1-19-2016

State v. Baeza Respondent's Brief Dckt. 42988

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 42988**
Plaintiff-Respondent,	)	
	)	**Blaine Co. Case No.**
v.	)	**CR-2013-2111**
	)	
MARCELINO B. BAEZA,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

HONORABLE JONATHAN P. BRODY
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

TED S. TOLLEFSON
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
PLAINTIFF-RESPONDENT

BEN P. McGREEVY
Deputy State Appellate
Public Defender
P. O. Box 2816
Boise, Idaho 83701
(208) 334-2712

ATTORNEY FOR
DEFENDANT-APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

STATEMENT OF THE CASE

Nature of the Case

Marcelino B. Baeza appeals from the judgment entered upon the jury verdict finding him guilty of lewd conduct with a minor under sixteen years of age. On appeal, Baeza claims the district court violated his due process rights when it permitted the six-year-old victim to testify via closed-circuit television pursuant to the Uniform Child Witness Testimony by Alternative Methods Act, I.C. §§ 9-1801, et seq.

Statement of Facts and Course of Proceedings

In July 2013, six-year-old J.C. was playing at her uncle's house when her uncle, Baeza, brought her ice cream, pulled down her underwear and touched her privates. (8/12/14 Tr., p. 343, Ls. 6-21, p. 347, L. 22 – p. 348, L. 1.) Baeza touched J.C. several times. (8/12/14 Tr., p. 345, L. 17 – p. 346, L. 12.) When Baeza's wife came home, Baeza quickly pulled up J.C.'s underwear and went into the kitchen. (8/12/14 Tr., p. 348, Ls. 2-13.)

When J.C. got back to her home she went straight to the bathroom. (8/12/14 Tr., p. 370, Ls. 14-16.) J.C.'s father, Antonio Corona, called for J.C.'s mother, Jesus Patlan-Baeza, because J.C. was crying and something was wrong. (8/12/14 Tr., p. 370, L. 21 – p. 371, L. 14.) When Ms. Patlan-Baeza entered the bathroom, she saw the toilet bowl was full of blood. (8/12/14 Tr., p. 371, L. 20 – p. 372, L. 2.) Ms. Patlan-Baeza took J.C. to the bedroom and checked her underwear. (8/12/14 Tr., p. 372, Ls. 6-16.) J.C.'s underwear was bloody. (Id.) Ms. Patlan-Baeza checked J.C.'s vagina and saw more blood.

(8/12/14 Tr., p. 372, Ls. 17-21.) Ms. Patlan-Baeza asked J.C. if anyone touched her, and she said her uncle Baeza touched her. (8/12/14 Tr., p. 372, L. 24 – p. 375, L. 7.) J.C. said Baeza touched her "bum" and her "colita," a Spanish word for private parts. (8/12/14 Tr., p. 373, L. 5 – p. 374, L. 1.) J.C. was crying and said she was in pain. (8/12/14 Tr., p. 374, Ls. 2-6.) J.C.'s father hugged her. (8/12/14 Tr., p. 374, Ls. 7-9.) J.C. told her parents what Baeza did to her. (8/12/14 Tr., p. 374, Ls. 16-24.) J.C.'s parents grabbed the children and drove to Baeza's house to confront him. (8/12/14 Tr., p. 374, L. 21 – p. 375, L. 7.) Baeza denied doing anything wrong and said he only gave J.C. an ice cream. (8/12/14 Tr., p. 376, Ls. 11-20.)

Police responded, and Baeza was transported to the Hailey Police Department where he was interviewed. (8/12/14 Tr., p. 434, Ls. 17-25.) Paramedics arrived and took J.C. to the hospital in an ambulance. (8/12/14 Tr., p. 440, L. 13 – p. 441, L. 5.)

At the hospital, J.C. was examined by Angela Brady, the sexual assault nurse, and Dr. Robertson, an emergency room physician. (8/13/14 Tr., p. 537, L. 16 – p. 538, L. 4.) Dr. Robertson observed a small abrasion inside of J.C.'s vagina. (8/13/14 Tr., p. 544, Ls. 4-25.) The abrasion could have been caused by something penetrating her vagina. (8/13/14 Tr., p. 550, Ls. 18-24.)

