STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0359

State of Minnesota,
Respondent,

vs.

Kim Marie Tate,
Appellant.

Filed January 3, 2022
Affirmed
Jesson, Judge

Becker County District Court
File No. 03-CR-19-289

Keith Ellison, Attorney General, Lydia Villalva Lijó, Assistant Attorney General, St. Paul, Minnesota; and

Brian W. McDonald, Becker County Attorney, Detroit Lakes, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Jesson, Judge; and Kirk, Judge.*

SYLLABUS

1. The analysis in *Maryland v. Craig*, 497 U.S. 836 (1990), applies to cases implicating a defendant's Confrontation Clause rights when a witness testifies by two-way, live, remote video technology.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

2. A generalized concern regarding the COVID-19 pandemic does not sufficiently further an important public policy so as to permit dispensing with a criminal defendant's right to confront a witness face-to-face in court.

3. Appellant's Confrontation Clause rights were not violated when the district court permitted a police officer to testify via two-way, live, remote video technology based upon a specific, particularized health concern.

OPINION

JESSON, Judge

The Confrontation Clause of the Sixth Amendment—like its counterpart in the Minnesota Constitution—provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; Minn. Const. art. I, § 6. And that confrontation predominantly requires a face-to-face meeting. *See Coy v. Iowa*, 487 U.S. 1012, 1016 (1988). This case places squarely before us whether the Confrontation Clause, a linchpin of our constitution, prohibits a witness from testifying against a defendant at trial, outside the defendant's physical presence, by two-way, live, remote video technology.

The setting is the COVID-19 pandemic. The witness was quarantined due to a known exposure to COVID-19.[1] The district court permitted the witness's testimony via the Zoom platform.[2] To determine whether use of this two-way, live, remote video

[1] "Coronavirus disease (COVID-19) is an infectious disease caused by the SARS-CoV-2 virus." World Health Org., *Coronavirus disease (COVID-19)*, https://www.who.int/health-topics/coronavirus#tab=tab_1 (last visited Nov. 22, 2021).
[2] Zoom is an internet platform for live, remote, two-way video technology.

technology violated appellant Kim Marie Tate's Sixth Amendment rights, we must determine the appropriate test for assessing whether an exception exists to the Sixth Amendment's strong preference for in-person confrontation. The test, we determine, is established in *Maryland v. Craig*, 497 U.S. 836. It states that a defendant's Sixth Amendment confrontation right "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." *Craig*, 497 U.S. at 850. Applying that test to the facts before us, we conclude that Tate's Confrontation Clause rights were not violated when the district court permitted a police officer to testify via live, remote, two-way video technology based upon a specific, particularized health concern. We therefore affirm.

FACTS

In March 2018, Tate sold methamphetamine to a confidential informant as part of a controlled buy conducted by agents with the West Central Drug and Violent Crimes Task Force (the task force).

Three task-force agents, including a sheriff's deputy, a police officer, and a special agent,[3] met with the confidential informant before the controlled buy. Prior to the controlled buy, the task-force agents searched the confidential informant and his car, and provided him with an audio transmitting and recording device and pre-documented money to purchase methamphetamine. The task-force agents conducted surveillance during the

[3] The special agent was a member of the West Central Drug and Violent Crimes Task Force.

controlled buy and listened to the audio device's live feed while it was recording. Agents heard three voices on the audio feed and identified the individuals as the confidential informant, Tate, and an unknown individual at Tate's home. The entire controlled buy was captured on the audio recording.

The confidential informant remained at Tate's home for approximately 45 minutes. After completing the sale, the informant returned to meet with the task force agents for a post-sale meeting. All three task-force agents were present for this meeting. The confidential informant gave the task-force agents the drugs he purchased from Tate. Analysts with the Minnesota Bureau of Criminal Apprehension later identified the drugs as 1.265 grams of methamphetamine. Respondent State of Minnesota subsequently charged Tate with one count of third-degree controlled-substance crime, sale, in violation of Minnesota Statutes section 152.023, subdivision 1(1) (2016).

The district court scheduled the case for trial on November 16-17, 2020. Four days before trial, the special agent was exposed to a person who tested positive for COVID-19. Public health officials instructed the special agent to quarantine as a precautionary measure. The state requested permission for the special agent to testify remotely at trial via Zoom. The state asserted that his testimony was "fundamental" to its case. Tate objected to the state's request on the ground that it violated her rights under the Confrontation Clause. Tate requested a trial continuance "to allow for this witness to be out of quarantine and testify in person."

The district court held a hearing to consider both the state's request to use live, remote, two-way video technology and Tate's request for a continuance. The district court

stated, "Obviously the Court's focus is on the safety of anyone who will be in the courtroom." It further noted:

> The Court does believe that confrontation clause [sic] does reflect a preference for in-person testimony but it's not an absolute right. . . . [A]nd the Court does believe that the pandemic, even of itself, would justify the type of exceptional circumstances that have to give rise to the practical realities of the case, and not exposing any attorneys or court staff or jurors to unnecessary risk of the disease spread.
>
> . . . .
>
> But I do want the largest possible screen available so jurors can view and actually see the witness while he is testifying, and if it takes longer to fully complete any cross-examination because of Zoom, we'll take as much time as necessary to make sure that the defendant's rights for cross-examination are vindicated.

The district court then granted the state's request to allow the witness to testify via live, remote, two-way video technology and denied Tate's continuance request.

The matter proceeded to trial. The state called two of the task-force agents to testify in person. It also called the special agent to testify remotely over Zoom. Prior to the special agent's testimony, the district court instructed the jury as follows:

> Our first witness today will be appearing on the video screen remotely. That is a result of the pandemic. But you are to judge the credibility just as a live witness with the factors that I had given you, and any other factors you believe bear on the credibility and weight; that that is to be considered live testimony, to be judged as you have been judging the credibility of any other witness that appears live.

The special agent testified that he was a member of the task force and met with the confidential informant and the other two task-force agents before the controlled buy. The

special agent stated that he listened to the audio transmitting live feed while the informant travelled to Tate's house, and also maintained visual surveillance. He also noted that he performed a pat-down search of the confidential informant both before and after the controlled buy.

During final jury instructions, the district court gave the following instruction to the jury regarding COVID-19 procedures generally:

> Throughout the trial, you have seen a number of safety precautions implemented in an effort to minimize the potential spread of Covid 19. Many of these steps may have made this process less comfortable or less convenient. However, you should not draw any inference from these procedures against the state or the defendant. The judicial branch enacted these precautions, and it is my responsibility to implement them in this courtroom for everyone's safety.

The jury found Tate guilty of the charged offense and the district court convicted her and imposed a sentence. This appeal follows.

ISSUES

I. Does the Supreme Court's decision in *Maryland v. Craig* apply to cases implicating a defendant's Confrontation Clause rights, when a witness testifies by live, remote, two-way video technology?

II. Did the district court violate Tate's constitutional right to confront the witnesses against her by permitting a state's witness to testify via live, remote, two-way video technology?

ANALYSIS

The Sixth Amendment right to confront witnesses long predates the constitution that now enshrines it. *Crawford v. Washington*, 541 U.S. 36, 61 (2004). This right presumes —and expresses a strong preference for—face-to-face confrontation at trial. *Craig*, 497 U.S. at 845-46.

But the right to personally confront witnesses is not absolute. Before us is a question of the boundaries of this bedrock right in the context of a global pandemic. To resolve this particular confrontation dilemma—whether the district court improperly permitted an officer to testify via live, remote, two-way video technology—we first must determine the appropriate Confrontation Clause test to apply in Minnesota in these circumstances. We then consider whether the district court violated Tate's confrontation right by permitting one of the state's witnesses to testify via live, remote, two-way video technology when the witness was in quarantine for exposure to the COVID-19 virus. We review both issues de novo. *Olson v. One 1999 Lexus*, 924 N.W.2d 594, 601-04 (Minn. 2019) (considering de novo which of two constitutional tests to apply); *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006) (reviewing de novo whether the admission of evidence violates a defendant's Confrontation Clause rights).

I. The analysis set forth in *Maryland v. Craig* governs the Confrontation Clause question presented here.

The only time the United States Supreme Court addressed the Confrontation Clause implications of testimony by live video came in *Maryland v. Craig*. And the only time a Minnesota court grappled with the same dilemma, we relied upon the *Craig* decision to

guide us. *State v. Sewell*, 595 N.W.2d 207 (Minn. App. 1999) (upholding the use of interactive television after application of the *Craig* test).[4] Yet Tate asserts that the subsequent landmark case of *Crawford v. Washington* undermines *Craig* (and correspondingly, *Sewell*) such that those cases should not provide the framework for addressing the confrontation issue before us.

