

No. \_\_\_\_\_

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In the  
Supreme Court of the United States

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Ryan L. Bessert,  
Petitioner

v.

State of Wisconsin  
Respondent

On Petition for Writ of Certiorari to the Supreme Court of  
Wisconsin

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Appendix

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## Appendix 1



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September 13, 2022

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You are hereby notified that the Court has entered the following order:

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No. 2021AP1062-CR      State v. Bessert, L.C.#2019CF54

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Ryan L. Bessert, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

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Sheila T. Reiff  
Clerk of Supreme Court

## Appendix 2

## State v. Bessert

Court of Appeals of Wisconsin, District Three

May 3, 2022, Decided; May 3, 2022, Filed

Appeal No. 2021AP1062-CR

### Reporter

2022 Wisc. App. LEXIS 376 \*; 2022 WL 1320393

STATE OF WISCONSIN, PLAINTIFF-  
RESPONDENT, v. RYAN L. BESSERT,  
DEFENDANT-APPELLANT.

**Notice:** THIS OPINION IS SUBJECT TO  
FURTHER EDITING. IF PUBLISHED, THE  
OFFICIAL VERSION WILL APPEAR IN THE  
BOUND VOLUME OF THE OFFICIAL  
REPORTS.

**Prior History:** [\*1] APPEAL from a judgment of  
the circuit court for Langlade County: JOHN B.  
RHODE, Judge. Cir. Ct. No. 2019CF54.

**Disposition:** Affirmed.

**Judges:** Before Stark, P.J., Hruz and Gill, JJ.

### Opinion

P1 STARK, P.J. Ryan L. Bessert appeals from a judgment, entered following a bench trial, convicting him of two counts each of first-degree sexual assault of a child under twelve years old and incest with a child. Bessert seeks a new trial, arguing that he was denied his Sixth Amendment rights under the United States Constitution. First, he claims he was denied his right to confront witnesses against him when, pursuant to WIS. STAT. § 972.11(2m)(a) (2019-20),<sup>1</sup> the circuit court allowed the victim to testify via closed-circuit

audiovisual equipment (CCTV).<sup>2</sup> Second, he claims he was denied his right to a public trial because the courthouse doors were inadvertently locked during the court's deliberations and when the court issued its verdicts.

P2 For the reasons that follow, we conclude that the circuit court properly applied WIS. STAT. § 972.11(2m)(a) under the circumstances of this case and that Bessert's rights were not violated by the court allowing the victim to testify via CCTV. Further, we assume without deciding that Bessert's right to a public trial was violated, but we conclude that the court [\*2] employed an appropriate remedy for the constitutional violation by timely reannouncing the verdicts in open court. Accordingly, we affirm.

### BACKGROUND

P3 Bessert came under investigation for sexual assault in January 2019. As part of that investigation, Alex,<sup>3</sup> who was six years old at the time, participated in a forensic interview and reported several instances of Bessert sexually abusing her in 2015 and 2016, when she was three years old. Sergeant Kyle Rustick, who served as

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<sup>2</sup> We note that CCTV stands for closed-circuit television, while WIS. STAT. § 972.11(2m)(a) uses the phrase "closed-circuit audiovisual equipment," which can include CCTV. For ease of reference, we will use CCTV to refer to all closed-circuit audio and visual equipment.

<sup>3</sup> Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim's name as well as nonidentifying terms for the other witnesses in this case.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

both an officer with the Antigo Police Department and a deputy with the Langlade County Sheriff's Office, also interviewed Bessert's former girlfriend. The girlfriend reported that between November 2013 and January 2014, she saw Bessert digitally penetrate Alex seven to ten times when she was an infant. According to another witness, Alex was "exhibiting sexualized behaviors, including doll play involving sexual behavior and trying to take off a boy child's pants."

P4 In March 2019, the State charged Bessert with twenty-six counts related to the sexual abuse allegations. Fifteen of those charges—all for first-degree sexual assault of a child under the age of twelve, incest, or repeated sexual assault of a child—were [\*3] for the incidents Bessert's former girlfriend alleged to have occurred between November 2013 and January 2014, when Alex was an infant. The remaining charges—involving additional counts of the already listed crimes as well as mental harm to a child; exposing genitals to a child; physical abuse of a child, intentionally causing bodily harm; and misdemeanor battery—related to the sexual abuse allegations Alex herself made for the period between 2015 and 2016.

P5 Prior to trial, the State filed a motion in limine seeking to present Alex's testimony via CCTV as allowed under WIS. STAT. § 972.11(2m)(a). The State's motion alleged that Alex was "still having emotional issues regarding [Bessert], including frequent nightmares," and "is afraid of [Bessert] and would not be able to adequately testify in the same room as him." Bessert opposed the State's request.

P6 At a hearing on the motion, Alex's guardian testified that then-seven-year-old Alex had lived with her for six years. At the time of the hearing, Alex had been participating in the early stages of the trial preparation process with the district attorney's office. Although the meetings at this stage involved "fun things" like "playing with [a victim support] [\*4] puppy," "playing board games," and eating chicken nuggets for dinner, the

guardian testified that Alex was aware of the purpose of the meetings. According to her guardian, after the meetings, Alex was "scared": "[A]fter we go home at night she talks about it and then she has nightmares, real bad ones." When questioned about the subject of the nightmares, Alex's guardian explained, "Some of them are with [Bessert] taking [Alex] away from me or lately she's been having nightmares of [Bessert] killing me or slicing my throat and I have to tell her it's okay, you know, I'm here for her." Her guardian further testified to Alex wetting the bed for a few days after these meetings and having angry outbursts where "she beats on the other" children in the home.<sup>4</sup> Based on her guardian's experience as a mother and a foster parent, she testified that this was unusual behavior compared to other children Alex's age.

P7 Further, Alex's guardian testified that Alex did not want to see Bessert. She reported that Alex had seen Bessert approximately one year earlier at a McDonald's. After that encounter, Alex came home and told her guardian that she no longer wanted to see Bessert.

P8 At the conclusion of [\*5] the guardian's testimony, the circuit court heard arguments from the parties. The State reiterated that Alex's nightmares, bed-wetting, and aggression—all of which had developed in the preparation period before trial—and her desire not to see Bessert again demonstrated that testifying without the assistance of CCTV would "cause [Alex] serious emotional distress such that she won't be able to reasonably communicate." Bessert objected to the CCTV accommodation, focusing on his confrontation rights, asserting that a "trial is anxious for everyone who testifies," and concluding that "the [S]tate has not met [its] burden ... in showing that [Alex] is going to shut down and not be able to reasonably communicate, or that she's going to be suffering

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<sup>4</sup> Her guardian also testified that Alex had been seeing a counselor to "minimize or deal with trauma," but she had not seen the counselor for months before the hearing due to the counselor's maternity leave.

from serious emotional distress." Defense counsel did not challenge the constitutionality of WIS. STAT. § 972.11(2m) directly and instead stated that "everyone says and everyone agrees it has survived constitutional muster."

P9 The circuit court found that the State had met its statutory burden of proof for the CCTV accommodation. The court found Alex's guardian very credible and observed that "she probably knows [Alex] better than anyone at this stage." It concluded

[\*6] that forcing [Alex] to testify in the presence of [Bessert], her alleged sexual abuser on multiple occasions, will result in her suffering serious emotional distress such that I am concerned she could not reasonably communicate effectively in this courtroom during the trial, and that video testimony from the other room that the district attorney has spent some time preparing is necessary to minimize the trauma to [Alex] and to provide a setting that is more amenable to securing [Alex's] uninhibited and truthful testimony.

P10 At the bench trial, Bessert's former girlfriend and Alex both testified consistently with their previous allegations of sexual abuse. To prove the allegations from 2013 and 2014, the girlfriend testified that she witnessed Bessert digitally penetrate Alex while he was changing her diaper and while giving Alex a bath. According to her, Bessert was excited by this behavior.

P11 The State also called Alex via CCTV to testify to the assaults that allegedly occurred in 2015 and 2016. Alex's testimony was confused and inconsistent. Her testimony began with her statement that "I woke up this morning and [Bessert] was under the bed—under the blankets I mean."<sup>5</sup> When the State [\*7] attempted to redirect Alex with a question about what she did that

morning, Alex stated, "When I woke up I tried to go outside and I was trying to run away because [Bessert] was doing the bad stuff." Alex was asked what she liked to do with Bessert, and she responded, "I only liked to play with him but when he did the bad stuff I didn't like it because when we played on the slide in the backyard I used to play on it." Alex testified that the "bad stuff" meant "[w]hen [Bessert] was touching [her] private" "[w]ith his hand." Alex also testified that Bessert forced her to touch "his private" and that he "touched his private in [her] private."

P12 According to Alex, when Bessert touched her, she "would try to run away and [she] couldn't" and she "said please stop a lot of times." Alex could not remember how old she was when Bessert did this, but she stated that she was living at his house the first time. The State asked how many times Bessert touched her privates, questioning, "Was it one time, two times or something else?" Alex responded that it was "two times." When asked whether her clothes were on, Alex stated, "I'm pretty sure I had underwear on, but I don't really know. But I'm pretty [\*8] sure I was naked."<sup>6</sup>

P13 Sergeant Rustick testified regarding his investigation. Through his testimony, the State established that Alex was living with Bessert from November 11, 2013, through the end of that year and that Alex was also with Bessert from November 2015 through June 2016. Rustick also discussed his interview with Bessert's former girlfriend, explaining that she "didn't know why I had come to see her"; that Rustick did not "mention sexual assault"; and that he did not mention Alex, but rather the girlfriend "brought [Alex] up."

P14 Bessert testified in his own defense that he did not assault Alex. He also called his mother and daughter to testify in his defense. Neither witness was directly asked if they saw Bessert touch Alex, but both witnesses implied that they did not witness

<sup>5</sup> On redirect, the State asked Alex, "[D]o you know where [Bessert] stays right now? Do you know where he lives right now?" Alex responded, "No.... I'm pretty sure he's in jail."

<sup>6</sup> The State also entered Alex's forensic interview into evidence, 106 which the circuit court stated it had viewed before the trial.



any inappropriate behavior between Bessert and Alex.

P15 During closing arguments, both the State and Bessert acknowledged that Bessert's former girlfriend and Alex were testifying to events that occurred during two separate time periods. The circuit court then took a short recess to deliberate. When the circuit court came back on the record, it found Bessert guilty of two counts each of first-degree [\*9] sexual assault of a child and incest—counts one through four of the Information, which occurred when Alex was an infant and to which Bessert's former girlfriend testified. The court acquitted Bessert on all remaining charges.

P16 Before sentencing, Bessert filed a motion for a new trial, arguing that he was denied his constitutional right to a public trial. According to Bessert, "the courthouse was improperly closed to the public from 4:30 P.M. until the conclusion of trial at 5:00 P.M." He stated that "[t]his closure was not at the request of any party" and that "the defense was not aware the courthouse doors automatically locked until after trial was concluded."

P17 At the motion hearing, the parties stipulated "that the courthouse door was locked at 4:30 p.m." on the date of Bessert's trial. The circuit court also took judicial notice of the following:

[T]he CCAP minutes prepared by the clerk from the conclusion of the trial said that we adjourned at approximately 4:30, reconvened at approximately 4:56 and then adjourned in finality at approximately 5:00 p.m. So there was only approximately according to that four or five minutes when we were on the record where the door was locked. [\*10] During that time the Court came back from deliberations, stated that it had reviewed its notes from the trial, reviewed the applicable jury instructions, announced the verdicts on all 26 counts, revoked bond, and ordered a PSI.

The court then, "out of an abundance of caution," 107(1983)).

reannounced its verdicts in open court and denied Bessert's motion for a new trial. Bessert now appeals.

## DISCUSSION

P18 On appeal, Bessert presents two arguments for our review. First, he claims that the circuit court's decision to allow Alex to testify using CCTV violated his right to confront the witnesses against him. Second, he argues that his right to a public trial was violated when the court deliberated and announced its verdicts when the courthouse doors were locked. He further disputes that reannouncing the verdicts in open court, as the court did here, was an appropriate remedy. For the reasons provided below, we reject Bessert's arguments and affirm.

### *Right to Confrontation*

P19 The Confrontation Clause of the Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...."<sup>7</sup> However, "[t]he right to cross-examination, and thereby confrontation, is not ... absolute." [\*11] *State v. Rhodes*, 2011 WI 73, ¶32, 336 Wis. 2d 64, 799 N.W.2d 850; *Maryland v. Craig*, 497 U.S. 836, 850, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990). "[T]he right to confrontation may be limited where necessary to further an important public policy, so long as there are means to assure the reliability of the witness's

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<sup>7</sup>This right applies to the states through operation of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). Our Wisconsin Constitution also provides confrontation rights: "In all criminal prosecutions the accused shall enjoy the right ... to meet the witnesses face to face ...." WIS. CONST. art. I, § 7. "Despite the state constitution's more direct guarantee to defendants of the right to 'meet' their accusers 'face to face,' the Wisconsin Supreme Court has generally interpreted the state and federal rights of confrontation to be coextensive." *State v. Vogelsberg*, 2006 WI App 228, ¶4, 297 Wis. 2d 519, 724 N.W.2d 649 (citing *State v. Burns*, 112 Wis. 2d 131, 144, 332 N.W.2d 757 (1983)).

testimony." *Rhodes*, 336 Wis. 2d 64, ¶34 (citing *Craig*, 497 U.S. at 850).