Sergeant Ornales interviewed Baeza and Baeza attempted to provide several explanations for J.C's injury. He first claimed that the stick shift in his truck could have caused the injury to J.C. or that J.C. was injured when he helped her out of his truck. (8/13/14 Tr., p. 470, L. 23 – p. 473, L. 17.) Baeza

then claimed that piggyback rides could have caused J.C.'s injuries or J.C could have fallen and hurt herself. (8/13/14 Tr., p. 473, L. 18 – p. 474, L. 24.) Baeza then finally stated that J.C. could have been injured when Baeza pushed J.C. on the couch, and it was possible that his hand slipped under J.C.'s underwear and made penetration. (8/13/14 Tr., p. 475, L. 11 – p. 477, L. 11.) During the interview with Sergeant Ornales, Baeza stated J.C.'s injuries were unintentional and that he had "screwed up." (8/13/14 Tr., p. 479, L. 4 – p. 480, L. 8.)

A grand jury indicted Baeza for two counts of lewd conduct with a minor under sixteen years of age. (R., pp. 48-49.) Count One alleged manual to genital contact and Count Two alleged manual to anal contact. (Id.)

The state filed a Motion for Hearing to Allow Child Witness Testimony By Alternative Method. (R., pp. 149-150) Tami Kammer, a licensed clinical professional counselor, testified at the hearing that she was currently treating J.C. for sexual trauma and J.C. was suffering from post-traumatic stress disorder. (1/16/14 Tr., p. 13, L. 12 – p. 14, L. 22.) Ms. Kammer testified that prior to July 2013, J.C. was able to sleep alone in her room, but she could not sleep alone since July 2013. (1/16/14 Tr., p. 14, L. 23 – p. 15, L. 18.) After July 2013, J.C. soiled her pants, was afraid to leave her parents and had nightmares. (Id.) These conditions did not exist prior to July 2013. (Id.) Ms. Kammer testified it would re-traumatize J.C. to testify in open court and would make the trauma treatment more difficult. (Id.) Ms. Kammer also testified that J.C. was fearful of Baeza. (1/16/14 Tr., p. 16, Ls. 14-17.) Ms. Kammer did not recommend that J.C. testify in open court or in front of Baeza. (1/16/14 Tr., p.

17, Ls. 18-22.) After J.C. testified at the grand jury, J.C. "fell apart." (1/16/14 Tr., p. 21, Ls. 6-11.) Ms. Kammer testified that post-traumatic stress was different for J.C. than for an adult because a "child does not have the ability to differentiate as well as an adult between reality and a discussion of." (1/16/14 Tr., p. 20, L. 19 – p. 21, L. 5.) Testifying in court could be "further damaging" to J.C. (1/16/14 Tr., p. 16, L. 18 – p. 17, L. 5.)

The district court accepted Ms. Kammer's testimony and found by "clear and convicting evidence that the child would suffer serious emotional trauma that would substantially impair the child's ability to communicate with the finder of fact if required to be confronted face-to-face with the defendant." (R., pp. 195-196.) The district court next "thoroughly considered all of the factors listed in I.C. § 9-1806[]," including the relative rights of the parties. (R., pp. 196-197.) The district court ruled that Baeza would not be present in court during J.C.'s testimony but would watch J.C.'s testimony in a separate room via closed-circuit television. (R., pp. 197-198.) The district court ordered that Baeza should have some method to communicate with his attorney while he was in the separate room. (Id.)

