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RENDERED: JANUARY 21, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000441-MR

TIMOTHY DIETZ — APPELLANT

V.

ON APPEAL FROM KENTON CIRCUIT COURT
HONORABLE MARTIN J. SHEEHAN, JUDGE
NO. 07-CR-00634

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Timothy Dietz appeals as a matter of right following a June 10, 2008 Judgment of the Kenton County Circuit Court convicting him of one count of first-degree sexual abuse and two counts of first-degree sodomy. The charges alleged that over the course of several years, from 2002 to 2006, Dietz sexually abused two minor children, R.D. and D.D., while he was either babysitting them or while the children were visiting him in his home. After the jury found Dietz guilty, they recommended that he be sentenced to a total of twenty years in prison, which the trial court imposed. On appeal, Dietz argues that the trial court erred by (1) removing the public from the courtroom during R.D.'s and D.D.'s testimony without first holding a hearing or finding that the closure was essential; (2) excluding Dietz from the courtroom during D.D.'s competency hearing; (3) allowing Dr. Siegel, the physician who examined D.D., to include a

hearsay statement in his testimony; (4) refusing to sever the counts of the indictment; (5) failing to strike Juror S. for cause; and (6) permitting the Commonwealth to amend the indictment.

Finding that the trial court abused its discretion in failing to sever count one of the indictment relating to Dietz's abuse of R.D. from counts two and three relating to Dietz's abuse of D.D., this Court must reverse Dietz's conviction and remand this case for new, separate trials. This Court's decision to reverse and remand Dietz's case renders moot his allegation that the trial court erred in failing to strike Juror S. for cause. Dietz's arguments that the trial court erred by excluding him from D.D.'s competency hearing and by admitting hearsay statements are not properly preserved for appellate review and will not be addressed by this Court. However, because Dietz's remaining two allegations of error may be relevant on remand, this Court notes first that the trial court did not err in permitting the Commonwealth to amend Count Three of the indictment, and second, that the closure of the courtroom for a minor's testimony should be considered very carefully by the trial court on remand, and a closure is only appropriate if the court makes findings on the record that special circumstances exist warranting the exclusion of the public.

RELEVANT FACTS

In the mid-1990's, Timothy Dietz, a semi-professional photographer, began taking pictures of floral arrangements for Vicky Davidson, the owner of a local floral shop. As part of her floral business, Vicky regularly went on "night-runs," where she sold flowers at local bars on the weekends from 9:00 p.m. till

around 2:00 a.m. After becoming friends with Vicky, Dietz began accompanying her on these night-runs because he had a large van they could use. On at least one occasion, Vicky brought her young daughter, R.D., with her on the night-runs, and Dietz became acquainted with R.D. After Vicky informed Dietz that she was having trouble finding a babysitter, Dietz began babysitting R.D. on Friday and Saturday nights so that Vicky could continue her night-runs. About a year later, on November 6, 1998, Vicky gave birth to her son D.D., and the following year, gave birth to her second son, K.D. Dietz also began babysitting Vicky's two boys. Dietz's charges in this case are based on his alleged sexual abuse of R.D. and D.D.

R.D., who was seventeen years old at trial, testified that Dietz began babysitting her when she was seven years old. She revealed that a couple of weeks after Dietz started babysitting her, he began touching her vagina with his hands. She stated that the abuse began when he saw her sitting on the couch with her hand resting under the waistband of her pants. R.D. said that Dietz took a picture of her with a Polaroid camera and told her that he would "show her how to do it the right way." R.D. testified that Dietz touched her inappropriately every weekend and that it happened "a lot." R.D. also testified that when she was approximately eleven or twelve years old, during the summer of 2002, she went over to Dietz's house to help him clean out his garage. She stated that she went inside with Dietz to watch a movie and look at his computer. Eventually, R.D. went upstairs with Dietz so he could show her around. R.D. stated that they went into one of the back rooms of the

house and got down on the floor by the door. She said that her top was on, but her pants were off. Using nicknames for the genitalia, R.D. testified that Dietz put his penis in her vagina. R.D. explained that she did not tell anyone because she was afraid her family would be mad and disown her. R.D. stated that Dietz never touched her again after this event and that she soon moved in with her aunt and uncle and did not see Dietz.

