight*, 430 Mich 418, 425-426; 424 NW2d 257 (1988), the Court held that a delay of a month was too long to admit statements under MRE 803(2). The Court explained:

> Few could quarrel with the conclusion that a sexual assault is a startling event. The difficulty in this case arises because the statements at issue were made approximately one month after the alleged assault, immediately after a medical examination of the child's pelvic area, and after repeated questioning by her parents. Under these circumstances, it simply cannot be concluded that the statements were made "while the declarant was under the stress of excitement *caused by the event or condition.*" Certainly the declarant was under stress, but one cannot safely say that this stress resulted from the alleged assault rather than from a combination of the medical examination and repeated questioning. [Footnotes omitted.]

This case is distinguishable from *Straight*. First, the time period is substantially shorter than a month. Second, the victim's statements were not made in response to repeated questioning. They were prompted by a discussion that had nothing to do with sexual

assault. The victim made the statements after Pecorilli reminded her children of the importance of being truthful. After this discussion, the victim began to show physical signs of suffering from emotional stress. She did not want to play with the other children. Instead, she began sobbing and hyperventilating, and she cowered as she sat on a park bench. The victim eventually told Pecorilli that she was upset about what defendant had done to her and that it was "going to ruin everything." The victim's reaction to a conversation that did not directly involve sexual abuse showed that she was still under the stress of the sexual abuse when she disclosed the abuse to Pecorilli. Although defendant argues that the passage of time created an opportunity for the victim to fabricate the allegations, there was no evidence of any motive to fabricate and the circumstances under which the statements were made showed that fabrication was unlikely. Because the requirements for an excited utterance were satisfied, the trial court did not abuse its discretion by admitting the statements.

Even if the trial court erred by admitting the victim's statements to Pecorilli, the error would not require reversal. "A preserved error in the admission of evidence does not warrant Sreversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013) (quotation marks omitted). The primary effect of Pecorilli's testimony was to provide an explanation for how the abuse was reported

to the police and led to the police investigation. As noted, statements offered to explain why certain action was taken are not hearsay. *Chambers*, 277 Mich App at 11. Pecorilli did not offer details about specific acts of sexual abuse. She testified generally that the victim described being sexually abused. Pecorilli testified that the victim's statements caused her to report the allegations to the police, which in turn led to the police investigation and the scheduling of forensic interviews. The testimony was not offered for a principal purpose of bolstering the victim's testimony, and would have had little effect for that purpose given that Pecorilli did not provide details of the victim's report of the alleged abuse. In contrast, the victim testified at length about the incidents she recalled and was subject to cross-examination by defendant about those details. Under these circumstances, after an examination of the entire cause, it does not affirmatively appear more probable than not that any error in the admission of the limited testimony offered by Pecorilli affected the trial's outcome.

III. PROSECUTORIAL MISCONDUCT

Next, defendant argues that misconduct by the prosecutor during trial denied him a fair trial. Because defendant failed to object to the claimed instances of misconduct, these claims are not preserved. Review on an unpreserved claim of prosecutorial misconduct "is limited to whether plain error affecting substantial rights occurred." *People v Abraham*, 256 Mich App 265, 274-275; 662 NW2d 836 (2003) (footnote omitted). This

Court will not reverse if the prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction from the trial court. *People v Williams*, 265 Mich App 68, 70-71; 692 NW2d 722 (2005), aff'd 475 Mich 101 (2006).

Claims of prosecutorial misconduct are decided case by case and the challenged conduct must be viewed in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). The test for prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). A prosecutor is afforded great latitude during closing argument. A prosecutor may not make a statement of fact that is unsupported by the evidence, but he is permitted to argue the evidence and reasonable inferences arising from the evidence in support of his theory of the case. *Id.* at 282; *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). Although a prosecutor must refrain from making prejudicial remarks, he is not required to phrase his arguments in the blandest of terms and he may use "hard language" when the evidence supports it. *Bahoda*, 448 Mich at 282; *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). A prosecutor may comment on the credibility of a witness, but he may not vouch for a witness's credibility by suggesting that he has some special knowledge about the witness's truthfulness. *People v Meissner*, 294 Mich App 438, 456; 812 NW2d 37 (2011); *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004).

