

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
April 2, 2013

v

TERRANCE MAURICE FOMBY,  
Defendant-Appellant.

No. 305602  
Wayne Circuit Court  
LC No. 11-001965-FC

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Before: MURRAY, P.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, carjacking, MCL 750.529a, and carrying or possessing a firearm when committing or attempting to commit a felony, MCL 750.227b. The trial court sentenced defendant to serve life in prison for felony murder, 20 to 60 years' imprisonment for armed robbery and carjacking, and two years' imprisonment for felony-firearm. We affirm.

Defendant first argues that his right to a public trial was violated when the trial court had the courtroom doors closed and locked during the opening statements and closing arguments of the parties' counsel. We disagree.

Generally, “[f]or an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court.” *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Defense counsel did not object to the trial court’s closing and locking the courtroom doors during opening statements and closing arguments. “[T]he failure to assert a constitutional right ordinarily constitutes a forfeiture of that right.” *People v Vaughn*, 491 Mich 642, 654; 821 NW2d 288 (2012). A member of the public can invoke the right to a public trial pursuant to the First Amendment; however, because defendant invokes the right on appeal, his claim is under the Sixth Amendment and subject to traditional waiver and forfeiture rules. *Id.* at 652, 659. Defendant has not preserved his Sixth Amendment argument for appeal.

On the other hand, a defendant’s failure to preserve his Sixth Amendment right to a public trial for appeal does not foreclose his opportunity to raise the issue. *Vaughn*, 491 Mich at 663-664. The plain error test for forfeited claims established in *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999), “applies to [a] defendant’s forfeited claim that the trial court violated his Sixth Amendment public trial right.” *Vaughn*, 491 Mich at 664. To obtain relief on forfeited

constitutional error, a “defendant must establish (1) that the error occurred, (2) that the error was ‘plain,’ (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *Id.* at 664-665, citing *Carines*, 460 Mich at 763. Whether the lower court violated defendant’s Sixth Amendment right to a public trial is a question of law this Court reviews de novo. *Vaughn*, 491 Mich at 649-650. A violation of a defendant’s right to a public trial is a structural error, which if found, satisfies the third prong of *Carines*, namely that the error affected defendant’s substantial rights. *Id.* at 665-666.

The right to a public trial is guaranteed by the Sixth Amendment of the United States Constitution and article 1, § 20 of the 1963 Michigan Constitution. *Vaughn*, 491 Mich at 650. Although the right is not absolute and may be limited, *id.* at 653, to facilitate appellate review of whether the trial court’s decision to close the courtroom was proper, a trial court must state the interest that justified the closure and articulate specific findings that explain why that interest justified the closure. *People v Kline*, 197 Mich App 165, 169; 494 NW2d 756 (1992). Further, the closure must be no broader than needed to protect the interest justifying it, that is, it must be “narrowly tailored” to satisfy the purpose for which closure was ordered. *Id.* at 169, 171. There is also a distinction between partially and fully closing courtrooms to the public. *Id.* at 169-170. “[T]he effect of a partial closure of trial does not reach the level of a total closure and only a substantial, rather than compelling reason for the closure is required.” *People v Russell*, 297 Mich App 707, 720; 825 NW2d 623 (2012), citing *Kline*, 197 Mich App at 170.

It is not absolutely clear from the record whether members of the public were present when the courtroom doors were closed and locked, but the public’s presence can be inferred from the fact that the trial judge specifically addressed the “ladies and gentlemen in the audience” and “those of you who are in the courtroom.” No one was removed from the courtroom during either the opening statements or closing arguments, and all members of the public who were then present were permitted to stay. The trial judge asked that if anyone needed to leave the courtroom that they do so before the beginning of the opening statements and closing arguments. The trial judge had the courtroom doors closed and locked so the attorneys could present their opening statements and closing arguments without interruption. Thus, the closure was only partial.

In this case, the trial court provided a reason for the closures—to allow the parties to present and the jury to hear opening statements and closing arguments uninterrupted. The trial court’s closure of the courtroom was narrowly tailored to serve this purpose because the trial judge (1) only had the doors closed and locked during the opening statements and closing arguments, and (2) she did not require members of the public already present to leave the courtroom. Therefore, the closure excluded the public only to the extent necessary to prevent disruptions during the opening statements and closing arguments. Defendant presents an alternative argument that the trial court could have posted warnings to those entering the courtroom or that it could have had a court officer deal with any problems were there any. But these solutions would not have prevented an interruption as effectively as closing the courtroom for this short period of time.

Because the closure was only partial, the trial court needed only provide a substantial, rather than compelling, reason for the partial closure of the courtroom based upon findings made

on the record. *Russell*, 297 Mich App at 720; *Kline*, 197 Mich App at 170. We conclude that the trial court provided a substantial reason for the partial courtroom closure and that it did not unnecessarily interfere with defendant's right to a public trial. We find the facts of this case similar to those in *People v Bails*, 163 Mich App 209, 211; 413 NW2d 709 (1987), where the trial court closed and locked the courtroom doors for thirty to forty-five minutes during the reading of jury instructions. The court did so "to prevent people from moving in and out of the courtroom on a sentencing day when the increased traffic would have been distracting to the jury." *Id.* There was no evidence that anyone was actually excluded from the courtroom during its closure. The Court held that the defendant's constitutional right to a public trial was not violated. *Id.* at 212. We also conclude that defendant's constitutional right to a public trial was not violated.