Off and on from September 2002 till December 2006, Dietz also babysat D.D. D.D., who was nine years old at the time of Dietz's trial, testified that Dietz would do "nasty stuff" to him when he was little, eventually clarifying that Dietz put his "thing" into D.D.'s "butt."[1] D.D. stated that the first instance of abuse occurred when he lived in the red-brick house. He testified that his mom was out on a night-run and Dietz was babysitting him. D.D. said that he was on his mother's bed in her bedroom and Dietz was standing on the floor. D.D. stated that after Dietz did the "nasty stuff," he left the room and did not do anything else. D.D. also testified that the same thing occurred after his family had moved from the red-brick house to the Wildwood Apartment Complex. D.D. stated that again while Dietz was babysitting him, Dietz put his "thing" into D.D.'s butt and then peed on D.D.'s back. During D.D.'s testimony, the prosecutor drew a picture of a man with a penis and asked D.D. to circle the "thing" that he was talking about. D.D. circled the man's penis.

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[1] At trial, D.D. never actually said the word "butt," and instead spelled out the letters, "b-u-t."

D.D. testified that after this occurred at their Wildwood apartment, he told his mom that Dietz had peed on his back.

R.D. testified that on July 3, 2007, her mother and her mother's friend were talking about Dietz and asked her what she thought of him as a babysitter. R.D. stated that at this time she finally told her mom that Dietz had touched her inappropriately. Vicky Davidson testified at trial that on July 5, 2007, after R.D. and D.D. told her that they had both been molested by Dietz, she went to the police station to file a report. Dietz was indicted on September 20, 2007, for one count of first-degree rape and two counts of first-degree sodomy. At trial, the Commonwealth relied on the testimony of R.D., D.D., Vicky Davidson, and Dr. Robert Siegel, the physician who examined and evaluated D.D.

As his defense, Dietz testified at trial and explained that his friendship with Vicky had become strained after he loaned her and her husband $4800, but they had only repaid him $2000. Dietz stated that Vicky's failure to repay him the full amount of the loan forced him to close his delivery business and that soon thereafter, he stopped babysitting her children. Dietz claimed that the allegations against him were false and that he never engaged in any inappropriate conduct while he was babysitting R.D. and D.D. Dietz also called Sergeant Paul of the Independence Police Department, who conducted the initial interview of Vicky Davidson on July 5, 2007. Sergeant Paul testified that during his interview of Ms. Davidson, she told him that she learned of the abuse of R.D. two days earlier, but that D.D. had told her about his abuse

approximately three weeks earlier. After deliberating, the jury found Dietz guilty of one count of first-degree sexual abuse—a lesser included offense of first-degree rape—based on his abuse of R.D., and found Dietz guilty of two counts of first degree sodomy based on his abuse of D.D. This appeal followed.

ANALYSIS

I. Because Dietz Failed to Object to the Trial Court's Ruling that He Should Be Excluded During D.D.'s Competency Hearing, Dietz Is Prevented From Raising This Issue On Appeal.

On the morning of April 23, 2008, while the parties were addressing pre-trial matters, the trial court raised the issue of whether Dietz should be excluded during D.D.'s competency hearing. After the Commonwealth briefly argued that Dietz should be excluded, Dietz's counsel responded that he disagreed, explaining that without Dietz in the courtroom, the court would never know whether D.D. experienced any trauma from Dietz's presence. At this point, without deciding the issue of whether Dietz was to be excluded or not, the trial judge moved on to the issue of whether one of the Commonwealth's witnesses would be permitted to testify about Dietz's alleged prior bad acts.[2] After bringing Dietz into the courtroom and hearing arguments on this issue, the trial court ruled that the testimony should be excluded as inadmissible prior bad act evidence under KRS 404(b). Following this ruling, the trial court informed the parties that it would now proceed with D.D.'s

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[2] This witness was also a minor and, like D.D., would have been required to undergo a competency hearing before being allowed to testify. However, the trial judge understandably reasoned that before deciding whether Dietz should be excluded during both D.D.'s and this additional witness's competency hearing, the court should first decide whether this additional witness's testimony was even admissible.

competency hearing and that the hearing would occur outside of the presence of Dietz. The trial judge then addressed Dietz's counsel and inquired whether this ruling was "without objection." Dietz's counsel responded, "No objection, the case law is clear." Dietz then left the courtroom and the parties began D.D.'s competency hearing.