Defendant argues that the prosecutor improperly stated during closing argument that the victim had remained consistent about her allegations. Viewed in context, the prosecutor's comments were referring to the evidence of the victim's prior statements and testimony admitted at trial. If the victim had made prior inconsistent statements, that information could have been brought out on cross-examination, but absent such evidence, it was not improper for the prosecutor to generally argue that the evidence showed that the victim had been consistent about her allegations. Furthermore, to the extent that the prosecutor's argument could be considered improper, a curative instruction, upon timely request, could have cured any perceived prejudice. Indeed, even without an objection, the trial court instructed the jury that its verdict must be based on "the evidence that has been properly admitted in this case," that "[t]he lawyers and statements and argument are not evidence," and that the jury "should only accept things the lawyers say that are supported by the evidence." These instructions were sufficient to protect defendant's substantial rights.

Defendant also argues that the prosecutor improperly commented on defense counsel's attempts to impeach the victim's testimony. Defendant complains that the prosecutor's remarks sought to convict him on the basis of defense counsel's skill and knowledge, rather than the actual facts of the case. Although a prosecutor may not personally attack defense counsel, *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003), the challenged remarks, viewed in

context, were focused on how the victim's responses to defense counsel's questioning demonstrated her credibility. The remarks were not a direct attack on defense counsel's legal skills. It was not improper for the prosecutor to argue that the manner in which she handled and responded to defense counsel's cross-examination were reasons to find that her testimony was credible. Moreover, to the extent that the remarks could be considered improper, a timely objection and curative instruction could have cured any perceived prejudice. And again, even without an objection, the trial court's instructions were sufficient to protect defendant's substantial rights.

Defendant next argues that the prosecutor improperly commented on the Care House interviews during the following portion of the prosecutor's opening statement:

> Now Care House is a facility that we have here in Macomb county [sic] that is child [sic] advocacy center and the purpose of the child advocacy center, Care House, is to do forensic interviews on children who are the suspected victims of child abuse, child sexual assault or witness to violent crimes.
>
> The forensic interviewer, there [sic] are highly trained. They have specialized knowledge in asking of questions. There is a certain method and manner that is followed based on a protocol that is set forth by a government task force in Michigan.

> That is the reason why kids go to that facility as opposed to being interviewed by the detective at our local police department.
>
> So she went to Care House and she was interviewed and she disclosed at Care House certainly more details were [sic] provided at Care House to the forensic interviewer than were initially provided to Christina. And after that the Defendant was then charged by the prosecutor [sic] office.

Defendant argues that the prosecutor misled the jury by stating that the victim's Care House interview actually conformed to protocols set by a Michigan task force because, according to defendant, it is the policy of Macomb County to not record forensic interviews, which defendant contends is not a state-wide policy. Viewed in context, the prosecutor's limited comment regarding task force protocols referred only to the "asking of questions." Defendant has not provided any basis for concluding that the manner in which the forensic interviewer questioned the victim did not conform to state protocols.

Defendant's principal complaint on appeal is with Macomb County's policy of not recording forensic interviews, which defendant contends is not a policy shared by the Michigan task force or followed by other counties.[1] This broader argument is beyond the scope of this

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[1] Although the victim's interview was not recorded, a written summary of that interview, which included the victim's responses to questioning, was prepared by the forensic interviewer and provided to the defense.

appeal. Notably, defendant never offered any evidence regarding the procedures used in different counties or whether Macomb County's procedures were consistent with state guidelines or recommendations. Further, defendant never created a factual record to explain or demonstrate how the failure to record the victim's interview affected his substantial rights, particularly where he was provided with the interviewer's written summary of the interview. Accordingly, defendant has not demonstrated entitlement to relief with respect to this unpreserved issue.