To address this issue, we begin with *Craig*, where the Supreme Court considered whether the Confrontation Clause prohibited a child witness from testifying outside the presence of the criminal defendant over one-way, closed-circuit television in a separate room. 497 U.S. at 841. The Court determined that the defendant's confrontation rights could 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 (emphasis added). *Craig* reasoned that the state had an important interest in protecting child sexual-abuse victims. And it determined that the witness's testimony was reliable because the defense could

[4] In *Sewell*, a witness was under a medical restriction not to travel at the time of trial. *Id.* at 211-12. On appeal, the defendant challenged his felony-murder conviction on the ground that the district court erred by permitting the witness to testify remotely. *Id.* at 211. We upheld the use of interactive television and applied the *Craig* test to our analysis. *Id.* at 212. While we did not address the necessity prong at length in *Sewell*, we analyzed the reliability prong in greater detail. *Id.* at 213. We agreed that the witness was unavailable to testify in person due to his health concerns and that the testimony was reliable because the defense "had an unfettered opportunity to cross-examine" the witness and the jury "saw and heard the cross-examination and [the witness's] responses." *Id.* At least one other nonprecedential opinion of this court has likewise relied on *Craig* and reached a similar result. *See, e.g.*, *State v. Hudson*, No. A13-1338, 2015 WL 4393325, at *2-4 (Minn. App. July 20, 2015) (containing extensive discussion of *Craig* and concluding that *Craig* remains good law despite *Crawford*'s holding), *rev. denied* (Minn. Oct. 20, 2015).

cross-examine the witness, the witness testified under oath, and the parties were able to assess the witness's demeanor over the television. *Id.* at 851-53. Important for purposes of our analysis, when discussing reliability, the Supreme Court turned to the reliability framework set out in its prior decision in *Ohio v. Roberts*. *Id.* at 851-52 (citing *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), *abrogated on other grounds by Crawford*, 541 U.S. at 36). In *Roberts*, the Court decided that admission of a hearsay statement did not violate the Confrontation Clause if the declarant was unavailable to testify and the statement bore "adequate indicia of reliability." 448 U.S. at 66.[5]

In establishing the two-part test in *Craig*—necessary to further an important public policy and reliability of the testimony—the Supreme Court observed that it "ha[s] never held . . . that the Confrontation Clause guarantees criminal defendants the absolute right to a face-to-face meeting with [all] witnesses against them at trial."[6] *Craig*, 497 U.S. at 844. But this lack of absoluteness should not equate to easily dispensing with face-to-face confrontation. *Id.* at 850.

While *Craig* considered the use of one-way closed-circuit television, its reasoning applies with equal force to live, remote, two-way video technology, such as the one at issue in this case. *See, e.g.*, *Sewell*, 595 N.W.2d at 211 (applying *Craig* test to two-way video testimony). The *Craig* test ensures that even where the testimony is remote, other elements

[5] According to *Roberts*, reliability could either be inferred from the fact that the statement fell "within a firmly rooted hearsay exception," or be established by "a showing of particularized guarantees of trustworthiness." *Id.*

[6] By way of example, the Court stated, "a literal reading of the Confrontation Clause would abrogate virtually every hearsay exception." *Id.* at 848.

of reliability—including the opposing counsel's ability to fully cross-examine[7] the witness and the jury's ability to see and hear the witness—sufficiently safeguard the defendant's constitutional rights. *See Craig*, 497 U.S. at 851 (noting that these other elements "ensure[] that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony").

We are not persuaded otherwise by Tate's assertion that *Craig* is undermined—and should not extend beyond its facts—on the ground that it conflicts with the Supreme Court's subsequent decision in *Crawford*, 541 U.S. at 36. In *Crawford*, the defendant's wife made an out-of-court, unsworn statement regarding a stabbing to a police officer, outside the presence of defendant's counsel. 541 U.S. at 39-40. Defendant's wife refused to testify at trial pursuant to the state's marital-privilege rule. *Id.* at 40. The state sought to introduce a recording of the wife's statement as evidence at trial and the district court permitted the state to do so, over the defendant's objection. *Id.* The Supreme Court reversed the defendant's conviction, determining that wife's statement was testimonial in nature and that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68. In so holding, *Crawford* overruled *Roberts*.

