
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0778

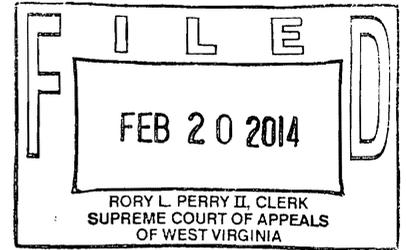
STATE OF WEST VIRGINIA,

*Plaintiff below,
Respondent.*

v.

CHRISTOPHER COX,

*Defendant below,
Petitioner.*



RESPONDENT'S BRIEF

**PATRICK MORRISEY
ATTORNEY GENERAL**

**DEREK AUSTIN KNOPP
ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, West Virginia 25301
Telephone: (304) 558-5830
State Bar No. 12294
E-mail: dak@wvago.gov
*Counsel for Respondent***

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR 1

II. STATEMENT OF THE CASE 1

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION 6

IV. SUMMARY OF ARGUMENT 6

V. ARGUMENT 7

 A. The trial court did not abuse its discretion by requiring defense witnesses to
 testify by video conference 7

 B. The court did not commit plain error when it allowed defense witnesses to
 testify in shackles. 10

VI. CONCLUSION12

TABLE OF AUTHORITIES

| CASES | Page |
|---|-------------|
| <i>Holbrook v. Flynn</i> , 475 U.S. 560, 106 S. Ct. 1340 (1986) | 8 |
| <i>Jennings v. Bradley</i> , 419 F App'x 594, 598 (6 th Cir. 2011) | 9 |
| <i>Maryland v. Craig</i> , 497 U.S. 836, 110 S. Ct. 3157 (1990) | 10 |
| <i>State ex rel. McMannis v. Mohn</i> , 163 W. Va. 129, 254 S.E.2d 805 (1979) | 10 |
| <i>State v. Allah Jamaal W.</i> , 209 W. Va. 1, 543 S.E.2d 282 (2000) | 7, 10, 11 |
| <i>State v. Johnson</i> , 195 Ohio App. 3d 59, 958 N.E.2d 977 (2011) | 9 |
| <i>State v. Miller</i> , 194 W. Va. 3, 459 S.E.2d 114 (1995) | 10-11 |
| <i>United States v. Yates</i> , 438 F.3d 1307 (11th Cir.2006) | 9 |
| STATUTES | |
| Fed. R. Civ. P. 43(a) | 8 |
| OTHER | |
| Rev. R.A.P. 18(a) | 6 |

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0778

STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

v.

CHRISTOPHER COX,

*Defendant Below,
Petitioner.*

RESPONDENT'S BRIEF

I.

ASSIGNMENTS OF ERROR

1. The trial court abused its discretion by requiring defense witnesses to testify by video conference because no statute or rule allows video testimony at trial.
2. The trial court committed plain error when it allowed defense witnesses to testify in shackles.

II.

STATEMENT OF THE CASE

On May 10, 2012, an indictment was issued against Christopher Cox ("Petitioner") in the Circuit Court of Fayette County, West Virginia. (App. at 2.) The indictment alleged that on or about September 24, 2011, Petitioner committed the offense of murder against Joseph B.

Braddock. Both Petitioner and Braddock were convicted felons at the time of the offense and were housed in the Mount Olive Correctional Center. After discovery and multiple continuances, a motions hearing was held via video teleconference on April 24, 2013. (*Id.* at 3, 348.)

During this hearing defense counsel raised the issue of his tendering a transport order for five witnesses, all of which were inmates located at the Mount Olive Correctional Complex. (*Id.* at 10.) The trial court expressed that it had safety concerns with having six convicted felons from Mount Olive in the courtroom at the same time. (*Id.*) Specifically, two of these witnesses were convicted of first degree murder, another had convictions of first degree robbery and wanton endangerment involving a firearm, and another was convicted of second degree robbery. (*Id.* at 189, 197, 205, 215.) The trial court stated that in the interest of safety that these witnesses should be permitted to testify under oath by way of videoconferencing. (*Id.*) The court stated that the jury would be able to view the demeanor and mannerisms of the witnesses, and additionally that the witnesses would also be able to see the jury as they testify. (*Id.* at 12.) The court articulated that this steered a middle ground between its safety concerns and the ability of the defense to present its evidence. (*Id.* at 11.)