Defendant further argues that the prosecutor improperly told the jury that the victim's Care House interview corroborated her trial testimony and that this was improper because a verbatim recording of that interview was never prepared. Although the interview was not recorded, a written summary of the interview, which included the victim's responses, was prepared by the forensic interviewer. Defendant does not contend that the prosecutor misrepresented the contents of that summary. To the extent that defendant continues to argue that a video or audio recording of the interview would have provided a more accurate record of the interview, that again is a policy argument that goes beyond the scope of this appeal. Because defendant did not challenge that policy in an appropriate motion in the trial court, and failed to create a factual record in support of his arguments on appeal, he is not entitled to relief.

Defendant next argues that the prosecutor improperly harassed defense witnesses and raised

frivolous objections, which denied him a fair trial. The record does not support this argument. The record discloses that the prosecutor objected during defense counsel's questioning of Tina Marra, a defense witness, arguing that the witness was providing nonresponsive answers to the questions asked. Contrary to what defendant argues, it was not solely within the province of defense counsel to raise that type of objection. See 2 Longhofer, Michigan Court Rules Practice, Evidence (4th ed), p 340, § 611.6.9. The prosecutor is an advocate for the state, and a prosecutor's good-faith effort to admit or exclude evidence does not constitute misconduct. *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007). The record indicates that Marra frequently offered testimony that went beyond the scope of the question asked. It was appropriate for the prosecutor to object when testimony exceeded the scope of defense counsel's question. We note that the trial court sustained some of the objections and instructed the witness to respond only to the questions asked. The objections did not amount to harassment.

Defendant complains that the prosecutor made similar objections to the testimony of other defense witnesses when, according to defendant, the answers provided by the witnesses were actually responsive. Defendant argues that the prejudice from the prosecutor's frequent objections was compounded by the prosecutor's following comments during closing argument:

> Now contrast that with what you saw from defense witnesses. There was not a single defense witness that took the stand that I

> think answered a question directly, not one. They evaded the questions, they were squirrelly about the questions. They had to be instructed by the judge to answer the questions. They were trying to give their own answers. Their body language was turned away. There were even a couple witnesses that were hiding their faces when they were answering questions, if they were answering the question at all.

Again, it was not improper for the prosecutor to object to testimony he deemed improper or unresponsive. The record shows that the prosecutor was acting within proper bounds by attempting to have the witnesses respond to the questions asked. Again, the trial court agreed that some of the witnesses' answers were nonresponsive. It was also appropriate for the prosecutor to comment on the witnesses' demeanor while testifying and to argue that their unwillingness to provide direct responses affected their credibility. The prosecutor's conduct, even if aggressive, did not amount to plain error that affected defendant's substantial rights.

Defendant also argues that the prosecutor wrongly implied that Marra and defense counsel had unethically coordinated an alibi defense. The record shows that Marra admitted to talking to family members about the victim's testimony during the preliminary examinations, even though those hearings were closed to the public. When the prosecutor further questioned Marra about how she knew that one of the incidents involved a fundraiser event in July 2015, Marra

testified that the defense attorneys asked her about that day and it was the attorneys who told her that one of the incidents allegedly occurred that day. The questioning was merely intended to determine what Marra knew about the victim's testimony and the source of that knowledge. It was not improper for the prosecutor to inquire whether Marra may have been influenced by her contacts with others involved in this case. Contrary to what defendant argues, the prosecutor did not imply that Marra and defense counsel had unethically coordinated a false alibi.

Defendant further argues that the prosecutor "bullied" Angel Rose[2] on cross-examination. Although this witness apparently became emotional during her testimony and stated, "I am going to end up freaking out," the record does not support defendant's argument that the witness's emotional reaction to questioning on cross-examination was the result of "bullying" by the prosecutor. When the witness expressed that she did not want to continue testifying, the prosecutor discontinued questioning her and the witness was excused.

