

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

STATE OF DELAWARE,	:	
	:	Cr. A.Nos. 04-01-0991
v.	:	04-01-0992
	:	
MERLIN SMITH,	:	
I.D. No. 0401005209	:	
	:	
Defendant.	:	

Submitted: November 15, 2004
Decided: December 22, 2004

ORDER

Upon the State' s Motion to Have Child Witness
Testify via Closed Circuit Television Under 11 *Del. C.* § 3514.
Denied.

Kenneth M. Haltom, Esquire, Deputy Attorney General, Dover, Delaware;
attorneys for the State of Delaware.

Sandra W. Dean, Esquire and Deborah L. Carey, Esquire (argued), Assistant Public
Defenders, Dover, Delaware; attorneys for the Defendant.

WITHAM, J.

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Before this Court is the State’ s motion requesting the Court to allow its child witness to testify via closed circuit television pursuant to 11 *Del. C.* § 3514. Based upon the record and the parties’ arguments that were presented before this Court on November 15, 2004, it appears to the Court:

1. Merlin Smith (“ Defendant”) has been charged with Rape in the First Degree in violation of 11 *Del. C.* § 773 and Endangering the Welfare of a Child in violation of 11 *Del. C.* § 1102 as a result of an alleged incident that occurred on or about November 16, 2003. The State has filed a motion requesting this Court to allow the alleged child victim, now eight years old, to testify via closed circuit television pursuant to 11 *Del. C.* § 3514. Because of the child’ s age and background, the State contends that the child will suffer serious emotional distress if she is required to testify in open court with the Defendant physically present. Defendant opposes the State’ s motion on several grounds. Defendant first contends that allowing the child to testify via closed circuit television violates his constitutional right to confront his accuser and is also very prejudicial because such a procedure creates a negative implication of guilt to the jury. Even if permitting the child to testify via closed circuit television does not violate his constitutional rights, Defendant contends that the State’ s motion should still be denied because the requirements of 11 *Del. C.* § 3514 have not been satisfied. Defendant contends that the State has failed to establish that testifying in the courtroom would result in the child suffering serious emotional distress to such an extent that she would be unable to reasonably communicate.

2. Title 11, Section 3514 of the Delaware Code permits the testimony of a child to be introduced via closed circuit television under limited circumstances. In pertinent part, 11 *Del. C.* §3514 (a)(1) provides:

(a)(1) In any prosecution involving any offense set forth in §3513(a) of this title, a court may order that the testimony of a child victim or witness less than 11 years of age be taken outside the courtroom and shown in the courtroom by means of closed circuit television if:

- a. The testimony is taken during the proceeding; and
- b. The judge determines that testimony by the child victim or witness in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.¹

Accordingly, in order for this Court to allow the child to testify via closed circuit television, this Court must conclude that the child, if required to testify in the courtroom, would suffer serious emotional distress to such degree that she would be unable to reasonably communicate.

3. In opposition of the State' s motion, Defendant contends that permitting the child to testify via closed circuit television would violate his Constitutional right to confront his accuser. This Court concurs with the Defendant that the Confrontation Clause encompasses the notion that the accused is entitled to have a

¹ 11 *Del. C.* § 3514.

face-to-face encounter with his accuser.² This Court also recognizes that a face-to-face confrontation is not an absolute right possessed by the accused and may be dispensed with if necessary in order to further an important public policy.³ The Supreme Court has declared that “if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of special procedures that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.”⁴ This limited exception, however, must be employed only after there has been a clear showing of necessity. The Supreme Court held that a Maryland statute which requires that the child “suffer ‘serious emotional distress such that the child cannot reasonably communicate’ clearly suffices to meet constitutional standards.”⁵ Because this standard is the same standard utilized in our statute, this Court holds that the requirements set forth in 11 *Del. C.* § 3514, if fulfilled, satisfy the standards mandated by the Constitution.

4. The State contends that the statutory requirements of 11 *Del. C.* § 3514

² *Maryland v. Craig*, 497 U.S. 836, 844 (1990) (quoting *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988)).

³ *Id.* at 850.

