

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JOHN KENNETH GOERKE,

Defendant-Appellant.

UNPUBLISHED

October 25, 2002

No. 225195

Oakland Circuit Court

LC No. 99-167765-FC

99-167766-FC

Before: Talbot, P.J., and Smolenski and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions on four counts of first-degree criminal sexual conduct. Defendant was sentenced to twenty-three to fifty years in prison for the two convictions arising out of assaults occurring before January 1, 1999. He was sentenced as a second habitual offender to twenty to fifty years for the two convictions arising out of assaults occurring after January 1, 1999, with 181 days credit for time served. We vacate defendant's convictions and remand for retrial.

The complainant was the 11 year old mentally impaired daughter of defendant's live-in girlfriend. Prior to trial, the prosecution moved to exclude defendant from the courtroom during the complainant's testimony, arguing that she would be unable to testify if the defendant was present in the courtroom. The trial court took the matter under advisement. On the day of trial, the trial court heard testimony from the complainant outside of the jury's presence, and concluded "it would be better" if the complainant and the defendant were in different rooms when the complainant testified. Defendant objected to being removed from the courtroom during complainant's testimony, and argued that the procedures outlined in MCL 600.2163a¹ accorded sufficient protection to complainant. The trial court apparently disagreed.² Defendant

¹ MCL 600.2163a provides the trial court with several ways to protect an underage or developmentally disabled witness who testifies at trial. The trial court may clear the courtroom of all persons not necessary to the proceedings, or position defendant in the courtroom so that the defendant is not in complainant's view. The trial court may also allow a witness' testimony to be videotaped and shown to the jury.

² The record does not contain the trial court's order that defendant would be excluded from the courtroom. Instead, there is reference to the fact that a company would be coming to set up the court room to accommodate closed circuit television for the complainant's testimony. The

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was able to confer with his trial counsel during several breaks in the cross-examination of the complainant. At defendant's request, the jury was instructed to make no inference from the fact that defendant was absent from the courtroom during the testimony.

Defendant first argues that because the trial court excluded him from the courtroom and forced him to watch the complainant's testimony by way of closed-circuit television, his constitutional and statutory right to be present during his trial, and to confront witnesses against him, were violated, requiring reversal of his conviction.³ We agree that defendant's statutory right to be present during his trial was violated, and that this violation requires reversal of his conviction.

Whether defendant's statutory right to be present during his trial was violated requires us to construe the statute at issue, a question of law which this court reviews de novo. *Kelly v Builder's Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001). A preserved nonconstitutional error is "presumed not to be ground for reversal unless it affirmatively appears that, more probably than not, it was outcome determinative. *People v Krueger*, 466 Mich 50, 54; 643 NW2d 223 (2002).⁴

MCL 768.3 provides, "No person indicted for a felony shall be tried unless personally present during the trial" In *Krueger*, the Michigan Supreme Court found that the exclusion of defendant from the courtroom during the child witness' testimony was a violation of the defendant's statutory right to be personally present during trial and required reversal of his conviction. While the Supreme Court noted that the statutory right to be present was not absolute, *id.* at 53 n 9, it found that the evidence of defendant's guilt presented a close question, and that evaluating the error in light of the weight and the strength of the untainted evidence, the error in removing the defendant from the courtroom was outcome determinative. *Id.* at 54-56.

We conclude that under the facts of this case, as in *Krueger*, it is more probable than not that the error in removing defendant from the courtroom while the complainant testified was outcome determinative. The complainant's testimony was pivotal to defendant's conviction. First, the complainant testified outside of the presence of the jury that she would not be able to testify while she was in the same room as defendant. Although the trial court might have accomplished this separation without removing defendant from the courtroom by utilizing the

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parties do not dispute, however, that defendant was in fact excluded from the courtroom

³ We note that defendant does not assert in his statement of questions presented that his right to confront the complainant was violated by the trial court's order. Thus, we do not address this issue since resolving this question is unnecessary to our resolution of the case.

⁴ The prosecutor contends that defendant has not preserved this issue. We disagree. The prosecutor argued that the victim was not going to testify "adequately" if "she knows he's in the courtroom." The trial court agreed and ruled that the victim's testimony would be given "in a separate room." Defense counsel objected to this procedure and argued instead that it was possible to shield the defendant from the victim's view while both she and the defendant remained in the courtroom. We are satisfied that this colloquy on the record was sufficient to preserve defendant's objection to his removal from the courtroom.

methods described in MCL 600.2163a, these procedures were not used.⁵ Without the complainant's testimony, no case could be presented against the defendant. Second, while the complainant's brother testified at trial that he observed one of the alleged assaults, he had denied witnessing the assault when he testified at the preliminary examination. In addition, he and complainant had different recollections about what else was occurring when the assault allegedly took place, requiring the jury to make crucial determinations about the complainant's credibility. Third, complainant's mother also testified that the complainant had told her at one time that the allegations were untrue.

As in *Krueger*, the proofs in this case are not overwhelming and illustrate that an effective cross-examination of the complainant was vitally important to the defense. Defendant's removal from the courtroom during the complainant's testimony deprived him of the ability to convey urgent lines of inquiry to his lawyer. In addition, defendant was unable to make the subtle statement by his presence and demeanor in court that he was innocent of the charges against him. *Krueger, supra* at 55. We therefore conclude that defendant should not have been excluded from the courtroom during the testimony of the complainant, vacate defendant's conviction and remand for retrial.⁶

/s/ Michael J. Talbot
/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder

⁵ The record does not describe whether a live closed circuit feed of the complainant's testimony was not possible to arrange. Because the motion to exclude the defendant from the courtroom was not decided by the trial court until the day of the trial, we presume there was no longer sufficient time remaining to videotape the complainant's testimony for presentation to the jury as an alternative to excluding defendant from the courtroom.

⁶ Because we vacate defendant's convictions, we also find it unnecessary to address defendant's constitutional "right to be present" claim, or his claims that the sentencing guidelines were improperly scored.