In sum, the record shows that the prosecutor had a good-faith basis for objecting to testimony and that his questioning of witnesses did not amount to impermissible harassment. Defendant has failed to show

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[2] This witness is improperly identified as April Veach in defendant's brief. Defendant also asserts that the prosecutor took advantage of this witness's health problem, but there is no indication in the record that the witness had a known illness or condition.

that plain error occurred as a result of the prosecutor's conduct.

Defendant further complains that, during the prosecutor's opening statement, the prosecutor made multiple improper references to defendant's incarceration and the revocation of a power of attorney that defendant had given to Pecorilli while he was in jail. However, the prosecutor only generally explained that defendant was not consistently involved in the victim's life because of his "constant poor choices in life" and that Pecorilli had assumed a parental role. Those comments did not mention that defendant was in jail. The prosecutor also explained to the jury that defendant asked Pecorilli to act in his place to make decisions for the victim when defendant was unavailable, but again did not state why defendant was unavailable. In her opening statement, the prosecutor explained that the evidence would show that defendant began to sexually assault the victim after Pecorilli and defendant's relationship began to unravel, and that, given the victim's close relationship to Pecorilli, she chose to confide in her. In both her opening statement and closing argument, the prosecutor addressed the fact that defendant revoked the power of attorney after the victim's allegations came to light, allegedly because defendant believed that Pecorilli was behind the allegations and had influenced the victim to fabricate the allegations.

At trial, the prosecutor elicited information about why the victim was living with Pecorilli, which included defendant's inability to provide for her. In her testimony, the victim explained that the sexual

assaults began after defendant returned from being in jail. There was no effort to introduce this information for the prohibited purpose of demonstrating defendant's bad character, MRE 404(b)(1). It was offered only as relevant background information to provide context for understanding the victim's relationships with defendant and Pecorilli, and the setting for when the sexual abuse began. "[P]rosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Accordingly, there was no plain error. Furthermore, the jury was informed that defendant's incarceration was not related to any type of sexual offense, but instead was for a crime involving marijuana, and the trial court gave cautionary instructions with regard to the limited permissible purpose for which the marijuana conviction could be considered. Thus, the presentation of this evidence did not affect defendant's substantial rights.

For these reasons, we reject defendant's arguments that he is entitled to a new trial because of the prosecutor's conduct.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that he did not receive effective assistance from trial counsel. Because defendant did not raise an ineffective-assistance claim in the trial court, our review of this issue is limited to errors apparent from the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To establish

ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant complains that defense counsel failed to question the victim about her previous testimony to establish inconsistencies between her former testimony and her trial testimony. For the Warren incident, the victim testified at the preliminary examination that she and her siblings were at a fundraiser event and went to defendant's home afterward. When they arrived at defendant's house, the victim went with defendant to his upstairs bedroom while her siblings remained in the car. The victim described defendant having her perform a single sexual act involving penetration. At trial, however, the victim described defendant performing two acts of penetration after returning from the fundraiser event. Defense counsel questioned the victim about the timing of this incident, but did not attempt to use her prior testimony to impeach her trial testimony regarding how defendant sexually assaulted her. At the preliminary examination for the Sterling

Heights incident, the victim testified that the sexual assault occurred in the mobile home where defendant was living with his girlfriend, Brandy, and that Brandy was in another bedroom during the assault. At trial, the victim testified that she was alone in the bedroom with defendant, but then Brandy "started talking" and defendant "had to leave." Defendant asserts that there was an inconsistency regarding whether Brandy unknowingly interrupted the sexual assault, but the record does not indicate whether Brandy entered defendant's bedroom or started talking from another room. In any event, defense counsel did not explore this issue on cross-examination.