P20 "Whether an action by the circuit court violated a criminal defendant's right to confront an adverse witness is a question of constitutional fact." *State v. Vogelsberg*, 2006 WI App 228, ¶3, 297 Wis. 2d 519, 724 N.W.2d 649. We uphold the court's findings of fact unless clearly erroneous, but we independently apply the law to those facts. *Id.*

P21 In this case, Bessert claims to assert an as-applied constitutional challenge to WIS. STAT. § 972.11(2m)(a) on the grounds that it violates his right to confrontation.<sup>8</sup> Our review of Bessert's arguments, however, reveals that his arguments largely assert a facial constitutional challenge to § 972.11(2m)(a).<sup>9</sup> Further, and as the State argues, both of Bessert's constitutional challenges are undeveloped, as he fails, at the very least, to develop our standard of review on either challenge.

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<sup>8</sup> The State argues that Bessert forfeited his as-applied constitutional challenge by failing to raise it in the circuit court. See *State v. Cole*, 2003 WI 112, ¶46, 264 Wis. 2d 520, 665 N.W.2d 328 (stating that an as-applied constitutional challenge may be waived or forfeited). As the State notes, defense counsel argued at the hearing on Bessert's motion that "everyone says and everyone agrees [WIS. STAT. § 972.11(2m)] has survived constitutional muster." Bessert disagrees with the State's position, arguing that his counsel's statement was "not a repudiation of [defense] counsel's earlier [Confrontation Clause] argument, which had been acknowledged by the court, but rather a pivot, shifting from an argument which had been lost, to an argument which could still be won."

We need not decide this question, as we have the authority to disregard forfeiture arguments and address an allegedly forfeited claim on the merits. See *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999) ("[T]he [forfeiture] rule is one of judicial administration and ... appellate courts have authority to ignore the [forfeiture].").

<sup>9</sup> Under a facial constitutional challenge, "the challenger must show that the law cannot be enforced 'under any circumstances.'" *State v. Wood*, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d 63 (citation omitted). "If a challenger succeeds in a facial attack on a law, the law is void 'from its beginning to the end.'" *Id.* (citation omitted). Under an as-applied challenge, we consider "the facts of the particular case in front of us" to determine whether a defendant's "constitutional rights were actually violated. If a challenger successfully shows that such a violation occurred, the operation of the law is void as to the party asserting the claim." *Id.* (citation omitted).

While we could decline to reach the merits and conclude that Bessert's constitutional claims are underdeveloped, see *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992), we choose not to do so. As we explain below, all of Bessert's constitutional claims fail, as § 972.11(2m)(a) is consistent with relevant legal precedent and the [\*12] circuit court engaged in the appropriate fact finding under the statute.

P22 Bessert's facial constitutional challenge is premised on his belief that the Confrontation Clause "requires in person, face to face confrontation." Citing *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and *Giles v. California*, 554 U.S. 353, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008), Bessert claims that there are only three exceptions to the Confrontation Clause requirement: "(1) a dying declaration; (2) when the defendant engages in some course of conduct designed to prevent a witness from testifying; and (3) a prior examination if the witness were demonstrably unavailable and the defendant had the opportunity to cross-examine the witness[] [at] the time of the examination." According to Bessert, none of these exceptions apply and WIS. STAT. § 972.11(2m) does not meet the criteria for an exception to the Confrontation Clause guarantee; thus, he appears to claim that the statute is unconstitutional under any circumstances.

P23 Whether the Confrontation Clause allows for modifications to the traditional face-to-face courtroom testimony at a criminal trial is not a novel question in our constitutional jurisprudence. In fact, in *Craig*, the United States Supreme Court addressed the same question presented here: "whether the Confrontation Clause of the Sixth Amendment categorically prohibits a child witness in a child abuse case from testifying [\*13] against a defendant at trial, outside the defendant's physical presence, by one-way closed circuit television." *Craig*, 497 U.S. at 840. There, the State relied on a Maryland statute allowing for testimony of a child victim by CCTV. *Id.* at 840-42. The Supreme Court acknowledged that in *Coy v. Iowa*, 487 U.S. 1012,

1016, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988), the Court had previously stated that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." **Craig**, 497 U.S. at 844. The **Craig** Court clarified that "[w]e have never held, however, that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial." *Id.* It noted that the decision in **Coy** "le[ft] for another day" the question of whether any exceptions exist. **Craig**, 497 U.S. at 844 (citing **Coy**, 487 U.S. at 1021).

P24 The Court in **Craig** ultimately concluded that a child could testify through CCTV where the circuit court makes the following three case-specific findings: (1) that the "procedure is necessary to protect the welfare of the particular child witness who seeks to testify"; (2) "that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant"; and (3) "that the emotional distress suffered by the child witness in the presence of the defendant is more than [\*14] *de minimis*, i.e., more than 'mere nervousness or excitement or some reluctance to testify.'" *Id.* at 855-56 (citation omitted). "So long as a [circuit] court makes such a case-specific finding of necessity, the Confrontation Clause does not prohibit a State from using a one-way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case." *Id.* at 860.

P25 Bessert argues, however, that **Craig** was "incorrectly decided" and that subsequent Supreme Court case law indicates that the decision has been overruled. According to Bessert, **Craig** "[a]rguably ... created a fourth exemption to the confrontation clause," the case "was highly questionable when it was decided over vigorous dissent, and subsequent Supreme Court case law clearly indicates it is no longer 'good law.'" Bessert observes that at the time **Craig** was decided, the leading Confrontation Clause case was **Ohio v. Roberts**, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), and **Craig's**

holding substantially relied on **Roberts**. **Roberts** was subsequently overturned by **Crawford**, and by doing so, argues Bessert, **Crawford** implicitly overturned **Craig**.

P26 We previously rejected this same argument in **Vogelsberg**. There, a jury convicted the defendant of first-degree sexual assault of his four-year-old grandson. **Vogelsberg**, 297 Wis. 2d 519, ¶2. Prior to trial, the State moved to permit the victim to testify via CCTV. *Id.* The circuit court took [\*15] testimony and determined that the victim "would likely be further traumatized by having to face his abuser at trial." *Id.* The court then "ordered that the victim be allowed to testify from behind a screen to shield him from visual contact with Vogelsberg." *Id.* On appeal, the defendant's "primary contention [was] that the U.S. Supreme Court's decision in [**Crawford**] represents a shift in confrontation-clause jurisprudence that overturns state and federal precedents permitting a witness to testify from behind a barrier upon a particularized showing of necessity." **Vogelsberg**, 297 Wis. 2d 519, ¶5.

P27 In response, we reviewed the leading state and federal case law on the subject, ultimately concluding that **Crawford** did not overrule **Craig**. **Vogelsberg**, 297 Wis. 2d 519, ¶¶6-13. We reasoned that "[h]ad the Supreme Court intended to overrule **Craig**, it would have done so explicitly." **Vogelsberg**, 297 Wis. 2d 519, ¶14. Further, we explained that "**Crawford** and **Craig** address distinct confrontation questions": "**Crawford** addresses the question of *when* confrontation is required; **Craig** addresses the question of *what* procedures confrontation requires. The two cases can coexist peacefully, and nothing in **Crawford** suggests that **Craig** is placed in doubt."<sup>10</sup> **Vogelsberg**, 297 Wis. 2d 519, ¶¶15-16 (citation omitted).

P28 The defendant in **Vogelsberg** did not argue that

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<sup>10</sup>Since **Vogelsberg** was decided, our supreme court has also positively cited **Maryland v. Craig**, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990). See **State v. Rhodes**, 2011 WI 73, ¶¶34-1036, 336 Wis. 2d 64, 799 N.W.2d 850.

the circuit court had failed to [\*16] make the three findings required by *Craig*, and we did not address WIS. STAT. § 972.11(2m)(a) or determine whether the statute comported with the three findings required by *Craig*. See *Vogelsberg*, 297 Wis. 2d 519, ¶20. Nevertheless, we concluded, based on our review of the record, that the court's "use of a barrier between Vogelsberg and the child witness was appropriate and did not violate Vogelsberg's confrontation right." *Id.*

P29 Bessert claims that *Vogelsberg* was also wrongly decided. However, we are bound by this court's conclusion in *Vogelsberg* that *Craig* is still good law. See *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) ("[O]nly the supreme court ... has the power to overrule, modify or withdraw language from a published opinion of the court of appeals."). Contrary to Bessert's argument in his reply brief suggesting that our supreme court also wrongly decided *Cook*, we cannot, as an error correcting court, correct our own purported errors. See *id.* At the heart of all of Bessert's arguments is the premise that the courts have decided these Sixth Amendment issues incorrectly. We have no authority, however, to determine that the relevant decisions by the United States Supreme Court, the Wisconsin Supreme Court, and this court were incorrect.

P30 Under the applicable case law, "the right to cross-examination is [\*17] not absolute, [and] the right to confrontation may be limited where necessary to further an important public policy, so long as there are means to assure the reliability of the witness's testimony."<sup>11</sup> *Rhodes*, 336 Wis. 2d 64,

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<sup>11</sup> Given this conclusion, we will not further address Bessert's contentions that the Confrontation Clause requires in person, face-to-face confrontation and that WIS. STAT. § 972.11(2m) does not meet the criteria for any of the three exceptions to his Confrontation Clause rights. See *supra* ¶22.

Bessert also argues that the circuit court's finding that Alex "would suffer serious emotional distress violates the presumption [that] every defendant is presumed innocent until proven guilty." As the State observes, this argument appears to be a different as-applied constitutional argument. Nevertheless, we reject Bessert's arguments

¶34 (citing *Craig*, 497 U.S. at 850). The "protection of the 'physical and psychological wellbeing' of children" represents one such important public policy. *Id.*, ¶35 (citation omitted). We therefore reject Bessert's facial constitutional challenge to WIS. STAT. § 972.11(2m). The only remaining question, then, is whether the circuit court's use of § 972.11(2m) in this case violated Bessert's rights.

P31 As to Bessert's as-applied constitutional challenge, he argues that the evidence before the circuit court was insufficient to support the court's findings under WIS. STAT. § 972.11(2m). We note that while Bessert argues that *Craig* is not good law, he does not claim that § 972.11(2m) fails to comply with *Craig*'s requirements. See *Craig*, 497 U.S. at 855-56, 860. Consistent with those requirements, § 972.11(2m)(a) authorizes the court to take a child witness's testimony via CCTV after making case-specific findings. As pertinent to this appeal, where a child is under the age of twelve, the court must make two findings:

- a. That the presence of the defendant during the taking of the child's testimony will result in the [\*18] child suffering serious emotional distress such that the child cannot reasonably communicate.
- b. That taking the testimony of the child in a room other than the courtroom and simultaneously televising the testimony in the courtroom by means of closed-circuit audiovisual equipment is necessary to minimize the trauma to the child of testifying in the courtroom setting and to provide a setting more amenable to securing the child witness's uninhibited, truthful testimony.

Sec. 972.11(2m)(a)(1)(a-b).

P32 We conclude the circuit court made the appropriate findings of fact under WIS. STAT. § 972.11(2m)(a) and properly allowed Alex to testify by CCTV. Bessert concedes on appeal that "the

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on this point as undeveloped. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not address undeveloped arguments).

circuit court made a meticulous record," but he argues that "there is nothing in the record which supports the finding [that Alex] would not be able to communicate." We disagree. The evidence presented by Alex's guardian demonstrated that she was "scared," and her fear had manifested into "real bad" nightmares. Those nightmares involved Bessert regaining custody of Alex and Bessert killing her guardian by "slicing [her] throat." Further, during the period where Alex was participating in trial preparation—which consisted of fun activities to develop a familiarity [\*19] with the assistant district attorneys—she developed problems that included wetting the bed, and she had angry outbursts toward other children. Her guardian made it clear that Alex was scared of the entire trial process, and Bessert specifically, and that she did not want to see Bessert again. Further, due to Alex's counselor being on maternity leave, Alex had no plan or support system to help her cope with this trauma, the stress of testifying, and her fear of seeing Bessert.

