IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 22-0199

STATE OF IOWA,
Plaintiff-Appellee

vs.

ABEL GOMEZ MEDINA
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY,
HONORABLE SCOTT BEATTIE AND HEATHER LAUBER

APPELLANT'S FINAL REPLY BRIEF

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I e-filed the Defendant-Appellant's Final Reply Brief with the Electronic Document Management System with the Appellate Court on the 4th day of August 2023.

The following counsel will be served by Electronic Document Management System.

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I hereby certify that on the 4th day of August 2023, I did serve the Defendant-Appellant's Final Reply Brief on Appellant, listed below, by mailing one copy thereof to the following Defendant-Appellant:

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I. THE COURT ALLOWING CLOSED CIRCUIT TESTIMONY FOR AN ADULT THAT IS ABLE TO COMMUNICATE REQUIRES REVERSAL UNDER THE CONFRONTATION CLAUSE AND IOWA CODE § 915.38(1)

A. Adults Must Have Face to Face Confrontation

The State's defense in this specific issue is that the trial court found, when the witness had turned 18 years old, was that the trial court found that closed-circuit testimony was necessary under the mental health prong of the statute. See Iowa Code § 915.38(1)(c); Appellee's Br. at 24-26. What the State refuses to do is acknowledge that allowing an adult witness to testify via closed-circuit testimony is a massive expansion of Maryland v. Craig, 497 U.S. 836 (1990) that has never been approved by either the United States Supreme Court or the Iowa Supreme Court.

The State claims that the court specifically addressed the test in Maryland v. Craig. The problem is that the court could not address the test, because the test is specifically for *child* witnesses. In Maryland v. Craig, 497 U.S. 836, 849-50 (1990), the U.S. Supreme Court set forth the test to determine when face-to-face confrontation with a *child* victim of alleged sexual abuse may be excused and closed-circuit television testimony used in its place. Id. The State must prove that the denial of face-to-face confrontation

is necessary to further an important public policy, and the U.S. Supreme Court determined that protecting *child* witnesses from the psychological harm of testifying, when they could not communicate, was a sufficiently important public policy concern to justify denying face-to-face confrontation. Maryland v. Craig, 497 U.S. 836, 840-42 (1990).

> [I]f 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 a special procedure 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.

Id. at 855. The critical inquiry is whether the use of the procedure is necessary to further the important state interest of protecting the child witness. Id. at 852.

> [W]here necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation.

Id. at 857 (emphasis added). Craig sets forth a three-part test for determining necessity. First, the trial court must hear evidence and determine whether use of the closed circuit television procedure is necessary to protect the welfare of the particular *child* witness who seeks to testify. Id. at 855. Second, the trial

court must find that the *child* witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. Id. at 856. Finally, the trial court must find that the emotional distress suffered by the *child* witness in the presence of the defendant is more than mere nervousness or excitement or some reluctance to testify. Id.

Since deciding Craig, the U.S. Supreme Court has not returned to the issue of the constitutionality of remote video testimony and has not expanded its jurisprudence to adults. See State v. Rogerson, 855 N.W.2d 495, 499 (Iowa 2014). Convenience, efficiency, and cost-saving are not sufficient public policy reasons for dispensing with face-to-face confrontation. Id. at 507.

The State argues that "he statute does not expand the protections to all adults, as Gomez argues, or to any adult with a hint of a relatively minor mental illness – it applies only to those for whom the protections of closed-circuit testimony are necessary, as determined by the trial court." Appellee's Br. at 25. But the problem is that the statute does expand the realm of witnesses beyond just children to now adults. The State now needs to bring sufficient public policy reasons for dispensing with face-to-face confrontation for adult witnesses, where Maryland v. Craig was just child witnesses. See State v. Rogerson, 855 N.W.2d 495, 507 (Iowa 2014) (there needs to be sufficient public policy reasons for dispensing with Confrontation).

The State is attempting to make the argument that an adult witness was permitted to testify by closed circuit testimony because the trial court decided it was necessary. But the State cannot point to any cases where the Iowa Supreme Court or the United States Supreme Court have determined that the protection of adults with mental illness is sufficient public policy to dispense with confrontation. The State is asking for this court to give them a massive expansion of Craig to adults with mental illness. Adults with mental illnesses are a massive number of people (far more than sexually abused children) and the court's expansion could potentially reach a very large number of witnesses. See Kessler RC, et al., Lifetime prevalence and age-of-onset distributions of mental disorders in the World Health Organization's World Mental Health Survey Initiative. World Psychiatry 6(3):168-176 (2007) (50% of adults will be diagnosed with mental illness.

