STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 2, 2000
v	No. 213346 Berrien Circuit Court
THOMAS TODD KRUEGER, Defendant-Appellant.	LC No. 97-410263-PC

Before: Zahra, P.J., and Kelly and McDonald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) (penetration with victim under thirteen), and one count of attempted second-degree criminal sexual conduct, MCL 750.520(c)(1)(a); MSA 28.788(3)(1)(a) (sexual contact with victim under thirteen). The trial court sentenced defendant to eighteen to eighty years' imprisonment for the first-degree criminal sexual conduct conviction and two to five years' imprisonment for the attempted second-degree criminal sexual conduct conviction. Defendant appeals as of right. We affirm.

Defendant first challenges the procedure utilized during the victim's testimony at trial. The victim in this case is defendant's daughter, who was five years old at the time of trial. In order to protect the child witness in this case, the trial court ordered the courtroom cleared and locked to prevent members of the public from entering during the child's testimony. In addition, the trial court ordered that defendant be removed from the courtroom during the child's testimony. Defendant was placed in a separate room and was able to view the witness' testimony via closed-circuit television. Defendant was provided with a notepad and a pencil so that he could write down questions or notes during the testimony and was allowed to confer with defense counsel during a break in cross-examination. Defense counsel remained in the courtroom with the judge, the jury, the assistant prosecutor, the witness, and the witness' support person. The trial court instructed the jury that defendant's absence from the courtroom was the trial court's decision.

Defendant argues that the procedure used by the trial court violated MCL 600.2163a; MSA 27A.2163(1), which allows special arrangements to be made during the testimony of a child under

sixteen who is an alleged victim of certain crimes set forth in the statute, and denied him his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution.

We first address defendant's arguments relating to the statute. Defendant claims that the trial court did not make sufficient findings to justify using special arrangements for the child witness' testimony in this case and that the procedure followed in this case is not provided for in the statute.

MCL 600.2163a; MSA 27A.2163(1) provides alternative methods for protecting the welfare of a child witness at trial. Subsection (12) allows the trial court to order one or more of the following arrangements: exclude all persons that are not necessary to the proceeding from the courtroom during the child's testimony, arrange the courtroom so that the defendant is seated "as far is reasonable and not directly in front of the witness stand," and require parties to question the child from a questioner's stand or podium. MCL 600.2163a(12); MSA 27A.2163(1)(12). Before ordering one or more of the special arrangements set forth in subsection (12), the trial court must make a finding on the record that the special arrangements are "necessary to protect the welfare of the witness." MCL 600.2163a(11); MSA 27A.2163(1)(11). If the court finds that the child "is or will be psychologically or emotionally unable to testify" even if the special arrangements provided for in subsection (12) are used, subsection (13) provides for a videotape deposition of the child to be used in lieu of live testimony.

We agree with defendant that the procedure used in this case is not provided for in MCL 600.2163a; MSA 27A.2163(1). The options under the statute do not include removing defendant from the courtroom. In fact, subsection (12)(b) specifically states: "[t]he defendant's position shall be the same for all witnesses and shall be located so as to allow the defendant to hear and see all witnesses and be able to communicate with his or her attorney." However, it does not necessarily follow that reversal is required, see *People v Burton*, 219 Mich App 278, 287; 556 NW2d 201 (1996).

Defendant claims that he was prejudiced by the trial court's failure to follow the procedures set forth in the statute because the jury was left to wonder whether defendant's own actions (disruptive behavior or voluntary absence) caused him to be removed, why if defendant was innocent he would not care enough about his daughter to be present during her testimony, and why it would be necessary to remove defendant while his accuser testified if he was truly innocent. We disagree. The trial court's instruction to the jury that defendant's absence was the trial court's decision was sufficient to dispel any speculation from the jury and eliminated this potential for prejudice. Defendant also claims he was prejudiced because his attorney did not have free and immediate access to defendant during cross-examination. However, defendant was allowed to take notes during the child's testimony and was permitted to confer with counsel during a break in cross-examination. There is no indication on the record that defendant did not have an adequate opportunity to confer with counsel. Accordingly, we find that reversal is not warranted in this case based on the trial court's deviation from the procedures set forth in the statute.

Defendant further argues the trial court did not make sufficient findings to justify special arrangements for the child's testimony. We disagree. The trial court found that the child could not and would not testify in the presence of defendant, and stated that it was "very concerned about the psychological effect" on the child if she were required to testify in defendant's presence. The trial

court's findings were based on the expert testimony of Robin Zollar and the trial court's personal observations of the child's inability to testify at the preliminary examination in the presence of defendant.

