

SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia v. David K.

238 W. Va. 33 (2016) · No. 15-0543 · Decided October 11, 2016

SUMMARY

This document is a separate opinion addressing whether the use of closed-circuit television to present testimony from a child sexual-assault victim violated the defendant's Confrontation Clause rights. The opinion discusses *Maryland v. Craig*, West Virginia Code §§ 62-6B-1 to -4, the West Virginia Rules of Evidence, and the separation of powers between the Legislature and the judiciary. Justice Workman concurred in affirming the convictions but dissented from the majority's reasoning and treatment of the statutory requirements.

CASE DETAILS

COURT	Supreme Court of Appeals of West Virginia
WRITING FOR THE COURT	Chief Justice Ketchum; Benjamin; Ketchum; Loughry; Workman
JURISDICTION	West Virginia
DECIDED	October 11, 2016
DOCKET	15-0543
DISPOSITION	affirmed
PROCEDURAL POSTURE	David K. appealed his convictions for two counts of felony sexual assault and two counts of felony sexual abuse by a custodian, arguing that the circuit court violated his Confrontation Clause rights by allowing a child witness to testify by live closed-circuit television without complying with statutory procedural safeguards.
STANDARD OF REVIEW	Rulings concerning a motion for a new trial and the existence of reversible error are reviewed for abuse of discretion; underlying factual findings are reviewed for clear error; questions of law are reviewed de novo. Evidentiary rulings, including those affecting constitutional rights, are reviewed for abuse of discretion. Unpreserved constitutional error is reviewed under the plain-error doctrine, and constitutional error is harmless only when the beneficiary proves beyond a reasonable doubt that it did not contribute to the verdict.
PRECEDENTIAL VALUE	published precedential state supreme court opinion
PARTIES	David K. v. State of West Virginia

TOPICS

criminal procedure

sixth amendment

evidence

statutory interpretation

constitutional law

PRACTICE AREAS

criminal procedure

constitutional law

evidence

QUESTIONS PRESENTED

1. Whether the circuit court erred by allowing the child witness to testify by live closed-circuit television without a written motion, evidentiary hearing, statutory findings, expert opinion, and the defendant's statutory election regarding courtroom presence.
2. Whether the circuit court's failure to follow the procedural safeguards in West Virginia Code sections 62-6B-1 to -4 constituted plain error affecting the defendant's substantial rights and the fairness, integrity, or public reputation of the proceedings.
3. Whether any Confrontation Clause or statutory-procedure error was harmless beyond a reasonable doubt in light of the defendant's opportunity to cross-examine the witness and the four instances of incriminating statements.

HOLDINGS

1. Under West Virginia Code section 62-6B-3(a), a circuit court may order a child witness to testify by live closed-circuit television only upon a written motion by the prosecuting attorney, the child's attorney, or the child's guardian ad litem, followed by the required statutory findings. Before permitting the testimony, the court must conduct an evidentiary hearing, consider the factors in section 62-6B-3(c), and make the clear-and-convincing-evidence findings required by section 62-6B-3(b), with the expert-opinion and other safeguards prescribed by sections 62-6B-3(d) and 62-6B-4.
2. The circuit court's failure to comply with the statutory procedural safeguards was error and clear or obvious error under the plain-error doctrine, but the defendant failed to establish that the error affected his substantial rights or seriously affected the fairness, integrity, or public reputation of the proceedings.
3. Any error in allowing the child witness to testify by live closed-circuit television without the required safeguards was harmless beyond a reasonable doubt and did not warrant reversal.

KEY QUOTATIONS

"The Supreme Court in Craig set out three findings that a court must make before allowing a child witness to testify by live closed-circuit television." (39)

"Based on the foregoing, we hold that pursuant to W.Va. Code § 62-6B-3(a), a circuit court may order the testimony of a child witness be given via live closed-circuit television upon (1) a written motion filed by the prosecuting attorney, the child's attorney, or the child's guardian ad litem and (2) the requisite findings of fact determined in accordance with W.Va. Code § 62-6B-3(b)." (42)

"We conclude that under the circumstances of this case—in which the State presented four different instances of David K. confessing to the crime, and in which counsel for David K. cross-examined A.R.—the circuit

court's failure to follow the procedural safeguards contained in W.Va. Code § 62-6B-1 et seq. was harmless error." (45)

FACTUAL BACKGROUND

David K. was charged with sexually assaulting and sexually abusing his fourteen-year-old stepdaughter, A.R. At trial, A.R. answered preliminary questions but became unresponsive when asked about the alleged sexual contact, prompting the circuit court to move her testimony to live closed-circuit television without a prior motion or statutory hearing. The State presented four instances of alleged confessions or incriminating statements by David K., including a signed written statement, statements to two police officers, recorded statements in a police cruiser, and a statement to his wife. Defense counsel did not object to the closed-circuit procedure and fully cross-examined A.R.

PROCEDURAL HISTORY

A Wetzel County grand jury indicted David K. on six felony counts. During trial, the child witness became unresponsive while questioned about the alleged abuse, and the circuit court sua sponte ordered her to testify by live closed-circuit television without a written motion, evidentiary hearing, expert opinion, or the statutory election allowing the defendant to leave the courtroom. The circuit court dismissed two counts, the jury convicted David K. on four counts, and the court denied his motion for a new trial before sentencing him to an effective term of twenty to forty years. The Supreme Court of Appeals affirmed.

DISPOSITION

affirmed

CASES CITED

- Maryland v. Craig, 497 U.S. 836 (1990)
- State v. Vance, 207 W. Va. 640, 535 S.E.2d 484 (2000)
- State v. Kaufman, 227 W. Va. 537, 711 S.E.2d 607 (2011)
- State v. Marple, 197 W. Va. 47, 475 S.E.2d 47 (1996)
- State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995)
- State v. White, 231 W. Va. 270, 744 S.E.2d 668 (2013)
- State v. Salmons, 203 W. Va. 561, 509 S.E.2d 842 (1998)
- State v. Starr, 158 W. Va. 905, 216 S.E.2d 242 (1975)
- State v. Lightner, 205 W. Va. 657, 520 S.E.2d 654 (1999)
- State ex rel. Grob v. Blair, 158 W. Va. 647, 214 S.E.2d 330 (1975)
- State v. Thomas, 157 W. Va. 640, 203 S.E.2d 445 (1974)
- State v. Frazier, 229 W. Va. 724, 735 S.E.2d 727 (2012)
- Chapman v. California, 386 U.S. 18 (1967)
- U.S. v. Olano, 507 U.S. 725 (1993)

- State v. LaRock, 196 W. Va. 294, 470 S.E.2d 613 (1996)
- State v. Nichols, 325 A.2d 28 (Me. 1974)
- Davis v. Alaska, 415 U.S. 308 (1974)

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