

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDERICK LEE COLLINGHAM,

Defendant-Appellant.

UNPUBLISHED
November 5, 1996

No. 170349
LC No. 93-65789-FC

Before: McDonald, P.J., and White and P.J. Conlin, JJ.*

PER CURIAM.

Defendant was convicted by a jury of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), involving the three oldest of his four minor children. He was sentenced to forty to eighty years' imprisonment on each count. On appeal, defendant challenges the prosecutor's references and elicitation of testimony that prosecution witness Judy Collingham, defendant's wife and the children's mother, who was originally a co-defendant, took and failed a polygraph exam and then decided to tell the truth; the trial court's failure to make findings in support of closing the courtroom as violative of his right to a public trial; the admission of videotaped testimony of the two older children, which had been presented at the preliminary examination over closed circuit television, as violative of the confrontation clause; and his sentence as disproportionate. We reverse.

I

Defendant first argues he was denied his due process right to a fair trial where the prosecutor deliberately remarked that Judy Collingham had taken a polygraph exam and argued that the circumstances under which she finally decided to "tell the truth," after failing the polygraph exam, lent credibility to the complainants' stories.

Our review of the record indicates that the prosecutor injected that Judy Collingham had taken a polygraph test during direct examination of Judy Collingham, in an objection during defense counsel's cross-examination of Judy Collingham, and in closing argument.

* Circuit judge, sitting on the Court of Appeals by assignment.

The results of a polygraph examination are inadmissible at trial, *People v Barbara*, 400 Mich 352, 357; 255 NW2d 171 (1977), and reference to a polygraph examination may constitute reversible error even when the actual results of the examination are not admitted. *People v Rocha*, 110 Mich App 1, 8; 312 NW2d 657 (1981). To determine whether reversal is mandated, this Court analyzes the following factors: (1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. *Rocha*, at 8-9.

Applying the factors set forth in *Rocha*, defendant objected to the prosecutor's questioning regarding the polygraph examination, and at the first break, moved for a mistrial. As to the second and third factors, the prosecutor made three references to the polygraph exam. We cannot conclude that they were inadvertent. On the fourth factor, the prosecutor stated in closing argument, referring to Judy Collingham, that "she went to a polygraph examination and said, no, I did not sexually abuse my children. But when finally caught in the lie, she broke down and said yes, we were involved," and argued further that her testimony "shows that the children were telling the truth about what happened to them." Thus, the references to the polygraph exam were attempts to bolster the prosecution's witnesses' credibility. As to the fifth *Rocha* factor, although the prosecution did not introduce the formal results of the polygraph examination, the first reference and series of questions as to the polygraph made clear that Judy Collingham had denied the alleged acts at the polygraph, and then admitted participation. Moreover, in closing argument, the prosecutor stated that Judy was "caught in a lie" when she took the polygraph exam and denied sexually abusing her children, thus implying the results of the examination. Thus, the five factors of *Rocha* are met and counsel reversal. Moreover, we conclude that given the children's difficulty in testifying and Judy Collingham's questionable credibility, the admission of the polygraph evidence cannot be regarded as harmless.

Because the case will be retried and defendant's other claims of error are not insignificant, we offer the following guidance for retrial.

While the plea agreement is a proper matter for jury consideration, the prosecutor should not be permitted to use the plea agreement and her view of the witness' compliance with it to suggest to the jury that the prosecutor has some special knowledge as to whether the witness is testifying truthfully. *People v Enos*, 168 Mich App 490, 494-495; 425 NW2d 104 (1988).

Additionally, before a courtroom can be closed under MCL 600.2163a(11); MSA 27A.2163(1)(11) the court must make findings on the record. Further, MCL 600.2163a(12); MSA 27A.2163(1)(12)(a) provides:

If the court determines on the record that it is necessary to protect the welfare of the witness and grants the motion made under subsection (11), the court shall order 1 or more of the following:

(a) All persons not necessary to the proceeding shall be excluded during the witness's testimony from the courtroom where the trial is held. The witness's testimony shall be broadcast by closed circuit television to the public in another location out of sight of the witness.

(b) In order to protect the witness from directly viewing the defendant, the courtroom shall be arranged so that the defendant is seated as far from the witness stand as is reasonable and not directly in front of the witness stand. The defendant's position shall be the same for all witnesses and shall be located so as to allow the defendant to hear and see all witnesses and be able to communicate with his or her attorney.

(c) A questioner's stand or podium shall be used for all questioning of all witnesses by all parties, and shall be located in front of the witness stand. [Emphasis added.]

And, as stated in *People v Kline*, 197 Mich App 165, 169; 494 NW2d 756 (1992):

The requirements for the total closure of a trial were set forth in *Waller*: (1) The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, (4) it must make findings adequate to support the closure.

Finally, before the court finds that the child witnesses are unavailable, it should make certain that the requirements of *Maryland v Craig*, 497 US 836; 111 L Ed 2d 666; 110 S Ct 3157 (1990), are met and make findings on the record.

In light of our disposition, we need not address defendant's remaining arguments.

Reversed.

/s/Gary R. McDonald

/s/ Helene N. White

/s/ Patrick J. Conlin