

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellee,

CASE NO.: 2023-0156

v.

ELI Y. CARTER,

Defendant-Appellant.

**ON APPEAL FROM THE LOGAN COUNTY COURT OF APPEALS
THIRD APPELLATE DISTRICT, App. No. CA 8-22-12**

MERIT BRIEF OF APPELLEE STATE OF OHIO

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STATEMENT OF THE CASE

On March 9, 2021, a Logan County Grand Jury indicted the Defendant on the following charges:

- Count 1: Rape in violation of RC §2907.02, a felony of the first degree
- Count 2: Sexual Battery in violation of RC §2907.03, a felony of the third degree
- Count 3: Rape in violation of RC §2907.02, a felony of the first degree
- Count 4: Sexual Battery in violation of RC §2907.03, a felony of the third degree
- Count 5: Rape in violation of RC §2907.02, a felony of the first degree
- Count 6: Sexual Battery in violation of RC §2907.03, a felony of the third degree

On March 12, 2021, the Defendant was arraigned on the indictment.

On February 7, 2022, the State filed a motion to permit out-of-state witness, Michael Mullins (74 years old), to testify remotely. On February 8, 2022, the Defense filed an objection to the State's motion. On February 8, 2022, the trial court issued a written decision granting the State's motion.

The matter proceeded to a jury trial on February 9th and 10th, 2022. The jury returned a verdict of not guilty on counts 1, 2, 3, and 5 and guilty on counts 4 and 6.

On March 18, 2022 a sentencing hearing was held. The Defendant was ordered to serve a prison term of 30 months on count 4 and 30 months on count 6, to be served concurrently. He was notified that he would be subject to 5 years of post release control. The defendant was given 44 days of jail time credit and remanded to the custody of ODRC.

On April 15, 2022, the Defendant filed a notice of appeal with the Court of Appeals.

On December 19, 2022, the Third Appellate District overruled the Defendant's sole assignment of error and affirmed the Defendant's conviction.

STATEMENT OF THE FACTS

The victim in this case, N.C. (DOB: 12/20/1989), was a foster child all of her childhood years (Trial Tr. at 28). She was placed at Adriel School in West Liberty, Ohio when she was 14 years old. While there, she was introduced to Eli and Liz Carter who were working there as teaching parents. (Trial Tr. at 31). That relationship developed into a foster placement with Eli and Liz Carter in 2006. Eli and Liz then decided to adopt N.C. and this was accomplished in the Montgomery County Common Pleas Court - Probate Division on June 22, 2007. (Trial Tr. at 36) N.C. was 17 years old at the time of her adoption. (Id).

On June 14, 2010, at age 20, N.C. went to the Bellefontaine Police Department to report that she had been sexually molested by her adopted father Eli Carter for a period of approximately three years in a continuing course of conduct in both Logan and Champaign counties. (Trial Tr. at 59). She reported that it started when she was approximately 17 and continued through the age of 19. Eli initially would rip off her clothes in a playful manner (Trial Tr. at 39). He then started touching her vagina. (Trial Tr. at 40). This led to digital penetration, intercourse and oral sex. (Trial Tr. at 41). She stated that it happened many times when she was 17, 18 and 19 years old. It primarily occurred at 417 Ludlow Road in Bellefontaine, but later when she went to college Eli would engage her in the car, and at her college dorm at Urbana University in Urbana, Ohio. (Trial Tr. at 41, 46). N.C. felt like she had to let him do it to remain a part of the family (Trial Tr. at 43).

When N.C. initially reported the abuse to the Bellefontaine Police Department, the detective on the case did not work an investigation and it was dropped. (Trial Tr. at 58 and 111-

112) N.C. then contacted law enforcement in 2017 to find out what happened to her complaint. (Trial Tr. at 59). Detective Dwight Salyer looked into the matter and found the case hadn't been worked. He re-opened the case and in 2020 conducted some follow up investigation (Trial Tr. at 113). He talked to family members, church members, and people that worked with Eli until he found some corroborating evidence.

Michael Mullins (74 at the time of the trial) was a licensed independent social worker in the State of Ohio with an emphasis on supervision. (Trial Tr. at 208). During the time in question, he was the CEO of Adriel in West Liberty. (Trial Tr. at 208). He was familiar with Eli and Liz Carter who worked at Adriel as teaching parents (Trial Tr. at 210). He was also familiar with N.C. who was first placed there in residential care and then became a foster child to the Carters (Trial Tr. at 211). He described N.C. as a very well behaved child despite the hurt and turmoil in her life (Trial Tr. at 212).

Mr. Mullins became aware of the allegations when David and Becky Palmer, brother and sister-in-law to Eli, asked to speak with him (Trial Tr. at 213). They shared the allegation of sex abuse between Eli and N.C. and felt they needed to report it because of their professional obligations (Trial at 213). This prompted Mr. Mullins to have Eli come to his office in June of 2010 (Trial Tr. at 213, 216). He said the meeting was very short (Trial Tr. at 213). Eli Carter came in and admitted that he did engage in a sexual relationship with N.C., but it was consensual and it was after she had turned 18 years of age (Trial Tr. at 214). Eli then announced that he resigned and walked out of the office (Id.) Mr. Mullins directed an employee of Adriel to make contact with Children's Services and report the allegation, but was concerned that nothing would

be done since the allegation did not involve a minor (Trial Tr. at 215). Mr. Mullins didn't hear from law enforcement until 2020 when Det. Salyer contacted him.

Karen Fowler, former clinical director of Adriel testified that she was present the day Eli Carter came in and spoke to Michael Mullins. (Trial Tr. at 177-178). She stated that once Mr. Mullins was aware of the sex abuse allegations he had her reach out to N.C. and provide her with resources. (Trial Tr. at 178).

Miranda Borland works for Logan County Children Services and was an intake worker in 2010 (Trial Tr. at 105). Ms. Borland testified that she received a sex abuse report involving N.C. and Eli Carter on June 14th of 2010 (Trial Tr. at 106). She stated that there were actually two individuals who had called in to report the abuse. However, she screened the referral out because the report was made when NC was 20 years old. It was passed on to law enforcement who then never followed up on it (Trial Tr. at 107).

Kurt Penhorwood testified that he used to be good friends with Eli Carter and they used to coach basketball together (Trial Tr. at 154). He testified that while the criminal case was pending, he had several conversations with Eli about the sexual abuse allegations. (Trial Tr. at 157). He testified that he became alarmed during their last conversation when he was speaking to both Liz and Eli Carter (Trial Tr. at 158). Liz asked Eli if he was going to tell him about the one thing that happened. (Trial Tr. at 158) Kurt was alarmed because he had always been told that nothing happened. (Id.) Eli initially wouldn't say anything other than he didn't do what he was accused of. (Id.) However when pressed Eli would only deny a forced sexual relationship with the victim, implying there was a consensual sexual relationship. (Trial Tr. at 158). Kurt then contacted law enforcement to report the conversation (Trial Tr. at 159).