Although Dietz represents in his brief that this issue is preserved, it is clear from the record that despite his initial disagreement with the Commonwealth's position, Dietz's counsel consented to the trial court's ruling and did not object to Dietz being excluded from the courtroom during D.D.'s competency hearing. Because Dietz did not object to the trial court's ruling at the time it was made, he has not preserved this alleged error for appellate review. RCr 9.22; Edmonds v. Commonwealth, 906 S.W.2d 343, 346 (Ky. 1995). Because this argument is unpreserved and because Dietz has not requested palpable error review pursuant to RCr 10.26, this Court will not address the issue on appeal.

II. Because Dietz Never Argued to the Trial Court that Dr. Siegel's Testimony Included an Inadmissible Hearsay Statement, This Allegation of Error Is Unpreserved and Will Not Be Reviewed By This Court.

Although the Commonwealth does not argue that this allegation of error is unpreserved, when reviewing the record to discover how the trial court ruled on this issue, it became clear that the trial court never entered a ruling on this matter because Dietz never presented the court with this argument. Even though Dietz objected to the admission of Dr. Siegel's medical evaluation report and to Dr. Siegel's ability to testify about certain aspects of D.D.'s medical

history, Dietz never objected to Dr. Siegel's recitation of the allegations in this case, never mentioned the word "hearsay" during Dr. Siegel's testimony, and never argued that any aspect of Dr. Siegel's testimony violated KRE 803(4). Thus, this argument is not preserved for appellate review.

After Dr. Siegel was sworn-in by the trial court, he introduced himself to the jury, gave his educational background, and described his current employment. Responding to the Commonwealth's questions, Dr. Siegel then stated that his regular protocol following an allegation of child abuse was to gather historical information about the child-victim, conduct a general physical examination, and then conduct a more specific examination of the particular areas that may have been most affected by the abuse. After Dr. Siegel acknowledged that he completed an examination of D.D. on September 5, 2007, the prosecutor presented Dr. Siegel and defense counsel with a copy of his examination report. The Commonwealth asked Dr. Siegel if it was part of his regular practice to make this type of report, and Dr. Siegel responded that it was. The prosecutor then moved for Dr. Siegel's report to be admitted into evidence as Commonwealth's Exhibit Three. Dietz objected, and the parties approached the bench.

Dietz's counsel then argued that

> The initial paragraph in the report pertains to a history that was provided by the mother and that would be in violation of Crawford. I understand that Crawford does not apply to evidence being obtained in furtherance of a medical examination, however, that is not the case here . . . [inaudible]. This examination occurred almost two months after the initial disclosure by the mother. This was not an examination done in

> furtherance of a medical examination . . . but in furtherance of the investigation in this case.

In response, the Commonwealth argued that the "doctor had no desire to do any investigation . . . he was there to treat the patient." Dietz's counsel then argued that because Vicky Davidson, D.D.'s mother, did not testify about D.D.'s history of constipation, the doctor, who learned about this history from D.D.'s mother, should not be able to testify about that aspect of D.D.'s medical history. The Commonwealth replied that the "constipation was part of the medical diagnosis . . . he even treats it." Dietz's counsel responded, "I don't care if he says [D.D.] has a history of constipation, that's fine. But the mother says things further down in the paragraph that are more damaging than just he has a history of constipation."

At this point, the trial judge stated, "Yeah, I think the medical history provided to the doctor [by the mother] and the historical aspects of it—that can come in. But I do have some problem with this other stuff."[3] The prosecutor agreed and stated that she "would agree to redact that." The trial judge then stated that he would overrule Dietz's objection and admit Dr. Siegel's medical evaluation report with one sentence redacted.

When the prosecutor resumed her direct examination of Dr. Siegel, she stated, "I was asking you if you were familiar with the allegations in this case. What is your understanding of those?" With no objection from Dietz, Dr. Siegel responded, "[D.D.] was brought in for alleged sexual abuse and the allegation

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[3] One sentence in Dr. Siegel's report references D.D.'s siblings.

was that he was sodomized over a period of several years by his babysitter—sodomy meaning penal-rectal contact." With no objection from Dietz, the prosecutor continued to ask Dr. Siegel about D.D.'s medical history:

> Prosecutor: And was that the entire history of D.D.?
> Dr. Siegel: No.
> Prosecutor: Was there anything else in that history that you would need to know to conduct your examination?
> Dr. Siegel: We do a general medical history too and umm . . . I was told [that D.D.] had a history of constipation that had been going on for approximately one and one half to one years prior and had been treated with a medication called MiraLax.