The State attempts to limit this number by pointing out that it is limited by judges finding necessity, but they have yet to argue why the protection of adults with mental illness is sufficient public policy to overcome the preference for face-to-face confrontation.

> [Flace-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.

Coy v. Iowa, 487 U.S. 1012, 1023 (1988). There is a strong preference for face-to-face confrontation. State v. Rogerson, 855 N.W.2d 495, 499 (Iowa 2014). Accusers will be more reluctant to make false accusations when they were in the personal presence of the accused. Id. at 504. The social pressure to tell the truth can be diminished when the witness is far away rather than physically present with the defendant in the courtroom. Id. Face-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person. Id.

Craig was limited, and the court should recognize that Craig was limited, or risk massive expansion of the use of closed-circuit testimony for all adults, a position never authorized by the U.S. Supreme Court. Expanding this practice to adults, based solely on mental illness, makes it so that video conferencing is available even in unconstitutional situations, such as mere nervousness or excitement or some reluctance to testify. See Maryland v. Craig, 497 U.S. 836, 856 (1990). The State promises that this will be limited by necessity, but they do not have such strong public policy justifications as to dispense with confrontation in this case, and they will ask again, and expand it beyond here. The court should demand sufficient policy justifications before dispensing with Mr. Gomez's constitutional rights, which the State cannot provide.

This was not harmless error. The court cannot be sure that the guilty verdict actually rendered in this trial was unattributable to the error. See State v. Newell, 710 N.W.2d 6, 25 (Iowa 2006). K.D. was the star witness of the prosecution's case, her testimony was not cumulative, the only corroborating evidence of her claims were the out-of-court statements made by L.G. that he saw "sex", every other witness around the family testified that they had never seen any inappropriate behavior between Mr. Gomez and K.D., and the prosecution's case relied on one eyewitness with no physical evidence. The court must reverse because error cannot surely be said to be harmless without the face-to-face testimony of K.D..

B. There Was Insufficient Evidence to Show that K.D. Could Not Give Truthful Testimony in the Presence of Mr. Gomez

The trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than mere nervousness or excitement or some reluctance to testify. Maryland v. Craig, 497 U.S. 836, 856 (1990).

> [T]he Confrontation Clause requires the trial court to make a *specific finding* that testimony by the child in the courtroom *in the presence of the defendant* would result in the child suffering serious emotional distress such that the child *could not reasonably communicate.*

Id. at 858 (emphasis added).

Iowa Code section 915.38(1) "preserves the defendant's basic right to confrontation while protecting minor victims from the trauma which often results from testifying in a defendant's physical presence. *If this trauma impairs or handicaps a child's ability to communicate,* protective measures must be adopted." State v. Rupe, 534 N.W.2d 442, 444 (Iowa 1995) (emphasis added).

While the State makes various citations to the mental health troubles of K.D., their evidence remains the lay opinion of the GAL that K.D. being in the presence would affect her ability to truthfully testify at trial. (Tr. Closed-Circuit Hearing 15:21-25). K.D. never said, and her reports to her counselor do not reflect, that she could not give truthful testimony in the presence of Mr. Gomez. (Tr. Closed-Circuit Hearing 15:21-25).

III. THE COURT ERRED IN REFUSING TO ALLOW EVIDENCE OF THE FAMLY DYNAMIC THAT BROUGHT THE EYEWITNESS'S CREDIBILITY INTO QUESTION

The government argues that there was already substantial evidence of the "family dynamic" in the record. Appellee's Br. at 40. However, the evidence was also relevant in showing whether K.D. felt supported or not, K.D.'s actions in the home, whether K.D. discussed the allegations with Tiffany, whether K.D. was acting out, and K.D.'s motive for making the allegations. (Trial Tr. Vol. 2 9:3-24).

CONCLUSION

The court should reverse and remand for new trial

ORAL ARGUMENT NOTICE

Counsel requests oral argument.

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___*/S/ Alexander Smith*_____
Dated: August 4, 2023
Alexander Smith