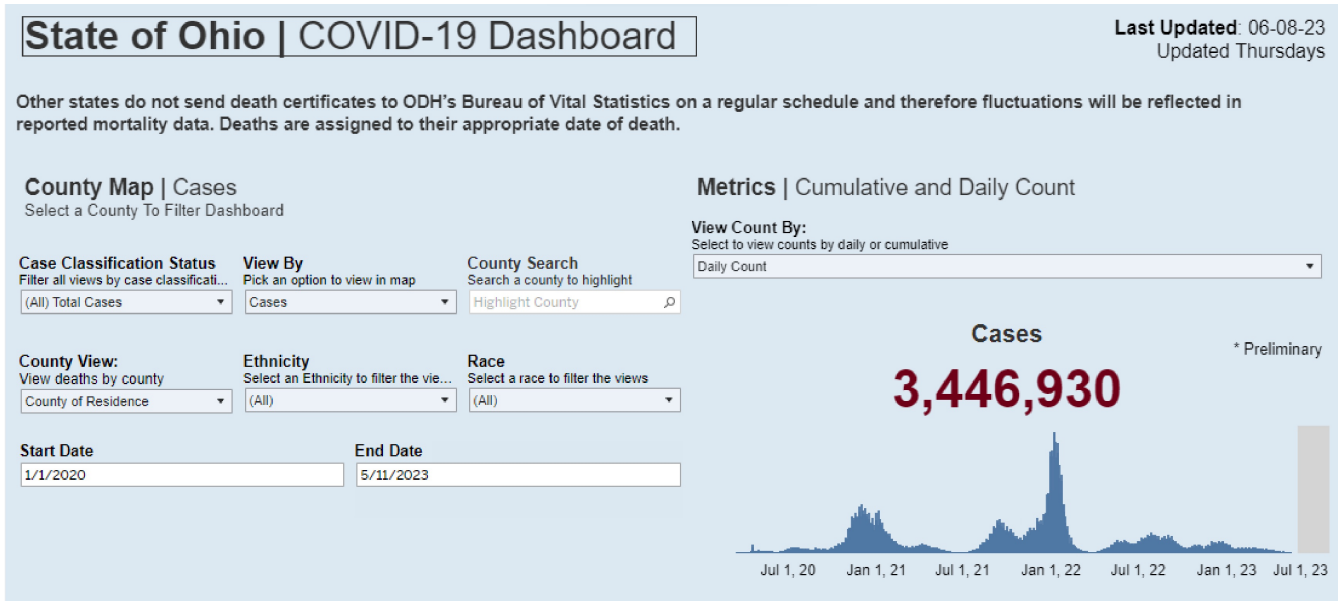
RESPONSE TO DEFENDANT’S PROPOSITION OF LAW

I. Historical Background

On January 19, 2020, the first COVID-19 case was reported in the United States. <https://www.ideastream.org/ohios-coronavirus-pandemic-a-timeline>. The first person to die in the United States from the new coronavirus happened on February 6, 2020. *Id.* On March 9, 2020 Ohio Governor Mike DeWine declared a state of emergency after three Ohioans tested positive for COVID-19. *Id.* Three days later, Governor Dewine announced statewide measures to combat the spread of the virus including closing schools and banning public events. *Id.* So began a lengthy and arduous struggle with the COVID-19 pandemic that wasn’t declared over by the CDC until May 11, 2023. <https://www.cdc.gov/coronavirus/2019-ncov/your-health/end-of-phe.html>. As of May 11, 2023, the state of Ohio has reported more than 3.4 million COVID cases since the start of the pandemic in 2020 with more than 42,000 deaths. <https://coronavirus.ohio.gov/dashboards>.

While the pandemic raged, courts in Ohio and around the nation struggled with how to conduct court business. Vast amounts of public resources were poured into personal protection equipment, Plexiglas shields, and remote technologies to prevent the spread of the virus. Trials and other court hearings were put on hold for months. Some courts had barriers erected in jury boxes to protect jurors from spread. Just two months before the trial in this case was to start, Ohio reported 16,091 new cases. In the weeks leading up to the trial, there was a nationwide surge in COVID-19 cases. Ohio was not immune and followed the national trend. See graphic

below. According to the Ohio Department of Health, January of 2022 had the highest rate of new daily cases reported during the pandemic.



It was also reported in the beginning of January, 2022 that airlines had canceled more than 15,000 U.S. flights since Christmas Eve. <https://www.cnbc.com/2022/01/01/severe-weather-omicron-infections-drive-thousands-more-us-flight-cancellations.htm> (<https://cnb.cx/3qDWHky>) Bad weather worsened flight disruptions in early January and Omicron infections among crews had thinned staffing at some carriers. *Id.* This is the historical context leading up to the trial of Eli Carter which was held on February 9th and 10th, 2022.

I. The Trial Court did not err in permitting Michael Mullins to testify by remote means

In the Defendant's first proposition of law, the defense argues that Michael Mullins' live video testimony denied the Defendant the right to confront witnesses against him in violation of the Sixth and Fourteenth Amendment to the United States Constitution as well as provisions in Ohio's constitution, laws and rules of evidence. The Defendant's proposition should be rejected as the State and the Trial Court showed it was for a necessary public purpose and the three elements of confrontation — oath, cross-examination, and observation of the witness's demeanor were all satisfied.

For the first time on appeal, the Defendant questions whether Mr. Mullin's testimony was one-way or two way video (Appellant's Brief at pg. 7). Mr. Mullin's testimony was via two way video as counsel for the State set up the remote transmission prior to the jury coming into the courtroom and verified it was two-way video. Everyone at the trial proceedings understood that. Now, for the first time on appeal, the Defendant is questioning this basic fact. A first principle of review is that a party may not present an argument on appeal that it failed to raise below. *State v. Wintermeyer*, 2019-Ohio-5156, ¶ 10, 158 Ohio St. 3d 513, 515, citing *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 1997- Ohio 401, 679 N.E.2d 1099 (1997). The Defense did not raise this alleged issue at the trial court nor at the court of appeals and should be prohibited from raising this unsupported averment now.

Under both the federal and Ohio constitutions, a criminal defendant has the right to confront witnesses. *State v. Crawford*, 2022-Ohio-2673, (8th App. Dist.) Specifically, the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him." (*Id.*) While the

United States Supreme Court has interpreted the Confrontation Clause as reflecting a preference for face-to-face confrontation, it has explained that the preference "must occasionally give way to considerations of public policy and the necessities of the case." (*Id.*), citing *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990).

"Even in criminal law, the right to confrontation is not absolute." *Ohio Ass'n. of Pub. Sch. Employees v. Lakewood City Sch. Dist.* (1994), 68 Ohio St.3d 175, 179, 1994 Ohio 354, 624 N.E.2d 1043. "Literal face-to-face confrontation is not the sine qua non of the confrontation right." *State v. Self* (1990), 56 Ohio St.3d 73, 77.