The state then filed a Motion to Close Trial and to Allow Child Friendly Procedures During Victim's Testimony. (R., pp. 225-228.) The district court considered whether the jury may draw inferences regarding the procedures used during J.C.'s testimony and invited Baeza to provide a jury instruction that would provide a neutral explanation as to the alternate procedures. (4/15/14 Tr., p. 18, L. 14 – p. 19, L. 6.) Baeza did not want a jury instruction. (Id.) The district court

entered a second pretrial order in which it provided additional details regarding the procedures for the alternate testimony method. (R., pp. 239-242.) Prior to trial the presiding judge recused himself and the case was reassigned. (R., pp. 281-282.)

Baeza filed a motion to reconsider the district court's ruling on the State's Motion to Allow Alternative Testimony. (R., pp. 327-328.) The district court held a hearing on Baeza's motion. (7/1/14 Tr., p. 8, L. 5 – p. 47, L. 6.) The district court entered an "Order Re: Testimony By Alternate Method." (R., pp. 409-417.) The district court held, "there is clear and convincing evidence that the child could suffer serious emotional trauma that would substantially impair her ability to communicate with the jury if she is required to be confronted face-to-face by the Defendant." (R., p. 413.)

The district court then considered the factors in Idaho Code § 9-1806 and ordered that J.C. would be allowed to testify via an alternative method. (R., pp. 413-414.) The district court changed the alternate method of J.C.'s testimony. (R., pp. 414-415.) The previous decision ordered that J.C. would testify in open court and Baeza would be moved to a different room. (R., pp. 197-198, 240-241.) The district court altered the previous order and ordered that now J.C. would be placed in a different room and testify via closed-circuit television. (R., pp. 414-416.) The jury, the court, the defendant, and the attorneys would all be present in the courtroom. (Id.) The district court modeled this procedure on the procedure outlined in Idaho Criminal Rule 43.3, which allows forensic testimony

by video conference. (R., pp. 412-416.) The district court reasoned that this new procedure would better protect Baeza's rights. (Id.)

At trial, prior to J.C.'s testimony the district instructed the jury not to give any different weight to J.C.'s testimony because of the "child-friendly procedures used during her testimony":

> THE COURT: And, ladies and gentlemen, it's going to be obvious in a second, but [J.C.] is going to testify over a video link. There should be audio. So you're going to see that. And if we have to deal with that during the testimony, please bear with us.
>
> But I do have an instruction regarding that for you. So the instruction as to the testimony is this: Do not give any different weight to [J.C.'s] testimony because of the child-friendly procedures used during her testimony.

(8/12/14 Tr., p. 333, L. 19 – p. 334, L. 4.)

J.C. testified that Baeza brought her ice cream then touched her private parts. (8/12/14 Tr., p. 343, Ls. 6-21.)

> Q. And after Uncle Marcelino [Baeza] brought you ice cream in the living room did anything happen between you and Uncle Marcelino?
>
> A. He touched me.
>
> Q. And when you say he touched me, can you tell me who it was that touched you, [J.C.]?
>
> A. My Uncle Marcelino.
>
> Q. [J.C.], tell me what it was that he touched you with.
>
> A. With his finger.
>
> Q. Where was it that he touched you, [J.C.]?
>
> A. In my bum.
>
> Q. Okay. And did he touch you anywhere else, [J.C.]?

A. He just touched me here and here.

Q. Okay.

(Id.) When J.C. said Baeza "touched [her] here and here" she "pointed to the front of her private parts and to the back of her private parts." (8/12/14 Tr., p. 343, L. 22 – p. 344, L. 4.) She testified that Baeza touched her private parts "several times." (8/12/14 Tr., p. 345, L. 17 – p. 346, L. 12.) Baeza touched her underneath her clothes. (8/12/14 Tr., p. 347, Ls. 2-5.)

Jesus Patlan-Baeza, J.C.'s mother, testified that J.C. was in pain and crying and told her that Baeza touched her private parts. (8/12/14 Tr., p. 372, L. 22 – p. 374, L. 6.[1]) Antonio Corona, J.C.'s father, also testified that J.C. told him that her uncle Baeza stuck his fingers in her vagina. (8/12/14 Tr., p. 409, Ls. 1-4.)