Dr. Siegel continued to describe D.D.'s medical history and then testified about his specific examination of D.D.

As evident from this recitation of the record, Dietz never objected to Dr. Siegel's statement about D.D.'s sexual abuse allegation and never argued that this statement constituted inadmissible hearsay. Despite Dietz's representation that this argument is preserved, it was never presented to the trial court, which means this Court has no trial court ruling to review. Having failed to preserve this allegation of error, this Court will not address it for the first time on appeal. RCr 9.22; Edmonds v. Commonwealth, 906 S.W.2d 343, 346 (Ky. 1995).

III. Because Dietz's Prior Abuse of R.D. Would Not Be Admissible in a Trial Charging Dietz with Abusing D.D., The Trial Court Abused Its Discretion by Refusing to Sever the Counts In Dietz's Indictment.

As one of his pre-trial motions, Dietz contended that the counts of the indictment should be severed because the allegations made by R.D. were not similar enough to the allegations made by D.D. to permit joining the offenses.

The trial court disagreed and overruled Dietz's motion to sever. Dietz argues on appeal that because R.D.'s allegations of sexual abuse were neither close in time nor strikingly similar to D.D.'s allegations, the trial court erred in permitting the offenses to be joined. We agree.

RCr 6.18 permits a trial court to join two or more offenses "if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan." However, if a defendant would be "unduly prejudiced by the joinder" of different offenses, a trial court is required to sever the charges. Roark v. Commonwealth, 90 S.W.3d 24, 28 (Ky. 2002). "The primary test for determining whether joinder constitutes undue prejudice is whether evidence necessary to prove each offense would have been admissible in a separate trial of the other." Id. An appellate court reviews a trial court's decision to join different offenses for an abuse of discretion, which means the trial court's ruling will only be disturbed if it was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000).

In order for joinder in this case to be permissible, a court must be able to conclude that R.D.'s allegations of abuse would be admissible in a separate trial charging Dietz with abusing D.D. In such a separate trial, R.D.'s allegation of abuse would be considered Dietz's prior bad act and must survive an application of KRE 404(b). KRE 404(b)(1) prohibits evidence of other crimes, wrongs, or acts to be introduced to prove a defendant's character for engaging

in criminal conduct, but does permit such prior bad act evidence to be admissible if it is "offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." This Court has acknowledged that this list is not exhaustive, and we have recognized that prior bad acts may also be admitted to show a defendant's "common scheme" or "modus operandi." Commonwealth v. English, 993 S.W.2d 941, 943-44 (Ky. 1999).

Here, the Commonwealth's basis for admitting evidence of Dietz's prior abuse of R.D. in a separate trial involving Dietz's abuse of D.D. would be that the prior bad acts demonstrate Dietz's modus operandi, or his method of operating as someone who sexually abuses children.[4] In order for prior bad acts to be admitted to prove modus operandi, "the prior misconduct must be so strikingly similar to the charged offense as to create a reasonable probability that (1) the acts were committed by the same person, and/or (2) the acts were accompanied by the same *mens rea*. If not, then the evidence of prior misconduct proves only a criminal disposition and is inadmissible." Id. at 945. Although in this case, neither the identity of the perpetrator nor his *mens rea* is at issue, this Court has explained that when the fundamental issue is "*corpus delicti*—whether the event occurred at all"—the similarities of the crimes are nonetheless relevant because such factual similarities "could demonstrate that

[4] This Court has explained that for the "common scheme or plan" exception to apply, the charged offenses must be "part and parcel of a greater endeavor which included the prior acts of sexual misconduct." English, 993 S.W.2d at 945. Because Dietz's abuse of D.D. was a separate instance of sexual misconduct, and not part of a "greater endeavor" that included his abuse of R.D., the common scheme or plan exception does not apply in this case.

if the act occurred, then the defendant almost certainly was the perpetrator." Clark v. Commonwealth, 223 S.W.3d 90, 97 (Ky. 2007) (internal citations omitted).