Defendant cites *People v Micalizzi*, 223 Mich 580; 194 NW 540 (1923), where the courtroom doors were closed and locked during the charge of the jury and where one of defendant's attorneys along with other individuals were denied admission to the courtroom. Our Supreme Court set aside the conviction and ordered a new trial. *Id.* at 585. A court officer asked that those who wanted to leave do so before the charge of the jury because the doors to the courtroom were going to be locked. *Id.* at 581. *Micalizzi* is distinguishable from the present case. First, defendant does not claim that anyone was denied admission to the courtroom during the period of time when the doors were closed and locked. See *Bails*, 163 Mich App at 212 (distinguishing *Micalizzi* in part because there was no evidence of anyone's being excluded from the courtroom due to the closure of the courtroom). Second, the *Micalizzi* opinion does not indicate that the trial court provided a reason for closing and locking the courtroom, whereas the trial court in this case provided a substantial reason for doing so: to prevent interruptions during the opening statements and closing arguments of the parties. Therefore, unlike *Micalizzi*, the partial closure of the courtroom in the present case does not warrant a new trial.

Moreover, even if we were to conclude that defendant has satisfied the first three prongs of the plain error test for relief from unpreserved constitutional error—(1) that the error occurred, (2) that the error was plain, and (3) that the error affected substantial rights—defendant cannot satisfy the fourth prong for relief—that the plain error "resulted in the conviction of an actually innocent defendant" or *seriously* affected "the fairness, integrity, or public reputation of judicial proceedings." See *Vaughn*, 491 Mich at 666-667. As discussed already, the closure of the courtroom in this case was limited to the time during which the parties' counsel were presenting their opening statements and closing arguments to the jury. This partial closure served the substantial purpose of permitting the uninterrupted presentation of the parties' position regarding the trial evidence to the jury. A fair reading of the record indicates that members of the public were present in the courtroom during the closures, and there is no evidence that any member of the public that desired to be present was refused. Under these circumstances, "we cannot conclude that the closure 'seriously affected the fairness, integrity, or public reputation of judicial proceedings.'" See, *Id.* at 668-669, quoting *Carines*, 460 Mich at 774. Defendant is not entitled to a new trial on the basis of his unpreserved claim of constitutional error. *Id.*

Defendant alternatively argues that his trial counsel's failure to object to the closure of the courtroom doors during opening statements and closing arguments constitutes ineffective assistance of counsel. We disagree.

To establish a claim of ineffective assistance of counsel, defendant must establish that his counsel's representation fell below an objective standard of reasonableness and that a reasonable probability exists that, but for counsel's errors, the result of the proceeding would have been different. *Vaughn*, 491 Mich at 669. To prove the first prong of deficient performance, "the defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy." *Russell*, 297 Mich App at 715-716, quoting *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011). "This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight." *Id.* at 716.

In the present case, defendant cannot overcome the presumption that counsel's failure to object to closure of the courtroom during the attorneys' presentations to the jury was sound trial strategy. After all, both defense counsel and the prosecuting attorney would benefit from having the undivided attention of the jury while presenting their view of the how the evidence supported their theory of the case. See e.g., *Vaughn*, 491 Mich at 670-671. We will not second-guess counsel on matters of trial strategy. *Russell*, 297 Mich App at 716.

Defendant also cannot show that, but for the locking of the courtroom door during the attorneys' presentations, there is a reasonable probability that the result of the proceeding would have been different. The locking of the courtroom door would not be evidence for the jury to consider in deciding the case; nor could it possibly have precluded the admission of relevant evidence. Defendant simply cannot establish that the locked courtroom door affected the outcome of the trial; thus, he cannot establish counsel's failure to object resulted in the actual prejudice necessary to establish ineffective assistance of counsel. *Vaughn*, 491 Mich at 672-674.

Defendant next argues that because the crime was committed before the Legislature increased the crime victim's rights fee assessment, the prohibition against ex post facto laws was violated. We disagree.

Defendant failed to preserve this issue for appeal by raising it below. *People v Earl*, 297 Mich App 104, 111; 822 NW2d 271 (2012). We review this claim for "plain error affecting defendant's substantial rights." *Id.*

In *Earl*, this Court addressed this precise issue and held the prohibition against ex post facto laws pursuant to state and federal constitutions was not violated where the crime occurred before the Legislature increased the fee assessment because the assessment is neither restitution nor punishment. *Id.* at 111-114. We are bound to follow *Earl*. MCR 7.215(J)(1). Therefore, defendant has failed to establish plain error.

We affirm.

/s/ Christopher M. Murray  
/s/ Jane E. Markey  
/s/ William C. Whitbeck