Thus, the right to confrontation is not absolute, and the primary concern of the Confrontation Clause is "to ensure the reliability of evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland* at 845. The Eighth District Court of Appeals has held that to qualify as an exception to the face-to-face confrontation requirement, "the procedure must (1) be justified, on a case-specific finding, based on important state interests, public policies, or necessities of the case and (2) must satisfy the other three elements of confrontation — oath, cross-examination, and observation of the witness's demeanor." *In re H.P.P.*, 8th Dist. Cuyahoga Nos. 108860 and 108861, 2020-Ohio-3974, ¶ 22, quoting *State v. Marcinick*, 8th Dist. Cuyahoga No. 89736, 2008-Ohio-3553, ¶ 18, quoting *Harrell v. State*, 709 So.2d 1364, 1369 (Fla.1998), citing *Maryland* at 849-851.

The Eighth District Court of Appeals has routinely upheld the use of two-way videoconferencing for trial testimony in the event a victim or witness is unavailable to appear at trial, and the preeminent case is *State v. Marcinick*, 8th Dist. Cuyahoga No. 89736, 2008-Ohio-

3553.¹ Other cases include *State v. Frierson*, 8th Dist. Cuyahoga No. 106841, 2019-Ohio-317; *State v. Oliver*, 8th Dist. Cuyahoga No. 106305, 2018-Ohio-3667; *State v. Gay*, 8th Dist. Cuyahoga No. 101345, 2015-Ohio-524; *State v. Sheline*, 8th Dist. Cuyahoga No. 106649, 2019-Ohio-528; *State v. Eads*, 8th Dist. Cuyahoga No. 87636, 2007-Ohio-539.

The Third Appellate District followed this Court's reasoning in *State v. Self*, 56 Ohio St. 3d 73, 73, 564 N.E.2d 446, 449 (1990) [w]hile closed-circuit television and videotape recording did not exist when the Ohio (or federal) Constitution was written and adopted, these new technologies, when employed in accord with R.C. 2907.41, provide a means for the defendant to exercise the right of cross-examination and to observe the proceedings against him with the same particularity as if he and the witness were in the same room." *State v. Carter*, 2022-Ohio-4559, ¶ 13 (Ct. App.) Ultimately, the Third District found that the justification in the case at hand was not an issue of witness convenience nor of inclement weather, but rather, the trial court's duty to protect those who come and go from the courthouse and to maintain the orderly administration of trial proceedings. *Id.* citing *State v. Owen*, 3d Dist. Union No. 14-92-34, 1993 Ohio App. LEXIS 2239, 1993 WL 128177, *3 (Apr. 26, 1993), citing Crim.R. 1(B); *State v. Harding*, 3d Dist. Marion No. 9-93-8, 1993 Ohio App. LEXIS 4077, 1993 WL 312905, *3 (Aug. 9, 1993).

¹ The Cuyahoga Court of Common Pleas has also permitted video testimony in other trials: *State v. Richard Annable* CR 530634; *State v. Frank Roby* CR 527621; *State v. David Thomas* CR 520343; *State v. Robert Falor* CR 521238; *State v. Paul Falzone* CR 527577; *State v. Sabrina Parr* CR 595654; *State v. Michael Gay* CR 579029; *State v. Martea Robinson* CR 582930; *State v. Antonio Hicks* CR 581201; and *State v. Eddie Brisbon* CR 597672.

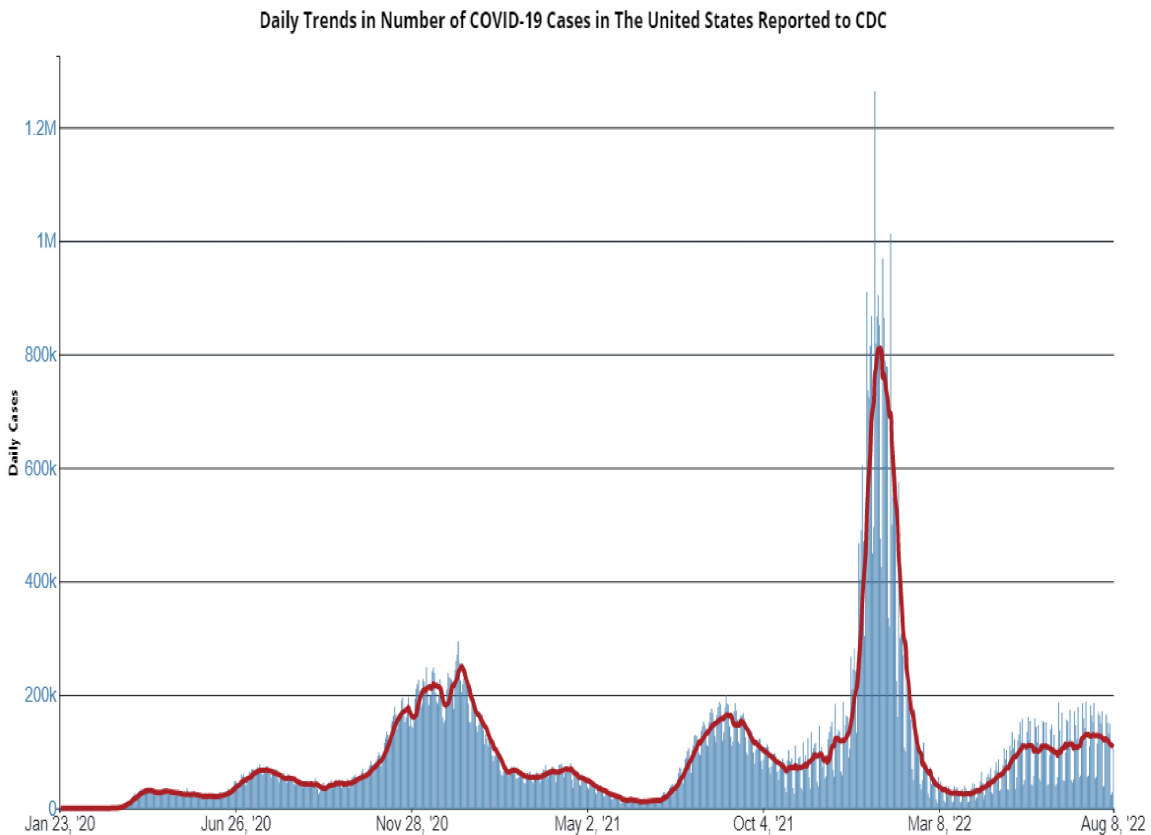
A. Michael Mullins remote testimony was justified.

Appellant does not argue that Michael Mullins' testimony was lacking any of the three elements of confrontation: oath, cross-examination, and observation of the witness's demeanor. Instead, he claims that the State did not adequately justify the necessity of the video testimony.

The Defendant argues that the risk of "flight cancellations" was insufficient to demonstrate necessity. The Defendant ignores the primary point of both the State's request and the trial court's decision which was public health and safety during the COVID-19 pandemic. The Defendant claims in his brief that the "parties did not significantly brief the issue of COVID on initial appeal." This is patently false, as the State raised the issue in depth in its initial appellate brief and this fact is easily checked. The risk of flight cancellations was a secondary concern to the main concern of COVID spread and risk of infection for an out-of-state witness. The Defendant spends a significant amount of time arguing with the trial court's secondary concern, but this is merely to draw away from the fact that COVID was a significant public policy concern recognized by practically most of the world.

The Logan County Court of Common Pleas has utilized video conferencing via Polycom and Zoom for pleas, sentencings, motions to suppress, probation violation hearings, and trial. This trial happened during the COVID-19 pandemic, a time where "judges should allow remote participation whenever possible[.]" *Phillips v. Dimacchia* (In re Swenski), 160 Ohio St.3d 1274, 2020-Ohio-3850, 158 N.E.3d 628, "Courts must continue to operate with a strong presumption toward remote proceedings and to leverage technology to conduct all proceedings remotely to the extent possible." *Russo v. Broner*, 163 Ohio St.3d 1252, 2021-Ohio-1246.

In this case, the trial court made a factual finding that the video testimony was appropriate and necessary for public policy considerations. This determination was based on competent, credible evidence. Michael Mullins was the only witness that lived out of state and the only witness that testified by live video. He lived in Farmington, Minnesota and had concerns about traveling during the pandemic. According to the CDC, in the United States there was a sudden spike in COVID-19 cases just before the trial in January of 2022. The graph below from the CDC's website reflects this fact.



https://covid.cdc.gov/covid-data-tracker/#trends_dailycases.

This surge in cases happened right before the trial was to start and continued through the trial. The trial court specifically identified the emergence of the COVID pandemic as an important

policy reason for allowing live video testimony. (February 8, 2022 Judgment Entry Granting State’s Motion for Michael Mullins to Appear Via Live Video, Page 2). It’s hard to see how the Defense can downplay this public policy issue when counsel for the defense wore masks during the entirety of the trial.

In another case decided by the Eight District, it reaffirmed its prior decisions, “allowing a witness to testify remotely via video does not violate a defendant's confrontation rights.” *State v. Crawford*, 2022-Ohio-2673, (Eighth App. Dist.) It further stated, “preventing the spread of COVID-19 is an important public policy that may warrant an exception to face-to-face confrontation under appropriate circumstances *Id. citing State v. Banks*, 2021-Ohio-4330, (First App. Dist.)

According to the First Appellate District, “[p]reventing the spread of COVID-19 is an important public policy that may warrant an exception to face-to-face confrontation under the appropriate circumstances. *State v. Banks*, 2021-Ohio-4330, (Ct. App.) citing *United States v. Donziger*, S.D.N.Y. Nos. 19-CR-561 and 11-CV-691, 2020 U.S. Dist. LEXIS 157797, 2020 WL 5152162,(August 31, 2020) (“With respect to the *Craig* standard, there is no question that limiting the spread of COVID-19 and protecting at-risk individuals from exposure to the virus are critically important public policies.”).

Both the United States Supreme Court and the Sixth Appellate District have also found that stopping the spread of COVID-19 is a compelling state interest. *See Roman Catholic Diocese v. Cuomo*, 141 S.Ct. 63, 208 L.Ed.2d 206 (2020) (“Stemming the spread of COVID-19 is unquestionably a compelling interest...”). *Frantz v. Beshear*, No. 21-5163, 2021 U.S. App. LEXIS

31295, (6th Cir. Oct. 18, 2021) (“mask requirements are rationally related to a legitimate government interest in controlling the spread of COVID-19”).

This Court acknowledged the importance of preventing the spread of COVID-19 and found that, “[d]uring this public-health emergency, a judge's priority must be the health and safety of court employees, trial participants, jurors, and members of the public entering the courthouse.” *In re Disqualification of Fleegle*, 161 Ohio St.3d 1263, 2020-Ohio-5636, 163 N.E.3d 609 ¶ 8 (Finding that, “[b]y failing to follow the Ohio Department of Health and Governor DeWine's directives, a judge endangers the health of those who enter the courthouse and their families,” and disqualification of a judge may be sought if, “attorneys or litigants believe that judges are not taking seriously recommendations from this court, the governor, or other public-health officials, and that as a result the health of trial participants, jurors, or the public is at risk.” *State v. Banks*, 2021-Ohio-4330, (First App. Dist.)

The Supreme Court of Minnesota has arrived at the same conclusion: “[w]e hold that *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990), sets forth the appropriate test to assess whether a Confrontation Clause violation under the federal or state constitutions has occurred. Applying that test to the circumstances presented here, we conclude that Tate's right to confrontation was not violated when the district court allowed one of the State's witnesses to testify via Zoom because the remote testimony was necessary under the circumstances then presented by the COVID-19 pandemic, and the testimony was sufficiently reliable.” *State v. Tate*, 985 N.W.2d 291, 294 (Minn. 2023).

The trial court’s secondary concern - that the pandemic had caused labor shortages with airlines that made travel an uncertainty on a daily basis also supports the public policy

requirements and needs under *Maryland v. Craig* and is factually supported by travel events in early January of 2022. One federal district court specifically found that long distance travel during the COVID pandemic was a justifiable public policy reason to allow remote testimony See *United States v. Davis, D.Delaware Cr. A No. 19-101-LPS, 2020 U.S. Dist. LEXIS 196624, 2020 WL 6196741, *4 (Oct. 23, 2020)* the court permitted some witnesses to testify remotely during 2020 based solely on the distance that they would have to travel in order to appear in person.

In addition, the record clearly establishes that the trial court complied with the requirements set forth in *State v. Marcinick, 2008 Ohio 3553 (Ohio Ct. App. 2008)* and repeated in *State v. Howard, 156 N.E.3d 433, 2020 Ohio 3819 (Ohio Ct. App. 2020)*. Specifically, Mr. Mullins testified under oath, was subjected to cross-examination and everyone in the courtroom, including the judge, the jury, counsel for the State and the Defense, and the Defendant could observe his demeanor. The record also does not indicate, nor does the Defendant assert, that any party or member of the jury had any difficulty in observing Mr. Mullins' demeanor while he was testifying, given that he appeared on a large video screen in the courtroom visible to everyone as well as on multiple video screens in front of the jury's seats.

The Logan County Common Pleas courtroom is, in part, displayed on the next page. This is how the jury room was configured during the Eli Carter trial. The jury box has eight monitors mounted directly in front of the jurors. The monitors are literally inches from their faces. Not shown is a large monitor on the far wall that everyone in the courtroom, including jurors, can also see.



(View inside the jury box at the Logan County Common Pleas Court courtroom)

The actual witness stand is set back several feet from the jury box and faces counsel tables - not the jury box. The jury's view of a live witness is therefore from the side.

Mr. Mullin's testimony was visible on every screen in the jury box. There were no obstructions, distance problems or technical difficulties.

Even if this Court were to find that the trial court erred in allowing the witness to testify remotely because the State did not sufficiently justify the witnesses' unavailability, a confrontation clause error does not require an automatic reversal. *State v. Castonguay*, 2021-Ohio-3116, (Ct. App.) "A constitutional error can be held harmless if we determine that it was harmless beyond a

reasonable doubt." *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 78, citing *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Whether a Sixth Amendment error is harmless beyond a reasonable doubt depends on "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Conway* at ¶ 78, citing *Chapman* at 23. The record establishes that the trial court here took precautions to ensure that the remote testimony did not violate the Defendant's right to confrontation. The defense has not shown, nor is there any evidence in the record that the remote nature of the witness' testimony contributed to the Defendant's conviction. Rather the evidence shows that the jury weighed all of the evidence and arrived at a verdict in which they found the evidence supported two of the charges, but not the rest.

Any alleged error was harmless and reversal should not be employed. See *State v. Durst*, 6th Dist. Huron No. H-18-019, 2020-Ohio-607 (while a witness should not have been permitted to testify remotely because the State did not establish that he was unavailable to appear in person, the admission of the remote testimony without a preliminary showing of unavailability was harmless error).

B. Mullins' remote testimony was not reliant on speech to text captioning

The Defendant next argues that Mr. Mullins' live testimony should have been inadmissible as he relied on a speech to text captioning program while listening to questions from the court and counsel. The Defense asserts that a court appointed interpreter should have been employed to assist the witness. However, the record was clear that Mr. Mullins was to rely on his own hearing to answer questions and in fact was ordered to rely on "verbal communication" during the hearing

(Trial Tr. at 204). Mr. Mullins agreed (Id.) There is no evidence that Mr. Mullins disregarded this order.

Counsel for Defense cites portions of the transcript in which the trial court first told the witness to “rely primarily as best you can on what you hear from the Court and the Attorneys.” However, the Defense leaves out the fact that the trial court then made this instruction an order.

THE COURT: I understand that the captioning is an aid for you, but the Court is directing you that you must rely on the verbal communication that occurs during this hearing. Do you understand that?

THE WITNESS: Yes.

(Trial Tr. at 203-204)

This was an unequivocal instruction that the Defense cannot show was disobeyed. There is not a single point of testimony the Defense can point to as evidence that an answer was not responsive to a question.

Mr. Mullins was subjected to a thorough and lengthy cross examination and the Defense hasn't pointed to a single point in his testimony where he appeared to have misunderstood the questions put to him. Rather his testimony shows he understood and answered all of the questions asked of him. This isn't a case where a non-native English speaker took the stand, declined an interpreter, and then tried to pretend they understood English anyway. Usually it becomes apparent, quite quickly, that the witness is having difficulty as their answers are non-responsive to the questions. In this case, Mr. Mullins' answers were responsive to the questions and the Defense has not shown any prejudice.

The decision to appoint an interpreter rests in a trial court's sound discretion. In order to find an abuse of discretion, the court of appeals must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment, *State v. Xu*, 2016-Ohio-8237, (Fifth App. Dist.). A trial court does not err in failing to appoint an interpreter where a defendant's testimony established at trial showed he could respond to all questions directed to him. *State v. Ortiz*, 2016-Ohio-354, 2016 Ohio App. LEXIS 307 (Ohio Ct. App., Stark County 2016).

In addition, if there was any error it was harmless. As noted by the Third Appellate District, a trial court must make reasonable accommodation for the hearing impaired. 28 C.F.R. 35.160(b)(2). While there is no evidence whatsoever in the record that Mullins read the questions rather than listened to them, the Defendant has not shown any prejudice.

The trial court did not abuse its discretion in denying the Defendant's request for an interpreter.

C. The Remote Nature of Mr. Mullins' Testimony was not Prejudicial.

The Defense argues, without any evidence, that the jury relied primarily on Mr. Mullins' live video testimony in reaching its verdict. At the same time, the Defense also argues that their cross examination of Mr. Mullin's was effective in exposing his inconsistencies. However, it is inconsistent to claim prejudice when the Defense admits their thorough cross-examination of the witness was beneficial to their case.

The Defense ignores the fact that the jury had to believe the victim's testimony that her adopted parent had sex with her in order to convict the Defendant of sexual battery. The Defense also ignored the testimony of Eli Carter's friend Kurt Penhorwood who testified that the Defendant

denied any forced sexual relationship with the victim, but implied there being a consensual sexual relationship. (Trial Tr. at 158). The remote nature of Mr. Mullins' testimony was not unduly prejudicial.

The Defense claims that remote video testimony by its very nature is prejudicial. However, the Defense has not presented any evidence in support of this claim. Not many studies have been done in this area. However, recent research calls into question existing perceptions about remote testimony. A recent article in the Southwestern Law Review by Dr. Karen Lisko presents evidence that jurors in some cases may prefer remote testimony. Karen Lisko *Bearing Witness To, Well, Witnesses: an Examination of Remote Testimony Versus In-court Testimony* Volume 51 Southwestern Law Review Number 1, pg. 63 (2021) (See Appendix)

Immediately after the nationwide shutdown due to the COVID-19 pandemic, the Maricopa County, Arizona judiciary formed a task force led by Chief Civil Judge Pamela Gates to study options for conducting jury trials in a safe manner *Id.* at 65. Dr. Karen Lisko and Jeff Frederick assisted in running simulations that tested the two modes of an in-person, socially distanced jury trial with a remote jury trial *Id.*. They relied on jury-eligible participants to serve as mock jurors and tested the same civil fact pattern (a defamation case) with the same presenting attorneys and witnesses in both modes *Id.*

The in-person jurors felt they could generally assess a witness's emotion even though she was masked or behind Plexiglas *Id.* at 66. However, the remote jurors expressed a stronger consensus that they could readily see the witness's emotion and assess her credibility because her image was so prominent on their screens *Id.* Some jurors expressed a preference for remote testimony based on the fact that the distance between the jury box and the witness stand can be problematic in reading the witness' expressions and demeanor *Id.*

In July 2020, the Online Courtroom Project also conducted a remote mock trial which included remote witness testimony. ONLINE COURTROOM PROJECT, ONLINE JURY TRIALS: SUMMARY AND RECOMMENDATIONS (2020), <https://www.onlinecourtroom.org/demonstration-report>, note 5, at 15-16. Social scientist Valerie Hans summarized the results as follows:

The Online Courtroom Project's demonstration mock jury discovered that the jurors had little difficulty viewing witness testimony and exhibits. Interestingly, "some jurors who had sat on previous juries felt it was easier to judge witness credibility because they had a closer view of the witness rather than looking across a courtroom." Likewise, some mock jurors who had served in person also reported that they could see the documents more clearly in the virtual demonstration trial. Valerie P. Hans, *Virtual Juries* 18 (Cornell L. Sch., Research Paper No. 21-16, 2021) (citation omitted), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3860165.