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Defendant must overcome the strong presumption that defense counsel exercised sound trial strategy and must show that, but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *Id.* at 368-369.

While defendant has shown that there were areas where defense counsel could have shown or explored possible inconsistencies between the victim's trial testimony and her prior testimony regarding certain details of the alleged incidents, the victim had already conceded that she could not recall every incident with defendant, and she admitted that she had difficulty

recalling all of the details of each incident or distinguishing between different incidents. Given these admissions by the victim, counsel may have reasonably determined that using her prior testimony to impeach her trial testimony regarding certain details of the various incidents would have had little value, but instead may have been negatively perceived by the jury, either because the jury might expect that the victim would understandably have difficulty remembering all of the details of each incident, or by creating sympathy for the victim if counsel's questioning was perceived as bullying. Defendant has not overcome the presumption that defense counsel's decisions regarding the scope and manner of his cross-examination of the victim was reasonable trial strategy.

Next, defendant argues that defense counsel was ineffective for not objecting to the introduction of improper character evidence about him and his family members. Defendant contends that evidence about his lack of education, lack of steady employment, drug use, neglectful conduct as a father, illegal copying of movies,[3] and criminal record, was irrelevant and should not have been introduced as evidence. Contrary to what defendant argues, this evidence was relevant to show the dynamics of the relationships between the victim and defendant, the victim and Pecorilli, and

[3] The victim testified that defendant illegally downloaded a copy of the movie, *Fifty Shades of Gray*, and allowed her to watch it. The defense theorized that the victim's allegations in this case were influenced by information she obtained from watching that film. The comment that defendant illegally downloaded the movie was volunteered by the victim.

Pecorilli and defendant. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The jury needed to understand the setting for the alleged sexual abuse, and why the victim would choose to disclose the allegations to Pecorilli, who was defendant's ex-wife and the victim's former stepmother. The challenged evidence was probative of why Pecorilli ended her relationship with defendant, why the victim continued to reside with Pecorilli after her separation from defendant despite that Pecorilli was not the victim's natural mother, why the victim might delay reporting defendant's sexual abuse, and why the victim would be willing to eventually disclose the abuse to Pecorilli. Thus, any relevancy objection to this evidence would have been futile. Counsel is not required to make a futile objection. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Further, because this evidence was neither offered nor used as other-acts evidence intended to show defendant's bad character, any objection on the basis of MRE 404(b) also would have been futile. Likewise, an objection to this testimony on the ground that it was unfairly prejudicial, MRE 403, would have been futile because it was necessary to explain the circumstances surrounding the alleged abuse and the victim's disclosure of the allegations.

Defendant also faults counsel for eliciting testimony that he had a prior conviction involving marijuana. Pecorilli testified on direct examination about

defendant being arrested and jailed. Defense counsel intervened and the prosecutor clarified that the arrest was for an unrelated matter, which was not sex-related. On cross-examination, defense counsel elicited that defendant's arrest involved marijuana. Defense counsel reasonably understood that defendant's incarceration was relevant because it explained why the victim was living with Pecorilli after she had separated from defendant, and because the victim had claimed that the sexual abuse began after defendant was released from jail. Knowing that, and even though Pecorilli had not revealed the nature of the offense for which defendant had been arrested (other than that it was not sex-related), it was not unreasonable for defense counsel to elicit that the arrest was related to marijuana, thereby preventing the jury from speculating that it involved more serious conduct. Counsel also asked Pecorilli whether she was aware that defendant subsequently obtained a medical marijuana card. Defendant has not overcome the presumption that counsel's manner of dealing with this issue was sound trial strategy. Moreover, in the court's final instructions, it instructed the jury that it was to consider the evidence that defendant was previously "convicted of a crime involving marijuana in the past" "only in deciding whether you believe the defendant is a truthful witness. You may not use it for any other purpose." Given this backdrop, there is no reasonable probability that this testimony affected the outcome of defendant's trial.