Since the procedure the trial court used in this case is not provided for in the statute, it is not clear whether the trial court had to find special protections were "necessary to protect the welfare of the witness" pursuant to subsection (11), or whether the trial court was required to find the child was or would be "psychologically or emotionally unable to testify" pursuant to subsection (13). Regardless of what standard is applied, we find the trial court's findings in this case were sufficient under the statute and were supported by the record. Furthermore, the trial court's findings comply with the standard set forth in *Maryland v Craig*, 497 US 836, 855-856; 110 S Ct 3157; 111 L Ed 2d 666 (1990). *Craig* requires that the trial court hear evidence and determine whether the special arrangements are "necessary to protect the welfare of the particular child witness who seeks to testify," that the trial court find "the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant," and that the trial court find that the emotional distress suffered by the witness is more than de minimus. *Id.*

Defendant also argues his removal from the courtroom violated his right of confrontation under the Sixth Amendment of the United States Constitution. The Confrontation Clause, which is made applicable to the states through the Fourteenth Amendment, *Pointer v Texas*, 380 US 400; 85 S Ct 1065; 13 L Ed 2d 923 (1965), provides: "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." US Const, Am VI. The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. *Craig, supra* at 845. The Confrontation Clause guarantees the defendant the right to a face-to-face meeting with witnesses appearing before the trier of fact and the right to be present at all stages of his trial. *Craig, supra* at 844; *Illinois v Allen*, 397 US 337, 338; 90 S Ct 1057; 25 L Ed 2d 353 (1970); *Burton, supra* at 287. However, the rights guaranteed by the Confrontation Clause are not absolute, and must be "interpreted in the context of the necessities of trial and the adversary process." *Craig, supra* at 850; *Burton, supra* at 287.

Defendant apparently recognizes that the fact that he was not permitted a face-to-face meeting with the child witness in this case is not enough to find a violation of his right to confront the witnesses against him. *Craig, supra* at 857 (upholding a Maryland statute allowing child witnesses to testify via closed-circuit television where other confrontation rights preserved, i.e. the children testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and the defendant while they testified). However, defendant argues that *Craig* is distinguishable from this case because there the child witnesses, not the defendant, were removed from the courtroom. *Craig, supra* at 840. Defendant also argues that *People v Hyland*, 212 Mich App 701; 538 NW2d 465 (1995), vacated in part on other grounds, 453 Mich 902 (1996), cited by the prosecution, is distinguishable from this case. There, the defendant, who was convicted of first-degree criminal sexual conduct, was removed from the courtroom during the child victim's testimony after he twice interrupted her testimony. *Id.* at 708. This Court rejected the defendant's argument that his removal from the courtroom violated his Sixth Amendment right to confront the witnesses against him, relying on *Craig, supra*. *Id.* at 709-

710. In *Hyland, supra* at 710, this Court held that the defendant's confrontation rights were preserved where the child was competent to testify, the defendant retained the full opportunity for cross-examination, both the defendant and the jury were able to observe the child on a monitor, defense counsel was present in the room with the child and was able to object to inappropriate questions, and the defendant had the opportunity to confer with counsel during questioning. In this case, like *Hyland*, the trial court found the child witness competent to testify, defendant was able to fully cross-examine the child, and defendant was able to view the child during her testimony on a video monitor. Moreover, in this case the jury was able to observe the witness live as she testified because the witness remained in the courtroom with the jury. Also like in *Hyland*, defense counsel was in the same room as the witness and had the opportunity to object to inappropriate questions. Finally, defendant was able to confer with counsel in this case during questioning. While we recognize that in this case defendant did not disrupt the proceedings as the defendant did in *Hyland*, we believe this difference is inconsequential. The same elements of confrontation were preserved in this case as in *Hyland*. Accordingly, we find that defendant's confrontation rights in this case were preserved despite the lack of a face-to-face meeting between defendant and the child witness and despite defendant's absence from the courtroom.

Defendant also raises two other issues on appeal that we will briefly address. First, defendant claims the trial court erred by reserving its ruling on the admission of certain other acts evidence under MRE 404(b) involving defendant's stepdaughter. The trial court ruled that the evidence would not be admissible in the prosecution's case in chief, but reserved its ruling on the admissibility of the other acts evidence until the time the evidence was presented. We find no abuse of discretion in the trial court's approach. *People v VanderVliet*, 444 Mich 52, 89-91; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

Finally, defendant claims the trial court erroneously admitted testimony from Trooper Claire Hoffman regarding the victim's statements to Trooper Hoffman regarding the alleged sexual abuse. Even if the testimony was erroneously admitted under MRE 803A because the prosecution failed to give defendant advance notice of its intent to offer the statement and its particulars, we find the error would be harmless because it is not more probable than not that a different outcome would have resulted without the error. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Kelly
/s/ Gary R. McDonald