Obviously further research needs to be done in this area, but the points brought up by these articles are pertinent. At the trial of Mr. Carter, Michael Mullins person was presented on eight screens that were situated just inches away from each juror. There was also a giant screen on the wall that also projected his testimony to the courtroom. His face and voice were closer to the jurors than if he had been in the witness box in the courtroom. The remote nature of the testimony did not cause any prejudice to the defense.

III. Conclusion

The State is not seeking a blanket ruling permitting remote testimony in all cases. There are standards and rules that should be carefully followed by the trial court before admitting such testimony and these standards are already in place. Recently enacted Criminal Rule 40 recognizes the modern advances in technology and adopts this standard and implements additional safeguards.

Generally, a trial court has broad discretion with respect to the admission of evidence. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 37, 848 N.E.2d 810. If the proponent of the remote testimony can show that (1) it is justified, on a case-specific finding, based on important state interests, public policies, or necessities of the case and (2) satisfies the other three elements of confrontation — oath, cross-examination, and observation of the witness's demeanor, then the process should be permitted. The standards were followed in this case as found by both the trial court and the court of appeals. The State respectfully requests that the Defendant's proposition of law be overruled.

Respectfully submitted,

/s/ Eric C. Stewart

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PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Brief was served upon attorneys Samuel H. Shamansky and Donald L. Regensburger at shamanskyco@gmail.com by email this 1st day of August, 2023.

/s/ Eric C. Stewart

Eric C. Stewart

Logan County Prosecutor

APPENDIX

1. February 8, 2022 Judgment Entry Granting State's Motion for Michael Mullins to Appear Via Live Video
2. Karen Lisko *Bearing Witness To, Well, Witnesses: an Examination of Remote Testimony Versus In-court Testimony* Volume 51 Southwestern Law Review Number 1, pg. 63 (2021)

**IN THE COMMON PLEAS COURT
OF LOGAN COUNTY, OHIO
GENERAL DIVISION**

LOGAN COUNTY
COMMON PLEAS COURT
FILED
2022 FEB -8 PM 2: 18
BARB McDONALD
CLERK

STATE OF OHIO, :
 :
Plaintiff, :

-vs- :

ELI Y CARTER, :
DOB: 06/05/1979 :
 :
Defendant. :

CASE NO: CR 21 03 0051

**JUDGMENT ENTRY GRANTING
STATE'S MOTION FOR MICHAEL
MULLSINS TO APPEAR VIA LIVE
VIDEO**

On February 7, 2022, the State of Ohio (the State) moved the Court to permit witness Michael Mullins (Mullins) to testify via live video. In its motion, the State represented Mullins lives in Minnesota and that "COVID spread and uncertain weather conditions" justified permitting remote testimony.

Defendant Eli Y. Carter (Defendant) opposed the motion. During an off-the-record status conference with the Court, Defendant's counsel questioned whether the State's reasons were sufficient. Defendant's counsel did not identify any specific obstacle to Defendant confronting Mullins. Defendant's counsel generally noted that COVID infection rates are somewhat lower than they have been at other times in the past and that currently there is no adverse weather in the forecast.

To permit remote video testimony, the procedures must (1) be justified, on a case-specific finding, based on important state interests, public policies, or necessities of the case and (2) must satisfy the other three elements of confrontation – oath, cross-examination, and observation of the witness's demeanor. *State v. Oliver*, 8th Dist. No. 106305, 2018-Ohio-3667 ¶ *P20, 112 N.E.3d 573, 580.

In this case, Mullins lives in Minnesota. Due to the emergence of the COVID pandemic, live video testimony has become much more common than it was before the pandemic. Further, the pandemic and labor shortages at airlines resulting from the pandemic and other causes and weather make travel by air uncertain on a daily base. The Court notes the Cincinnati Bengals played in Kansas City in the AFC Championship Game on Sunday, January 30, 2022. A few days before the game, the airport in Covington, Kentucky suddenly canceled all flights to Kansas City. Fans and media were forced to rent cars at the airport and drive to Cincinnati. Air travel post-pandemic is not as reliable as it was pre-pandemic. In addition, it is currently winter in Ohio. Weather is unpredictable and could delay or prohibit from reaching Logan County to testify in person.

The State has identified Mullins as an important witness in its case. According to the State's bill of particulars, "[o]n December 9, 2020, Detective Salyer spoke with Michael Mullins, who was the CEO of Adriel [School] at the time of the initial report. Michael stated that Becky [Fullmer] and her husband had come to him with the allegations that there was a sexual relationship between Eli and the Victim. Michael stated that he discussed it with some of his staff and reported it to children's services.

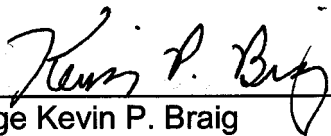
"Michael had Eli come in and they talked about the report. Eli admitted to an incident but did not go into detail. Michael said there was no question they were talking about a sexual matter. Eli told Michael that the relationship was consensual, and that the victim had been over the age of 18. Michael stated that he terminated Eli, but then stated that he could not remember if he was fired or allowed to resign."

Under the fact specific circumstances of this case, the Court finds Mullins unavailable to testify in person. Moreover, testimony from Mullins about what Defendant

told him is relevant and admissible as admissions of the Defendant. Finally, the Court's video conferencing system, which was funded by a grant from the Ohio Supreme Court is available and functional and capable of providing Defendant and his counsel the opportunity to confront Mullins and subject him to cross-examination. The Court will place Mullins under oath and the jury will be able to observe his demeanor.

For all these reasons, the Court find the State's motion well-taken and **GRANTS** the motion.

IT IS HEREBY SO ORDERED.



Judge Kevin P. Braig

cc: Prosecutor
SAMUEL H SHAMANSKY

BEARING WITNESS TO, WELL, WITNESSES: AN EXAMINATION OF REMOTE TESTIMONY VERSUS IN-COURT TESTIMONY

Karen Lisko*

I. INTRODUCTION: ACCELERATED REMOTENESS

The COVID-19 pandemic required the world to quickly adapt countless in-person tasks to remote settings. In the courts, it also accelerated experimental approaches to remote courtroom practices across the United States, including the appearance of trial witnesses testifying live via remote video.¹ While some courts have sporadically incorporated this practice for years, the pandemic prompted many courts to examine this mode of testifying at a more expansive level when choosing among the four options of (1) suspending in-person trials altogether, (2) participating in socially distanced trials, (3) conducting remote trials, or (4) presiding over “hybrid” trials (combining some in-person elements with remote components).²

So, how has this quickening of approaches impacted witness testimony, and how have juries and trial attorneys reacted to these modes of testifying? This Essay addresses results from several recent (and, in the case of my

* Dr. Lisko is a Senior Litigation Consultant with Perkins Coie LLP. She is a founding member of the Online Courtroom Project and a Past President of the American Society of Trial Consultants.

1. *Trial by Zoom: Virtual Trials in the Time of COVID-19*, EVERSLEDs SUTHERLAND: LEGAL ALERTS (Feb. 11, 2021), <https://us.eversheds-sutherland.com/NewsCommentary/Legal-Alerts/239466/Trialby-Zoom-virtual-trials-in-the-time-of-COVID-19>.

2. Norma C. Izzo, *How Litigators are Confronting COVID in the Courtroom*, ABA (Aug. 31, 2020), <https://www.americanbar.org/groups/litigation/committees/trial-practice/articles/2020/covid-19-video-testimony-courtrooms/>; Janna Adelstein, *Courts Continue to Adapt to COVID-19*, BRENNAN CTR. (Sept. 10, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/courts-continue-adapt-covid-19>.

doctoral dissertation,³ not so recent but, in parts, still relevant) sources. Throughout the pandemic, my colleagues and I have conducted simulations on behalf of the Online Courtroom Project and as advisors to the Maricopa County (Arizona) Jury Trial Innovation Task Force, including Dr. Jeff Frederick, who has also authored an article for this issue.⁴ In addition, I have conducted post-trial interviews with actual jurors and attorneys involved in remote trials who offered their perspectives on remote witness testimony.⁵ I have also analyzed national survey data on behalf of the Judicial Division of the American Bar Association regarding judges' and attorneys' experiences with and attitudes toward remote proceedings.⁶

As part of this research on remote proceedings, we have collected judges' and attorneys' forecasts about the future of remote witness testimony. The great majority predict many witnesses will testify remotely to some degree long after the pandemic is over, largely to enable witnesses to appear remotely by videoconference when health or distance would ordinarily preclude their involvement if they were only allowed to testify in the courtroom.⁷ If this prognostication is true, we must better appreciate the jury experience with witnesses in the remote setting.

II. REACTIONS TO IN-PERSON VERSUS REMOTE WITNESS TESTIMONY

Few lack opinions about the advisability of live witness examination relegated to a square viewing screen. The idea that a witness's credibility could be evaluated as effectively by video in comparison to the courtroom setting pushes against logic for many trial attorneys and judges. How does one read nonverbal subtleties or first impressions as the witness enters the courtroom to take the stand? Some argue that such assessments fall into the category of "extralegal" and are potentially inappropriate measures.⁸ Still, many jurisdictions' pattern jury instructions *encourage* the fact finder to

3. Karen Lisko, *Juror Perceptions of Witness Credibility as a Function of Linguistic and Nonverbal Power* (May 17, 1992) (Ph.D. dissertation, University of Kansas) (KU ScholarWorks).

4. Jeffrey T. Frederick, *Online Jury Selection: New Tools for Jury Trials*, 51 SW. L. REV. 40 (2021).

5. ONLINE COURTROOM PROJECT, *ONLINE JURY TRIALS: SUMMARY AND RECOMMENDATIONS* (2020), <https://www.onlinecourtroom.org/demonstration-report>.

6. *Judging During the Pandemic: What Judges and Lawyers (and Jurors) Think About Remote Proceedings and the Future of Court Operations*, ABA (May 20, 2021), https://www.americanbar.org/groups/judicial/events_cle/program-library/judging-during-the-pandemic/.

7. *Id.*

8. Victor Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C. L. REV. 481, 484-85 (1987).

consider the demeanor of the witness when assessing credibility.⁹ Logic can be correct, or reality can be counterintuitive. Therein lies the need to test logic rather than rely alone on opinions about the advisability of remote witness testimony.

A. Jurors' Reactions to In-Person v. Remote Witness Testimony

Immediately after the nationwide shutdown due to the COVID-19 pandemic, the Maricopa County, Arizona judiciary formed a task force led by Chief Civil Judge Pamela Gates to study options for conducting jury trials in a safe manner.¹⁰ Jeff Frederick and I assisted in running simulations that tested the two modes of an in-person, socially distanced jury trial with a remote jury trial. We relied on jury-eligible participants to serve as mock jurors and tested the same civil fact pattern (a defamation case) with the same presenting attorneys and witnesses in both modes.

One of the witnesses needed to convey tearful emotion while testifying. She appeared in the two modes to two separate mock juries:



Fig. 1. Jury Views of Witness Testimony (2020).

9. Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know About Cognitive Psychology and Witness Credibility*, 64 AM. UNIV. L. REV. 1331, 1350 (2015).

10. Pamela Gates et al., *Virtual Juries: We Can, but Should We? And if So, How?*, LITIG., Summer 2021, at 12, 1; *See infra* Figure 1.

Importantly, the juries saw the witness in only one mode, meaning their reactions were not based on a comparison of the two. The in-person jurors felt they could generally assess her emotion even though she was masked or behind Plexiglas.¹¹ However, the remote jurors expressed a stronger consensus that they could readily see her emotion and assess her credibility because her image was so prominent on their screens.¹² By happenstance, some of those jurors had been actual jurors in trials before the pandemic; those jurors expressed a preference for remote testimony, citing the in-court distance between the jury box and the witness stand as sometimes problematic in reading the witness's expressions and demeanor.¹³ As we noted in an article we published in *Litigation* earlier this year:

In the virtual trial setting, witness examination was a paramount concern. How well would jurors be able to see and hear the witness? How well could they see the exhibits? How attentive and involved would jurors be in the process? Would the witness's emotion and credibility fall flat on screen? On almost all measures, jurors rated the witness experience at the top of the scale. Our online trial jurors said it was easy to attend to the proceedings and they felt involved in them. Jurors felt that it was easy to see the exhibits. Finally, almost all, and in most cases all, jurors felt that they could see and hear the witnesses' testimony and attorneys' presentations very well.¹⁴

In July 2020, the Online Courtroom Project also conducted a remote mock trial which included remote witness testimony.¹⁵ Social scientist Valerie Hans summarized the results as follows:

The Online Courtroom Project's demonstration mock jury discovered that the jurors had little difficulty viewing witness testimony and exhibits. Interestingly, "some jurors who had sat on previous juries felt it was easier to judge witness credibility because they had a closer view of the witness rather than looking across a courtroom." Likewise, some mock jurors who had served in person also reported that they could see the documents more clearly in the virtual demonstration trial.¹⁶

11. Gates et al., *supra* note 10, at 15.

12. *Id.* at 4-5.

13. ONLINE COURTROOM PROJECT, *supra* note 5, at 8.

14. Gates et al., *supra* note 10, at 16.

15. ONLINE COURTROOM PROJECT, *supra* note 5, at 15-16.

16. Valerie P. Hans, *Virtual Juries* 18 (Cornell L. Sch., Research Paper No. 21-16, 2021) (citation omitted), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3860165.