At trial the State presented the testimony of five correctional officers who worked at Mount Olive on September 24, 2011. (*Id.* at 89, 109, 115, 126, 137.) Correctional officer Andrew Ward testified that he was doing showers when another officer notified him that recreation time was up for inmates in the recreation yard. (*Id.* at 93.) Ward described the procedure that was used to transfer these inmates from their cells to the recreation yard. If an inmate wants recreation time that inmate must strip in their cell and hand their clothes to the

officer who then proceeds to check the clothes for weapons. (*Id.* at 89.) The prisoners are then handed back their clothes and handcuffed through the food tray slot, and then shackled. (*Id.*) Inmates are only taken one at a time to the recreation area. (*Id.*) Inmates are then unshackled, placed in a cage adjacent to the recreation yard where their handcuffs are removed, and then the door to the rec yard is opened. (*Id.* at 90.) When Ward was notified recreation time was up, he went to the cage and knocked on the window to let the inmates know their recreation time was up. (*Id.* at 93.)

The first inmate Ward ordered to come off the yard was Joseph Braddock. (*Id.* at 96.) Petitioner was also in the rec yard with Braddock and the two were talking to each other when Braddock was told to come off the yard. (*Id.* at 97.) Ward testified when Braddock turned to come towards the cage Petitioner began striking him in the back of the head and face. (*Id.* at 98.) After a couple of hits, Ward testified that Braddock fell to the ground and Petitioner then began to stomp on him. (*Id.* at 99.) Ward testified that Braddock did not try to defend himself but just tried to block everything he could. (*Id.* at 99.)

Ward waited for another officer to arrive before entering the cage door. Officers were yelling loud verbal commands for Petitioner to stop kicking and to get down, however Petitioner did not comply. (*Id.* at 107.) Correctional officer Josh Hypes arrived with pepper spray and began spraying it towards Petitioner. (*Id.* at 100.) Ward testified that he guessed Petitioner saw what was going on because Petitioner pulled Braddock further into the rec yard away from the officers spraying pepper spray. (*Id.* at 100-101.) Ward testified that Petitioner eventually stopped and walked to the cage door where he was handcuffed. (*Id.* at 101.) When Ward was asked about Braddock and his injuries, Ward testified that it looked like Braddock's "head was

stomped in.” (*Id.* at 103.) Hypes similarly testified that it appeared that Braddock’s “head was smashed in” and that he also had blood running from his nose. (*Id.* at 119.)

Correctional officer Daniel Cherry was in the control tower at the time of the altercation between Petitioner and Braddock. (*Id.* at 109.) Cherry could view the rec yard from the tower. Cherry testified that he saw Ward call for Braddock, in which Braddock started to move toward the cage. (*Id.* at 110.) Cherry also testified that Petitioner began to strike Braddock when Braddock was trying to get to the cage and additionally testified that Petitioner continued to kick Braddock in the head area when while he was on the ground. (*Id.* at 110-11.)

The State also presented a video-recording of the incident to the jury as well as medical testimony that Braddock died as a result of traumatic brain injury consistent with being kicked in the head. (*Id.* at 139, 152, 177.) Before the defense witnesses testified, the trial court instructed the jury that certain evidence was going to be presented to them by way of video, and that they were to consider this evidence as if the witness were present in the courtroom and further to make no distinction in the way that they treat the testimony of these witnesses from any other witnesses that testified in this case. (*Id.* at 184.)

Two defense witnesses were in the rec yard the morning of the incident. Charles Brannon testified that Braddock had spit on Petitioner, and that they both started scuffling and fighting. (*Id.* at 187.) Quinton Peterson testified that he saw Braddock spit on Petitioner and then try to get to the cage before the two started fighting. (*Id.* at 196.) The defense also offered the testimony of two other inmates, Zachary Shreves and Keith Lowe, who testified that Braddock had offered them money to kill Petitioner. (*Id.* at 204, 213-14.) The defense also called Frederick Hamilton, who claimed that Petitioner did not kill Braddock as he was

responsible for Braddock's death. (*Id.* at 210.) Hamilton was subsequently excused as a witness and his testimony was stricken from the record. (*Id.* at 210-11.)

Petitioner also testified stating the Braddock had spit on him after he had attempted to talk to Braddock about any problem that Braddock had with him. (*Id.* at 226-227.) Petitioner testified that Braddock also threatened stabbing him and that he was afraid that he was going to pull a knife, though he never saw a knife. (*Id.* at 235.) Petitioner stated the Braddock threw a punch after spitting on him, and it was only then that he got a hold of Braddock. (*Id.* at 236.) Petitioner also admitted to kicking Braddock in the head, though Petitioner testified that Braddock still had a hold of his leg at that time. (*Id.* at 237.)

After hearing all of the testimony, the jury convicted Petitioner of first degree murder with a recommendation of no mercy. (*Id.* at 327.) On June 25, 2013, sentencing proceedings were held in which counsel asked to be heard on his motion for new trial which contained, among other things, an allegation that the manner in which the defense witnesses testified via video conference was improper. (*Id.* at 333.) The court again expressed its security concerns, stating that the events concerning this conviction not only came out of Mount Olive, but also out of one of the most violent areas there. (*Id.* at 334.) The people involved were different from the general prison population at Mount Olive as they were only let out of their cells one hour a day to go to recreation. (*Id.*) In denying Petitioner's motion the court stated that the defense witnesses were sworn, clearly observed by the jury, examined, cross-examined, and that their credibility could properly be determined by the jury. (*Id.* at 335.) The court stated that it did the best it could to balance the interests of all the parties concerned. (*Id.* at 336.)

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State does not request oral argument in this matter. In accordance with Rev. R.A.P. 18(a), the State notes that the facts and legal arguments have been adequately presented in the briefs and record. The decisional process would not be significantly aided by oral argument.

IV.

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion by requiring defense witnesses to testify by videoconference. The trial court was justifiably concerned about the safety of the courthouse when it was faced with the possibility that six convicted felons would be in the courthouse at the same time. The trial court has the power to make sure the courtroom is safe for all the parties involved in trying a case. The use of testimony via videoconference was a valid exercise of that power under the circumstances of this case.

Furthermore, allowing the defense witnesses to testify in physical restraints is not plain error. There is no evidence within the record that the trial court forced or compelled these witnesses to remain in their prison garb and shackles as Petitioner's trial counsel made no objection or request for his witnesses to be in civilian clothes. Additionally, under these circumstances Petitioner cannot demonstrate that allowing defense witnesses to testify in prison garb and shackles in this case was inherently unfair or affected his substantial rights.

V.

ARGUMENT

A. The trial court did not abuse its discretion by requiring defense witnesses to testify by video conference.

The trial court was justifiably concerned about the safety of the courtroom when it was faced with the possibility that six convicted felons, three of which were convicted of murder, would be in the courthouse at the same time. The trial court has the discretion to maintain a safe environment within the courtroom. While Petitioner argues that there is no express statute or rule delineating that the trial court may take video testimony, Petitioner fails to mention the clear authority of the court to maintain the security of the courtroom. For example, in *State v. Allah Jamaal W.*, this Court stated generally that “an incarcerated defense witness should not be subjected to physical restraint while in court.” *State v. Allah Jamaal W.*, 209 W. Va. 1, 6, 543 S.E.2d 282, 287 (2000). However, the Court also found that the trial judge may require these witnesses to be restrained if the trial judge has found such restraint reasonably necessary to prevent escape, *provide safety*, or *maintain order* in general. *Id.* (emphasis added). While there is no statute or rule spelling out that the judge has the authority to require defense witnesses to be physically restrained, the court has the power to do so in order to provide for the safety of the courtroom.

Furthermore, videoconferencing is no stranger to the courtroom. As Petitioner explains, West Virginia allows a child to testify during a trial by video. (Pet’r’s Br. at 4.) While Petitioner points out that there are statutory prerequisites to allowing a child to testify by video, such as findings by a psychiatrist that the child will suffer severe emotional harm, findings were made by the court as to why videoconferencing would be used in this case. (*Id.*) In this

situation, the court found that having six convicted felons who were housed at a maximum security prison in the courtroom simultaneously was a safety concern. Moreover, the alternative to videoconferencing would be to bring additional guards and security to the courtroom which would also create problems as to the jury's perception of the defense witnesses. *See, i.e., Holbrook v. Flynn*, 475 U.S. 560, 562-63, 106 S. Ct. 1340, 1342-43, (1986)(defense counsel objected to the use of uniformed police sitting in the courtroom as it would suggest to the jury that defendants were of bad character.) Indeed the court expressed its concern with the amount of officers and/or bailiffs that would be required to bring all of the defense witnesses in to testify. (App. at 336.)

Additionally, safety concerns have justified allowing testimony via videoconferencing in other jurisdictions. The Federal Rules of Civil Procedure provide that "for good cause and compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." Fed. R. Civ. P. 43(a). The Sixth Circuit, in an unpublished decision, upheld a federal district court's decision to utilize videoconferencing to maintain the safety of the courtroom.

"The district court found that three witnesses presented security threats because they were housed at maximum security prisons and had extensive disciplinary records, and that the fourth witness was in a crisis stabilization program and would not have access to proper mental health support if he were transported to another facility. . . . The district court also ensured that appropriate safeguards were instituted. The jury could listen to the witnesses and observe their demeanor, [counsel] could question them, and the transmission was instantaneous. Thus, we hold that the district court did not err by requiring . . . witnesses to testify via video teleconferencing."

Jennings v. Bradley, 419 F. App'x 594, 598 (6th Cir. 2011).

In criminal cases, video conference testimony issues often come up in the context of confrontation clause challenges. The United States Supreme Court upheld the constitutionality of

video conference testimony in *Maryland v. Craig* in the context of a child sexual abuse statute. *Maryland v. Craig*, 497 U.S. 836, 860, 110 S. Ct. 3157, 3171, (1990). The Court held: “[A] defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.” *Id.* at 850, 110 S.Ct. at 3166.

Notably, courts in other jurisdictions have applied the *Craig* test to situations outside the context of a child-sex abuse statute. *See, e.g., United States v. Yates*, 438 F.3d 1307, 1313 (11th Cir.2006) (holding in conspiracy and fraud case that “*Craig* supplies the proper test for admissibility of two-way video conference testimony”); *Bush v. State*, 193 P.3d 203, 215–16 (Wyo.2008) (applying *Craig* test to determine that two-way video conferencing testimony of witness was necessary to meet important public interest because witness was located in another state and too ill to travel); *State v. Johnson*, 195 Ohio App.3d 59, 74–76, 958 N.E.2d 977, 989–91 (2011) (applying *Craig* test to determine admissibility of testimony via two-way, closed-circuit television when necessary because of defendant's family's intimidation of witnesses), *appeal not allowed*, 131 Ohio St.3d 1437, 960 N.E.2d 987 (2012).

While the confrontation clause is not at issue here, these cases are still instructive concerning the use of testimony via video conference. First and foremost, these cases demonstrate that the use of two-way videoconferencing is permissible in the face of a constitutional challenge where the use of video conference testimony is reliable and necessary to further an important public policy interest. Additionally, these cases demonstrate that video

conference testimony is used for a variety of reasons including the inability of a witness to travel because of issues regarding health or distance.