In Clark, supra, this Court emphasized the strict requirement in the modus operandi analysis that the prior bad act evidence must be so similar to the crime charged "to constitute a so-called signature crime." Id., *quoting* Dickerson v. Commonwealth, 174 S.W.3d 451, 469 (Ky. 2005). In stressing the importance of the factual similarities, this Court went on to explain that facts that simply meet the elements of the offense charged should not be considered when determining whether the modus operandi exception is satisfied. Id. at 98. For example, the fact that both R.D. and D.D. were under the age of twelve years old is an element of first-degree sexual abuse and therefore is not a persuasive similarity sufficient to meet the modus operandi exception. "Instead, the modus operandi exception is met only if the conduct *that meets the statutory elements* evidences such a distinctive pattern as to rise to the level of a signature crime." Id (emphasis added).

Although the Commonwealth in this case argues that R.D.'s and D.D.'s allegations are sufficiently similar to meet the modus operandi exception, the only similarities noted in its brief are that the victims are half-siblings, that Dietz was their babysitter, and that they were both pre-pubescent when the abuse began.[5] The trial court could certainly rely on the fact that Dietz related

[5] R.D. was approximately seven years old, while D.D. was between four and five years old when the alleged abuse began.

to the victims in a similar manner as their babysitter and that the victims were of a similar age in determining whether the Commonwealth satisfied its burden in meeting the modus operandi exception. Although the fact that the victims were half-siblings and lived in the same residence is also a factor to be considered, we note that the victims were not living together when the instances of abuse occurred; Dietz's abuse of D.D. did not begin until R.D. stopped living with her immediate family and moved-in with her aunt and uncle. Regardless, it is still significant that Dietz babysat both victims and that they both lived in the red-brick house and were of a similar age when the abuse began.

In his brief, Dietz focuses on the many differences between R.D.'s and D.D.'s allegations of abuse. D.D. alleged that Dietz abused him in the red-brick house and in the Wildwood apartment, whereas R.D. alleged that Dietz started abusing her in the red-brick house, but that he raped her when she was visiting him at his house. D.D. stated that he was always in his mother's bedroom when the abuse occurred, but R.D. did not specify where D.D. abused her when she was in her house and alleged that she and D.D. were on the floor in a back room of his house when he raped her. D.D. alleged that Dietz was babysitting him when both instances of abuse occurred. R.D. stated that Dietz's abuse began when he started babysitting her, but that he was not babysitting her when he had sex with her. Although there are certainly similarities between R.D.'s and D.D.'s allegations of abuse, because Kentucky case law requires the allegations to be so strikingly similar to constitute a

"signature crime," the commonalities are not significant enough in this case to permit Dietz's prior abuse of R.D. to be admitted in D.D.'s separate trial, and thus, the joinder in this instance was reversible error.

In Clark, supra, this Court held that the alleged similarities between Clark's prior abuse of M.M. and his current charges of sexual abuse did not meet the modus operandi exception. Clark, 223 S.W.3d at 98-99. In reciting the similarities between Clark's prior bad act and the current allegations, this Court stated that "what we are left with is Clark reaching his hands down the pants of all three victims who were all of the same approximate age without asking the victim to reciprocate the sexual contact." Id. at 99. In contrast, numerous differences existed between the prior abuse and current charges, including not all of the victims accused Clark of orally abusing them; the abuse occurred in several locations, such as school, bedrooms, bathrooms, living rooms, and vehicles; sometimes the victims were alone with Clark and sometimes other people were around; and Clark was a counselor to some victims and simply a family friend to others. Id.

On the other hand, this Court permitted prior bad act evidence to be admitted pursuant to the modus operandi exception in Anastasi v. Commonwealth, 754 S.W.2d 860 (Ky. 1988). In describing the similarities between the prior sexual misconduct and the current charges, this Court explained that

> all the victims were young boys with whom Anastasi managed to be alone in bedrooms. In each instance he was dressed only in his underwear and all victims, except one, were clothed only in underwear. In each

> case, prior to sexual contact, he tickled and wrestled with the children.