P33 Based on this evidence, the circuit court found that (1) "forcing [Alex] to testify in the presence of [Bessert], her alleged sexual abuser on multiple occasions, will result in her suffering serious emotional distress" such that "she could not reasonably communicate effectively in this courtroom during the trial," and (2) "video testimony ... is necessary to minimize the trauma to [Alex] and to provide a setting that is more amenable to securing [Alex's] uninhibited and truthful testimony." On this record, the court's findings are not clearly erroneous. Thus, the court properly allowed the State to present Alex's testimony via CCTV, and there was no Confrontation Clause violation.<sup>12</sup> See WIS. STAT. §

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<sup>12</sup> We also note that Bessert's convictions were for the counts related to his actions when Alex was an infant, as testified to by his former girlfriend. Bessert was acquitted on the charges for which Alex provided testimony. We do not, however, address the confrontation issue under the harmless error rubric, as we were not convinced that the State proved beyond a reasonable doubt that the use of Alex's testimony via CCTV did not affect the circuit court's verdict on the charges for which Bessert was found guilty.

972.11(2m)(a)(1)(a-b).; *Craig*, 497 U.S. at 850.

### *Right to a Public Trial*

P34 Bessert's [\*20] final argument is that when the courthouse locked its doors prior to the circuit court reading its verdicts, his constitutional right to a public trial was violated, and, accordingly, he is entitled to a new trial. The State disagrees, arguing that to the extent Bessert's public trial right was actually violated, the court appropriately remedied the violation. Assuming without deciding that a violation of constitutional proportions occurred, we agree with the State that the court properly remedied the violation.

P35 Defendants have a constitutional right to a public trial under the Sixth Amendment to the United States Constitution.<sup>13</sup> *State v. Vanness*, 2007 WI App 195, ¶7, 304 Wis. 2d 692, 738 N.W.2d 154.

The Supreme Court has described four values furthered by the Sixth Amendment guarantee of a public trial: "(1) to ensure a fair trial; (2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; (3) to encourage witnesses to come forward; and (4) to discourage perjury."

*State v. Ndina*, 2009 WI 21, ¶49, 315 Wis. 2d 653, 761 N.W.2d 612 (citation omitted).

P36 The right to a public trial, however, is also not absolute. *Id.*, ¶44. To determine whether a defendant's right to a public trial has been violated, we engage in a two-step analysis. *Id.*, ¶46. First, we "determine[] whether the closure at issue implicates the Sixth Amendment right to a public trial." *Id.* [\*21] We need go no further if the first step fails. *Id.* If the right to a public trial is implicated, then we "must determine whether the closure was

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<sup>13</sup> This right is also applicable to the states through the Fourteenth Amendment. *State v. Vanness*, 2007 WI App 195, ¶7, 304 Wis. 2d 692, 738 N.W.2d 154.

justified under the circumstances of the case." *Id.*

Closure of a criminal trial is justified when four conditions are met: "(1) the party who wishes to close the proceedings must show an overriding interest which is likely to be prejudiced by a public trial, (2) the closure must be narrowly tailored to protect that interest, (3) alternatives to closure must be considered by the trial court, and (4) the court must make findings sufficient to support the closure."

*Id.*, ¶56 (quoting *Vanness*, 304 Wis. 2d 692, ¶9 n.3); see also *Waller v. Georgia*, 467 U.S. 39, 44, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). However, even where an unjustified closure has occurred, where the "closure is trivial, there is also no constitutional violation." *Vanness*, 304 Wis. 2d 692, ¶9. "In short, the triviality inquiry goes principally to the length of the closure and what parts of the trial were closed." *Id.*, ¶12. We review whether a defendant's Sixth Amendment right to a public trial has been violated as a question of constitutional fact, upholding the circuit court's findings of fact unless clearly erroneous but applying constitutional principles to those facts independently. *Ndina*, 315 Wis. 2d 653, ¶45.

P37 In this case, it is undisputed [\*22] that the courthouse doors were locked and closed to the public during the four or five minutes it took for the circuit court to issue its verdicts. The closure of the building during a trial was accidental; thus, the court made no findings to justify the closure of the criminal trial. See *id.*, ¶56. Further, the Second Circuit Court of Appeals has held that "closing the court to announce the verdict was not a trivial violation because the verdict is the focal point of a criminal trial." *Vanness*, 304 Wis. 2d 692, ¶12 (citing *United States v. Canady*, 126 F.3d 352, 364 (2d Cir. 1997)).

P38 We acknowledge the State's argument that the court closure here may have been a trivial violation. The State asserts that "[u]nlike in *Canady*, where there was no proceeding covering the

announcement of the verdict, see *Canady*, 126 F.3d at 363-64, here the court announced its verdicts during a trial with 'numerous people' in the gallery." The State argues that "[t]his appears to be a significant distinction when considering the four core values that the public trial right advances and given some of our supreme court's statements on the topic." See *State v. Pinno*, 2014 WI 74, ¶¶42, 44, 356 Wis. 2d 106, 850 N.W.2d 207.

P39 Nevertheless, recognizing our mandate to decide cases on the narrowest possible grounds, see *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989), the State suggests that we should assume that [\*23] the courtroom closure here was not trivial. We agree. Therefore, we assume without deciding that Bessert's right to a public trial was violated and that the violation was not trivial.

P40 The remaining question is whether the remedy used by the circuit court—reannouncing its verdicts in open court—was sufficient to remedy the constitutional violation. The State argues in the affirmative, noting that by reannouncing its verdicts in open court, the court heeded our supreme court's instruction in *Pinno*. There, the court observed that "even in the event of an improper courtroom closure, courts must carefully fashion a remedy to avoid granting a 'windfall' to an opportunistic defendant." *Pinno*, 356 Wis. 2d 106, ¶46. The *Pinno* court relied on the Supreme Court's discussion in *Waller*, where the public was excluded from a seven-day suppression hearing. *Waller*, 467 U.S. at 41-43. As the remedy for the constitutional violation, the Court ordered a new suppression hearing, rather than a new trial. *Id.* at 50. According to the Court, "the remedy should be appropriate to the violation. If, after a new suppression hearing, essentially the same evidence is suppressed, a new trial presumably would be a windfall for the defendant, and not in the public interest." *Id.*

P41 *Canady* is also [\*24] instructive. There, after a bench trial, the district court mailed its decision and

order convicting the defendant of the crimes rather than announcing its decision in open court. *Canady*, 126 F.3d at 355. The Second Circuit held that the court's failure to announce the verdict in open court was not a trivial violation, but it determined that the appropriate remedy was to "remand to the district court to announce its decision in open court." *Id.* at 364. Despite acknowledging that "*Canady* is factually similar to [his] case," Bessert claims that "[t]he *Canady* [c]ourt's hollow remedy contrasts sharply with the lofty language the court used in describing the right to a public trial" and that he is entitled to a new trial. We disagree.

P42 We conclude that the circuit court's remedy of reannouncing its verdicts in open court was sufficient to advance the core values furthered by the Sixth Amendment guarantee of a public trial. As an initial matter, we note that neither party has identified the standard by which we are to review the court's choice of remedy for a violation of a defendant's right to a public trial. Whether a violation of the right occurred is, as noted above, a question of constitutional fact, but the standard of review by which we [\*25] consider the remedy provided by the court is less clear. The State explained that it "has not identified a binding case that establishes the standard by which this [c]ourt reviews a circuit court's remedy for a public-trial-right violation." We concur.

P43 The State then argues that "[b]ecause courts are charged with fashioning a remedy that is 'appropriate' to the violation, see *Pinno*, 356 Wis. 2d 106, ¶46," this court "should review the circuit court's decision for an erroneous exercise of discretion." Bessert did not respond to the State's assertion in his reply brief. We conclude, however, that regardless of whether we review the circuit court's decision de novo or for an erroneous exercise of discretion, the court fashioned an appropriate remedy.

P44 In this case, the closure was accidental and not caused by the State or the circuit court; it occurred

for approximately twenty-five minutes while the court was deliberating and not in session and for only four or five minutes during the reading of the verdicts; and members of the public were still present in the courtroom during that time, despite the courthouse doors being locked. Under these circumstances, we determine that granting Bessert a new trial [\*26] would not be an appropriate remedy and would provide a windfall to him. The same values advanced by a public reading of the verdicts at the conclusion of the trial were accomplished by reannouncing the verdicts in open court at the subsequent motion hearing before sentencing. Bessert does not dispute this point. He merely stands on his right to a public trial, arguing that "secret proceedings will lead to a corrupt, indolent and arbitrary judicial system." Bessert, however, fails to identify any evidence that those concerns are present here. We therefore agree with the State that, even assuming a violation of Bessert's right to a public trial occurred, the court appropriately remedied that violation, and Bessert is not entitled to a new trial.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.

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End of Document

## Appendix 3



**FILED**  
**08-26-2020**  
**Clerk of Circuit Court**  
**Langlade County, WI**  
**2019CF000054**

**BY THE COURT:**

**DATE SIGNED: August 26, 2020**

Electronically signed by Joan Kretz  
 Circuit Court Deputy Clerk

STATE OF WISCONSIN	CIRCUIT COURT BRANCH 1	LANGLADE COUNTY
State of Wisconsin vs. Ryan L. Bessert		<b>Judgment of Conviction</b> Corrected Sentence to Wisconsin State Prisons and Extended Supervision Case No. 2019CF000054
Date of Birth: 10-29-1979		

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1	1st Degree Child Sexual Assault - Intercourse with Person under 12	948.02(1)(b)	Not Guilty	Felony B	11-01-2013 on or between November 2013 and January 2014	Court	06-25-2020
2	Incest with Child	948.06(1)	Not Guilty	Felony C	11-01-2013 on or between November 2013 and January 2014	Court	06-25-2020
3	1st Degree Child Sexual Assault - Intercourse with Person under 12	948.02(1)(b)	Not Guilty	Felony B	11-01-2013 on or between November 2013 and January 2014	Court	06-25-2020
4	Incest with Child	948.06(1)	Not Guilty	Felony C	11-01-2013 on or between November 2013 and January 2014	Court	06-25-2020

**IT IS ADJUDGED** that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Agency	Comments
1	08-26-2020	State Prison w/ Ext. Supervision	36 YR		***Corrected to reflect Cts 5-26 Court finds not guilty after court trial on 6/25/20***
2	08-26-2020	State Prison w/ Ext. Supervision	25 YR		
3	08-26-2020	State Prison w/ Ext. Supervision	36 YR		
4	08-26-2020	State Prison w/ Ext. Supervision	25 YR		

**Total Bifurcated Sentence Time**

Confinement Period				Comments	Extended Supervision			Total Length of Sentence		
Ct.	Years	Months	Days		Years	Months	Days	Years	Months	Days
1	26	0	0		10	0	0	36	0	0
2	15	0	0		10	0	0	25	0	0
3	26	0	0		10	0	0	36	0	0
4	15	0	0		10	0	0	25	0	0

**Sentence Concurrent With/Consecutive Information:**

Ct.	Sentence	Type	Concurrent with/Consecutive To Comments
1	State prison	Concurrent	Cts 2, 3 and 4
1	Extended Supervision	Concurrent	Cts 2, 3 and 4
2	State prison	Concurrent	Cts 1, 3 and 4
2	Extended Supervision	Concurrent	Cts 1, 3 and 4
3	State prison	Concurrent	Cts 1, 2 and 4
3	Extended Supervision	Concurrent	Cts 1, 2 and 4
4	State prison	Concurrent	Cts 1, 2 and 3
4	Extended Supervision	Concurrent	Cts 1, 2 and 3

**Conditions of Extended Supervision:****Obligations:** (Total amounts only)

Fine		Court Costs		Attorney Fees	<input type="checkbox"/> Joint and Several	Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge
		652.00					52.00	368.00		1,000.00
Ct.	Condition	Agency/Program		Comments						
1	Costs									
1	Other			DNA sample if not already on file. No contact w/victim or victim's guardian T.P. Comply with sex offender registration. Sex offender evaluation and follow through w/any counseling recommended.						
2	Costs									
2	Other			Comply with conditions in Ct 1.						
3	Costs									
3	Other			Comply with conditions in ct 1.						
4	Costs									
4	Other			Comply with conditions in Ct 1.						

**Pursuant to §973.01(3g) and (3m) Wisconsin Statutes, the court determines the following:**The Defendant is ☐ is not ☒ eligible for the Challenge Incarceration Program.The Defendant is ☐ is not ☒ eligible for the Substance Abuse Program.**IT IS ADJUDGED** that **494** days sentence credit are due pursuant to §973.155, Wisconsin Statutes**IT IS ORDERED** that the Sheriff shall deliver the defendant into the custody of the Department.

If the defendant is in or is sentenced to state prison and is ordered to pay restitution, **IT IS ORDERED** that the defendant authorize the department to collect, from the defendant's wages and from other monies held in the defendant's inmate account, an amount or a percentage which the department determines is reasonable for restitution to victims.

