STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL THOMAS PLUNKETT,

Defendant-Appellant.

UNPUBLISHED
December 6, 1996

No. 179570
Monroe County
LC No. 93-25735-FH

Before: MacKenzie, P.J., and Jansen and T.R. Thomas*, JJ.

PER CURIAM.

This case arises from defendant's sexual assault of his five-year-old daughter. After a mistrial, defendant was convicted in a subsequent jury trial of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and aggravated assault, MCL 750.81a; MSA 28.27(1). He was sentenced to concurrent terms of twenty-five to sixty years' imprisonment for the CSC conviction and one year for the aggravated assault conviction. Defendant appeals as of right. We affirm in part and remand in part.

Defendant first contends that he was denied his right of confrontation when his daughter's testimony was videotaped (while he was sequestered in another room, watching the proceedings on closed-circuit television) and the videotape was shown to the jury. According to defendant, this procedure violated the holding of *Maryland v Craig*, 497 US 836; 110 S Ct 3157; 111 L Ed 2d 666 (1990), as well as the statutory requirements set forth at MCL 600.2163a; MSA 27A.2163a. We are unable to assess the merits of defendant's argument on the record before us. While the trial court held an evidentiary hearing to determine whether the child would be required to testify face-to-face at defendant's trial, the court failed to make any findings on the record concerning the matter.

In order to justify the use of a closed-circuit television procedure that permits a child witness in a child abuse case to testify in the absence of face-to-face confrontation with the defendant:

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* Circuit judge, sitting on the Court of Appeals by assignment.

> The trial court *must* hear the evidence and *determine* whether use of the…procedure is necessary to protect the welfare of the particular child witness who seeks to testify[,] *find* that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant [and] *find* that the emotional distress suffered by the child witness in the presence of the defendant [would] be more than de minimis, i.e., more than "mere nervousness or excitement or some reluctance to testify." [*Craig, supra,* 497 US 855-856 (Citations omitted; emphasis added.)]

Consistent with the mandate of *Craig, supra,* MCL 600.2163a; MSA 27A.2163a provides, in pertinent part:

> (13) If, upon the motion of any party or in the court's discretion, the court finds *on the record* that the witness is or will be psychologically or emotionally unable to testify at a court proceeding…the court shall order that a videotape deposition of a witness shall be taken to be admitted at a court proceeding instead of the live testimony of the witness. [Emphasis added.]

In this case, the absence of findings of fact concerning the necessity of the videotape procedure, as mandated by *Craig, supra,* and the absence of findings on the record regarding the psychological or emotional ability of the child to testify, as mandated by the statute, requires this Court to remand to have such findings placed on the record. We therefore remand for the limited purpose of allowing the trial court, consistent with *Craig* and MCL 600.2163a; MSA 27a.2163a, to set forth the facts which led to its decision to order the victim's video deposition to be taken outside defendant's presence. The court shall make this fact finding within twenty-eight days of the issuance of this opinion. This Court retains jurisdiction to review the record made on remand and, upon that review, to assess the merits of defendant's claim that the videotape procedure was improper and violated his right of confrontation.

Defendant's remaining claims require little discussion. The record shows that the trial court conducted its own inquiry into the victim's sense of obligation to testify truthfully *after* the prosecutor made her inquiry. *People v Garland*, 152 Mich App 301, 309; 393 NW2d 896 (1986). The record does not support defendant's contention that the trial court relied on the prosecutor's examination in deciding that the victim was competent.

Moreover, the record establishes that defendant's second trial was not barred by the double jeopardy clause. The prosecutor did not intentionally elicit the testimony that led to defendant's motion for mistrial, and, in fact, defendant conceded that the prosecutor tried to stop the witness's testimony. Defendant's double jeopardy rights did not preclude a new trial. See *People v Dawson,* 431 Mich 234; 427 NW2d 886 (1988).

Affirmed in part and remanded for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Barbara B. MacKenzie
/s/ Kathleen Jansen
/s/ Terrence R. Thomas