Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-325

JULY TERM, 2020

State of Vermont v. Richard McLauchlan*	}	APPEALED FROM:
	}	
	}	Superior Court, Bennington Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 1121-12-17 Bncr
		Trial Judge: William D. Cohen

In the above-entitled cause, the Clerk will enter:

Defendant appeals from his convictions of one count of aggravated sexual assault and one count of aggravated sexual assault of a child. As to the first count, defendant argues that the court erred in allowing the minor complainant to testify outside of his presence. The State acknowledges that it intended to dismiss the second count at sentencing due to Double Jeopardy concerns. We affirm defendant's conviction on the first count, reverse his conviction on the second count, and remand for a new sentencing hearing at which the second count will be dismissed.

Defendant was charged in December 2017 with sexually assaulting his daughter, Z.M., when she was between five and seven years old. Z.M. was seven at the time defendant was charged. The State moved under Vermont Rule of Evidence 807 to have Z.M. testify outside defendant's presence. Following a hearing, at which Z.M.'s therapist testified, the court granted the State's request, finding the rule's requirements satisfied. Tracking the language of the rule, it found that requiring Z.M. to testify in defendant's presence would present a substantial risk of trauma that would impair her ability to testify. It explained that, during therapy, Z.M. verbally expressed, and physically exhibited, anxiety, stress, embarrassment, and fear over testifying. The therapist opined that the risk of trauma associated with testifying resulted from defendant's presence and thus, providing the child with a dog or stuffed animal in the courtroom would not suffice. The court also viewed three forensic interviews of the child and found that Z.M. expressed fear of defendant on numerous occasions and was visibly upset when asked to discuss the incidents at issue. The court found that this problem would only be exacerbated if Z.M. was forced to testify in defendant's presence.

Z.M. testified at trial as did a detective, Z.M.'s grandmother, defendant's former girlfriend, and the forensic interviewer. The parties stipulated that Z.M. had tested positive for chlamydia, a sexually transmitted disease. The jury found defendant guilty on both counts.

Prior to sentencing, this Court issued State v. Bergquist, 2019 VT 17, __ Vt. __. The Court held that V.R.E. 807, on its face, did not comply with constitutional requirements because it "purport[ed] to allow a child witness to testify outside of a defendant's presence upon a showing of 'a substantial risk of trauma to the child' that would 'substantially impair the ability of the child

. . . to testify.' " Id. ¶ 67 (alteration in original) (emphasis omitted) (quoting V.R.E. 807(f)). The Bergquist Court clarified that under the Sixth Amendment as interpreted in Maryland v. Craig, 497 U.S. 836 (1990), a court must find by a preponderance of the evidence " 'that the child would be traumatized' by the defendant's presence and that 'the trauma would impair the child's ability to communicate.' " Bergquist, 2019 VT 17, ¶ 67 (emphasis omitted) (quoting Craig, 497 U.S. at 855-56).

The State asked the trial court to clarify its earlier ruling in light of Bergquist. Defendant did not object. The trial court issued a second decision clarifying that a preponderance of the evidence showed that Z.M. would have been traumatized by defendant's presence and the trauma would have impaired her ability to communicate. The court explained that, in its earlier ruling, it had cited Craig for the proposition that the denial of face-to-face confrontation requires a case-specific finding of more than de minimis trauma and that "the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant." 497 U.S. at 855-56.

The court found that the evidence before it on the Rule 807 motion amply satisfied Berquist. Accordingly, it made several clarifications to avoid a potentially unnecessary remand. It largely reiterated its earlier findings, including the finding that the child's fear and anxiety of defendant would only have been exacerbated if she had been forced to testify in his presence. It noted that Z.M. was at a very tender age and already exceedingly reticent. It found that her ability to express anything in a courtroom in defendant's presence would have been severely limited and it was very likely that she would have shut down or broken down emotionally. Accordingly, the court stated that the preponderance of the evidence presented at the time it decided the initial motion supported a finding that Z.M. would have been traumatized by defendant's presence and that trauma would have impaired her ability to communicate. Following sentencing, defendant appealed.

Defendant argues that the evidence and the findings do not support the court's conclusion, by a preponderance of the evidence, that Z.M. would be traumatized if she testified in his presence. He appears to assert that because the court's decision post-Berquist was similar to the one it issued before Berquist, its decision cannot stand. According to defendant, the evidence shows only that there was a substantial risk that Z.M. would be traumatized by the courtroom generally and not that she would be traumatized by his presence.

We find no error, plain or otherwise. We reject the suggestion that the court could not clarify its decision in light of Bergquist. We note, moreover, that the court essentially reiterated its earlier findings and, in addition, made a finding that Z.M. would have been traumatized by defendant's presence and that trauma would have impaired her ability to communicate. The court's findings are supported by the evidence and they support the court's determination, by a preponderance of the evidence "that [Z.M.] would be traumatized by the defendant's presence and that the trauma would impair [her] ability to communicate." Bergquist, 2019 VT 17, ¶ 67 (quotation and emphasis omitted). Indeed, its findings are similar to those we deemed sufficient in Bergquist. See id. ¶ 69 (concluding that appropriate standard was satisfied where trial court found it "highly likely that [child] would completely shut down and respond in a very strong emotional matter" based on trauma child had suffered from abuse and her earlier reactions to attempts to discuss this subject).

Z.M.'s therapist testified that the child would be traumatized by testifying in defendant's presence and she explained the basis of her opinion. Her testimony was not limited to the effect that the courtroom would have on the child but focused on the effect of being in the same room as defendant, whom Z.M. had not seen for a long time, and the fear that that would engender in Z.M.

The therapist described that during her sessions with Z.M., it was difficult for Z.M. to overcome her fear and speak about what happened. The court also made findings based on its review of the child's forensic interviews and her reaction when asked to discuss the events at issue. Z.M. was visibly upset during these interviews and afraid of defendant. The court reasonably concluded, based on the evidence, that these effects would be exacerbated if the child was forced to testify in defendant's presence. We find no error in the court's decision to allow Z.M. to testify outside defendant's presence.

Defendant's aggravated-sexual-assault conviction is affirmed, his conviction on the second count is reversed, and the case is remanded for a new sentencing hearing at which the second count will be dismissed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

_____
Beth Robinson, Associate Justice

_____
Karen R. Carroll, Associate Justice