If the defendant is placed on probation or released to extended supervision, **IT IS ORDERED** that the defendant pay supervision fees as determined by the Department of Corrections.

**THIS IS A FINAL ORDER FOR THE PURPOSE OF APPEAL.**

**Distribution:**

John B. Rhode, Judge  
Elizabeth R. Gebert, District Attorney  
Brent Harold Debord, Defense Attorney  
Court - Original  
Wisconsin State Prison - EC  
Probation & Parole - EC

## Appendix 4

FILED  
01-13-2021  
Clerk of Circuit Court  
Langlade County, WI  
2019CF000054

1 STATE OF WISCONSIN NINTH DISTRICT  
2 LANGLADE COUNTY CIRCUIT COURT

3 -----

4 State of Wisconsin, Case No. 2019CF54

5 Plaintiff,

6 vs.

7 Ryan L. Bessert,

8 Defendant.

9 -----

10 MOTION HEARING

11 -----

12 January 9, 2020 PROCEEDINGS HELD BEFORE THE  
13 10:33 a.m. HONORABLE JOHN B. RHODE,  
CIRCUIT COURT JUDGE PRESIDING

14 -----

15 APPEARANCES:

16 The Defendant, Ryan L. Bessert,  
17 appeared in person and with counsel,  
Attorney Brent H. Debord, Oconto,  
18 Wisconsin.

19 The State of Wisconsin appeared by  
Langlade County District Attorney  
Elizabeth R. Gebert and Assistant  
20 District Attorney Kelly Hays,  
Antigo, Wisconsin.

21

22

23

24 Joan O'Connor  
Official Court Reporter  
25 Joan.O'Connor@wicourts.gov • (715) 627-6319

1 MR. DEBORD: All right. Thank you.

2 THE COURT: All right. Then let's turn to the  
3 State's Motions in Limine.

4 Number 1 is obviously the one I assumed would  
5 be the biggest issue that we have to deal with today.  
6 One of the two or three biggest issues. And when this  
7 was filed, at the time it was anticipated this was a  
8 jury trial. But apparently the motion is still on the  
9 table and being requested even though it's now going to  
10 be a court trial. That motion being: "The child victim  
11 is --" I think it's supposed to say "in this case be  
12 permitted to testify via closed circuit audiovisual  
13 equipment pursuant to Section 972.11(2)(m)."

14 Some argument in the motion: "The child victim  
15 is the seven year old biological daughter of the  
16 defendant. Her current foster guardian is on hand to  
17 testify that the child victim is still having emotional  
18 issues regarding the defendant including frequent  
19 nightmares. The child victim is afraid of the defendant  
20 and would not be able to adequately testify in the same  
21 room as him."

22 I had prepared some notes on this just  
23 reviewing the statute and the language itself. It's  
24 relatively straightforward. It's not a confusing  
25 statute. There are two parts of it for a child at this

1 age. The Court must be convinced and must find that the  
2 presence of Mr. Bessert will result in the child victim  
3 suffering serious emotional distress such that she  
4 cannot reasonably communicate. And I must also find  
5 that video testimony from another room is necessary to  
6 minimize the trauma to the child and provide a setting  
7 more amenable to securing the child's uninhibited  
8 truthful testimony.

9 The state is still making the request for that  
10 even though it's no longer a jury trial?

11 MS. GEBERT: Yes, Your Honor, because really  
12 the presence of the jury has nothing to do with the  
13 state's concern. The state's concern is the child being  
14 required to testify in front of Mr. Bessert, her father,  
15 who is accused of doing all of these things to her based  
16 upon her statements as well as eyewitness statements.

17 Your Honor, I would note just because this is I  
18 believe the first time in Langlade County history that  
19 we're contemplating this type of testimony, I have  
20 communicated with the jail, with the county IT  
21 Department and the victim witness coordinator to develop  
22 a space that would be appropriate for this testimony to  
23 occur using for our technology that is the same  
24 technology we use for having individuals appear in bond  
25 appearances from the Langlade County Jail via that type

1 of technology. And so there is a space and the  
2 technology is available and can be set up to accomplish  
3 that purpose.

4 I know, Your Honor, because you read the  
5 statute I'm sure you see the statute sort of puts the  
6 burden on you if you agree to allow this. You're  
7 supposed to supervise that that space is made available  
8 or I think maybe it even says you're supposed to provide  
9 the space. But just to put your mind at ease I've  
10 already gone through all of the steps to make sure that  
11 such a space exists and that the technology is available  
12 and will function. We won't have the same issues that  
13 we have when we're calling another county to another  
14 county jail or something like that because we'll be  
15 using our own equipment to just basically communicate  
16 from one part of our network to another part of the  
17 network.

18 Your Honor, in regard to the finding that the  
19 Court must make I would note I have a witness available  
20 to testify that is the guardian of the child victim in  
21 this case. And before that testimony I would simply  
22 point out that serious emotional distress is not defined  
23 in 939 with the other definition. It's not defined in  
24 972 or 948. The only place where there is any  
25 definition of serious emotional distress is in regard to



1 the stalking statute which is in Wis. Stat. 940.32. And  
2 in that statute it specifically says for the purposes of  
3 the stalking statute for that section serious emotional  
4 distress means to feel terrified, intimidated,  
5 threatened, harassed or tormented. And so because there  
6 is no definition contained in 972.11 or any of the other  
7 statutes that would be relevant in this case I believe  
8 that the Court can rely upon a common sense  
9 interpretation of what serious emotional distress would  
10 mean.

11 I would further note that the witness available  
12 to testify is the guardian, that there is no social  
13 worker assigned to [REDACTED] anymore and so there wouldn't  
14 be anyone else who is interacting with her in such a way  
15 that another person's impressions would be as I think  
16 apt, fresh, or reasonable as the guardian's. And so  
17 that is the person who I intend to call to testify. I  
18 don't know if you want to -- if you do have any concern  
19 about using that testimony. If you do I would have to I  
20 guess attempt to secure a different witness and have to  
21 ask to adjourn this to another time to accomplish that.

22 THE COURT: Okay. And I don't mean to cut you  
23 off. This is an important issue I'll let both sides  
24 have their full say, their peace. But before we get  
25 into argument on it I gather since it's being brought up

1     that the defendant is opposed to Grace testifying by  
2     video; is that right, Mr. Debord?

3             MR. DEBORD: That is correct, Your Honor. I  
4     previously posed that in response to the State's Motions  
5     in Limine that I filed either the day the state filed it  
6     or the day after. I know that I was prepping for a  
7     large sexual assault trial or maybe been involved in at  
8     the time when I responded. But we have objected. We  
9     continue to object to it. Do you want me to make  
10    arguments now?

11            THE COURT: No. I just want to make sure  
12    there's an issue which you're telling it is. I think we  
13    do need to take testimony from whatever witness you have  
14    available today to talk about that because on the record  
15    that I have right now I am not comfortable finding that  
16    ██████ testifying in the presence of Mr. Bessert will  
17    result in her suffering serious emotional distress such  
18    that she cannot reasonably communicate or that that  
19    video testimony is necessary to minimize trauma to her  
20    and to provide a setting more amenable to securing the  
21    child's uninhibited and truthful testimony. I might be  
22    convinced of that from even the lay witness.  
23    Ms. Peschke I gather is the person we're talking about  
24    who's caring for her.

25            I will say this though and preface it with a --

1     although it's been some time since I watched the video  
2     of [REDACTED] I did watch it several times. I took very  
3     detailed notes of it, replayed certain portions of it  
4     numerous times to prepare for other issues on  
5     admissibility of that that we dealt with already. And  
6     my recollection of that for whatever it's worth as I go  
7     into this motion I did not really perceive or sense any  
8     fear or trepidation or trauma by [REDACTED] when she spoke  
9     about her father or of her father or the dealings or  
10    interactions she had with her father. Frankly I was --  
11    it might even more worrisome from the defense standpoint  
12    that I was sort of stunned or shocked how matter of fact  
13    when she spoke about these things. Does the alleged  
14    sexual assaults and invasions of her body by various  
15    people besides just Mr. Bessert when she was talking  
16    about just seemed odd to me how casually and matter of  
17    factually she spoke of those things. Which, again, I  
18    don't know how to take that. It could actually be even  
19    more devastating to the defense's case because of the  
20    way she spoke of them.

21           But to preface whatever testimony or proof  
22    you're going to put in on this issue, I did not  
23    immediately perceive that, oh yeah, this little girl,  
24    there's no way she could testify in front of her father.  
25    But I will keep an open mind. I might be convinced of

1     that. I will turn it over to you then at this time to  
2     produce any evidence or testimony about that issue that  
3     you wish, Attorneys Gebert and Hays.

4             MS. GEBERT: Your Honor, I guess there's  
5     nothing more that I have to say at this point. I would  
6     simply ask to call my witness, Ms. Tina Peschke.

7             THE COURT: Thank you. Come on up and be  
8     sworn, Ms. Peschke.

9

10            the Witness in the above-entitled  
11            matter after having been duly sworn  
12            testifies and says as follows:

13                               -o0o-

14                               DIRECT EXAMINATION

15     BY MS. GEBERT:

16            Q.     Would you please state your name and spell your  
17     last name for the record?

18            A.     [REDACTED]

19            Q.     Where do you live?

20            A.     [REDACTED].

21            Q.     How long have you lived at that residence?

22            A.     Thirteen years.

23            Q.     Do you know [REDACTED]

24            A.     Yes, I do.

25            Q.     How do you know her?

1 A. I have guardianship of [REDACTED].

2 Q. How long have you been her guardian?

3 A. Six years now.

4 Q. Does [REDACTED] reside with you?

5 A. Yes.

6 Q. How long has she lived with you?

7 A. Six years.

8 Q. How old is [REDACTED]?

9 A. She just turned seven in November.

10 Q. On average how much time would you say you  
11 spend with [REDACTED] on any given day?

12 A. Well, when she's not in school I'm with her all  
13 day and on weekends I don't go nowheres. I'm always  
14 home with the kids.

15 Q. Do you have a job?

16 A. No.

17 Q. In general how would you describe [REDACTED]  
18 behaviors as a seven-year-old girl in your observations  
19 of her?

20 A. She's happy-go-lucky.

21 Q. And more specifically when we look at what  
22 we're all here for today, have you participated in the  
23 child preparation meetings that we've had with [REDACTED]

24 A. Yes, I have.

25 Q. And has she expressed to you any of her

1 impressions following those preparation meetings with  
2 how she feels about --

3 A. She's scared. She has -- well, after we go  
4 home at night she talks about it and then she has  
5 nightmares, real bad ones.

6 Q. Does she tell you what the -- I'm sorry. How  
7 did you become aware of the nightmares?

8 A. She lets out a really loud screech and she  
9 comes running into my room.

10 Q. Does she tell you what the nightmares are  
11 about?

12 A. Yes.

13 Q. And what is that?

14 A. Some of them are with her dad taking her away  
15 from me or lately she's been having nightmares of her  
16 dad killing me or slicing my throat and I have to tell  
17 her it's okay, you know, I'm here for her. So we go  
18 through some bad ones.

19 Q. I'm sorry. I should have asked this a little  
20 earlier, but do you have any children?

21 A. Yes, I do.

22 Q. How many kids do you have?

23 A. I have four kids.

24 Q. And those are your biological children?

25 A. Yes.

1 Q. And in addition to those biological children  
2 you're [REDACTED] guardian. How did you first make contact  
3 with [REDACTED]?

4 A. Through Social Services.

5 Q. And what was your role at that time?

6 A. Foster mom.

7 Q. Have you been a foster mom for other kids?

8 A. Yes.

9 Q. Can you recall how many foster kids you've had  
10 over the years?

11 A. About nine of them so far.

12 Q. Have you witnessed any other behaviors of Grace  
13 as far as nighttime behaviors or anything like that that  
14 are of concern?

15 A. Yes. [REDACTED] been wetting the bed and she's  
16 been very angry lately and she beats on the other ones  
17 there. She's just -- her attitude has really changed  
18 since she started coming, you know, since she knows  
19 she's got to come to court.

20 Q. I'm sorry. I think you anticipated my question  
21 a little bit. So when you described these -- I think  
22 when you described the nightmares and you said she's  
23 afraid I was asking you a question. My question was has  
24 she talked to you about how she feels about this trial?

25 A. Yes. She doesn't want to be here. She doesn't

1 want to come.

2 Q. When was the last time that [REDACTED] saw the  
3 defendant?

4 A. I think it was 2018 or 2019 in November out at  
5 McDonald's.

6 Q. (By The Court) I'm sorry. Could you repeat  
7 that?

8 A. It was in November of 2018 or 2019 out at  
9 McDonald's.

10 Q. (By The Court) That's the last time she saw her  
11 father?

12 A. Yes.

13 Q. (By Ms. Gebert) Was it a couple months ago or  
14 more than a year ago?

15 A. About a year ago.

16 Q. Okay. So 2018?

17 A. Right. Yes.

18 Q. Does [REDACTED] in these behaviors and when she's  
19 expressing herself in this way, does she express a  
20 concern about seeing the defendant?