Officer Skuza testified that he spoke with Baeza and Baeza "appeared nervous, wouldn't make eye contact, kind of appeared to be clammy and a little shaky." (8/12/14 Tr., p. 434, Ls. 7-12.) Officer Stewart testified that he also observed Baeza was shaky and "a little bit nervous." (8/12/14 Tr., p. 439, Ls.9-13.)

Teresa Garen, an interpreter working at the emergency room at Saint Luke's hospital, testified that J.C. told her that "he" touched her bottom and vagina with his fingers. (8/13/14 Tr., p. 507, L. 20 – p. 509, L. 14, p. 512, Ls. 2-

[1] J.C.'s statements to her father and mother were admitted under the excited utterance hearsay exception. (R., p. 170.) This ruling has not been challenged on appeal.

22.) Angela Brady, a nurse at the Saint Luke's emergency room, testified that J.C. told her that Baeza caused her injuries. (8/13/14 Tr., p. 529, Ls. 19-25.)

After the close of evidence, the district court again gave an instruction regarding J.C.'s testimony:

> THE COURT: Do not give any different weight to [J.C.'s] testimony because of the child-friendly procedures used during her testimony.

(8/14/14 Tr., p. 672, Ls. 20-22.) The jury found Baeza guilty of Count I, Lewd Conduct for manual to genital contact, but not guilty of Count II, Lewd Conduct for manual to anal contact. (R., p. 495.) The district court sentenced Baeza to twenty years with ten years fixed (R., pp. 531-535.) Baeza timely appealed. (R., pp. 541-543.)

ISSUE

Baeza states the issue on appeal as:

> Did the district court's order allowing J.C. to testify against Mr. Baeza at trial by the alternative method of closed circuit television violate Mr. Baeza's due process right to a fair trial because the alternate method infringed on his presumption of innocence?

(Appellant's brief, p. 10.)

The state rephrases the issue as:

Has Baeza failed to show that allowing J.C. to testify via closed-circuit television violated his due process rights?

ARGUMENT

Baeza Has Failed To Show The District Court's Order Allowing J.C. To Testify Pursuant To The Uniform Child Witness Testimony By Alternative Methods Act Violated His Due Process Rights

A. Introduction

The state charged Baeza with lewd conduct against his six-year-old niece, J.C. (R., pp. 48-49.) After a hearing, the district court permitted J.C. to testify via closed-circuit television pursuant to the Uniform Child Witness Testimony by Alternative Methods Act. (R., pp. 193-199, 239-242, 409-417.) On appeal, Baeza argues that the order allowing J.C. to testify via closed-circuit television infringed on his due process rights and presumption of innocence because the alternate procedure implied to the jury he was guilty. (Appellant's brief, pp. 13-28.) Baeza is incorrect. Allowing a six-year-old special accommodations when testifying did not imply Baeza was guilty. The district court provided a neutral explanation regarding the form of J.C.'s testimony. The district court instructed the jury not to give any different weight to J.C.'s testimony "because of the child-friendly procedures used during her testimony." (8/12/14 Tr., p. 333, L. 19 – p. 334, L. 4; 8/14/14 Tr., p. 672, Ls. 20-22.) Further, the alternate procedure was necessary to further an important state policy, namely the protection of a child sexual abuse victim when testifying. Regardless, even if there was error, the error was harmless because the result of the trial would have been the same regardless of the method by which J.C. testified.

B. Standard Of Review

Questions of constitutional law are subject to free review on appeal. State v. Doe, 157 Idaho 43, 49, 333 P.3d 858, 864 (Ct. App. 2014) (citing State v. O'Neill, 118 Idaho 244, 245, 796 P.2d 121, 122 (1990); State v. Miller, 131 Idaho 288, 292–93, 955 P.2d 603, 607-08 (Ct. App. 1997)).