In this case, the trial court had a significant interest in maintaining the safety of the courtroom. Based upon the foregoing, the trial court did not abuse its discretion when it required the defense witnesses in this case to testify via video conference.

B. The court did not commit plain error when it allowed defense witnesses to testify in shackles.

Petitioner argues that the trial court impermissibly allowed his witnesses to testify in shackles from the Mount Olive Correctional Center. As Petitioner acknowledges, defendants do not have “a constitutional right to have his witnesses appear at trial without physical restraints or in civilian attire.” *State ex rel. McMannis v. Mohn*, 163 W. Va. 129, 136, 254 S.E.2d 805, 809 (1979). “The issue of whether a witness for the defendant should be physically restrained or required to wear prison attire while testifying before a jury is, in general, a matter within the sound discretion of the trial judge and will not be reversed absent a showing of an abuse of that discretion.” *State v. Allah Jamaal W.*, 209 W. Va. 1, 6, 543 S.E.2d 282, 287 (2000) “An incarcerated defense witness should not be subjected to physical restraint while in court unless the trial judge has found such restraint reasonably necessary to prevent escape, provide safety, or maintain order in general.” *Id.* “The burden is upon the defendant to timely move that an incarcerated defense witness be permitted to testify at trial without physical restraints. *Id.* at 6-7, 543 S.E.2d at 287-88.

Petitioner correctly asserts that defense counsel neither timely objected to the physical appearance of the defense witnesses nor requested a cautionary instruction. (Pet’r’s Br. at 7.) Therefore, Petitioner alleges the trial court committed plain error in regard to this claim. “To trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3)

that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” Syl. pt. 7, *State v. Miller*, 194 W. Va. 3, 7, 459 S.E.2d 114, 118 (1995).

Petitioner’s claim fails as he cannot satisfy the plain error standard. There is no evidence within the record that the trial court forced or compelled these witnesses to remain in their prison garb and shackles as Petitioner’s trial counsel made no objection or request for his witnesses to be in civilian clothes. Additionally, under these circumstances Petitioner cannot demonstrate that allowing defense witnesses to testify in prison garb and shackles in this case was inherently unfair or affected his substantial rights. The testimony in this case involved more than the jury simply knowing that the defense witnesses were incarcerated for a past crime. The crime committed in this case occurred at Mount Olive Correctional Center. The jury heard testimony induced by both the prosecution and defense regarding the prison environment at Mount Olive, including past violence. The jury also heard testimony regarding the procedures used to transfer the inmates to the rec yard which involved strip searches and cages that separate the guards from the inmates during handcuffing. The jury further heard testimony that the inmates were housed in a unit that only allowed them to be out of their cells for one hour per day.

Petitioner cites this court’s decision in *Allah Jamal* in support of his claim, but that case is distinguishable inasmuch as defense counsel in that case made a timely objection to his witnesses appearing in shackles and prison garb. *Allah Jamaal W.*, 209 W. Va. at 3, 543 S.E.2d at 284. Furthermore, the crime involving Allah Jamal did not occur in a prison. *Id.* Therefore, the jury in that case did not necessarily hear testimony about the prison environment and the extra precautions that are taken with the inmates that are housed there. Accordingly, the trial court did not commit plain error when it allowed defense witnesses to testify in shackles.

VI.

CONCLUSION

For the reasons herein stated, the State respectfully requests that this Court affirm the conviction of first degree murder.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By Counsel,

PATRICK MORISSEY
ATTORNEY GENERAL



DEREK AUSTIN KNOPP
ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, WV 25301
Telephone: (304) 558-5830
State Bar No. 12294
Email: dak@wvago.gov
Counsel for Respondent

CERTIFICATE OF SERVICE

I, Derek Austin Knopp, Assistant Attorney General and counsel for the respondent, do hereby verify that I have served a true copy of the *Respondent's Brief* upon counsel for the petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 20th day of February, 2014, addressed as follows:

Jason D. Parmer
Office of the Public Defender
Kanawha County
Charleston, WV 25330


DEREK AUSTIN KNOPP