Defendant also argues that counsel was ineffective for not objecting to the testimony regarding the power of attorney that defendant gave to Pecorilli, and the testimony that defendant later revoked that power of attorney after the victim made the allegations against defendant. After the power of attorney was revoked, Pecorilli became the victim's foster parent. Defendant maintains that this evidence was not relevant, but again, this evidence was probative of the nature of the relationship between Pecorilli and the victim, and thus was relevant to explain why the victim would choose to disclose the abuse to Pecorilli. Once again, any relevancy objection by defense counsel would have been futile.

Defendant also complains about counsel's failure to object to testimony about defendant's extended family, particularly Rosey, which defendant again argues was not relevant. The testimony indicated that the victim had lived with different family members, or that different family members were often around during the periods in which the alleged abuse occurred. With regard to Rosey, Pecorilli explained why she did not want the children to spend time around Rosey, but also testified that the victim and Rosey were like sisters because they grew up together. Pecorilli explained that Rosey did not "follow the straight and narrow," she did not "listen to authority, she did not "listen to family," and she "will throw someone under the bus if it will save her." The victim would sometimes get in trouble because Rosey talked her into leaving the house when she was not supposed to, or to going places she was not

allowed to go. On cross-examination, defense counsel further questioned Pecorilli about Rosey and why she was a bad influence on the victim.

Testimony about defendant's family members, particularly Rosey, was again relevant to an understanding of the family dynamics in which the victim was raised and lived. Indeed, part of the defense theory was that defendant never had the opportunity to sexually abuse the victim because other family members were always around. Although defendant complains that it was not necessary to introduce Pecorilli's testimony that defendant's family members were demanding, manipulative, and "difficult to get along with," this testimony was probative of why the victim would have formed a relationship with Pecorilli and would choose to disclose the abuse to Pecorilli instead of a different family member. Moreover, the victim explained that defendant did not want her around Rosey because she was a bad influence, and that the sexual abuse began after defendant found out that she had spent time with Rosey. For that reason, defendant had the victim stay in his bedroom with him during visits when Rosey was around. According to the victim, the sexual assaults were part of the punishment she received for spending time with Rosey. Therefore, it was necessary for the jury to understand why defendant did not like the victim spending time with Rosey, and why defendant felt it was necessary to "punish" the victim for doing so. Defendant has not shown that defense counsel's failure to object to this testimony was objectively unreasonable.

Defendant argues that defense counsel was ineffective for failing to object to the victim's hearsay statements to Pecorilli when the victim disclosed the sexual abuse. As explained earlier, the victim's statements to Pecorilli were admissible under the hearsay exception for excited utterances, MRE 803(2). In any event, defense counsel objected to this testimony at trial and the trial court overruled the objection. Therefore, defendant cannot establish ineffective assistance of counsel on this basis.

Defendant also argues that defense counsel should have objected to Pecorilli's testimony that the victim had earlier reported that defendant physically confronted her, but did not mention any sexual abuse. Defense counsel may have reasonably declined to object to this testimony because it showed that the victim was not hesitant about reporting perceived misconduct by defendant, yet she did not reveal any sexual abuse by defendant in her initial report, despite that the sexual abuse had allegedly been occurring for some time. Counsel may have reasonably believed that the victim's failure to mention any sexual abuse in this earlier report undermined the credibility of her later allegations. Defendant has not overcome the presumption that counsel made a strategic decision to not object to this testimony.

Defendant also argues that defense counsel should have objected to Pecorilli's testimony about her conversation with her children in which she talked about the importance of being honest. Although defendant contends that this conversation was inadmissible hearsay,

the testimony about this conversation was not introduced to establish its truth, but only to explain what prompted the victim to disclose defendant's sexual abuse. Therefore, it was not hearsay, MRE 801(c), and any hearsay objection would have been futile.