21 A. She doesn't want to -- she didn't want to go  
22 see him but I figured because, you know, it was her dad.

23 Q. Well, I mean not in November of 2018. I'm  
24 talking about in the last couple months when we've been  
25 preparing for a trial. Sorry that was my --



1           A.    She doesn't want to be here.  She's scared to  
2    come in.

3           Q.    And does she say anything about seeing him?

4           A.    Yes.  She doesn't want to see him.  She doesn't  
5    want to see her dad.  No.

6           Q.    How would you in your extensive time you spent  
7    with [REDACTED] how you describe her attachment to you?

8           A.    She's really close to me.  If I leave the house  
9    and go to the store I have to reassure her that I'm  
10   coming back, she knows I'm coming back to her.  And then  
11   when we go shopping I take the girls with me.

12          Q.    And just going to back to the nightmares a  
13   little bit.  You said that she let out a loud screech I  
14   think you said and then she comes running into your  
15   room?

16          A.    Yes.

17          Q.    When she comes running into your room what is  
18   she doing?

19          A.    She's like hysterical and crying.  And I just  
20   put her -- she sleeps with me the rest of the night.

21          Q.    Did any of the other I guess 13, 12 or 13 kids  
22   who you either raised or partially raised behave like  
23   that when they were seven years old?

24          A.    No.

25          Q.    And then you said that she's also been wetting

1 the bed. Is that a problem you had with the 12 or 13  
2 other kids you raised at that age?

3 A. No.

4 Q. How frequent would you say she is wetting the  
5 bed?

6 A. Well, lately it's been every time we come and  
7 see you. It's like after we see you, and it goes on for  
8 two or three days and then it stops.

9 Q. And during those meetings that you've also been  
10 attending have you been discussing in detail her  
11 testimony at that point -- at any point yet?

12 A. No, not yet.

13 Q. And now you said that [REDACTED] has been angry  
14 lately?

15 A. Yes.

16 Q. Could you just describe that a little bit more?

17 A. Well, she gets angry at anything lately, you  
18 know. Like, she'll be sitting there -- she just gets  
19 angry because of everything that's going on. I don't  
20 know how to describe her anger, but with everything  
21 going on I don't think she really understands it. I  
22 don't need to talk about nothing with her. I just let  
23 her spew up what she's got to and then I just tell her  
24 everything's going to be okay.

25 Q. And then I think you made a comment about her

1 engaging in violence against the other kids?

2 A. When she gets really angry she'll start hitting  
3 them.

4 Q. How many other kids do you have in your house  
5 right now?

6 A. I have two little girls with me.

7 Q. How old are they?

8 A. One is 4 and one just turned 18.

9 MS. GEBERT: Thank you. Nothing further.

10 THE COURT: Questions for Ms. [REDACTED],  
11 Mr. Debord?

12 MR. DEBORD: Yes. Thank you, Your Honor.

13 -o0o-

14 CROSS-EXAMINATION

15 BY MR. DEBORD:

16 Q. Ms. [REDACTED], you've been a foster mother for  
17 how long?

18 A. Seven -- nine years now.

19 Q. Thank you for doing that. It's an important  
20 job. How many total children including foster children  
21 are in your home right now?

22 A. Three.

23 Q. The two other girls and [REDACTED]?

24 A. Right.

25 Q. You described that [REDACTED] is happy-go-lucky?

1 A. Some days, yes.

2 Q. Okay. How are things at school?

3 A. She's doing okay. We had a meeting. She has  
4 trouble reading but otherwise she does good.

5 Q. And she communicates with you at home?

6 A. Yes.

7 Q. And the teachers say she communicates at  
8 school?

9 A. Yes.

10 Q. How many of these meetings have you had with  
11 the District Attorney's Office and the victim witness  
12 coordinator?

13 A. Four so far.

14 Q. [REDACTED] has been there for all of them?

15 A. Yes.

16 Q. Has she answered questions at these meetings?

17 A. Not that I know. Not right off hand, no.

18 Q. Has anybody asked her questions?

19 A. Not that I know.

20 Q. Has she asked questions at those meetings?

21 A. Not that I know.

22 Q. What are those meetings like generally?

23 A. They talk, you know, they play games with her.  
24 They're getting her used to coming in, you know, to  
25 trial. They just talk.

1 Q. And who are "they" please?

2 A. The district attorney and Kelly.

3 Q. And the victim witness coordinator as well? Is  
4 she there?

5 A. No.

6 Q. When was the last one of these you had?

7 A. It was right before Christmas.

8 Q. Okay. And how is [REDACTED] behaving at these  
9 meetings?

10 A. She's fine until we go home.

11 Q. Now, when you get home you said that you and  
12 she talk about what happened; is that correct?

13 A. Um-hum.

14 Q. Is that a yes?

15 A. Yes. I'm sorry.

16 Q. It's okay. What does she talk about?

17 A. She talks about things that had happened to  
18 her.

19 Q. Okay. So she does discuss things with you?

20 A. Yes.

21 Q. Do you discuss things back, what knowledge you  
22 might have?

23 A. No. I tell her she has to -- I can't answer  
24 for her because I'm not, you know, I tried not to talk  
25 to her too much. I tell her she has to talk to her

1 counselor on stuff, but I do listen to her.

2 Q. So she talks about this a lot?

3 A. Only when she has really bad nightmares or she,  
4 you know, thinks about it.

5 Q. Okay. Does she have nightmares about other  
6 things?

7 A. Nope.

8 Q. And I heard you testify that none of your other  
9 foster kids have ever had nightmares or night terrors?

10 A. Nope.

11 Q. None of them have had bed wetting issues?

12 A. Nope.

13 Q. Now, ma'am, I need to ask you what's your  
14 education level, please?

15 A. I finished 11th grade. I'm working on my GED.

16 Q. All right. Very good. When's the last time  
17 you and [REDACTED] talked about what's happening here?

18 A. We haven't really talked about it yet. She  
19 knows that we got served papers. That's it, you know  
20 for subpoena papers, but we don't know talk about it  
21 unless she brings it up.

22 Q. What does she normally talk about during the  
23 day?

24 A. Her dad doing stuff to her.

25 Q. I mean during the normal course of the day.

1           A.    We talk about school and how she's doing.  And  
2    if she has homework we sit at the kitchen table and do  
3    homework.  And then after that we have supper together,  
4    and then, you know, she gets to watch TV.

5           Q.    Is she normally chatty?

6           A.    No.  She's -- some days she can be chatty but  
7    other days she very quiet unless she gets to know you  
8    and then she'll talk your arm off.

9           Q.    Could you describe her as shy?

10          A.    Yes.

11          Q.    But once she's gets to know somebody?

12          A.    Yeah, then she's okay to talk to.  She'll talk.

13               MR. DEBORD:  Thank you.  I have no other  
14    questions.

15               THE COURT:  Any redirect, Attorney Gebert?

16               MS. GEBERT:  Yes, Your Honor.  Thank you.

17                               -o0o-

18                               REDIRECT EXAMINATION

19    BY MS. GEBERT:

20          Q.    Ms. [REDACTED], in regards to the bed wetting,  
21    Attorney Debord asked if your kids ever had issues with  
22    bed wetting and you said they didn't.  What about when  
23    they were potty training?  Did they have issues with bed  
24    wetting then?

25          A.    No, because you put Pull-Ups on them.

1 Q. Okay. And so my -- but when they're  
2 transitioning to no Pull-Ups and that sort of thing  
3 would there be bed wetting issues potentially?

4 A. No.

5 Q. Okay. You're good at potty training kids?

6 A. Yeah.

7 Q. And then this might sound like a silly question  
8 but is Mr. Bessert with you when you're in your car or  
9 in your house talking and [REDACTED] is talking about what  
10 happened to her?

11 A. No.

12 Q. Is he present with us during our victim's --

13 A. Yes, he is.

14 THE COURT: Just wait. Don't interrupt her  
15 question.

16 Q. (By Ms. Gebert) Is he present with us when you  
17 and [REDACTED] are meeting with me and Kelly?

18 A. No.

19 Q. And I think because the defense did bring up  
20 the circumstances of her being present with the  
21 defendant, that's what this is really all about. So the  
22 last time she had contact with him, did she -- how did  
23 she respond to that after it was done?

24 A. She didn't want to be there and she was -- she  
25 told me when she came home she didn't want to be there



1 no more. She did not want to see him no more.

2 Q. And at that last time she had contact with him,  
3 had she come out and reported this stuff that had  
4 happened at that point; do you recall?

5 A. Yes. She says quite a bit about it after that.  
6 And I don't know if it was, you know, when she was  
7 seeing him how she was scared and then all of a sudden  
8 she didn't want to see him no more.

9 Q. In our meetings where [REDACTED] is interacting with  
10 me and Kelly and you, have you ever heard her start --  
11 you know, you describe her as talking to you about  
12 happened to her and that sort of thing and bringing it  
13 up herself. Has she ever come out and brought it up  
14 with us?

15 A. Not that I know of.

16 Q. I'm sorry to put you on the spot like this, but  
17 do you remember how -- when our first meeting with [REDACTED]  
18 was?

19 A. Do I remember? No, I do not.

20 Q. Was the first meeting last week?

21 A. No.

22 Q. Was the first meeting right before Christmas?

23 A. Yes, I think it was two, three weeks before  
24 Christmas. The end of November we came in.

25 Q. The end of November?

1 A. Yep.

2 Q. Okay. Thank you. And at those meetings do  
3 we -- have we eaten dinner together?

4 A. Yes.

5 Q. Does [REDACTED] play with our victim witness support  
6 dog?

7 A. Yes.

8 Q. Does she know that's my dog?

9 A. Yes.

10 Q. Did Grace hug me and tell you the last time we  
11 met?

12 A. I don't recall.

13 Q. Have you seen her hug us?

14 A. I don't remember.

15 MS. GEBERT: All right. Thank you. Nothing  
16 further.

17 THE COURT: Anything else, Mr. Debord?

18 -o0o-

19 RECROSS-EXAMINATION

20 BY MR. DEBORD:

21 Q. Ma'am, did you see the meeting between [REDACTED]  
22 and Mr. Bessert in November of 2018?

23 A. No, my daughter took [REDACTED]

24 MR. DEBORD: Thank you. Nothing further.

25 THE COURT: I have a couple.

1 -o0o-

2 EXAMINATION

3 BY THE COURT:

4 Q. You mentioned she has a counselor. You  
5 mentioned telling her she needs to tell things like that  
6 to her counselor. Who is her counselor?

7 A. Lauren over at the health care center.

8 Q. Norm?

9 A. Lauren. I don't know her last name.

10 Q. That's okay. And how long has she seen Lauren?

11 A. She's seen her for almost two years now.

12 Q. And how frequently does she see Lauren?

13 A. Well, Lauren's on maternity leave otherwise  
14 she'd see her every two weeks.

15 Q. So when was the last time she saw her?

16 A. It was in September? It was September.

17 Q. So she hasn't seen any counselor since  
18 September?

19 A. Right.

20 Q. So I guess my next question is: Has a plan been  
21 worked with the counselor to minimize or deal with  
22 trauma that's upcoming dealing with this trial?

23 A. Yes.

24 Q. What can you tell us about that plan or what's  
25 been discussed?

1           A.     Well, I'm going to have to go call them. We  
2     got to make an appointment. We got to find out when  
3     Lauren is back off maternity leave and then Lauren will  
4     start seeing her again.

5           Q.     So there's a plan to deal with it if it's an  
6     issue, but has it been dealt with already with Lauren on  
7     the trauma?

8           A.     Yes. Lauren has talked to her. She has opened  
9     up to her. I don't know what she told Lauren because  
10    it's confidential you know.

11          Q.     Let me redirect you. I'm talking about trauma  
12    that would be fallout from having to see her dad or  
13    testify at the trial, that specific trauma?

14          A.     Not yet, no.

15                 THE COURT: All right. Any follow-ups to  
16    those, Attorney Gebert?

17                                 -o0o-

18                         FURTHER REDIRECT EXAMINATION

19    BY MS. GEBERT:

20          Q.     Do you know when Lauren is going to be back  
21    from maternity leave?

22          A.     She should be back before the end of this month  
23    they said.

24                 MS. GEBERT: Thank you. Nothing further.

25                 THE COURT: Mr. Debord, any follow-ups to my

1 questions about the counselor?