C. Allowing J.C. To Testify Pursuant To The Uniform Child Witness Testimony By Alternative Methods Act Did Not Violate Baeza's Due Process Rights

The district court considered all of the factors required under the Uniform Child Witness Testimony by Alternative Methods Act, Idaho Code §§ 9-1801, et seq. and determined that six-year-old J.C. would be allowed to testify via alternate means. (See R., pp. 193-198, 239-242, 409-417.) Baeza argues on appeal that the alternative method used to present J.C.'s testimony violated Baeza's right to a presumption of innocence because having a child testify via closed-circuit television is inherently prejudicial. (Appellant's brief, pp. 13-20.[2])

1. Baeza Has Failed To Show The Alternate Method Of J.C.'s Testimony Was Inherently Prejudicial

Before a district court may allow a child witness to testify via an alternate method the district court must find "by clear and convicting evidence" that the

[2] On appeal, Baeza does not argue that the Uniform Child Witness Testimony by Alternative Methods Act, I.C. § 9-1801 et seq. is unconstitutional. Before the district court, Baeza asserted that the Act violated his right to confront witnesses and the procedure violated his due process and presumption of innocence rights. (See, R., pp. 171-175, 410-411.) The district court rejected both arguments. (See, R., pp. 193-199, 410-411.) Baeza does not raise the constitutionality of the Act on appeal, but instead only argues that using a closed-circuit television for J.C.'s testimony violated Baeza's due process and presumption of innocence rights. (See Appellant's brief, pp. 13-20.)

child would "suffer serious emotional trauma that would substantially impair the child's ability to communicate with the finder of fact" if the child was forced to testify either "face-to-face" with the defendant or in an "open forum." See I.C. § 9-1805.

Tami Kammer, a licensed clinical professional counselor, testified that she is treating J.C. for sexual trauma and J.C. is suffering from post-traumatic stress disorder. (1/16/14 Tr., p. 13, L. 12 – p. 14, L. 22.) Ms. Kammer testified that it would re-traumatize J.C. to require her to testify in open court and J.C. was afraid of Baeza. (1/16/14 Tr., p. 14, L. 23 – p. 15, L. 18, p. 16, Ls. 14-17.) Ms. Kammer testified that she did not recommend that J.C. testify in open court or in front of the defendant. (1/16/14 Tr., p. 17, Ls. 18-22.) The district court found:

> The Court accepts the testimony of Ms. Kammer and finds accordingly. The Court concludes by clear and convincing evidence that the child would suffer serious emotional trauma that would substantially impair the child's ability to communicate with the finder of fact if required to be confronted face-to-face by the defendant. An alternative form of testimony will be allowed.

(R., pp. 195-196, see also R., p. 413 ("[T]here is clear and convicting evidence that the child would suffer serious emotional trauma that would substantially impair her ability to communicate with the jury if she is required to be confronted face-to-face by the Defendant.").) Baeza does not challenge these findings on appeal. (See Appellant's brief, pp. 13-28.)

Once the standard under Idaho Code § 9-1805 is met, then the district court determines whether to allow a child to present testimony in an alternate method by considering seven factors. See I.C. § 9-1806.

> **I.C. § 9-1806. Factors for determining whether to permit alternative method**
>
> If the presiding officer determines that a standard under section 9-1805, Idaho Code, has been met, the presiding officer shall determine whether to allow the presentation of the testimony of a child witness by an alternative method and in doing so shall consider:
>
> > (1) Alternative methods reasonably available;
> > (2) Available means for protecting the interests of or reducing emotional trauma to the child without resort to an alternative method;
> > (3) The nature of the case;
> > (4) The relative rights of the parties;
> > (5) The importance of the proposed testimony of the child;
> > (6) The nature and degree of emotional trauma that the child may suffer if an alternative method is not used; and
> > (7) Any other relevant factor.

I.C. § 9-1806. The district court considered all seven factors. (See R., p. 196 ("The Court has thoroughly considered all of the factors listed in I.C. § 9-1806."), p. 413 ("[T]his court has considered the factors in I.C. Sec. 9-1806.").) During this consideration, the district court acknowledged that "Defendant's rights take priority over the other interests in the case." (R., p. 414.)