Defendant also argues that defense counsel was ineffective for stipulating to the use of a support person during the victim's testimony at trial. Although defendant argues that MCL 600.2163a did not authorize the presence of a support person because the victim was 17 years old at the time of trial, the prosecutor's motion and the stipulation were not based on that statute, but rather relied on MRE 611(a), which grants a trial court broad discretion to control the proceedings to protect witnesses from embarrassment or harassment. Regardless, defendant has not established that he was prejudiced by the presence of a support person. As the prosecutor points out, nothing in the record suggests that the jury was aware of the support person's role in supporting the victim.

Defendant also argues that defense counsel was ineffective for not objecting to the prosecutor's conduct discussed in part III, *supra*. As previously discussed, defendant has not established that the prosecutor's conduct was improper or prejudicial. Moreover, at the start of his closing argument, defense counsel informed the jury that he intentionally did not interrupt or object to the prosecutor's closing argument because "it is not evidence." Thus, in addition to our conclusion that the prosecutor's arguments were not improper, it is

apparent that defense declined to object to the prosecutor's arguments as a matter of strategy.

Defendant argues that even if an isolated error by defense counsel does not require reversal, the cumulative effect of counsel's many errors denied him a fair trial. Although a single error in a trial may not necessarily provide a basis for granting a new trial, it is possible that the cumulative effect of multiple minor errors may add up to error requiring reversal. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). The test is whether the cumulative effect deprived the defendant of a fair and impartial trial. *Id.* at 387. The foregoing analysis demonstrates that defense counsel did not have a valid basis to object to defendant's many claims of evidentiary error or to the prosecutor's conduct, or there were sound strategy reasons for counsel's decisions. In addition, defendant has not demonstrated that he was prejudiced by counsel's stipulation to the presence of a support person during the victim's testimony. For these reasons, defendant has failed to show that he is entitled to a new trial due to the cumulative effect of counsel's performance at trial. See *id.*

V. SCORING OF OFFENSE VARIABLE 11

Defendant challenges the trial court's scoring of offense variable (OV) 11 of the sentencing guidelines. The trial court prepared a sentencing information report for CSC-I in each of defendant's three cases. The court scored the guidelines the same in each case, and

in each instance assessed 50 points for OV 11. The court's scoring decisions placed defendant in OV Level 5 (80 to 99 points), which combined with defendant's placement in Prior Record Variable Level D, resulted in a guidelines range of 135 to 225 months under the applicable sentencing grid, MCL 777.62. Defendant argues that the trial court erred by assessing 50 points for OV 11. We agree.

When reviewing a trial court's scoring decision, the trial court's "factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.* A finding is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008).

MCL 777.41 provides:

> (1) Offense variable 11 is criminal sexual penetration. Score offense variable 11 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Two or more criminal sexual penetrations occurred ..... 50 points

(b) One criminal sexual penetration occurred..... 25 points

(c) No criminal sexual penetration occurred..... 0 points

(2) All of the following apply to scoring offense variable 11:

(a) Score all sexual penetrations of the victim by the offender arising out of the sentencing offense.

(b) Multiple sexual penetrations of the victim by the offender extending beyond the sentencing offense may be scored in offense variables 12 or 13.

(c) Do not score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense.

Defendant argued below that the trial court could not consider any penetrations that resulted in a conviction, even if they arose from the same sentencing offense. The trial court found, however, that because the victim had testified that defendant sexually penetrated her on at least 16 different occasions, there were "[t]wo or more criminal sexual penetrations" to support a 50-point score for OV 11. The trial court erred because it failed to consider that it could only score "sexual penetrations of the victim by the offender *arising out of the sentencing offense.*" MCL 777.41(2)(a) (emphasis added).