2 MR. DEBORD: No, sir. Thank you.

3 THE COURT: All right. You may step down,  
4 Ms. Peschke.

5 Additional testimony or just arguments on this  
6 issue?

7 MS. GEBERT: Just arguments, Your Honor.

8 THE COURT: Any testimony you want me to hear  
9 about this issue or evidence you want to offer,  
10 Mr. Debord?

11 MR. DEBORD: No, sir.

12 THE COURT: Then I'll hear what the state's  
13 asking me to order and why.

14 MS. GEBERT: Thank you, Your Honor. Your  
15 Honor, as stated in the motion in limine we are asking  
16 for the Court to allow for closed circuit audiovisual  
17 testimony by [REDACTED] Bessert who is seven years old. The  
18 statute requires the Court to find that if the trial is  
19 going to commence either before the child's 12th  
20 birthday or 16th birthday. We're talking about a  
21 seven-year-old little girl here. It's a very different  
22 situation. Far from 12 years old.

23 As you heard in testimony and considering what  
24 you must find: First, the presence of the defendant will  
25 cause serious emotional distress such that the child

1 cannot reasonably communicate. You've heard [REDACTED] at  
2 this point has been having trial prep with me and ADA  
3 Hays. And in those meetings we're doing fun things.  
4 We're playing with the puppy. We're playing board  
5 games. We're eating dinner together. We're having nice  
6 times. Just from our perspective building rapport but  
7 for her getting to know us. And even in the time that  
8 we've been working with her, getting to know her prior  
9 to the trial date that was supposed to be early in  
10 December, even in all those times we haven't even gotten  
11 to the point where she has disclosed -- where she has  
12 talked to us about what's going on. We're still  
13 building that trust with her to even get her to say it  
14 to us. And so the idea of her being able to reasonably  
15 communicate I believe will be there as far as getting  
16 her to answer questions that are being asked of her.  
17 But to say that she has to do it in the presence of the  
18 defendant I think it's very apparent from the testimony  
19 that that will cause her serious emotional distress such  
20 that she won't be able to reasonably communicate.

21 Your Honor, she's having nightmares, horrible  
22 nightmares after these fun meetings with myself and  
23 Kelly, and it's not a traumatic moment there. We're  
24 having a good time. Mr. Bessert certainly isn't  
25 present. We're doing fun things and even after that

1 just because she knows because we've told her basically  
2 why we are meeting her, she goes home and proceeds to  
3 have horrible nightmares, screaming and hysterically  
4 crying. And what is the nightmare? The nightmares  
5 involve Mr. Bessert taking her away. Mr. Bessert  
6 brutally killing [REDACTED], slicing her throat. She's having  
7 these horrible nightmares all after just these fun  
8 meetings that we're having.

9 I would also point to the bed wetting issue,  
10 that she's developed this bed wetting behavior in the  
11 time leading up to this trial where we have trial prep  
12 and then for the next couple of days after that meeting  
13 she wets the bed for the next two or three nights and  
14 then it stops and then we have another meeting and then  
15 it starts again.

16 She's also had an attitude change since she has  
17 started this trial preparation process where she's angry  
18 when she's striking out at her foster sisters. In  
19 general, Your Honor, this little girl -- [REDACTED],  
20 who knows her probably better than anybody on the  
21 planet -- this little girl who is generally a  
22 happy-go-lucky little girl with some trouble reading but  
23 otherwise doing well in school in general, that's who  
24 she is. When she has to consider this case and what  
25 happens when she knows that this is what we're getting

1 together to talk about, all of that happy-go-lucky goes  
2 away and she becomes this petrified little girl who is  
3 seven years old and wetting the bed. Seven years old  
4 and having horrible nightmares that leave her to have to  
5 sleep in the bed with her guardian. These are behaviors  
6 that Ms. [REDACTED] testified she did not witness in the  
7 other children who she raised, either her own children  
8 or her foster children. We're allowed to rely upon our  
9 own common experience. The Court is certainly allowed  
10 to do that. And I would ask you to consider looking  
11 back to your own children to see if a seven year old  
12 wetting the bed for days on end consistently was a  
13 normal behavior that you saw in your kids.

14 I would note that the child forensic interview  
15 that you said she seemed so comfortable and she wasn't  
16 expressing fear or trepidation, she was with a  
17 professional child forensic interviewer who built  
18 rapport with her and is an expert on getting children  
19 who have experienced bad trauma in their life, abuse or  
20 witnessed their parents doing drugs, all different  
21 things like that. She opened up to her but that's very  
22 different. And you can recall that video. That is a  
23 room that is specifically designed to be a comfortable  
24 place for a little kid: the smaller chairs, cozy  
25 setting, sometimes there are stuffed animals in the



1 room. It's designed to make a child comfortable. Your  
2 Honor, that's what we can accomplish with the closed  
3 circuit testimony where we will hopefully be able to --  
4 Attorney Hays and I are not child forensic experts, but  
5 with the work we've done we expect that we will be able  
6 to get her to open up hopefully in the same way as the  
7 forensic interviewer did. But, Your Honor, the child  
8 forensic interview where she opened up was a safe  
9 environment where her perpetrator wasn't sitting there  
10 right where she is out looking at her out of the corner  
11 of her eye. I would note that not only is that a  
12 traumatic thing just even in general but she hasn't even  
13 seen him in over a year. And so to go that period of  
14 time and now have to walk into a courtroom and in front  
15 of the defendant describe the things that he did to her  
16 when she's afraid that he's going to kill her guardian,  
17 when she's afraid that he is going to take her away,  
18 that he's going to kill her guardian and she never wants  
19 to see him again. She never wants to see him again.  
20 She's scared of him. To say that that child is going to  
21 walk into the courtroom and not suffer serious emotional  
22 distress is going to cause her to not be able to  
23 communicate reasonably.

24 I believe -- Your Honor, I believe the  
25 testimony that we've presented has made it clear that

1     what [REDACTED] is experiencing is directly related to her  
2     appearing for this very testimony. And like I said we  
3     don't have a statute that specifically or generally  
4     defines serious emotional distress. But serious  
5     emotional distress is defined in the stalking statute  
6     and it says it means to feel terrified, intimidated,  
7     threatened, harassed, or tormented. [REDACTED] is tormented  
8     in her dreams by the defendant. She -- describing a  
9     screech, a loud screech and hysterical child, if that is  
10    not a terrified child I don't know what is.

11             Like I said, Your Honor, I believe that we have  
12    a perfectly appropriate setting that will be amenable to  
13    secure [REDACTED] uninhibited, truthful testimony. And I  
14    believe the testimony that you heard today has  
15    demonstrated that the courtroom will not be that  
16    setting. And that this child will suffer serious  
17    emotional distress such that she will not be able to  
18    reasonably communicate all of the graphic details that  
19    we all know from the child's forensic interview during  
20    the trial in this case. Thank you.

21             THE COURT: Thank you. Mr. Debord, your  
22    position?

23             MR. DEBORD: Thank you, Your Honor. First of  
24    all we have to deal with the first principle that my  
25    client has a constitutional right to confront in court

1 the witnesses who testify against him. That's an  
2 essential and fundamental constitutional right in trial  
3 in the bill of rights. Trial is meant to be stressful.  
4 It's under the stress of trial, the stress of  
5 examination, of cross-examination that we can break down  
6 the deceit in witnesses. We can begin to discern the  
7 truth. It's not like Perry Mason where people just fall  
8 apart and confess their crimes, but the purpose of trial  
9 is trial is so that there is a seriousness, a  
10 stressfulness so that a person can be reached into their  
11 core. The trial is anxious for everyone who testifies.  
12 I've never known a witness who wasn't afraid to testify.  
13 Maybe not someone from law enforcement who have become  
14 used it but even then a lot of them don't like trials or  
15 having to testify.

16 The state has invited the Court to consider its  
17 own experience with raising children. I have children.  
18 Bed wetting happens. Night terrors happen. My own  
19 children went through both of those. Anxiety happens in  
20 children. Coming in to meet with the district attorney  
21 and the state and talk about these things, that's an  
22 unusual experience so of course it's going to end in  
23 stress. [REDACTED] is going to have anxiety. [REDACTED] is going  
24 to not know what's going to happen to her. Her mind is  
25 going to go to worse case scenarios. But, again, we

1 have to look at the statue here, that serious emotional  
2 distress, not any emotional distress but serious  
3 emotional distress such that the child cannot reasonably  
4 communicate. Now, I think the state used the term  
5 petrified. I don't think that's accurate because we  
6 have testimony that [REDACTED] was able to talk about her  
7 nightmares and her fears and her anxieties. That she's  
8 been able to talk about these things. She's not shut  
9 down in school. She's not shut down at home. She's  
10 described as mostly happy-go-lucky. She had anger  
11 problems, sure, that happens with children especially  
12 with anxiety issues. She's living in a foster home that  
13 by itself creates anxiety. There was the November 2018  
14 meeting at Burger King. We have nothing from the state  
15 showing that [REDACTED] did not talk at that meeting. We  
16 have nothing showing that she didn't have interactions  
17 with Mr. Bessert. That's not enough here to show that  
18 she can't reasonably communicate. The state is  
19 speculating as to what will happen on the stand here.

20 As I was listening to the state's presentation  
21 and questioning I actually won't have a problem if the  
22 Court allowed Ernestine the dog to be present during  
23 this. We're not in front of a jury so we don't have to  
24 worry so much about diminishing the dignity of the court  
25 proceedings, but I think having the dog here would be

1 fine if that becomes an issue for her comfort. I think  
2 Ernestine is a very sweet dog and would be fully  
3 appropriate.

4 Looking again at the statute we can see that  
5 the trial here would be before the child's 12th  
6 birthday. But looking at the factors that the Court is  
7 to consider here: the chronological age --

8 THE COURT: Let me just interrupt you. I was  
9 looking at those factors too. Don't you think those  
10 factors only come into play when I'm dealing with a 16  
11 year old, between 12 and 16?

12 MR. DEBORD: You're correct. I see that now.  
13 Thank you very much.

14 THE COURT: Because I started breaking those  
15 down and I remembered. The way I think -- that's a  
16 little bit of the confusing part of the statute. I  
17 think those only come in when I'm dealing with that age  
18 limit. Then I'm glad you agree that I interpreted that  
19 right.

20 MR. DEBORD: I just saw the words A to B and  
21 not on AlBA.

22 THE COURT: I wish there was some factors and  
23 more guidance than I'm given but, yeah, I don't think we  
24 need to talk about those. I guess I'm not forbidding it  
25 if any of those you think are relevant and want to touch

1 on them I don't care. But I don't think the statute  
2 directs us consider those particulars.

3 MR. DEBORD: Well, that saves me some words.  
4 But I do think that we should look at the forensic  
5 interview. The state talks about the Court has seen it.  
6 This is a situation where [REDACTED] is being brought in in  
7 front of a stranger, into a strange room in this closed  
8 room with a closed door. Sure there's little dolls and  
9 throw pillows and there's some child things on the wall.  
10 But in the course of about two and a half hours she  
11 talks thousands of words. She's extremely loquacious.  
12 She is extremely loquacious in this meeting with this  
13 therapist. Again, a stranger that she's meeting for the  
14 first time. The amount of time that the interviewer had  
15 to spend with exception before and it's 15 minutes  
16 before [REDACTED] is really just gabbing away.

17 So I don't think this is an issue of  
18 environment. We don't have a jury where she's going to  
19 be in front of 12 strangers. We can have her come in  
20 and get prepped in this environment and get used to  
21 that. That's fine. I am gentle in my cross-examination  
22 of children. Whether I'm in front of a jury or not,  
23 it's not good to be harsh to children. It just doesn't  
24 work. It doesn't get me what I want.

25 And the state has not met their burden here in

1 showing that [REDACTED] is going to shut down and not be able  
2 to reasonably communicate, or that she's going to be  
3 suffering from serious emotional distress. Anxiety?  
4 Sure. But emotional distress so that she becomes  
5 petrified? No. I don't think that's an issue.

6 Further, I'm not sure the environment that the  
7 state was talking about preparing, but if it's the old  
8 cinder block room they use at the jail, bringing a child  
9 into the jail environment --

10 THE COURT: That's not what we're talking about  
11 I see today. What is the room we're talking about?

12 MS. GEBERT: It's the soft victim conference  
13 room we have with couches, with Teddy bears. It's the  
14 room where we've been doing our preparation with [REDACTED]  
15 in much the same way we would do trial preparation in a  
16 courtroom with an adult witness. So it's a room that's  
17 designed to be similar in many ways to the forensic  
18 interview room that [REDACTED] experienced at the Child  
19 Advocacy Center.

20 THE COURT: And we're sure the video is going  
21 to work between there and here?

22 MS. GEBERT: Yes, Your Honor. I had the IT  
23 Department check the jack to make sure that the jack it  
24 will plug into is properly formatted for the system  
25 that's going to be -- the jail system is transportable,

1     it's mobile, it can be brought over. And the jail has  
2     already given the authorization to use that equipment if  
3     the Court allows this.