B. Attorneys' Reactions to In-Person Versus Remote Witness Testimony

In general, attorneys lag jurors in their enthusiasm for witnesses testifying remotely.¹⁷ This sentiment is not surprising. Attorneys have been trained to draw upon the courtroom setting to make an important point during direct or cross-examination. Without question, some of that courtroom drama is mitigated in the remote setting. If technical “blips” occur using a videoconferencing platform, momentum toward a key point could be lost.

As the survey response below reveals, some attorneys have voiced concern that a witness who testifies remotely can “cheat offline,”¹⁸ either by looking up information by computer or by having a “coaching conversation” with counsel (perhaps by text or instant message) while on the virtual stand.

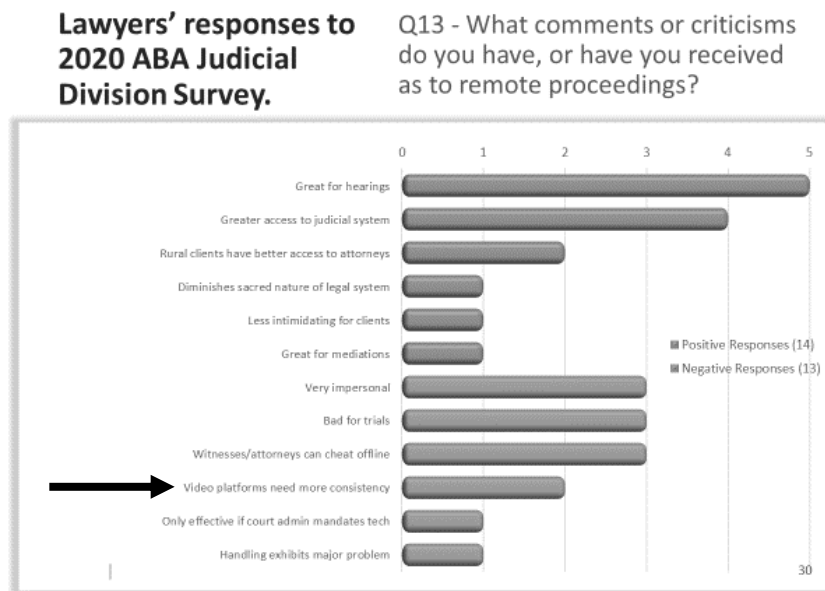


Fig. 2. Lawyer's Responses to Remote Proceedings (2020).

Moreover, with good reason, some discount the efficacy of remote witness testimony when jurors cannot pass around or see a physical exhibit as sharply on their video screens.¹⁹ While documents and many demonstratives can be screen shared (often with greater legibility than in a

17. ONLINE COURTROOM PROJECT, *supra* note 5, at 63-64.

18. See *infra* Figure 2; *Judging During the Pandemic: What Judges and Lawyers (and Jurors) Think About Remote Proceedings and the Future of Court Operations*, *supra* note 6.

19. ONLINE COURTROOM PROJECT, *supra* note 5, at 64.

physical courtroom), as Judge Gates notes, “When the color of the sweater in evidence matters, remote juries suffer.”²⁰ Without a doubt, courts and attorneys should discern among witnesses and circumstances to determine the advisability of having a given witness testify remotely.

III. IMPLICATIONS

Importantly, the jury research summarized here focused on jurors’ *perceptions* of their abilities to assess a witness in different settings, not on their *accuracy* in judging credibility.²¹ Arguably, this differential between perceptions and accuracy occurs during in-person court proceedings as well. While significant social science research finds that our credibility assessments are deeply affected by our biases,²² this is exactly what defines the human experience of judgment in every setting.

In a recent article, Susan Bandes and Neal Feigenson discussed legitimate concerns about differences between remote (video) testimony and in-court (live appearance) testimony.

Only one study has manipulated video vs. live appearance as an independent variable and measured empathy as a dependent variable; it found that mock jurors did not feel less empathy for a child witness who testified via CCTV vs. one testifying live. On the other hand, several studies measuring responses that could be construed as loose proxies for empathy (e.g., likeability) have found that persons are regarded more favorably when encountered live vs. via a screen.²³

So, how does one reconcile our findings that jurors are enthused about remote trial proceedings and remote witness testimony with the findings cited by Bandes and Feigenson that remote trials have possible roadblocks? Is this a case where more than one thing can be true? Quite possibly. But reason for discernment exists. For example, they note:

”Understanding the [nonverbal] language of eyes enables perceivers to attribute mental states to others,” and it is easier for viewers to do this when the other person gazes directly at them. For instance, viewers have more difficulty rapidly identifying others’ emotional expressions when those others avert their gaze. In face-to-face interactions, “the level of

20. Telephone Conversation with Judge Gates, Superior Ct. of Ariz. in Maricopa Cnty. (May 2020).

21. ONLINE COURTROOM PROJECT, *supra* note 5; Gates et al., *supra* note 10.

22. Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFF. L. REV. 1275, 1287, 1290-91 (2020).

23. *Id.* at 1293 n.48 (citation omitted). For further understanding of how remote proceedings affect empathy, see Susan A. Bandes & Neal Feigenson, *Empathy and Remote Legal Proceedings*, 51 SW. L. REV. 20 (2021).

emotionality in the encounter [can] be regulated by the amount of mutual gaze the participants permit[] each other,” but if there is little mutual gaze to begin with or, more to the point, if no one can be sure when mutual gaze is occurring, people will struggle to deploy their emotional intelligence to assess the situation.²⁴

This research aptly describes the problem when jurors encounter a witness who makes disconnected eye contact in a remote setting. Admittedly, this excerpt is one among many findings.²⁵ But the premise of concern here is indicative of one that is outdated, making the “more than one thing can be true” proposition real. Though difficulties may arise with a virtual jury, remote trials constantly adapt to remove these roadblocks and to better situate the jurors.

IV. CONCLUSION

Remote trials may remain a viable option for conducting proceedings because some jurors find that viewing a witness online strengthens their ability to view the witness’s emotions and mannerisms. By having this close-up view, some jurors feel like they could better assess a witness’s credibility. While there still may be difficulties with conducting a remote jury trial because the jurors are not physically present with the parties, certain issues have been resolved during the pandemic. For example, a well-set room for witness testimony delivered remotely fixes the issue of poor eye contact with the finder of fact. Moreover, a simple HUE camera²⁶ is now standard for connecting a witness to the fact finder. This camera is placed in front of a monitor and enables a witness to look directly at the screen and the questioning attorney while also making strong eye contact with the jury.

24. Bandes & Feigenson, *supra* note 22, at 1295.

25. *Id.*

26. See *infra* Figure 3; *HUE HD Camera*, HUE, <https://huehd.com/products/hue-hd-camera/?ph=520e08a63daa08ffebfa06f6> (last visited Sept. 27, 2021).



Fig. 3. HUE Camera from Amazon.

As jury trials continue remotely due to COVID-19 restrictions, the point is this: though there are obstacles to remote witness testimony, there are remedies to effectuate remote proceedings.