STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 9, 2010
v	No. 288672 Midland Circuit Court
ORSON HAROLD WOLFE, Defendant-Appellant.	LC No. 08-003670-FH

Before: Beckering, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of criminal sexual conduct in the second degree, MCL 750.520c(1)(a) (victim under 13). The trial court sentenced defendant as a second habitual offender, MCL 769.10, to two concurrent terms of 88 months to 22½ years in prison. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The two complaining witnesses, aged respectively five and seven years at the time, testified that defendant forced them to touch his sexual anatomy while they were visiting the home in which both defendant and complainants' father lived. Each witness initially took the stand in the normal course of proceedings, but showed obvious discomfort at having to describe the events in question. The prosecuting attorney then persuaded the trial court to allow those witnesses to testify again, this time from a separate room by video hook-up. Through this arrangement the witnesses provided the testimony necessary to convict defendant.

On appeal, defendant challenges the trial court's decision in this regard, arguing that the court failed, over defense objections, to follow statutory requirements, that the proceeding also violated defendant's constitutional rights of confrontation, and that defense counsel was ineffective for failing to raise the constitutional argument.

I. MCL 600.2163a

At trial, defense counsel objected to resort to video testimony of one of the child complainants on the ground that she had finished testifying, and of both child complainants on the ground that the prosecuting attorney was looking to the video procedure simply as a second attempt to get the testimony she wanted. Generally, we review evidentiary rulings for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

Defendant argues that the trial court improperly allowed the remote video testimony without first trying alternatives, and points out that MCL 600.2163a, which governs videorecorded testimony, authorizes the use of dolls, clearing the courtroom of unnecessary persons, arranging the courtroom to maximize the distance between the witness and the defendant, and placing a questioner's stand or podium in front of the witness as special procedures for troubled witnesses, and then authorizes resort to videorecorded testimony if "the court finds on the record that the witness is or will be psychologically or emotionally unable to testify . . . even with the benefit of [those] protections . . . ." MCL 600.2163a(17).[1] However, the defense did not ask the court to try those alternatives. Further, MCL 600.2163a(19) states that this statutory scheme "is in addition to other protections or procedures afforded to a witness by law or court rule," thus indicating that it is not the only avenue for resorting to such special procedures for the sake of troubled witnesses. Moreover, a trial court has broad discretion over its general conduct of trial. See *People v Romano*, 181 Mich App 204, 220; 448 NW2d 795 (1989), quoting *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). For these reasons, we hold that, in the absence of objections, a trial court does not abuse its discretion in proceeding directly from attempts at eliciting live, in-court testimony from troubled witnesses to video testimony from a remote location.

Defendant further argues that there was not a sufficient showing that the young complainants were psychologically or emotionally unable to testify. We disagree. The trial court stated as follows:

> I think there's no question in the circumstance of [the second child complainant] that there was in fact a complete shutdown whenever the issue got to the mere identification of the defendant in this case, . . . and so there is no question that that's a circumstance I think good cause is shown.
>
> I agree that it becomes a much closer circumstance in regards to [the first child complainant], who did answer the questions but indicated she did not remember; but she did indicate that she remembered an incident involving the defendant but could not describe what that incident was. The court will also note . . . [the witness] has her hands over her eyes. The court observed the . . . behavior. The court observed behavior that also would indicate the possibility of some unease with the circumstances presented and, for that reason, I will allow [the witness] to be recalled . . . .

The court thus demonstrated that it had given close attention to the young witnesses, and how they were handling the stress of testifying in defendant's presence.

For these reasons, we conclude that the trial court satisfied the statutory requirements for allowing those witnesses to testify from a remote location.

[1] The prosecutor did attempt to facilitate the children's live testimony through the use of their grandfather as a support person as authorized under MCL 600.1263a(4).