4             THE COURT: Okay. Continue, Mr. Debord.

5             MR. DEBORD: Thank you. By that if [REDACTED] wants  
6     to have stuffed animals up there with her during  
7     testimony that's also appropriate and fully fine. I  
8     think we can make this environment as comfortable for  
9     her as possible. Again, my client has a constitutional  
10    right to confront the witnesses and be confronted by  
11    them, and the state has not made the showing here that  
12    [REDACTED] is going to not be able to reasonably communicate.  
13    What it sounds like is she is a very communicative  
14    child. Thank you.

15            THE COURT: Thank you, Mr. Debord. It's your  
16    motion, I believe you have the burden so I'll let you  
17    have the last say, and I actually have some questions  
18    for each of you on this. But last argument for now,  
19    Attorney Gebert.

20            MS. GEBERT: Yes, Your Honor. Thank you. Your  
21    Honor, first of all it's not the 12 strangers that the  
22    state was concerned about, it's that when considering  
23    [REDACTED] testimony it's the one person, it's the one  
24    person, it's the perpetrator, it's her father who she is  
25    already terrified of. When we look at [REDACTED] and this



1 idea that, oh, the witness is supposed to experience  
2 stress that it's not supposed to be an easy thing to  
3 come and testify. She has already experienced stress  
4 that has led to all of the things I described in my  
5 initial argument. Just from having meetings, not even  
6 talking about this. And just to be clear, at those  
7 meetings we're building rapport and she hasn't come to  
8 this point where she's this loquacious child as Brent  
9 puts it who is just randomly volunteering information to  
10 us. That hasn't happened yet even in the meetings that  
11 we've had with her already.

12 I believe the cross-examination questions of  
13 Ms. Peschke were questions: "Does [REDACTED] communicate with  
14 her teachers?" And the answer was, "Yes." The question  
15 wasn't: Does she talk about this incident, these  
16 incidents with her teachers? That's not the question.  
17 The question was: "Does she communicate?" The answer  
18 is, "Yes." "Does she participate in our witness  
19 meetings?" The answer is, "Yes." The question was:  
20 "Does she answer questions about this?" "Yes." And  
21 Ms. [REDACTED] response was, "No." We haven't gotten to  
22 that point yet, Your Honor. So I guarantee that that is  
23 going to cause us an extreme amount of stress for her to  
24 even have to go through this is disclosure process  
25 again. She's already done it once with child forensic

1 interview and now to go through it again will put a very  
2 large amount of stress on her.

3 I will also note that the defense criticized  
4 that there isn't testimony about [REDACTED] behavior at --  
5 it was actually at McDonald's, not Burger King. But  
6 [REDACTED] wasn't talking about what the defendant did to  
7 her. She came home from McDonald's and told [REDACTED] she  
8 doesn't want to go see her dad anymore. She doesn't  
9 want to see him. She's scared of him after the  
10 McDonald's meeting.

11 And then just as a practical point I appreciate  
12 that Attorney Debord suggests that Ernestine, Earnie,  
13 the victim support dog could be in the courtroom, but  
14 she's not certified for that. And I actually don't  
15 think that she would be allowed to be in the courtroom,  
16 not to mention she's trained to be a comfort support  
17 dog. She's not trained to be a courtroom support dog  
18 where she would need to I believe just sit next to the  
19 child during the entire testimony and not come running  
20 over to talk to other people but just sit next to the  
21 victim. So practically speaking I don't believe that is  
22 a possibility unfortunately.

23 But really, Your Honor, the issue was that it's  
24 obvious that her tormenter, that the person she's  
25 terrified of is Mr. Bessert. And so putting her in the

1 courtroom to testify I think will cause that level of  
2 serious emotional distress to the point where she won't  
3 reasonably communicate.

4           And so I am asking you to grant this motion for  
5 her to testify via closed circuit. Mr. Bessert will  
6 still have plenty of opportunity for confrontation. He  
7 will be able to witness her demeanor while she is  
8 testifying. His attorney will be able to cross-examine  
9 her as delicately or zealously as he chooses to. All of  
10 those things are still ensured. And, Your Honor, the  
11 statute tells us that as long as you make these findings  
12 that there isn't a confrontation issue in the first  
13 place. He still gets the confrontation, and the  
14 Wisconsin State Legislature developed this statute to  
15 give the defendant the right to confrontation but maybe  
16 not at the expense of these victim's absolute terror.  
17 Thank you.

18           THE COURT: All right. Tough issue. I have a  
19 lot of notes here. A lot of thoughts going through my  
20 head. I had a hypothetical for each of the attorneys  
21 and I'll let each weigh in on each of them.

22           I'll start with the state. I'm not saying I'm  
23 doing this but just theoretically the idea of what if we  
24 started trying to do it here in the courtroom and if it  
25 appeared that it was being emotionally stressful on

1     [REDACTED] or that she was having trouble communicating or  
2     there appeared to be what the Court would perceive or  
3     anyone would perceive being inappropriate conduct or  
4     even maybe inadvertent conduct by Mr. Bessert is having  
5     a result we didn't anticipate on making it difficult for  
6     [REDACTED] to testify. What would be the state's reaction  
7     to starting that out or trying that? And as you  
8     consider your response to that -- I'm sure the state has  
9     considered if I do grant this motion and order it and if  
10    there is a conviction here and the defendant appeals,  
11    which I assume if there's a conviction there's going to  
12    be an appeal in this case, that's one more ground that  
13    they are going to have to say he's unreasonably or  
14    inappropriately denied a proper format of confrontation.  
15    Wouldn't it make sense to at least try this and see how  
16    it goes? I'm not saying I know that but your reaction  
17    to that?

18           MS. GEBERT: First, I guess that it's easier if  
19    she was the question of the appeal. We'd be happy to  
20    fight that, Your Honor. And what we're suggesting is  
21    not a -- it's a new thing for Langlade County but  
22    actually Dunn County has developed this as a standard  
23    practice for child witnesses. They have a room that is  
24    specifically designated and designed. And so I know  
25    that other counties are more advanced than we are in

1 utilizing this type of technology. And we actually had  
2 a presentation at the district attorney training in  
3 December, the education that we went to in December that  
4 was a presentation by Dunn County and the Department of  
5 Justice, Crime Victim Services, about this exact --  
6 utilizing this exact type of set up. And so I'm  
7 confident that we would be happy to fight an appeal.

8 In regards to starting and seeing what happens,  
9 Your Honor, I guess just my thought would be I'm  
10 imagining that [REDACTED] would get on the stand, have some  
11 sort of complete meltdown in one form or another. And  
12 are you thinking that we're somehow going to be able to  
13 rehabilitate her and start the testimony again that day?

14 THE COURT: No. Move her to the room then if  
15 she's having difficulty here.

16 MS. GEBERT: But then just start and try to get  
17 her to talk in the room?

18 THE COURT: Maybe.

19 MS. GEBERT: I don't see that happening, you  
20 know. And I think the trauma of even being in the  
21 courtroom, because of how terrifying her nightmares are,  
22 I would just have a concern that we may never get her to  
23 talk if she comes in here and sees Mr. Bessert sitting  
24 there to respond to her. So I don't -- I wish that I  
25 could say, oh, that -- because on the one hand it does

1 make sense to see what happens. But this is a human  
2 being, and we know what she's experiencing already, and  
3 so I just simply don't think that would be an  
4 appropriate solution.

5 THE COURT: Do you want to respond to that  
6 hypothetical, Mr. Debord?

7 MR. DEBORD: Yes. I think the Court's  
8 suggestion is the proper way to do this based upon the  
9 testimony we've had so far, the evidence presented to  
10 the Court. We're dealing with speculation of how she's  
11 going to be behave. We don't have any expert here, we  
12 don't have a counselor here to say that there's a strong  
13 probability that she won't be able to reasonably  
14 communicate. Give her the opportunity to reasonably  
15 communicate. If she is able to reasonably communicate  
16 then the issue is just moot. If she isn't able to  
17 reasonably communicate take whatever efforts we need, to  
18 move her to another room, get her calmed down. We don't  
19 have a jury that we have to worry about, taking them  
20 away from their lives. We can all sit here for two or  
21 three hours if need be while she gets calmed down and  
22 refocused. I think the Court's proposal is reasonable  
23 and wise.

24 THE COURT: All right. Well, I'll ponder that.  
25 My hypothetical for you, Mr. Debord, is -- granted, the

1 right of confrontation is basic to our system and you've  
2 made out arguments about that. This would be a denial  
3 of the traditional confrontation. But I respect and am  
4 impressed by the state's argument that this statute has  
5 already passed muster. It is still, although it's not  
6 the traditional confrontation, it is a mechanism which  
7 has survived valid law and apparently still affords  
8 confrontation.

9           What really is the harm to your client if I err  
10 on the side of caution and protect this little girl and  
11 just do this? What's really the harm other than he  
12 doesn't get to look at her and see her when she's  
13 testifying in the same room? What's the harm?

14           MR. DEBORD: Before I answer the Court's  
15 question directly I want to comment that it troubles me  
16 that other counties are doing this procedure apparently  
17 from what the state is saying, what Ms. Gebert said as  
18 regular business. This should be extraordinary business  
19 because, again, we are dealing with the constitutional  
20 right. Yes, the legislature has crafted this way of  
21 dealing with the problem. But, again, we're having a  
22 standard here about cannot reasonably communicate. Not  
23 just that they have trouble communicating, but they  
24 cannot reasonably communicate. This should be an  
25 extraordinary situation.

1 MS. GEBERT: Your Honor, I'm sorry. I believe  
2 Attorney Debord is misinterpreting my comment. My  
3 comments that this is the common course that Dunn County  
4 is engaging in is for this type of scenario where a  
5 child's direct testimony is going to be necessary in a  
6 sensitive crime scenario. So this is -- that is a very  
7 extraordinary, and fortunately for all of us, a rather  
8 not a less frequent, not a normal type of case that we  
9 are talking about. So just to be clear that's not what  
10 I'm saying. They're not using this for every time  
11 there's a child who has to testify for this type of a  
12 situation.

13 THE COURT: All right. Continue, Mr. Debord.

14 MR. DEBORD: Thank you. And the harm that  
15 comes is that my client does not have the opportunity to  
16 make eye contact with the person testifying against him.  
17 I recall that my mother once told me she could always  
18 tell when I was lying because I wouldn't make eye  
19 contact with her. That's part of the process. That's  
20 why we have witnesses in court so that we can look at  
21 them. That connection that happens. It is powerful.  
22 It is emotional. It causes people stress, but that's  
23 what trial is about. Again, we have this exception  
24 that's been crafted. As everyone says and everyone  
25 agrees it has survived constitutional muster. But again



1 it needs to be for an extraordinary situation. And,  
2 yes, child sexual assault crimes are not all the crimes  
3 we deal with. But even within that subset of crime,  
4 this type of testimony, this type of audiovisual  
5 communication still needs to meet extraordinary  
6 circumstance where the child witness is essentially  
7 unable to testify in person. We don't have any evidence  
8 showing that's even probable, just possible. Thank you.

9 THE COURT: Further -- you gave some response  
10 already on this issue, but further response on this  
11 hypothetical -- or this question I posed to Mr. Debord,  
12 Attorney Gebert?

13 MS. GEBERT: Your Honor, I would note that the  
14 statute and its instruction to me make it clear that  
15 this is supposed to be a common sense sort of decisive  
16 made by the Judge. First, because the statute doesn't  
17 require an expert. The statute doesn't require a  
18 professional even. It doesn't say the Court will hear  
19 testimony from a certified professional as is sometimes  
20 the case in some of the statutes as to what serious  
21 emotional distress is going to be and do. It's a common  
22 sense sort of thing and that's further shown by the  
23 statute because it doesn't even give us a definition of  
24 what serious emotional distress is.

25 And so, Your Honor, for me, what I'm looking at

1 and what I'm trying to point the Court to is her  
2 behaviors and the emotional distress that she's already  
3 suffered and demonstrated the extreme emotional distress  
4 that she's suffered even just getting together with the  
5 two prosecutors who are both for the record petite,  
6 young-looking women to play games and eat chicken  
7 McNuggets. That is causing her the emotional distress  
8 that you heard testimony about, Your Honor. And so that  
9 is indicative I think of what we're going to be dealing  
10 with here because we haven't even gotten into the meat  
11 of her testimony with her and she's already experiencing  
12 that kind of stress. She's so terrified of the  
13 defendant. I'm not going to continue to belabor my  
14 point but that's my response, Your Honor. Thank you.

15 THE COURT: Well, a complicated issue. We've  
16 taken a lot of time on this. We're going to be working  
17 into a little bit of our lunch hour but fortunately we  
18 have a long lunch hour today. I grant that nobody else  
19 is going to miss out on anything of significance but I  
20 got on rule on this important issue and I don't have  
21 another chance and court time to do it other than today.  
22 I think this is really the main one. There might be one  
23 or two other issues we still have to deal with today.