But *Crawford* did not overrule *Craig*. The majority opinion in *Crawford* did not even cite to the *Craig* decision. *See generally id.* Furthermore, *Crawford* and *Craig*

[7] The Confrontation Clause ensures the reliability of the evidence by subjecting it to "rigorous testing." *Craig*, 497 U.S. at 845. The Confrontation Clause commands "not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61.

answered different questions: *Crawford* addressed the constitutionality of admitting an out-of-court statement, *see id.* at 42, while *Craig* considered whether a defendant's Confrontation Clause right has been satisfied when a court allows testimony via remote technology in place of face-to-face testimony for an unavailable witness, *see Craig*, 497 U.S. at 840.

Our decision to apply the *Craig* analysis is bolstered by caselaw, which has generally extended the holding in *Craig* to Confrontation Clause cases involving live, remote, two-way video technology. *See, e.g.*, *United States v. Carter*, 907 F.3d 1199, 1206 (9th Cir. 2018) (applying *Craig*'s two-part test in context of two-way video); *United States v. Yates*, 438 F.3d 1307, 1313 (11th Cir. 2006) (same); *United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005) (same); *see also State v. Rogerson*, 855 N.W.2d 495, 502-503, 506 (Iowa 2014) (applying *Craig* standard, requiring showing of necessity and reliability, and citing other cases adopting *Craig* test).[8]

[8] While the vast majority of courts agree that *Crawford* did not overrule *Craig*, Tate urges us to follow the approach of the Supreme Court of Michigan in *People v. Jemison*, 952 N.W.2d 394 (Mich. 2020). There, the district court permitted an expert witness to testify via live, remote, two-way video technology, over the defendant's objection. *Jemison*, 952 N.W.2d at 396. A jury found the defendant guilty of first-degree criminal sexual conduct. *Id.* The state appellate court sustained the use of this technology, applying the *Craig* test and reasoning that it was cost-effective to permit the expert witness to testify remotely. *Id.* at 400. The Supreme Court of Michigan reversed and remanded, confining the *Craig* test to its specific facts—one-way video with a child sexual-abuse victim—and determining that *Crawford* was controlling. *Id.* at 396, 400-01. Specifically, the court held that *Crawford* "requires face-to-face cross-examination for testimonial evidence unless a witness is unavailable and the defendant had a prior opportunity for cross-examination." *Id.* at 396. But Tate does not clearly articulate *which* test this court should apply, if not *Craig*, when (as here) defendant *has* an opportunity for cross-examination, albeit remotely. Thus, for the reasons explained above—although we agree with *Jemison*'s general

We recognize that not all courts have adopted the *Craig* test. But the primary outlier, the Second Circuit, adopted a test which we view as too easily dispensing with personal confrontation. In *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999), that court endorsed an "exceptional circumstances" test to analyze the issue of testimony presented via two-way video. *Gigante* permitted video testimony for a witness in the Federal Witness Protection Program who was suffering from terminal cancer. *Gigante*, 166 F.3d at 79-80. The Second Circuit held that "[u]pon a finding of exceptional circumstances, . . . a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice." *Id.* at 81. *Gigante* noted that Federal Rule of Criminal Procedure 15 permitted deposition of pretrial witnesses in exceptional circumstances, and that such deposition testimony may be presented at trial when the witness is unavailable. *Id.* at 82.[9] Given the important role personal confrontation plays in our adversarial system, and the weight of federal authority supporting the *Craig* test, we decline to apply the minority approach set out in *Gigante*.

---

statement that "expense is not a justification for a constitutional shortcut"—we decline to follow the approach set out in *Jemison*. *Id.* at 400.

[9] Other courts have expressly rejected *Gigante*'s reasoning. In *Carter*, for example, the Ninth Circuit reviewed a trial court's decision to permit a witness to testify via remote technology. 907 F.3d at 1203. After reviewing the *Craig* and *Gigante* tests, the court stated that it "agree[d] with the Eighth and Eleventh Circuits that *Gigante* is an outlier and that the proper test is *Craig*." *Id.* at 1208 n.4; *see also United States v. Babichenko*, No. 1:18-CR-00258-BLW, 2021 WL 1759851, at *2 (D. Idaho May 4, 2021) (declining to follow *Gigante* and holding that "the interests of justice [would be] better served with live videoconference testimony given under oath, where the Government can engage in live cross-examination and the jury can observe the demeanor of the witnesses," as set forth in *Craig*).

In the end, this court is bound to follow precedential caselaw, leaving to the Supreme Court the "prerogative alone to overrule one of its precedents." *United States v. Hatter*, 532 U.S. 557, 567 (2001) (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)); *see also Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of [the Supreme Court] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn . . . earlier authority sub silentio."). Because the Supreme Court has not overruled *Craig*, and because the premise for its holding was not undermined by *Crawford*, we conclude it stands as binding authority and applies in cases involving live, remote, two-way video technology in criminal trials.

II. The necessity and reliability prongs of the *Craig* test are satisfied here.

Having determined that the *Craig* decision operates as precedential authority in Minnesota, we turn to its application in this case. We are asked to first consider whether denying in-person confrontation was necessary to further an important public policy, and to then examine the reliability of the testimony presented. *Craig*, 497 U.S. at 850. Courts define an "important public policy" narrowly for the purpose of finding an exception to the Confrontation Clause. *See id.* at 848, 850 (stating that only narrow circumstances may warrant dispensing with confrontation right). By way of example, issues related to the convenience of the parties or added expense are insufficient to satisfy the necessity prong of the *Craig* standard. *See, e.g.*, *Carter*, 907 F.3d at 1208 (noting that "a criminal

defendant's constitutional rights cannot be neglected merely to avoid added expense or inconvenience"); *Yates*, 438 F.3d at 1316 (requiring district court to make "case-specific findings of fact that would support a conclusion that [a] case is different from any other criminal prosecution in which the Government would find it convenient to present testimony by two-way video conference"). We consider both the necessity and reliability prongs in turn.

Necessity

Under the first prong, we consider de novo whether the use of live, remote, two-way video technology for the special agent's testimony was necessary to further an important public policy. *Caulfield*, 722 N.W.2d at 308. What qualifies as "necessary" in a confrontation analysis is a high bar. *Carter*, 907 F.3d at 1206 (stating that the standard is a stringent one). Thus, when alternatives are available to remote video procedures, "[t]he right of confrontation may not be dispensed with so lightly." *Id.* at 1209 (quoting *Barber v. Page*, 390 U.S. 719, 725 (1968)).

We begin our necessity analysis with a summary of the pandemic-related orders of the Governor and the Chief Justice of Minnesota, which provide the backdrop to the district court's ruling. On March 13, 2020, the Governor issued an emergency executive order declaring a peacetime emergency due to the COVID-19 pandemic. Emerg. Exec. Order No. 20-01, *Declaring a Peacetime Emergency & Coordinating Minnesota's Strategy to Protect Minnesotans from COVID-19* (Mar. 13, 2020). The Governor later extended the emergency order numerous times, including on November 12, 2020, four days before Tate's trial was scheduled to begin. *See, e.g.*, Emerg. Exec. Order

No. 20-33, *Extending Stay at Home Order & Temporary Closure of Bars, Restaurants, and Other Places of Public Accommodation* (Apr. 8, 2020) (extending order); Emerg. Exec. Order No. 20-35, *Extending the COVID-19 Peacetime Emergency Declared in Executive Order 20-01* (Apr. 13, 2020) (extending order and recognizing that pandemic constituted an "unprecedented and rapidly evolving challenge"); Emerg. Exec. Order 20-97, *Extending the COVID-19 Peacetime Emergency Declared in Executive Order 20-01* (Nov. 12, 2020) (extending order).

Shortly after the Governor's initial pandemic executive order, the Chief Justice of the Minnesota Supreme Court issued an order suspending all jury trials that had not yet begun and, with certain exceptions, directing other cases to be held via live, remote, two-way video technology. *Order Continuing Operations of the Courts of the State of Minnesota Under a Statewide Peacetime Declaration of Emergency*, No. ADM20-8001, at 3-6 (Minn. Mar. 20, 2020). In a subsequent order, the Chief Justice approved a pilot program, beginning in June 2020, to test whether jury trials could be held safely during the pandemic. *Order Governing the Continuing Operations of the Minnesota Judicial Branch Under Emergency Executive Order 20-48*, No. ADM20-8001, at 2 (Minn. May 1, 2020). The pilot program, which was subsequently expanded across the state, required district courts to conform with the Minnesota Judicial Branch's COVID-19 Preparedness Plan, which necessitated (among other safety precautions) mask-wearing and social distancing. *Order Governing the Continuing Operations of the Minnesota Judicial Branch Under Emergency Executive Order Nos. 20-53, 20-56*, No. ADM20-8001, at 2 (Minn. May 15, 2020).

With these orders in mind, we turn to the proceedings before the district court. In addressing the defense's request for a continuance on the first day of trial, the district court stated:

> The Court has requested that a 65- or 70-inch screen be used to project to assist the jurors in viewing credibility. The Court does believe that [the special agent's in-person testimony could risk] . . . exposure to court staff, jurors, lawyers, in bringing someone in that is known to have been in contact with someone, whether or not they do or don't have symptoms. And [counsel], you may be on the cutting edge where there may be some additional rules from the Supreme Court later this week on what type of trials are going to go forward, but as of today the rules haven't changed.[10] So the Court will deny the request. Go ahead.

This decision followed the district court's reasoning at the pretrial hearing on the state's request for remote testimony. There, the court stated that while the Confrontation Clause "reflect[ed] a preference for in-person testimony," it was "not an absolute right." And the court reasoned that "the pandemic, even of itself, would justify the type of exceptional circumstances that have to give rise to the practical realities of the case."

[10] Four days later, on November 20, 2020—as the district court foresaw—the Chief Justice issued an additional order. This order limited in-person activity in court facilities, required remote hearings, and stated that "[j]ury trials in progress shall proceed to completion," but "starting on November 30, 2020, no new jury trials will commence before February 1, 2021," with certain exceptions. *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, No. ADM20-8001, at 2 (Nov. 20, 2020). A subsequent order forbade most new jury trials from commencing until March 15, 2021. *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, No. ADM20-8001, at 2 (Jan. 21, 2021). In short, the district court was appropriately concerned that any further continuance of this case could have resulted in a significant and uncertain delay of justice for appellant.

In addressing whether—as the district court concluded—remote testimony was necessary to further an important public policy, we begin with the policy at hand: protecting public health when in the throes of a global pandemic. This policy, given the ongoing orders from the Governor and Chief Justice at this juncture of the pandemic in November 2020, easily qualifies as an important purpose and is consistent with our conclusion regarding medical necessity in *Sewell*. But we disagree with the district court's reasoning that the COVID-19 pandemic, standing alone, satisfies the necessity requirement. The first *Craig* prong requires more than generalized findings of policy concerns. *Craig*, 497 U.S. at 845 (citing *Coy*, 487 U.S. at 1021). Instead, "[t]he requisite finding of necessity must of course be a case-specific one." *Id.* at 855. And the burden rests on the state to make an adequate showing of necessity. *Id.* Thus, we hold that a generalized concern regarding the COVID-19 pandemic is not a sufficient furtherance of an important public policy to dispense with a defendant's right to confront a witness face-to-face.

Our decision is in line with the majority of courts to consider this question, in the pandemic context, which have required the state to show that the testimony *of a particular witness* must be remote in order to serve an important public policy, rather than allowing the state to rest on the general existence of the pandemic. Multiple state courts follow this approach and require the state to show that allowing a specific witness to testify via live, remote, two-way video technology is necessary to an important policy goal. *See, e.g.*, *State v. Comacho*, 960 N.W.2d 739, 754-56 (Neb. 2021) (affirming conviction involving remote testimony because remotely-testifying witness was COVID-19-positive during

trial); *State v. Bailey*, 489 P.3d 889, 901-02 (Mont. 2021) (reversing conviction because state did not show that remote testimony was necessary to further important policy); *C.A.R.A. v. Jackson Cnty. Juv. Off.*, 2021 WL 2793539, at *8-10 (Mo. Ct. App. July 6, 2021) (concluding juvenile's Confrontation Clause rights were violated by remote testimony without showing of particularized necessity); *J.A.T. v. Jackson Cnty. Juv. Off.*, 2021 WL 3040942, at *6-8 (Mo. Ct. App. July 20, 2021) (same).[11] Similarly, at least two federal courts, upon the government's request to present remote testimony, have required a showing that an individual witness is particularly vulnerable to the virus. *United States v. Pangelinan*, No. 19-10077-JWB, 2020 WL 5118550, at *1 (D. Kan. Aug. 31, 2020); *United States v. Casher*, No. CR 19-65-BLG-SPW, at *2-3 (D. Mont. June 17, 2020).