II. Confrontation and Assistance of Counsel

We review constitutional questions de novo. *People v Conat*, 238 Mich App 134, 144; 605 NW2d 49 (1999). However, there was no defense objection below on confrontation grounds, leaving this issue unpreserved. A defendant pressing an unpreserved claim of error must show plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). The reviewing court should reverse only when the defendant is actually innocent or the error "'seriously affected the fairness, integrity, or public reputation of judicial proceedings.'" *Id*. at 763, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

The state and federal constitutions guarantee a criminal defendant the right to confront the accuser. US Const, Ams VI and XIV; Const 1963, art 1, § 20. However, "the right of the accused to meet witnesses face-to-face is not absolute . . . ." *People v Buie*, 285 Mich App 401, 408; ___ NW2d ___ (2009). "This preference must occasionally give way to considerations of public policy and the necessities of the case." *Id.* (internal quotation marks and citations omitted). The United States Supreme Court has held:

> [A]llowing the testimony of a child witness, who was alleged to be a victim of abuse, by way of one-way, closed circuit television did not violate the defendant's right of confrontation because the procedure adequately protected the other elements of the Confrontation Clause: the oath, the cross-examination, and the ability of the trier of fact to view the demeanor of the witness. [*Id.* at 409, citing *Maryland v Craig*, 497 US 836, 840, 851-852; 110 S Ct 3157; 111 L Ed 2d 666 (1990).]

However, "this procedure may only be used if the prosecution shows it is 'necessary to further an important state interest . . . .'" *Buie*, 285 Mich App at 409, quoting *Craig*, 497 US at 852. "'[T]he state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure . . . .'" *Buie*, 285 Mich App at 409, citing *Craig*, 497 US at 855. See also *People v Pesquera*, 244 Mich App 305, 312-314; 625 NW2d 407 (2001).

Before resorting to such procedure, "the trial court must hear evidence and make a case-specific finding that the procedure is necessary." *Buie*, 285 Mich App at 409, citing *Craig*, 497 US at 855. "The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant." *Craig*, 497 US at 856. Defendant argues that the trial court in this instance failed to satisfy both requirements. We disagree.

The court decided to allow the video testimony from a remote location in the course of trial, after one of the child witnesses had testified, and during the course of the other child witness's attempt to do so. The court was able to observe the witnesses directly, and thus had before it compelling evidence concerning their emotional difficulties in the matter. Further, neither party expressed any desire to supplement that evidence, by calling experts or otherwise.

Although the trial court did not specifically state that it was defendant's presence, rather than the courtroom generally, that was troubling the witnesses, the court did note that it was in identifying defendant that the second witness suffered a total "shut down," and that the first one,

in addition to other manifestations of tension or turmoil, was given to covering her eyes. That defendant's presence was causing the trouble thus seems to inhere in the court's observations and conclusions. Given that defense counsel asked for no elaboration or clarification, we deem that implication sufficient explanation.

Defendant suggests that *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), where the Supreme Court held that the Confrontation Clause recognizes confrontation, or cross-examination, as an indispensable means of testing the truthfulness of testimonial assertions, and does not admit of substitution by other means, *id.* at 68-69, should lead to the overruling of *Craig*. Such a development would call into question this Court's decisions in *Buie* and *Pesquera* as well. But defendant concedes that this Court is not empowered to overrule *Craig*. *Buie* and *Pesquera* likewise remain binding authority. See MCR 7.215(J)(1).

For these reasons, defendant fails to show that the procedure here challenged violated his constitutional rights to confront witnesses against him.

We must likewise reject defendant's claim of ineffective assistance of trial counsel for failing to object on constitutional grounds. "In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Regarding the latter, the defendant must show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel's poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997), quoting *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

In this case, at the time of trial, *Buie* had yet to be decided. However, *Craig* and *Pesquera* stood as binding authority that well recognized the propriety of resort to video testimony from a remote location in connection with alleged child victims of sex crimes, as a procedure that can be made to comport with a defendant's confrontational rights. Defense counsel thus would have had nothing to gain from raising the confrontation issue at trial. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) ("Trial counsel is not required to advocate a meritless position."). It was thus neither error for counsel not to raise the issue, nor would it have affected the outcome had he done so. See *Rockey*; *Messenger*.

Affirmed.

/s/ Jane M. Beckering
/s/ Jane E. Markey
/s/ Stephen L. Borrello