24 On this issue the Court has heard Ms. [REDACTED]  
25 testimony and I think a lot of Ms. [REDACTED] She does a

1 lot of good work. I appreciate her. Mr. Debord  
2 appreciates her as well. I heard him say that. She  
3 does a lot of great work in this community. It's not  
4 what this is about. But she's a good person. She has a  
5 lot of credibility with me. So I paid careful attention  
6 to her testimony. And as the DA said she probably knows  
7 [REDACTED] better than anyone at this stage. Right or wrong,  
8 however the circumstances unfolded, she's raised [REDACTED]  
9 for the last six years. Six out of seven years of her  
10 life. She describes [REDACTED] as generally happy-go-lucky  
11 although there's been some bumps along the road here.

12 I'm absolutely convinced that she is scared  
13 about this trial upcoming. As Mr. Debord says who  
14 wouldn't be? Everyone, even law enforcement I think get  
15 a little nervous on routine stuff. So she's scared.  
16 That's normal. I believe [REDACTED] that she's been having  
17 nightmares. It's hard to know what the nightmares are  
18 caused by. I know even if we did have an expert  
19 testify, which we didn't, they couldn't say, well, these  
20 are why she's having nightmares. They could give  
21 theories and possibilities. It could possibly be that  
22 she's traumatized and terrified of her father and seeing  
23 him. It could be that she's just terrified in general  
24 about having a trial. That's equally plausible. It  
25 could be something entirely else.

1           I have raised five children. I remember my  
2   little girl never wanting to miss school. Even when she  
3   was growing up she refused to skip school which we  
4   thought odd until we found out later when she was a  
5   teenager it was because there was another little girl in  
6   her class that would spread rumors about anybody anytime  
7   they were gone and she was terrified about missing  
8   school and have nightmares. And so [REDACTED] might be  
9   having nightmares or bedwetting about something that  
10   happened in school that's not related to any of this or  
11   what's going on here. Who knows. That's all  
12   speculation. But I am convinced that when [REDACTED] says  
13   she's having them, she's having them. I don't believe  
14   that [REDACTED] would lie about what she says at least the  
15   nightmares are about. She has had specifically  
16   nightmares about her father taking her away and her  
17   father hurting [REDACTED] She has had bedwetting and  
18   abnormal anger issues lately. Again, all symptoms  
19   similar to the nightmares. It could be fear of Dad. It  
20   could be fear of the trial. It could be something  
21   totally unrelated. We don't know.

22           At first I was a little disappointed that I  
23   didn't have, when I found out there was a counselor, why  
24   am I not hearing from the counselor on this issue? It  
25   seems like it would be right up the counselor's alley.

1 A good reason or answer to that is the counselor's been  
2 on maternity leave, and she really hasn't met with the  
3 counselor during this critical time frame when the trial  
4 has become imminent and she's preparing for it. And,  
5 again, the counselor might have some more expertise and  
6 have some help to the Court here. But if the counselor  
7 tried telling me this is why she's having what she's  
8 having I wouldn't believe them because that's not that  
9 exact of a science.

10 I didn't really write down -- well, I have some  
11 conflicting notes. The general testimony from [REDACTED] at  
12 first was just that, you know, she's afraid, she's  
13 stressed out about this, but I never really heard any  
14 specific statement about she's afraid of seeing her  
15 father. She's afraid of being reminded of what her  
16 father did to her. There wasn't really any tie to the  
17 father at first but then, as it was explored further,  
18 there was talk about after the last visit which is now  
19 more than a year ago, and not wanting to see her dad  
20 after that. And also testimony from [REDACTED] that she has  
21 recently said that as well, not just right after the  
22 McDonald's visit in November of 2018, recently said she  
23 doesn't want to see her father. Yeah, it could very  
24 well be from the trauma of this and the distress.

25 You know, I think kids are remarkable little

1 things. I have to preside over a lot of divorces. And  
2 if I had a nickel for every time this scenario developed  
3 where, you know, mom has primary placement and dad has  
4 weekend visitation and every time it's time to go see  
5 Dad I'm crying and fighting with her and then when she  
6 comes home from a weekend with her dad she shuts down  
7 and it takes me three days to get her out of her shell.  
8 And the dad's saying, "Really? That's weird. I'm  
9 sitting here today because every time she comes to see  
10 me she begs me to seek primary placement of her." She  
11 says, "Dad, Mom's new boyfriend is a jerk and he's mean  
12 to me. I don't want to be with Mommy anymore." And so  
13 either the parents are lying or there's exaggerations or  
14 -- I think a lot of times all that's caused by the kid.  
15 I think the kid's doing both because they see it gets a  
16 charge out of the people that are caring for them and  
17 gives them attention. And who knows what's really going  
18 on. I'm not saying seven-year-old [REDACTED] is already old  
19 enough to be manipulating to that level but it's hard to  
20 know exactly what's going on in her head or why she's  
21 reacting the way she is or for sure how she's reacting  
22 and what it means. It's all very speculative.

23 The district attorney makes some good points  
24 about these visits. She's not bringing up what happened  
25 to her. It's not being asked of her. And even though

1 it was a cause of trauma, what would normally would be  
2 an innocuous, harmless, friendly time with some nice  
3 people that have a dog and are feeding her chicken  
4 nuggets and playing games with her, why is that causing  
5 trauma? I don't know. I wish I did know. Nobody can  
6 tell me. No expert can tell me if this is fear about  
7 the trial, fear about her father, or some entirely  
8 unrelated thing.

9 So while I kind of liked my hypothetical that I  
10 put to the state about, well, can't we just try it and  
11 see how it goes? I do understand the state's point.  
12 Although we wouldn't have to make a jury wait. I don't  
13 want to wait two or three hours. I don't know. What do  
14 we have, two days set aside for this?

15 THE CLERK: One.

16 THE COURT: One day. I don't know that we  
17 really have the luxury of a two or three hour calming  
18 down period if it is working a number on this little  
19 girl. I'm respectful of the right of confrontation but  
20 I -- and I agree with Mr. Debord, there is a very  
21 powerful argument that you look someone in the eye.  
22 It's hard to look them in the eye and lie to them.  
23 Although I have seen people look me in the eye and lie  
24 and effectively so in this courtroom. That's not always  
25 the test. I think it's hard for a child to do that.

1 There is some value to that. But not an easy call.

2 Other than that argument by Mr. Debord, I  
3 really am trying to answer my question that I put to him  
4 first, what is really the harm if the lawyer still gets  
5 to cross-examine her if he wants. She's still under the  
6 stress of a trial. She's being either put under oath or  
7 we're going through that mechanism to verify that she  
8 knows the difference between truth and untruth which  
9 we'll have to cover. So there's still the stress factor  
10 there which is a good thing. It creates some  
11 seriousness about the whole thing even for a child.  
12 This could go either way so sometimes I just have to go  
13 with what pops into my head and my heart and the right  
14 thing to do here. And if I brought it to the state's  
15 attention if I do grant the request and the Court of  
16 Appeals says you shouldn't have done that, one more out  
17 Mr. Bessert now has if he is convicted of anything. If  
18 the state's mindful of that and still wants to go ahead  
19 with that and not worry about that -- or I mean I'm not  
20 saying not worry about it but is willing to take on that  
21 challenge if it has to be that way.

22 So I am going to find that forcing [REDACTED] to  
23 testify in the presence of her father, her alleged  
24 sexual abuser on multiple occasions, will result in her  
25 suffering serious emotional distress such that I am



1 concerned she could not reasonably communicate  
2 effectively in this courtroom during the trial, and that  
3 video testimony from the other room that the district  
4 attorney has spent some time preparing is necessary to  
5 minimize the trauma to [REDACTED] and to provide a setting  
6 that is more amenable to securing [REDACTED] uninhibited  
7 and truthful testimony. So we'll give that a try.

8 Question then next on the logistics of that so  
9 we can plan for sure to do that. Would both of the  
10 attorneys be here in this room or --

11 MS. GEBERT: Right, Your Honor. And I printed  
12 Attorney Debord the statute this morning because it does  
13 also specifically designate a lot of how these  
14 arrangements should be made. Continuing to --

15 MR. DEBORD: 972.11, subset --

16 MS. GEBERT: Sorry, Brent. Can you stop?

17 It would be 972.11(2m). And then we're going  
18 to Letter B, Number 6 that talks about the spatial  
19 arrangement. I believe actually that the Judge is  
20 supposed to view the spatial arrangements, determine  
21 where the child can be sitting, and it says that the  
22 child on Number 7 can sit on the floor, a platform, or  
23 an appropriately sized chair or moving around, and then  
24 also bar or terminate the attendance of any person whose  
25 behavior is disruptive or unduly stressful to the child.

1 Then sub (c) continues that only the following persons  
2 may be present in the room in which the child is giving  
3 testimony. The first is any person necessary to operate  
4 the equipment, the second is the parent, guardian, et  
5 cetera, one individual whose presence would contribute  
6 to the welfare and well-being of the child, and then the  
7 third is actually two people because it's one person  
8 designated by the attorney for the state and approved by  
9 the Court and one person designated by the defendant or  
10 the defendant's attorney for the defendant and approved  
11 by the Court.

12 THE COURT: Holy mackerel.

13 MS. GEBERT: Yes. So I think what we need to  
14 do is Attorney Debord will need to suggest somebody and  
15 the state will need to suggest somebody who will be in  
16 the room with Gracie when she's testifying.

17 THE COURT: Well, lots the logistics to cover  
18 and we'll have to make a very clear record of what we're  
19 doing and not doing and preserve that for the record.

20 MR. DEBORD: I apologize for stepping on  
21 Ms. Gebert there. I was getting anxious and getting a  
22 little --

23 THE COURT: You were trying to help her.

24 MR. DEBORD: I was trying to help but she was  
25 going to a different place than I thought she was. She

1     didn't need my help.

2                 THE COURT: No problem. I had a different  
3     statute to look at here on being mindful of  
4     972.11(2m)(bm)(4) which brings up the subject I talked  
5     about, about handling the -- that she understands that  
6     it is wrong to tell a lie and that she will testify  
7     truthfully. We have to be careful on how those  
8     preliminary questions are handled. I was not extremely  
9     impressed with how they were handled in the interview,  
10    part of the reason why I ruled that video is not going  
11    to be shown to the jury.

12                MR. DEBORD: Judge, I would note that I  
13    anticipate bringing an objection to the mother or legal  
14    custodian being present in the room when the child is  
15    testifying because they are also witnesses here and we  
16    have issues of bias and motive to fabricate with those  
17    witnesses.

18                THE COURT: Well, I don't have the energy to  
19    sort that out now. See what you can get to stipulate on  
20    that and we'll get ready for all possibilities and we'll  
21    sort that out. If you can find time on my calendar  
22    before the trial and want me to have to give it you,  
23    otherwise since it's a court trial we'll be dealing with  
24    this on the day of trial.

25                MR. DEBORD: All right.

1           THE COURT: You can also both communicate with  
2 me by e-mail if that's faster on things. I am good at  
3 checking my e-mail. I will respond in kind to both of  
4 you, not ex parte, and maybe we can work out some  
5 logistical things that way. And you're welcome to print  
6 my e-mails and make them part of the record if you need  
7 to. I know the clerk isn't always thrilled about  
8 e-mails being in there but with all the logistical  
9 things on this it might be a good idea to do some e-mail  
10 communicating.

11           All right. I'm burning out on that issue. The  
12 issue of Ms. Howard is now not an issue. She's going to  
13 be here in person so we don't have to debate about that.

14           MS. GEBERT: She will be here in person, she  
15 won't be in custody so no problem.

16           THE COURT: I didn't gather that -- those were  
17 the two main ones that I saw the defense having a  
18 significant problem with on the plaintiff's motion in  
19 limine. Any others you want to bring up or talk about  
20 now, Mr. Debord?

21           MR. DEBORD: Let me just address them. I'll go  
22 through them. Number 2, I don't anticipate --

23           MS. GEBERT: I'm sorry, Brent, to interrupt  
24 you. Attorney Hays will prepare the rest of the motions  
25 in limine if I may be excused by Your Honor?

1 -o0o-

2 I, Joan K. O'Connor, Official Court Reporter

3 in and for the State of Wisconsin, do hereby certify:

4 That I reported stenographically the

5 proceedings held in the above-entitled cause; that my

6 notes were thereafter transcribed with Computer-Aided

7 Transcription; and the foregoing transcript, consisting

8 of pages numbered from 1 to 77, inclusive, is a full,

9 true and correct transcription of the portion of my

10 shorthand notes that were requested to be transcribed

11 taken during the proceeding had on January 9, 2020.

12 IN WITNESS WHEREOF, I have hereunto set my

13 hand this 13th day of December, 2020.

14

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16

17 Electronically signed by:

18

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Joan K. O'Connor

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