⁴ *Id.* at 855.

⁵ *Id.*

have been satisfied because there is sufficient evidence indicating that the child will suffer serious emotional distress to such a degree that she will be unable to reasonably communicate if she is required to testify in the presence of the Defendant. In support of its position, the State has produced expert testimony from Dr. Teresa Dunbar, a licensed psychologist. Based upon her interview with the child, Dr. Dunbar opined that the child would suffer serious emotional distress to such extent that she would be unable to reasonably communicate to the Judge, jury, or anyone else in the courtroom if she was required to testify in the presence of the Defendant.⁶ The report and testimony of Dr. Dunbar revealed a great deal of the child's traumatic history, including the child's lack of a family support system as well as other difficult abusive experiences that she encountered throughout her young life. Dr. Dunbar also considered the limited amount of therapy that the child received and concluded that the litigation process would probably setback any psychological healing that the child might have achieved. Dr. Dunbar testified that the child lacks the requisite "ego strength" necessary to withstand the psychological effects of the litigation process. Because the child lacks the necessary "ego strength", Dr. Dunbar opined that the child would disassociate and close down verbally if required to testify in open court. By allowing the child to testify via closed circuit television and outside the presence of the Defendant, Dr. Dunbar

⁶ Dr. Dunbar also reviewed the child's school records, DFS records, and had conversations with the child's current therapist, DFS worker, CASA worker, and foster mother.

believed that the child may be able to reach a comfort zone which would enable her to testify. Based upon the report and testimony of Dr. Dunbar, the State contends that the statutory requirements of 11 *Del. C.* § 3514 have been satisfied and that this Court should permit the child to testify via closed circuit television.

5. This Court agrees with the State that the child could suffer emotional distress if she is required to testify in open court. However, because allowing the child to testify via closed circuit television implicates and infringes upon the Defendant’ s constitutional rights, the statute requires more than just a showing of emotional distress. The child must suffer “ serious emotional distress such that the child cannot reasonably communicate.”⁷

Dr. Dunbar’ s report indicates that the child was oriented to person, place, and location and was willing to share her thoughts and feelings throughout the interview process. Although Dr. Dunbar related in her report and testimony that the child does not have the requisite “ ego strength” to prevent her from being affected by the litigation process, Dr. Dunbar’ s report also reveals that the child has renowned resiliency and has “ purposefully explored solutions to difficulties that she was having with people in her life.”⁸ In particular, when questioned about having to testify in Court, the child responded that it would be difficult for her but that she would ignore the Defendant and not look at him. Although the child expressed that

⁷ 11 *Del. C.* § 3514.

⁸ Psychological Assessment at 6.

she did not want the Defendant to look at her, she also commented that she did not want this to happen to anyone else and would use her imagination not to think about him. Dr. Dunbar also testified that the child is resilient and has a way of “taking care of herself” in difficult situations. Dr. Dunbar’s clinical findings in her report express that the child “does not project a sense of helplessness, but rather projects an ability to master difficult situations.”⁹ Based upon these findings, it appears to this Court that the child is quite resilient and has developed useful coping techniques to manage difficult situations. Accordingly, this Court must conclude that there is insufficient evidence before this Court substantiating that the child would suffer serious emotional distress to such degree that she would be unable to reasonably communicate.

6. Imperative to this Court’s holding is the notion that testimony via closed circuit television is not the rule but rather the exception to be employed only upon a clear showing of necessity. While this Court has no reservation in concluding that the child will suffer emotional distress as a result of testifying in the presence of the Defendant, the testimony and report of Dr. Dunbar alone do not substantially support a finding that the child will suffer the degree of serious emotional distress required by the statute. Because the statutorily mandated requirements of 11 *Del. C.* § 3514 have not been satisfied, this Court cannot divest the Defendant of his constitutional right by allowing the child to testify via closed

⁹ *Id.* at 8.

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circuit television. If necessary, however, this Court may readdress the issue at trial where it will be afforded the opportunity to observe the child and better equipped to make such determination. Accordingly, the State' s motion is hereby *denied*.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution