STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1101

State of Minnesota,
Respondent,

vs.

Anthony James Trifiletti,
Appellant.

Filed September 12, 2022
Reversed and remanded
Slieter, Judge
Dissenting, Hooten, Judge*

Ramsey County District Court
File No. 62-CR-20-2974

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Anders J. Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Johnson, Judge; and Hooten, Judge.

SYLLABUS

A witness's possible exposure to a contagious virus by itself does not render her unavailable for purposes of the Sixth Amendment's Confrontation Clause if the witness is able to be present.

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

OPINION

SLIETER, Judge

The issue presented reflects a clash between the district court's reasonable concern for the health and well-being of all those in the courtroom and the constitutional right of a defendant to confront his accusers. The constitutional right of the defendant wins the clash.

FACTS

Appellant Anthony Trifiletti was driving from downtown Minneapolis to Cottage Grove on the evening of May 1, 2020. Trifiletti's three friends were following Trifiletti in a separate vehicle on Interstate 94 in St. Paul when a car cut between them. In response, Trifiletti pressed his truck's brakes, causing the car to collide with the back of Trifiletti's truck. After leaving the interstate and stopping their vehicles on Burns Avenue, Trifiletti and the driver of the other vehicle began to argue. Trifiletti and his friends heard the man yell, "I'm GD," which Trifiletti understood to be a gang term. After Trifiletti's friends had returned to their vehicle, the situation worsened and Trifiletti shot the man with the handgun Trifiletti lawfully possessed. The man died of his wounds later that night.

The state charged Trifiletti with second-degree intentional murder, and later amended the complaint to add second-degree felony murder. Minn. Stat. § 609.19, subds. 1(1), 2(1) (2018). During the trial in March 2021, Trifiletti claimed self-defense, explaining to the jury that he saw the other motorist "turn around and start coming straight towards me" and reach into his waistband as if he were grabbing a gun. To contradict Trifiletti's self-defense claim, the state called to testify the only other eyewitness to the shooting—M.W., who was driving her vehicle with her boyfriend, S.S., and observed

Trifiletti shoot the man. M.W. testified, "I seen [Trifiletti] run to his vehicle and then I seen him grab a gun, shut his door, and then fired." She told the jury that the other driver was "walking away" when Trifiletti shot him. The jury failed to reach a unanimous verdict, so the district court declared a mistrial.

During the second trial, in April 2021, M.W. and S.S. each reported that they may have been exposed to COVID-19. During the first day of trial evidence on April 12, the district court learned that M.W. had experienced unidentified symptoms but "apparently is getting better" and spoke with a doctor, who advised against taking a COVID-19 test. The district court directed the prosecutor to provide updated information about the COVID-19 status of M.W. and S.S. so that the district court could decide whether they should be present in the courtroom.[1]

On day two of trial evidence, April 13, the district court judge announced to the attorneys that he spoke to Dr. Lynne Ogawa, M.D., a Ramsey County public-health official, and she advised that "it would be reasonable . . . for [M.W. and S.S.] to testify, as long as they remain masked and we enforce the other public health protocols that we had put into place during trial," such as mandatory masking and distancing. The prosecutor reported that M.W. and her infant child previously experienced a cough but that this symptom had dissipated. Based on this information, the district court indicated that it would allow M.W. and S.S. to testify.

[1] The state first reported the witnesses' conditions and continued to update the court and counsel by email. Those emails are not in the record, but the district court discussed the issue on the record with the parties.

Later on day two of trial evidence, the prosecutor reported that S.S.'s doctor, upon learning of S.S.'s recent contact with an individual who may have had COVID-19 but was asymptomatic, recommended that he quarantine for ten days. The prosecutor also informed the district court that M.W. reported that she had experienced COVID-19-like symptoms after being in close contact with her sister on April 6, who tested positive for the virus on April 12, but that those symptoms had fully dissipated.

On day three of trial evidence, April 14, and based upon the information learned the previous afternoon, the state argued that both witnesses were unavailable and therefore sought to either read the transcripts of the witnesses' first-trial testimony or present their testimony remotely using video technology. Trifiletti objected to the state's request, insisting that he has a right to live, in-person confrontation and pointing out that the district court had received only self-reported, secondhand information about these witnesses' potential unavailability.

The district court concluded that M.W. and S.S. were unavailable to testify. It declined to conduct a remote *voir dire* of the witnesses to inquire further about the circumstances of their potential exposure, relying instead on the updates the witnesses gave the prosecutor. The district court informed the parties that, based upon its review of information from the department of health's website that morning, both M.W. and S.S. "should be in quarantine and should not be coming down to the courthouse." It determined that the witnesses' "reported exposure to a COVID-positive person . . . presents a clear public health risk within the view of national and local guidance."

The district court gave Trifiletti two alternatives as it relates to presentation of [M.W.'s] testimony in her absence: examine the witnesses remotely via video technology or have her testimony from the first trial read to the jury. Trifiletti objected to both alternatives as "a Hobson's choice"[2] because "neither [was] acceptable," and stated that he felt "very strongly" that he would not "pick the lesser of two evils." The district court noted that Trifiletti objected to both options, and that he would make "legal arguments that . . . will preserve" the objection. Trifiletti filed a memorandum presenting his legal arguments with the district court.

On day four of trial evidence, April 15, the district court found that neither option would "violate the confrontation clause." Defense counsel inquired about a potential third option, stating that "I assume if I move for a continuance, that will be denied, based on the Court's ruling." The district court responded, "My inclination would not be to continue the trial." Defense counsel further inquired, "And that would apply equally if I ask for a mistrial," to which the district court responded, "I don't see the grounds for a mistrial." The district court concluded that "both of the methods [of presenting M.W.'s testimony] that I am allowing would be a constitutional surrogate for the live testimony of [M.W.]."

After lunch break, defense counsel stated, "We've made a decision, understanding that we have one of two options to pick, and we've opted . . . [for] the prior testimony [to] be read into the record."

[2] "A choice between what is available and nothing." *The American Heritage Dictionary of the English Language* 836 (5th ed. 2018).

The jury found Trifiletti guilty of second-degree murder while committing a felony and the lesser-included charge of second-degree manslaughter pursuant to Minnesota Statutes section 609.205(1) (2018)[3] but acquitted him of intentional second-degree murder. The district court sentenced Trifiletti to 150 months in prison. Trifiletti appeals.

ISSUE

Is Trifiletti entitled to a new trial on the ground that the district court violated his Sixth Amendment right to confront witnesses against him by ruling that M.W. was unavailable to testify in person?

ANALYSIS

Trifiletti challenges his conviction, arguing that prohibiting M.W. from testifying in person violated the Confrontation Clause and that this error is not harmless beyond a reasonable doubt.[4] Because the Sixth Amendment guarantees Trifiletti the right to confront M.W., with only limited exceptions recognized by the founding-era common law, and the state failed to prove that any of those limited exceptions exist, we agree that his Confrontation Clause right was violated and the error was not harmless. We reverse and remand for a new trial.

A.

The Sixth Amendment to the United States Constitution guarantees, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses

[3] Upon Trifiletti's request, the district court instructed the jury on this lesser-included manslaughter offense. *See* Minn. Stat. § 609.04, subd. 1 (2018).

[4] Trifiletti also contends that presenting S.S.'s prior testimony violated his Sixth Amendment right but concedes that the testimony was harmless to his case.

against him." U.S. Const. amend. VI; *see also* Minn. Const. art. 1, § 6. This right is grounded in the common-law tradition "of live testimony in court subject to adversarial testing." *Crawford v. Washington*, 541 U.S. 36, 43 (2004). Because the Confrontation Clause was patterned after the common-law right, "the Sixth Amendment demands what the common law required" before admitting an out-of-court testimonial statement: "unavailability and a prior opportunity for cross-examination." *Id.* at 68. The state bears the burden of proving that a witness is unavailable to testify before presenting her prior testimony, and we review *de novo* whether the state met that burden. *See State v. Cox*, 779 N.W.2d 844, 852 (Minn. 2010) (concluding, after reweighing the evidence, that the state "failed to establish by a preponderance of the evidence" that a witness was unavailable to testify at the defendant's trial).

Before proceeding with our Sixth Amendment analysis, we must first consider our court's recent decision in *State v. Tate* and why, contrary to the state's argument, it does not answer the issue before us. 969 N.W.2d 378 (Minn. App. 2022), *rev. granted* (Minn. Mar. 15, 2022). The state argues that our court in *Tate* concluded that a witness who is possibly exposed to COVID-19 is unavailable for Confrontation Clause purposes. We disagree that *Tate* informs our decision. *Tate* was decided pursuant to a different legal framework described in *Maryland v. Craig*, 497 U.S. 836 (1990), in which a witness provided *live testimony* via remote technology. The case presented to us involves a legal framework described in *Crawford*, in which a witness's tape-recorded testimonial statement was played to the jury.

First, as our court thoroughly and methodically explained, *Tate* was not based upon *Crawford*, but on *Craig*. 969 N.W.2d at 383-85. We distinguished *Craig* from *Crawford* by explaining that those cases "answered different questions: *Crawford* addressed the constitutionality of admitting an out-of-court testimonial statement, 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." *Id.* at 385 (citations omitted). Unlike *Tate*, this case squarely presents us with the constitutionality of admitting an out-of-court testimonial statement—a *Crawford* question.

Second, though *Tate* concluded that the state met its "necessity" showing by indicating that the quarantining witness "was susceptible to the virus and unavailable to testify in person," our court was not asked to determine, in a *Crawford* context, whether the witness was unavailable. *Id.* at 389. Moreover, the *Craig* analysis allows non-face-to-face *live* testimony when "denial of such [face-to-face] confrontation is *necessary* to further an important public policy and only where the *reliability* of the testimony is otherwise assured." *Id.* at 381 (emphasis added) (quoting *Craig*, 497 U.S. at 850).

Thus, a *Craig* analysis (which our court followed in *Tate*) requires consideration of the two prongs, necessity and reliability, and does not require, as does the *Crawford* consideration for non-confronted testimony, unavailability. Following this directive, our court in *Tate* considered whether the method of "live, remote, two-way video technology" utilized in that case satisfied the necessity and reliability prongs of the *Craig* test. *Id.* at 383. We determined that the *Craig* test was satisfied and the Confrontation Clause was

not offended when a witness exposed to COVID-19 and ordered by public-health officials to quarantine for the length of the trial could testify remotely. *Id.* at 391.

We are faced with a different question: Did the state prove that M.W.'s possible exposure to COVID-19 and fully-dissipated-cough symptoms, which prevented her from testifying in person, render her unavailable pursuant to *Crawford*? *Tate* does not inform our decision.

We now consider Trifiletti's Confrontation Clause claim in the *Crawford* context. We first analyze the caselaw to inform us whether a potential public-health risk renders a witness unavailable. And, assuming the law recognizes this form of witness unavailability, we next analyze whether the state has proved sufficiently that this witness was unavailable.

B.

We begin by analyzing case law to determine what unavailability means. Trifiletti asserts that only death can render a witness unavailable pursuant to the Confrontation Clause, relying on 19th-century caselaw. *See United States v. Macomb*, 26 F. Cas. 1132, 1133 (No. 15,702) (C.C.D. Ill. 1851) (explaining that a living witness's testimony could not be admitted in a criminal trial); *Finn v. Virginia*, 26 Va. 701, 707 (1827) (determining that prior testimony cannot be admitted in a criminal case); *Johnston v. State*, 10 Tenn. 58, 59 (1821) ("The English practice . . . always has been to read the depositions of witnesses taken upon oath, in the presence of the prisoner and the magistrate . . . , if it be proved on oath to the satisfaction of the court, that the witness is dead."). He argues that *Crawford* compels our adoption of this rule.

By contrast, the state contends that M.W.'s potential exposure to COVID-19 was sufficient to render her unavailable to testify. Whether a witness's possible exposure to COVID-19 and the virus's potential impact on others in the courtroom is enough to establish that the witness is unavailable appears to be an issue of first impression in our state. The parties have not cited, nor have we found, a federal or state case addressing this issue.

A criminal defendant's constitutional right to confront the witnesses against him is grounded in the English common law. *Crawford*, 541 U.S. at 43. After extensively surveying the common-law authorities, the United States Supreme Court held in *Crawford* that, in order to allow "admission of testimonial statements of a witness who did not appear at trial," the witness must both be unavailable and one whom the defendant had an opportunity to cross-examine. *Id.* at 53-54. Our task is to examine these sources and decide whether, as argued by Trifiletti, the witness's death is the exclusive means of proving her unavailability or, as argued by the state, a witness who was possibly exposed to a contagious virus would be considered unavailable at common law.

We first consider the English common law before the passage of the Sixth Amendment. Next, we review the United States Supreme Court's Sixth Amendment caselaw regarding witness unavailability. We then consider state and federal decisions involving witness unavailability.

1.

The founding-era caselaw that formed the basis of the Sixth Amendment demonstrates the circumstances that justify reading an absent witness's prior testimony due

to the witness's unavailability. For example, in a Puritan minister's trial for "publish[ing] a slanderous and infamous libel," the court allowed the prosecution to read the prior testimony of an absent witness who was "beyond the seas." *Udall's Trial*, 1 How. St. Tr. 1271, 1277, 1282-83 (1590). A half-century later, a witness to an alleged treason "was in town, but he could not stay, but he was examined before this court," so the court permitted his examination to be read. *Lord Macguire's Trial*, 4 How. St. Tr. 653, 673 (1645). Prior testimony was also admitted when a witness had escaped from custody, *Mordant's Trial*, 5 How. St. Tr. 907, 921-22 (1658), and when a witness was "unable to travel." *Lord Morley's Trial*, 6 How. St. Tr. 770 (1666). These cases demonstrate that, pursuant to English common law, death was not the only circumstance that would render a witness unavailable and justify reading the witness's earlier testimony at a criminal trial.

Leading treatises in the 18th century also reflect this approach. Matthew Hale, *Pleas of the Crown: Or, a Methodical Summary of the Principal Matters Relating to that Subject*, 262-633 (5th ed. 1716) ("In Case of Felony . . . . These Examinations, if the party be dead or absent, may be given in Evidence."); 2 William Hawkins, *A Treatise of the Pleas of the Crown: Or a System of the Principal Matters Relating to That Subject, Digested under Their Proper Heads*, 429 (1721) ("It seems settled, That the Examination of an Informer taken upon Oath and subscribed by him . . . may be given in Evidence . . . if it be made out by Oath to the Satisfaction of the Court, that such Informer is dead, or unable to travel, or kept away by the Means or Procurement of the Prisoner."). And a 19th century American treatise further confirms that these examinations may be received "if the witness, though not dead, is out of the jurisdiction, or cannot be found after diligent search, or is insane, or

sick and unable to testify, or has been summoned, but appears to have been kept away by the adverse party." 1 Greenleaf, *A Treatise on the Law of Evidence* § 163 (1842).

These authorities confirm that, at the time the Sixth Amendment was ratified, a witness's unavailability was not strictly limited to death. But these commentaries also fail to inform us as to whether a witness's possible exposure to a contagious virus renders the witness unavailable.

2.

Our law incorporated this understanding of unavailability at the time the Sixth Amendment was ratified. In the early 20th century, the Supreme Court explained that the common-law right to confrontation yielded only "upon proof being made to the satisfaction of the court that the witness was, at the time of the trial, dead, insane, too ill ever to be expected to attend the trial, or kept away by the connivance of the defendant." *West v. Louisiana*, 194 U.S. 258, 262 (1904), *overruled on other grounds by Pointer v. Texas*, 380 U.S. 400, 406 (1965). In *Barber v. Page*, 390 U.S. 719, 724-25 (1968), the Supreme Court held that an absent witness's prior testimony (the witness was in a federal penitentiary and outside state jurisdiction at the time of trial) may not be presented to the jury "unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." Applying this test just a few years later, the Supreme Court decided that a living witness residing in Sweden was unavailable because the state "was powerless to compel his attendance at the second trial," and declined to afford *habeas* relief to the convicted defendant after the trial court received the witness's prior trial testimony. *Mancusi v. Stubbs*, 408 U.S. 204, 212-13 (1972). Even after *Crawford*, the Supreme Court held that a

living witness who went into hiding was unavailable and presenting her prior testimony adhered to the Confrontation Clause. *Hardy v. Cross*, 565 U.S. 65, 71-72 (2011) (*per curiam*).

Though *Crawford* reshaped the way courts must treat a witness's prior testimonial statement, it did not upset the "largely consistent" application of the unavailability principle. 541 U.S. at 57 (citing both *Barber* and *Mancusi*); 2 McCormick on Evid. § 253 n.27 (8th ed. 2020) ("[T]he requirements respecting when a witness is unavailable appear unchanged [by *Crawford*]."). And though the Supreme Court's Confrontation Clause cases establish that a living witness may nevertheless be unavailable, no such case has addressed whether unavailability may be occasioned by a witness's possible exposure to a contagious virus.

3.

Federal and state courts that have addressed the Confrontation Clause question similarly limit the meaning of unavailability to circumstances not here present. Oftentimes, those courts have noted that unavailability for Confrontation Clause purposes and unavailability pursuant to Federal Rule of Evidence 804 and its state counterparts are, though not to be equated, often closely related. *See, e.g.*, *Idaho v. Wright*, 497 U.S. 805, 814 (1990); *State v. Lebrick*, 223 A.3d 333, 345 (Conn. 2020); *State v. Kitt*, 823 N.W.2d 175, 188 (Neb. 2012). We believe it appropriate, therefore, to review the rules of evidence to inform us as to when a witness is unavailable. According to rule 804, a witness is unavailable only if the witness: (1) is exempt from testifying because a privilege applies; (2) refuses to testify despite a court order to do so; (3) lacks the memory to testify;

(4) cannot testify because of death, infirmity, physical illness, or mental illness; or (5) could not be brought before the court by service of process or other reasonable means. Fed. R. Evid. 804(a); *see also* Minn. R. Evid. 804(a).

And before considering those cases, we also acknowledge *Crawford*'s directive that Sixth Amendment protection is not left "to the vagaries of the rules of evidence." *Crawford*, 541 U.S. at 61. But our task today is to discern the meaning of "unavailable witness" for Confrontation Clause purposes, and these cases are informative in completing that task. This evidentiary rule imposes a high standard of unavailability.

In *United States v. Faison*, 679 F.2d 292, 296-97 (3d Cir. 1982), the Third Circuit vacated a defendant's wire-fraud conviction after the district court admitted prior testimony of an important witness who could not appear at trial after suffering a heart attack. Without deciding whether the Confrontation Clause prohibited the absent witness's former testimony from evidence, the court determined that Federal Rule of Evidence 804(a)(4) did not apply to absent witnesses with temporary illnesses, and so the district court was required to consider whether the witness's absence could be avoided by a reasonable continuance. *Id.*

So too in *State v. Ellis*, 417 P.3d 86 (Utah 2018). There, the trial court found a key witness was unavailable after she refused to testify so that she could stay home and care for her newborn infant who was experiencing an illness. *Id.* at 88-89. The Utah Supreme Court reversed the defendant's conviction, finding that the state failed to prove that the witness's absence was of a sufficient duration, and therefore violated that state's version of rule 804, declining to reach the constitutional question. *Id.* at 89-90. "Unavailability

implies a more substantial, lasting barrier to participation at trial." *Id.* at 90. *See also Earl v. State*, 672 So. 2d 1240, 1243 (Miss. 1996) (finding physically ill witness unavailable was error without medical testimony or affidavit); *State v. Gregg*, 464 N.W.2d 431, 432-34 (Iowa 1990) (finding child witness psychologically unavailable was error); *State v. Hannagan*, 473 A.2d 291, 293 (R.I. 1984) ("To support a finding of a witness's unavailability on account of illness, we believe that such evidence must be presented by way of expert testimony, and the illness in question must exist to such a degree as to render the witness's attendance or his or her testimony relatively impossible and not merely inconvenient."); *People v. Stritzinger*, 668 P.2d 738, 746 (Cal. 1983) (same).

Minnesota's counterpart to the federal rule 804 likewise imposes a high standard of unavailability. The state and federal rules include the same five unavailability circumstances, including a witness's inability "to be present or to testify . . . because of death or *then existing* physical or mental illness or infirmity." Minn. R. Evid. 804(a)(4) (emphasis added). And as the *Ellis* court recognized, all five "subsections of rule 804(a) share at least one component in common—they all involve a substantial barrier to the witness testifying not just on an isolated date but over an extended period of time." 417 P.3d at 90. None of these exceptions to the hearsay rule suggest that M.W.'s possible exposure to COVID-19, without any symptoms of illness that prevent her from providing live, in-person testimony, renders her an unavailable witness.

In sum, M.W.'s possible exposure to COVID-19 without any symptoms of illness that prevents her from providing live, in-person testimony, does not satisfy any of the recognized circumstances rendering a witness unavailable. Therefore, she was available

to provide live, in-person testimony. M.W. was willing to testify, she was physically and mentally able to testify, she was within the jurisdiction, and she remained in contact with the prosecutor. The reason provided by the district court that M.W. was unavailable was its reasonable public-health concern for those in the courtroom who could potentially have been exposed to COVID-19. Our extensive review of the caselaw related to witness unavailability reveals no such public-health basis for admitting an unconfronted, testimonial statement against a criminal defendant. The district court erred by allowing the state to read her prior testimony into evidence. Therefore, Trifiletti's Sixth Amendment right to confront the witnesses against him was violated.

C.

Even if the law informed us that a witness is unavailable because of a possible exposure to COVID-19 and the resulting potential public-health risk to those in the courtroom if she were to testify in-person, the state did not meet its burden of showing that M.W. posed such a risk.

The district court found that M.W.'s "reported exposure to a COVID-positive person . . . presents a clear public health risk," and the state asks us to review this finding for clear error. But we "review de novo the surrounding circumstances relevant to a Sixth Amendment determination." *Cox*, 779 N.W.2d at 852. And our *de novo* review indicates that the record does not support the conclusion that the risk identified by the district court rendered M.W. unavailable to provide testimony.

The district court recited from the Minnesota Department of Health (MDH) website its definition of "close contact," which required being within six feet of a person with

COVID-19 for more than 15 minutes in a 24-hour period. By MDH's definition, a person who met these criteria had been exposed to COVID-19. However, there are no facts in the record which indicate that M.W.'s contact with her sister, who six days after M.W.'s contact tested positive for COVID-19, met this MDH definition of "close contact." This absence of evidence related to M.W.'s possible exposure reflects an additional failure by the state to demonstrate that M.W. was a public-health risk if she was to testify in person, especially given the precautions the district court had already taken to conduct the trial safely during the pandemic.

In response to the COVID-19 pandemic, the chief justice imposed restrictions on in-person criminal trials that remained effective during Trifiletti's trial. *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, No. ADM20-8001, at 3-6 (Minn. Mar. 22, 2021). The district court, in compliance with the chief justice's order, modified its courtroom so that everyone, including the jurors, were at least six feet apart and ordered everyone to be masked. It noted,

> We have sought and adjusted our plans at the direction and advice of public health officials based upon the most recent guidelines from the Minnesota Department of Health and the Center for Disease Control. Every aspect of what we're doing here has been vetted and approved by public health doctors.

And Dr. Ogawa, a Ramsey County public-health official, indicated to the district court that it would be "reasonable" for M.W. to testify if she remained masked, notwithstanding her possible exposure to COVID-19. This supports the conclusion that M.W. was not a public-health risk if she testified in person. And additional review of the record indicates the state

did not provide a preponderance of evidence that M.W. was unavailable due to a public-health risk.

First, we note that the district court received indirect information about M.W.'s possible exposure to COVID-19. Specifically, the prosecutor relayed the information to the district court without making M.W. available, even remotely, to provide direct information on her condition and the nature and extent of her contact with her sister. As we noted, the district court refused to *voir dire* M.W. regarding her condition, despite Trifiletti's request, and the record reflects no effort by the state to join that request. And the only indirect information that M.W. may have been ill was a cough, that had since dissipated, which a doctor did not think warranted a COVID-19 test.

Second, the state provided no medical information, such as a medical report or a doctor's statement, to identify and confirm M.W.'s health condition. Though we found no caselaw from Minnesota on this point, courts in other jurisdictions conclude that competent medical evidence is required to prove a witness is medically unavailable. *E.g.*, *United States v. McGowan*, 590 F.3d 446, 454 (7th Cir. 2009) (relying on affidavits from physicians); *Earl*, 672 So. 2d at 1243 ("The trial court relied solely on the testimony of the State's victims assistance coordinator and the word of the prosecutor. There were no medical witnesses presented or affidavits that would have allowed the court to determine if [the witness] could not be present."); *State v. Taylor*, 562 A.2d 445, 452 (R.I. 1989) ("[E]xpert testimony must establish that the witness's illness makes his or her testimony virtually impossible, not merely inconvenient."); *Stack v. United States*, 519 A.2d 147, 157 (D.C. 1986) (rejecting the state's evidence of unavailability because it "consisted only of

unsworn hearsay"). The only medical information in this record was provided by Dr. Ogawa, who advised the district court that the witness could safely testify if safety protocols were followed.

We emphasize that the district court's decision was based on the *possibility* that M.W. had contracted the virus from someone with whom she *may* have had "close contact," and the *possibility*, if M.W. did actually contract the virus, that others in the courtroom and courthouse would be exposed to the virus if she were to testify in person. And there is nothing in the record indicating that M.W. took a COVID-19 test to confirm she had the virus and, instead, there is evidence that her doctor suggested she not take a test. And though the district court emphasized that M.W. "should be in quarantine," the state presented no evidence that M.W. was instructed to quarantine, or that she would have been in quarantine when she was to provide testimony. Further, we do not believe that her presence in quarantine would change our analysis because there was no medical information to identify and confirm M.W.'s health condition. Based on our *de novo* review, the speculative public-health risk that M.W. might pose if she was to testify in person fails to outweigh Trifiletti's concrete Confrontation Clause right to confront his accusers.

We add that these circumstances did not limit the district court to a binary choice between live, remote testimony and reading M.W.'s former testimony. Trifiletti's counsel asked about the district court's amenability to continuing the trial, to which the district court responded, "My inclination would not be to continue the trial," which we interpret to mean the district court was not going to continue the trial. And contrary to the state's claim

during oral argument, the absence of a formal continuance motion does not, by these facts, constitute invited error which precludes his ability to now raise the issue.

The general rule in Minnesota is that "a party cannot avail himself of invited error." *Majerus v. Guelsow*, 113 N.W.2d 450, 457 (1962) (quotation omitted). "Typically, this doctrine is based on waiver and the idea that a defendant who *fails to object* to an instruction below loses his or her right to claim on appeal that the instruction was erroneous." *State v. Gisege*, 561 N.W.2d 152, 158 (Minn. 1997) (emphasis added); *see also* Minn. R. Evid. 103(a)(1) (requiring objection to the admission of evidence to preserve a claim of error).

As we explained, Trifiletti plainly objected to the two choices presented by the district court for the presentation of M.W.'s testimony. *State v. Vasquez*, 912 N.W.2d 642, 649 (Minn. 2018) (discussing that a defendant may preserve a claim of error by objecting at trial). Further, the district court acknowledged Trifiletti's objection and that it would be preserved. Therefore, there exists no invited error.

Additionally, courts consider a continuance as the presumptive remedy for a witness's temporary unavailability. *E.g.*, *Ellis*, 417 P.3d at 91 ("If the defendant does not object to a continuance and a reasonable continuance would allow the witness to attend, then the witness cannot be said to be unavailable."); *State v. Clonts*, 802 S.E.2d 531, 545-46 (N.C. App. 2017) (holding factual findings insufficient to show unavailability, in part because "[t]he trial court did not address the option of continuing trial until [the absent witness] returned from her deployment" in the Navy), *aff'd*, 371 N.C. 191 (N.C. 2018); *State v. Perry*, 159 P.3d 903, 906-07 (Idaho App. 2007) (holding evidence insufficient to

show a terminally ill witness unavailable because the witness may have been able to appear "in a few weeks"), *rev. denied* (Idaho May 30, 2007); *see also Sahagian v. Murphy*, 871 F.2d 714, 716 (7th Cir. 1989) (finding prior testimony of a witness recovering from open heart surgery was admissible because defendant objected to a continuance). The district court was not limited to the two choices it offered Trifiletti.

We acknowledge the very appropriate concern that the district court had for the well-being of all those in the courtroom during this trial, which was conducted during the COVID-19 pandemic. But "[g]overnment is not free to disregard the [Constitution] in times of crisis." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring). However appropriate and reasonable the district court's concern, that concern must give way to Trifiletti's constitutional right to confront the witnesses against him.

In sum, assuming the law informed us that a witness's possible exposure to COVID-19 does render her unavailable, the state failed to prove by a preponderance of the evidence that M.W.'s in-person testimony posed a public-health risk. Therefore, in this case, the witness was not unavailable. Presenting her testimony from the first trial violated Trifiletti's constitutional right to confront the witness.

D.

Having found that Trifiletti's Sixth Amendment right was violated, we must now decide whether that violation was harmless beyond a reasonable doubt. Violating the Confrontation Clause is harmless if the verdict was surely unattributable to the challenged evidence. *State v. Caulfield*, 722 N.W.2d 304, 314 (Minn. 2006). "[T]he question is

whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *State v. Juarez*, 572 N.W.2d 286, 291 (Minn. 1997) (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)). Based on this record, we cannot say that M.W.'s testimony was harmless beyond a reasonable doubt.

M.W. was the state's sole eyewitness to the shooting. She testified that Trifiletti ran to his truck, grabbed a gun, shut his door, and fired, killing the other motorist. The state contends that the jury evidently disbelieved this testimony as demonstrated by its not-guilty verdict regarding the intentional-murder charge. We are unpersuaded.

The jury might have believed her testimony that Trifiletti ran back to his truck before shooting the other motorist—which contradicted his self-defense theory—while disbelieving other parts of her testimony, such as her claim that Trifiletti shot the man while he was turning around, which was contradicted by the physical evidence that Trifiletti shot the victim in the front of his body. *See State v. Johnson*, 568 N.W.2d 426, 436 (Minn. 1997) (concluding that the jury is free to believe some parts of a witness's testimony and disbelieve others).

The prosecutor discussed M.W.'s testimony during the state's closing argument, though briefly, arguing that Trifiletti could have retreated. If the jury believed M.W.'s testimony that Trifiletti ran back to his truck before firing his gun, it could have also determined that Trifiletti had a chance to retreat and rejected his self-defense argument. It is not our role to determine whether M.W. was a credible witness, only "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Juarez*, 572 N.W.2d at 291. We conclude there is.

DECISION

M.W.'s possible exposure to COVID-19 alone did not render her unavailable. Therefore, the district court erred by allowing the state to present her prior testimony. Further, even if M.W.'s possible exposure to COVID-19, which may have presented a general public-health concern had she testified in person, rendered her unavailable as a matter of law, the state failed to prove by a preponderance of the evidence that such a specific public-health concern existed. Prohibiting M.W. from testifying in-person violated Trifiletti's constitutional right to confront M.W. That error was not harmless beyond a reasonable doubt, and Trifiletti is entitled to a new trial.

Reversed and remanded.

HOOTEN, Judge (dissenting)

I respectfully dissent from the majority's decision to reverse the district court and remand this case for a third trial. First, I disagree with the majority's legal conclusion, in contravention of our precedent, that a district court may never find that a witness, who has been exposed to COVID-19, is at risk of spreading a virulent disease to the public, and is required to quarantine under government protocols, is unavailable to testify at trial in person. Second, because Trifiletti's counsel was able to cross-examine the witness at a prior trial in the same case and a transcript of this prior examination was read to the jury, Trifiletti's rights of confrontation were not violated under the Confrontation Clause. Finally, because Trifiletti did not move for a continuance and strategically chose the method of presenting the absent witness's testimony over the method of presentation approved by our court in *State v. Tate*, he cannot now argue on appeal that he chose the unconstitutional method of presenting the evidence. For those reasons, I would affirm Trifiletti's conviction.

I. *State v. Tate* recognizes a public-health exception to the face-to-face requirement of the Confrontation Clause.

I disagree with the majority that a witness exposed to COVID-19 can never be unavailable to testify at an on-going trial under the Confrontation Clause of the Sixth Amendment. Although the majority reaches as far back as the Sixteenth Century to show that a witness may be unavailable for only specific categories of absences, like death, traveling beyond the jurisdiction, or illness, the only binding authority necessary to determining the issues before us is our court's recent decision in *State v. Tate*, 969 N.W.2d

378 (Minn. App. 2022), *rev. granted* (Minn. March 15, 2022). It is *Tate* that binds our decision today.

The Sixth Amendment expresses a "preference" for face-to-face confrontation. *Maryland v. Craig*, 497 U.S. 836, 849 (1990). "But the right to personally confront witnesses is not absolute." *Tate*, 969 N.W.2d at 383. It "must occasionally give way to considerations of public policy and the necessities of the case." *Craig*, 497 U.S. at 849 (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)). The United States Supreme Court has held that "the rights of the public shall not be wholly sacrificed in order that an incidental benefit [such as the witness's physical presence in the courtroom] may be preserved to the accused." *Mattox*, 156 U.S. at 243. Our court earlier this year determined that a witness may testify remotely because he had been instructed to quarantine by public-health officials due to a possible COVID-19 exposure. *Tate*, 969 N.W.2d at 388. We upheld the district court's determination that there could be no physical, face-to-face confrontation, concluding that the witness "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." *Id.* at 389. Our court necessarily concluded that public-health concerns rendered the witness unavailable for a physical, face-to-face confrontation before a jury and therefore rejected the defendant's Sixth Amendment challenge. *Id.* at 388. Our decision that a witness exposed to COVID-19 is physically unavailable to appear before a jury applies here.

The majority, in attempting to distinguish this case from *Tate,* relies on a distinction between *Crawford*'s unavailability requirement for former testimony on one hand and

Craig's necessity requirement for video testimony on the other. But this distinction, under the unique facts of this case, where a witness is unavailable to testify in person at an on-going trial because of the dangers of exposing the jury and the public to COVID-19 during a global pandemic, does not withstand scrutiny. The Confrontation Clause does not prohibit use of a procedure that, despite lack of face-to-face confrontation, ensures that other requirements of the confrontation right are satisfied. *Craig*, 497 U.S. at 850-51. And the necessity inquiry announced in *Craig* requires a similar analysis as Crawford's unavailability test. In *Ohio v. Roberts*, the United States Supreme Court recognized that "the Sixth Amendment establishes a rule of necessity" requiring the prosecution to "either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." 448 U.S. 56, 65 (1980). Although *Crawford* later overruled *Roberts* on other grounds (namely *Crawford* rejected *Roberts*' "reliability" factor), it implicitly reaffirmed that the unavailability prong adheres to the Court's Sixth Amendment jurisprudence, including the rule of necessity. *Crawford v. Washington*, 541 U.S. 36, 57-58 (2004). Our state's appellate courts likewise recognize that proving a witness is unavailable for a face-to-face confrontation is essential to the Sixth Amendment's rule of necessity. *State v. Byers*, 570 N.W.2d 487, 494 (Minn. 1997) ("The necessity requirement is met here as a result of [the witness's] unavailability due to his refusal to testify."); *State v. Hansen*, 312 N.W.2d 96, 102 (Minn. 1981) ("The requirement of necessity is fulfilled by a showing that the declarant is unavailable."), *overruled on other grounds by Crawford*, 541 U.S. at 61; *State v. Johnson*, 679 N.W.2d 169, 174 (Minn. App. 2004) (same); *State v. Sewell*, 595 N.W.2d 207, 212 (Minn. App. 1999) (requiring the prosecution to show "the

unavailability of the witness and the necessity of his testimony" before permitting video testimony). In all of these cases, the issues were whether the witness was unavailable to physically appear at trial and if so, whether the defendant's rights of confrontation were satisfied at the trial.

Despite our decision in *Tate*, the majority today holds that district courts have no discretion to find a witness is unavailable to protect the public from COVID-19. This result is untenable as the coronavirus pandemic continues to smolder and would unnecessarily bind district courts in future public health crises involving infectious diseases. Although we review *de novo* the circumstances relevant to a Sixth Amendment challenge, we ordinarily will reverse a district court's findings of historical fact for clear error. *State v. Fields*, 679 N.W.2d 341, 345 (Minn. 2004). And whether a witness is unavailable is a preliminary question of fact for the district court under Minnesota Rule of Evidence 104. *Byers*, 570 N.W.2d at 492 ("We afford the trial court considerable discretion in admitting evidence [of an unavailable witness's former testimony]."). The nature and extent of M.W.'s exposure, the severity of her symptoms, the COVID-19 positivity rate, and the level of risk posed to those in the courtroom are all issues best reserved to the district court's sound discretion.

The district court's findings justify dispensing with face-to-face confrontation under the public-health exception that our court recognized in *Tate*. The district court found that the witness, M.W., had been "exposed in a close contact way with" a person who later "tested positive for COVID" on the eve of trial, and that M.W. and her son later developed symptoms consistent with COVID-19, such as a cough and congestion. The district court

also found that another witness, S.S., was instructed by a healthcare professional to quarantine for ten days after encountering M.W.'s son. The district court considered the reported COVID-19 statistics and the publicly available guidance from the state's health department and concluded that M.W. should be in quarantine. It recognized that a person may remain asymptomatic for up to 14 days after encountering a COVID-positive person before becoming sick and could spread the virus without ever experiencing symptoms. The district court's cautious conclusion that M.W. should not report to the courthouse reflects its responsibility to everyone in the courtroom—especially to the jurors, who are compelled by law to attend trial. Minn. Stat. § 593.42, subd. 4 (2020). The district court's finding that M.W. is particularly susceptible to the virus and its conclusion that she is unavailable conforms to our decision in *Tate*. I would not disregard the district court's reasoned judgment or conclude that the district court clearly erred in its findings.

Whether the *Tate* court correctly determined that a quarantining witness may be unavailable is not for us to relitigate—indeed, the supreme court will soon answer that question. But until it does, our role is to apply the law, not change it. *See State v. Chauvin*, 955 N.W.2d 684, 694-95 (Minn. App. 2021). Because our court in *Tate* has determined that a quarantining witness is unavailable to physically appear at trial, and that alternative methods of presenting the witness's testimony are necessary under the Sixth Amendment, I would affirm the district court's decision that M.W., who, like the witness in *Tate*, had been in close contact with a COVID-positive person, is unavailable.

II. Because Trifiletti's counsel was able to adequately cross-examine M.W. when she testified in the prior trial, there was no violation of the Confrontation Clause by allowing the transcript of the prior testimony to be read in Trifiletti's second trial.

Trifiletti claims that, notwithstanding the fact that he chose the method of presenting M.W.'s testimony to the jury, his rights under the Confrontation Clause were violated because he was not able to have a face-to-face cross-examination of M.W. before the jury in the second trial. Yet, as was recognized in *Crawford*, "[w]here testimonial evidence is at issue . . ., the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." 541 U.S. at 68. The United States Supreme Court has explained that "the Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Kentucky v. Sincer*, 482 U.S. 730, 739 (1987). Our court in *Tate* rejected the defendant's claim that his right of confrontation was violated where the witness was allowed to testify and be cross-examined via live, remote, two-way video technology. 969 N.W.2d at 391. In this case, the question is whether Trifiletti's right of confrontation was violated when a transcript of M.W.'s prior, sworn trial testimony was read to the jury rather than having her testify remotely or appear face-to-face.

There is no dispute that Trifiletti's counsel was able to fully and effectively cross-examine M.W. at the prior trial and that the transcript of M.W.'s testimony and cross-examination was read to the jury. In *United States. v. McGowan*, 590 F.3d 447, 456 (7th Cir. 2009), the court held that once the district court found that a witness was unavailable for trial, the defendant, under the facts of that case, "could not seriously challenge the other

part of the analysis, whether he had an adequate opportunity for cross-examination where he had been able to cross-examine him on several different occasions" in depositions taken prior to trial. *See also United States v. Richardson*, 782 F.3d 237, 245 (5th Cir. 2015) (holding that the use of a transcript of a witness's testimony at a prior trial, where the witness had been subject to cross-examination, satisfied the Sixth Amendment's requirement that the accused be given the "opportunity" to cross-examine a witness); *United States v. Cabrera-Frattini*, 65 M.J. 950, 953 (N-M. Ct. Crim. App. 2008) (holding that the use of the transcript of a deposition given by a witness, who later was unavailable for trial, did not violate the defendant's rights of confrontation because he had an opportunity to cross-examine the witness at the deposition); *Brady v. State*, 575 N.E.2d 981, 987 (Ind. 1991) (holding that the right to meet witnesses face-to-face "is secured where the testimony of a witness at a former hearing or trial on the same case is reproduced and admitted, where the defendant either cross-examined such witness or was afforded an opportunity to do so, and the witness cannot be brought to testify at trial again[.]"). Because Trifiletti was able to fully cross-examine M.W. in the prior trial, when she was under oath before a judge and jury, there has been no violation of the Confrontation Clause.

III. By failing to move the district court for a continuance and specifically rejecting the opportunity to take M.W.'s testimony remotely in favor of reading the transcript of her testimony from the prior trial to the jury, Trifiletti is attempting to transform his strategic choices into the district court's error.

The record shows that Trifiletti, once his motion to prohibit the admission of M.W.'s testimony without her physical appearance at the trial was denied, elected how her testimony was to be presented. On appeal, Trifiletti argues he was given a "binary choice"

between reading M.W.'s former testimony and having her testify remotely, without the district court considering whether to grant a continuance. But according to the actual record, the district court gave Trifiletti the option of requesting a continuance, which he declined to do before electing the error he now complains of on appeal. After finding that M.W. was unavailable to testify in person, the district court gave Trifiletti the choice to have the state read M.W.'s former testimony from the first trial, or to examine her remotely using live, two-way video technology. Trifiletti's counsel then stated, "And the other option is to request a continuance." The district court revealed that it was inclined against granting a continuance but agreed, "That is another option." Trifiletti's counsel requested an opportunity "to talk to Mr. Trifiletti," and the parties broke for lunch. After almost two hours to consult his counsel about those options, Trifiletti made his decision. Rather than move for a continuance or ask to examine M.W. live using remote technology, he chose the method he now asserts was error: presenting M.W.'s direct and cross-examined testimony from the prior trial. Because there was no motion for a continuance, and therefore no definitive ruling by the district court on a continuance, and the district court simply deferred to Trifiletti's strategic decision as to how the testimony of M.W. was to be presented, there is no reversible error.

It is well settled that we do not second guess a litigant's or his attorney's strategic decisions. *State v. Nicks*, 831 N.W.2d 493, 506 (Minn. 2013). The record does not indicate that Trifiletti ever requested a continuance or that the district court ever ruled on any motion for a continuance. The district court expressly acknowledged that Trifiletti could request a continuance and gave Trifiletti nearly two hours to consult with his counsel to weigh the

pros and cons of that choice. Trifiletti had already requested a speedy trial and had been through one full trial, leading to a hung jury. He and his counsel may have liked the jury that they selected and wanted to avoid losing one or more jurors during the continuance, or risk losing so many that the district court would declare another mistrial.

Trifiletti and his counsel may have also reasonably decided that his chances of an acquittal would not be any better, or perhaps would be worse, if M.W., after prepping for her second cross-examination, were to testify in person. Any or all these reasons and more besides could have motivated Trifiletti's decision not to request a continuance. All we know is that Trifiletti was aware of his option to request a continuance and decided not to after consulting his attorney. The court's role is not to protect Trifiletti from the consequences of his choices. Trifiletti's decision to elect a reading of M.W.'s prior testimony over live remote testimony using two-way video technology brings his strategy into focus. By rejecting the option of confronting M.W. live using remote technology, Trifiletti rejected an option, which according to our decision in *Tate*, did not violate his Sixth Amendment rights. *See Tate*, 969 N.W.2d at 391. And we should not review asserted errors that the appellant himself invites. *State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007).

A review of the record indicates that Trifiletti may have had good reason for his rejection of the remote testimony option. Trifiletti's first cross-examination of M.W. in the prior trial was devastating. M.W.'s testimony was discredited by the physical evidence, her changing story, and her past criminal history involving credit-card fraud. Trifiletti decided, quite reasonably, that reading M.W.'s earlier testimony was preferable to her testifying live and perhaps improving her credibility with the jury. The procedure allowed Trifiletti's

attorney to read his previous cross-examination and have a reader playing the part of M.W. recite her former testimony. This allowed Trifiletti to present the jury with M.W.'s incredible former testimony without any risk that M.W. would rehabilitate her credibility or win sympathy with the jury. Indeed, Trifiletti's strategy was successful in that the jury implicitly rejected most of M.W.'s testimony by acquitting Trifiletti of the most serious charge brought by the state against him, second-degree murder with intent, which was based in large part upon her testimony. Whatever Trifiletti's reasoning for choosing M.W.'s former testimony over presenting her testimony live, that reasoning applies equally whether her testimony was given remotely or in-person. It was Trifiletti's decision that reading M.W.'s former testimony to the jury was his preferred method of presenting M.W.'s testimony to the jury, and we should not reverse based on any alleged error he invited.

Although Trifiletti objected to both methods for presenting M.W.'s testimony, "the criminal process often requires suspects and defendants to make difficult choices." *South Dakota v. Neville*, 459 U.S. 553, 564 (1983) (holding that the constitutional privilege against self-incrimination does not protect an arrestee from the being compelled to choose between taking and refusing a blood-alcohol test). The Confrontation Clause was not violated where Trifiletti did not move for a continuance, the witness was unable to appear at trial because of her required quarantine under COVID-19 protocols, and Trifiletti had adequate opportunity to confront and cross-examine her at his prior trial. Because Trifiletti reasonably decided against requesting a continuance and instead relied on M.W.'s former

testimony rather than requiring M.W. to testify remotely, I would not relieve him of the consequences of his choice.