In *People v Johnson*, 474 Mich 96, 100; 712 NW2d 703 (2006), the Court explained that "arising out of the

sentencing offense" "means that the 'sexual penetration of the victim must result or spring from the sentencing offense.'" The Court further explained:

> [W]e have previously defined "arising out of" to suggest a causal connection between two events of a sort that is more than incidental. We continue to believe that this sets forth the most reasonable definition of "arising out of." Something that "aris[es] out of," or springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen. For present purposes, this requires that there be such a relationship between the penetrations at issue and the sentencing offenses. [*Id.* at 101.]

Recently, in *People v Lampe*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 342325; issued February 21, 2019); slip op at 6, this Court stated:

> [D]efendant argues that, because he received two convictions for CSC-III, neither penetration resulting in a conviction could be considered when assessing points for OV 11. However, this Court has repeatedly rejected this argument. See *People v Cox*, 268 Mich App 440, 455-456; 709 NW2d 152 (2005); *People v McLaughlin*, 258 Mich App 635, 672-678; 672 NW2d 860 (2003); *Mutchie*, 251 Mich App at 278-281. In particular, this Court has concluded that "OV 11 requires the trial court to exclude *the one penetration* forming the basis of the offense when the sentencing offense

> itself is first-degree or third-degree CSC." *McLaughlin*, 258 Mich App at 676 (emphasis added). All other sexual penetrations arising from the sentencing offense, including penetrations resulting in separate CSC-I or CSC-III convictions, are properly considered under OV 11. See *Cox*, 268 Mich App at 455-456; *McLaughlin*, 258 Mich App at 672-678; *Mutchie*, 251 Mich App at 278-281. [Footnote omitted.]

Thus, although multiple penetrations resulting in separate convictions may be considered, it is still necessary that the multiple penetrations arise from the sentencing offense.

In LC No. 2017-000447-FC (Docket No. 342394), defendant was convicted of only one count of CSC-I for the incident that occurred in Sterling Heights. At trial, the victim testified regarding only one act of sexual penetration during that incident. Accordingly, when scoring the guidelines in LC No. 2017-000447-FC, the trial court should have assessed zero points for OV 11 because that sentencing offense involved only one act of sexual penetration, that act formed the basis of defendant's CSC-I conviction, and the court was not permitted to consider that penetration in scoring OV 11.

In LC No. 2017-001859-FC (Docket No. 342395), defendant was convicted of four counts of CSC-I for offenses that occurred in Eastpointe. However, those convictions arose from two separate incidents. The victim testified that one incident occurred when defendant penetrated her with his penis and finger. The victim

testified that on a separate occasion, defendant penetrated her with his penis and finger when she was alone with defendant in his bedroom. Because those convictions arose from two separate incidents, the four convictions did not arise out of the sentencing offense. At most, the victim's testimony supported a finding that there was one additional act of criminal sexual penetration beyond each sentencing offense. Thus, at most, the trial court should have assessed only 25 points for OV 11 in LC No. 2017-001859-FC.

In LC No. 2017-001865-FC (Docket No. 342396), defendant was convicted of two counts of CSC-I for offenses that occurred in Warren, but which appeared to have occurred on different days. However, the victim testified that defendant penetrated her twice during the incident that occurred after the fundraiser event, once vaginally and once orally. This testimony supported a score, at most, of 25 points for one additional act of sexual penetration beyond the sentencing offense in LC No. 2017-001865-FC.

Although the victim testified that she believed there were 16 incidents of sexual assault committed by defendant, she could not recall the details of the other nine incidents. Regardless, there was no evidence that the other incidents arose out of the sentencing offenses in these three cases. Therefore, as plaintiff concedes, the trial court could not score OV 11 on the basis of these other incidents. In each case, the trial court's scoring of OV 11 caused defendant to be placed in OV Level V, thereby increasing his guidelines range. As plaintiff concedes, because the scoring errors affect

defendant's appropriate guidelines ranges, defendant is entitled to be resentenced. See *People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006).

We affirm defendant's convictions, but vacate his sentences and remand for resentencing. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Jane M. Beckering
/s/ Michael F. Gadola