We recognize that another court—like the district court here—has concluded that the public policy goal of preventing the spread of COVID-19 is, by itself, sufficient to justify the remote presentation of testimony. In a juvenile delinquency case, one Florida court concluded that the juvenile's Confrontation Clause rights were not violated because, at the time of the trial, the infection rate in the state was near its highest. *E.A.C. v. State*, 324 So. 3d 499, 506 (Fla. Dist. Ct. App. 2021). But we do not find this reasoning persuasive in light of the heavy preference accorded the opportunity for in-person confrontation under the Sixth Amendment.

[11] Instead of reversing the judgments in *C.A.R.A.* and *J.A.T.*, the Missouri Court of Appeals transferred both appeals to the Missouri Supreme Court because it reasoned that the cases presented a question of "general interest and importance." *C.A.R.A.*, 2021 WL 2793539, at *10-11; *J.A.T.*, 2021 WL 3040942, at *8.

While a generalized COVID-19 concern does not satisfy *Craig*'s necessity prong, we turn to whether the state has made a particularized showing of necessity. The special agent was exposed to a person who tested positive for COVID-19 four days before the trial began. Public health officials advised him to enter into precautionary quarantine. The transcript also reflects that the district court judge, the jurors, and counsel for both the state and the defense were physically present in the courtroom. Given the 14-day quarantine period, we conclude that the state made a specific showing that this witness, in particular, was susceptible to the virus and unavailable to testify in person without risking the health and safety of jurors, court personnel, and all those with whom he would come into contact in the courthouse. In arriving at this conclusion, we are also mindful that the special agent (while an important witness) was only one of three officers testifying about the controlled buy and the actions of the task force.

Still, Tate asserts that if we adopt the *Craig* test (as we do), we should apply it in light of *Carter*, 907 F.3d at 1208, and conclude that the necessity prong is not met where the court could have granted a trial continuance until the special agent was out of quarantine. We are not persuaded. In *Carter*, the court considered a continuance request for a witness who was seven months pregnant and unable to travel to testify in person. *Id.* The court stated that a defendant's confrontation right "cannot be neglected merely to avoid added expense or inconvenience." *Id.* We agree with that sentiment but here, unlike in *Carter*, there was no way for the district court to know when the state's witness would become available. Tate, pointing to the two-week quarantine period, argues that the special agent was only in temporary quarantine. But the special agent was exposed to an individual

who tested positive for COVID-19. If he became infected, it was unknown how long his sickness would last, and it could have far exceeded 14 days. We are further mindful that in November 2020, the virus-infection rates were high. As the Chief Justice's November 2020 order acknowledged when ordering no new trials be commenced without special permission, "positive case numbers, the state's positive percentage rate, and hospitalizations [had] increased." *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, No. ADM20-8001, at 1 (Minn. Nov. 20, 2020). Given the high rate of transmission (alluded to by the district court), other witnesses, court personnel, or jurors could be exposed to (or become infected with) the virus during any continuance, thus leading to a series of continuances. In short, unlike the expected end date of a pregnancy, no definite end date of the pandemic was on the calendar. In this context, the possibility of a continuance did not negate the state's showing of necessity. *See Casher*, 2020 WL 3270541, at *3 (distinguishing *Carter* because, unlike a pregnant witness, the pandemic presents a situation with "no way for the Court to know when the crisis will end").

Accordingly, given this record, we conclude that the state made a particularized showing that the use of live, remote, two-way video technology was necessary to further an important public policy. The first *Craig* factor is satisfied.

Reliability

Turning to the second prong of the *Craig* test, we consider whether the reliability of the state's witness was assured by other means. 497 U.S. at 850. To satisfy this prong, the witness must generally be under oath and understand the seriousness of his or her

testimony, the witness must be subject to cross-examination, and the judge, jury, and defendant must be able to properly see and hear the testifying witness. *Id.* at 845-46, 857; *see also Carter*, 907 F.3d at 1206 (identifying elements of confrontation as oath, competency, cross-examination, and viewability by judge and jury). All four elements need not be fully present to deem the testimony reliable. *Craig*, 497 U.S. at 846, 851. Rather, the testimony may still be reliable even if one element of confrontation is restricted. *Id.*

We are satisfied that the reliability prong is met here. The district court was sensitive to the defense's concern about allowing the witness to appear via live, remote, two-way video technology. The district court stated that it

> want[ed] the largest possible screen available so jurors can view and actually see the witness while he is testifying, and if it takes longer to fully complete any cross-examination because of Zoom, we'll take as much time as necessary to make sure that the defendant's rights for cross-examination are vindicated.

The testimony followed this directive. The special agent's testimony was then presented via live, remote, two-way video technology. The district court administered an oath to the witness. Tate does not dispute that the jury, the judge, counsel, and the defendant, were all able to see and hear the special agent testify. Nor does Tate dispute that the witness could see and hear proceedings in the courtroom. The district court ensured that there was a large screen in the courtroom to facilitate the witness's testimony. The defense's cross-examination consumed nearly nine transcript pages, while the direct-examination extended to seven. And the district court offered the defense the

opportunity to re-cross the witness, but the defense declined. The reliability of the special agent's testimony was thus tested "in the crucible of cross-examination." *Crawford*, 541 U.S. at 61.

Nothing in the transcript suggests that the court ran into technical problems during either examination. Nothing in the transcript demonstrates that anyone in the courtroom had difficulty seeing or hearing the witness, or observing his demeanor. And at the beginning of cross-examination, the defense attorney asked the special agent if he could "see and hear" properly. The special agent responded that he could.[12]

This situation is similar to that in *Sewell* (albeit with improved technology),[13] where the defendant argued that remote technology prevented the defense from using body language cues or demeanor clues when cross-examining the witness. 595 N.W.2d at 213. The *Sewell* court rejected that argument, reasoning that

> defense counsel not only had an unfettered opportunity to cross-examine [the witness], he did so extensively and effectively. Having heard, and cross-examined, [the witness's] prior testimony, counsel was able to explore inconsistent statements . . . . The jury saw and heard the cross-examination and [the witness's] responses . . . . We believe that the jury had

[12] At one point during his testimony, the special agent indicated that he could not read a portion of a BCA report referenced during cross-examination regarding fingerprint testing and touch DNA testing. He stated that the writing on the BCA report was "too small" for him to see. However, he did not dispute the attorney's representation that the writing related to fingerprint testing or touch DNA evidence. Further, he testified that he could not "recall one way or the other" whether he requested fingerprint testing or touch DNA testing.

[13] Frederic I. Lederer, *The Evolving Technology-Augmented Courtroom Before, During, and After the Pandemic*, 23 Vand. J. Ent. & Tech. L. 301, 325-28 (2021) (discussing improvements in quality of currently available videoconferencing technology).

> a reasonable opportunity to observe and assess [the witness's] demeanor during his testimony.

Id. Accordingly, we determined that there was "no constitutional infirmity in the use of [live, remote, two-way video technology] for the presentation of the testimony of an unavailable witness in this case."[14] *Id.*

The same analysis applies here: the witness was under oath, defense counsel was able to conduct live cross-examination, and the parties could observe the special agent's demeanor. We thus conclude that the reliability of the officer's testimony was assured.

In sum, because *Craig* stands as precedential authority, and because both prongs of the *Craig* test are satisfied, we conclude that the use of live, remote, two-way video technology for the special agent's testimony did not violate Tate's Confrontation Clause right.

DECISION

The two-part test articulated in *Craig*, 497 U.S. at 836, extends to live, remote, two-way video technology in Minnesota. We further conclude that Tate's Confrontation Clause right was not violated when the district court permitted one of the state's witnesses

[14] Still, Tate relies upon cases suggesting that the use of live, remote, two-way video technology inhibits a defendant's ability to read demeanor cues. We disagree. The presentation of witness testimony over live, remote, two-way video technology bears *more* indicia of reliability than the one-way technology approved in *Craig*, where the court determined the witness's testimony reliable when she testified via closed-circuit television *outside* the view of the defendant. *Craig*, 497 U.S. at 855-56. Here, by contrast, the state presented the witness's testimony using live, remote, two-way video technology.

to testify via live, remote, two-way video technology when the state satisfied the necessity and reliability prongs of the *Craig* test. We therefore affirm.

Affirmed.