Id. at 862. This Court has acknowledged that its decision in Anastasi, supra, "pressed the limits of admissibility of other uncharged criminal acts on the grounds of similarity sufficient to indicate a modus operandi." Rearick v. Commonwealth, 858 S.W.2d 185 (Ky. 1993). If Anastasi, supra, was barely sufficient to satisfy this demanding exception, then the similarities in this case, which are not as striking as those in Anastasi, cannot support a finding that Dietz engaged in a signature crime or that his prior acts of sexual abuse could be admitted pursuant to the modus operandi exception.

Here, although Dietz babysat both children, both victims were between the ages of four and seven when the abuse began, and both victims lived in the same residence at one time, there are no specific factual similarities between the allegations of abuse to satisfy the demanding modus operandi exception. Rather, several differences exist between the allegations, such as the abuse occurred at different locations—the children's home and Dietz's home—and in different rooms of each residence, the victims were different genders, and the abuse did not always occur while Dietz was babysitting the children. Because this exception is met only if the defendant's past and present conduct demonstrates "such a distinctive pattern as to rise to the level of a signature crime," the circumstances in this case are not sufficiently similar to justify the admission of Dietz's prior bad acts. Clark, 223 S.W.3d at 98. Thus, the trial court should not have permitted the Commonwealth to join R.D.'s and D.D.'s indictments and Dietz is entitled to new, separate trials.

IV. Because Dietz Refused To Accept a Continuance After the Trial Court Permitted the Commonwealth to Amend Count III of the Indictment, He Waived the Right to Claim That He Was Denied His Right to Present a Complete Defense.

Count Three of Dietz's original indictment stated "[t]hat between December 31, 2003 and December 31, 2004, in Kenton County, Kentucky, the Defendant, Timothy Dietz, committed the offense of sodomy in the first degree . . ." This count was based on D.D.'s allegation that Dietz had sexually abused him when his family lived in the Wildwood Apartment Complex. However, Vicky Davidson, D.D.'s mother, testified at trial that she and her children moved into their Wildwood apartment in 2004[6] and moved out of this apartment in 2006, which is outside of the time period listed in the indictment. At the close of the Commonwealth's case-in-chief, the prosecutor moved to amend Count Three of the indictment from "December 31, 2003 and December 31, 2004" to "December 31, 2003 and December 31, 2006."

Dietz objected to this amendment, primarily arguing that by extending the time period by two years, the trial court was precluding the defense from investigating those two years and from discovering a potential alibi for Dietz. The trial court responded that although it could give the defense a week long continuance in order to investigate the additional time period, it was unrealistic to believe that the defense could come-up with an alibi that would cover a two-

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[6] Vicky initially testified that she and her family moved to the Wildwood Apartments in 2005, but then modified her testimony and asserted that they moved there in 2004.

year period. After the trial court mentioned the continuance, the Dietz's counsel responded:

> Let's just get to the bottom of this. I'm not asking for a continuance no matter what your ruling is. The law says you don't have to allow [the amendment] but that you can. You're going to make a decision and we're going to live with it. We're going to go forward because this [allegation] never happened, period.

Following several more minutes of discussion, the trial court sustained the Commonwealth's motion and permitted the indictment to be amended. On appeal, Dietz now argues that by allowing this amendment, the trial court denied him his right to present a defense and to obtain effective assistance of counsel. Dietz contends that if he had been give more timely notice of the time period the Commonwealth intended to include in Count Three of the indictment, he may have been able to present an alibi defense for the additional two years. Our reversal on other grounds renders moot Dietz's concern about needing additional time to develop an alibi defense, but we nonetheless address this issue briefly to clarify that the amendment was proper under RCr 6.16.

RCr 6.16 states that

> The court may permit an indictment . . . to be amended any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. If justice requires, however, the court shall grant the defendant a continuance when such an amendment is permitted.

As Dietz concedes, the amendment in this case did not result in an additional or different offense being charged. Rather, Dietz maintains that the trial court

erred because his substantial rights were prejudiced by allowing the amendment. However, as the Commonwealth explains, by expressly refusing a continuance—the remedy prescribed in RCr 6.16—Dietz has waived his right to claim that he was prejudiced by not having an adequate amount of time to prepare a defense. *See* Commonwealth v. McKenzie, 214 S.W.3d 306, 308-309 (Ky. 2007) (holding that because the defendant failed to make a motion for a continuance after the indictment was amended, he waived his right to claim on appeal that he was prejudiced by the lack thereof). In any event, on remand, Dietz will have ample time to address the additional two year period contained in the amended indictment.

V. A Closure of the Courtroom For a Minor's Testimony is Only Appropriate If Special Circumstances Exist and If the Trial Court Makes Specific Findings On the Record Identifying Those Circumstances.

Prior to R.D.'s and D.D.'s testimony, the trial court ordered that the courtroom be cleared, explaining to those present that although the defendant had a right to a speedy and public trial, the witnesses about to testify were minors and were going to be recounting salacious allegations. The trial court also announced to the parties remaining in the courtroom—the attorneys, D.D.'s father, the bailiff, and Dietz—that if anyone from the press arrived, they would be allowed to remain in the courtroom. The trial judge explained that the closure was necessary for the best interest of the children, but that permitting the media to remain would balance Dietz's right to a public trial. On appeal, Dietz argues that the trial court committed reversible error by clearing the courtroom without first holding a proper hearing and making

adequate findings that a closure was necessary. First, we note that this issue will not arise in a re-trial of R.D.'s allegations of abuse because she has already reached the age of eighteen. However, because this issue may arise during a re-trial of D.D.'s allegations, we note that on remand, the trial court should consider carefully whether a closure is necessary and should make specific findings of special circumstances, aside from the minor's status and his testimony recounting sexual abuse, before excluding the public during the minor victim's testimony.

In Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 510 (1984), the U.S. Supreme Court stated that in order for an appellate court to determine if a trial court's closure was proper, the trial court should articulate the interest served by the closure along with specific findings regarding why the closure is essential. In Beauchamp v. Cahill, 297 Ky. 505, 180 S.W.2d 423 (Ky. 1944), this Court stated that a trial judge

> may protect a child witness, who from the nature of the case must testify to revolting facts, by excluding morbid, prurient, curious, and sensation-seeking persons from the court room, so long as he does not abuse his discretion and deprive the accused of the right to have his family and friends present as well as a reasonable portion of the public.

As evident from the above case law, a closure of the courtroom is not necessarily warranted simply because a minor is testifying about being sexually abused by the defendant. Special circumstances must exist to justify excluding the public during this testimony and the trial court is required to make findings on the record detailing the special circumstances that are

present. Thus, on remand, the public may be excluded during D.D.'s testimony only if the trial court identifies on the record special circumstances, above and beyond D.D.'s status as a minor and his testimony recounting sexual abuse, that warrant a closure.

CONCLUSION

In this case, because the trial court should not have permitted the Commonwealth to join the indictments against Dietz, we must reverse Dietz's conviction and remand this case for new, separate trials. Here, the differences between R.D.'s and D.D.'s allegations of abuse outweighed the similarities. Because Kentucky applies such a demanding standard before evidence of a defendant's prior sexual abuse is admissible to prove the defendant's modus operandi, R.D.'s allegations would not have been admissible in a separate trial charging Dietz with abusing D.D. or vice-versa. Thus, joinder of R.D.'s and D.D.'s allegations was not proper. The June 10, 2008 Judgment of the Kenton County Circuit Court convicting Dietz of one count of first-degree sexual abuse and two counts of first-degree sodomy and sentencing him to twenty years in prison is hereby reversed. This matter is remanded for further proceedings not inconsistent with this opinion.

Minton, C.J.; Abramson, Noble, Schroder and Venters, JJ., concur. Cunningham, J., concurring in part and dissenting in part by separate opinion in which Scott, J., joins.

CUNNINGHAM, JUSTICE; CONCURRING IN PART AND DISSENTING IN PART: I believe the joinder of offenses was proper and, therefore, I respectfully dissent on that issue.

I continue to believe that the sexual molestation of small children is such an aberration of normal human conduct and shows such depravity as to make it a "signature crime." Here, both victims were less than nine years of age, and they were siblings. Also, in both cases Appellant was the babysitter and in a position of trust. They satisfy RCr 6.18 for joinder because the offenses represent a "common scheme"—the abhorrent molestation of small children of the same family by one in a position of trust. I would affirm the conviction.

Scott, J., joins.

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