The district court determined that J.C. would be placed in a separate room and would testify via closed-circuit television because "this appears to best protect the rights of the Defendant while avoiding face-to-face contact between the child and the Defendant." (R., p. 414.[3]) The district court ordered:

[3] The district court modeled the closed-circuit television testimony procedures upon the provisions of Idaho Criminal Code 43.3. (R., pp. 414-415.) Idaho Criminal Rule 43.3 provides that forensic testimony in a criminal case may be offered by video teleconference. See I.C.R. 43.3. The state is unaware of any case law holding that taking video testimony pursuant to Idaho Criminal Rule 43.3 is inherently prejudicial to the defendant.

> 1. The child, if called as a witness, will be allowed to testify via closed-circuit television.
>
> 2. The room where the witness is must be in the courthouse.
>
> 3. The child must be visible to the court, defendant, counsel, jury, and others physically present in the courtroom.
>
> 4. The court (attorneys conducting the questioning) and witness must be able to see and hear each other simultaneously and communicate with each other during the testimony, however, the camera will be set in such a way that the Defendant is not seen by the child. If this is impossible, the court will reconsider this decision and traditional face-to-face testimony may be required.
>
> 5. The Defendant must be able to consult privately with counsel as in any other case.
>
> 6. In addition to an interpreter and videographer, a victim witness coordinator will be allowed in the room while the child is testifying. It is expected that any support personnel will be visible on camera. A bailiff will be present and will report any contact with the witness that might be out of view of the camera. The court wants further clarification and discussion of who will be in the room during testimony, which will be easier to clarify once the details of the closed-circuit logistics are in place. If the child's parents are allowed in the room they need to be visible at least to the bailiff if not on camera.
>
> Other child-friendly procedures may be used, as in child friendly oath, a coloring book, and the like.

(R., pp. 41-416.) The district court took great care in crafting the alternate method to make sure Baeza's rights were protected. (See R., pp. 413-416.)

On appeal, Baeza claims the district court erred by ordering this alternate method because "allowing J.C. to testify by closed circuit television was inherently prejudicial." (Appellant's brief, p. 15.) Baeza argues that the jury would infer that the child needed to be protected from the defendant or that the child would suffer serious emotional trauma from testifying in the presence of the

defendant and this impermissibly infringed upon Baeza's presumption of innocence. (See Appellant's brief, pp. 13-20.) Baeza's argument regarding what "implicit messages" the jury potentially received from the closed-circuit television testimony ignores the explicit messages (instructions) given to the jury by the district court.

The district court twice told the jury that the court was using "child-friendly procedures" when J.C. was testifying and not to give J.C.'s testimony different weight because of these "child-friendly procedures."

> Do not give any different weight to [J.C.'s] testimony because of the child-friendly procedures used during her testimony.

(8/12/14 Tr., p. 333, L. 19 – p. 334, L. 4; 8/14/14 Tr., p. 672, Ls. 20-22.) J.C. was six years old when she testified. (8/12/14 Tr., p. 363, Ls. 15-16.) No other small child testified during the course of the trial.[4] The appellate court presumes that the jury followed the instructions given by the district court. See State v. Abdullah, 158 Idaho 386, 445, 348 P.3d 1, 60 (2015); State v. Byington, 132 Idaho 597, 608, 977 P.2d 211, 222 (Ct. App. 1998). The district court did not inform the jury J.C. was testifying via closed-circuit television to protect J.C. from emotional harm or from Baeza. Compare State v. Wright, 153 Idaho 478, 488, 283 P.3d 795, 805 (Ct. App. 2012) (the district court erred when it specifically drew the jury's attention to the defendant's restraints by stating: "For the record, so there's no question as far as what's going on, there's been a little fuss over the break and I've required that Mr. Wright be restrained. If he behaves himself

[4] Baeza's daughter testified, but at 12 years old, she was significantly older than the six-year-old J.C.

here in a while, we'll loosen that up."). Instead, the jury was told that the reason J.C. testified via closed-circuit television was because that procedure was "child-friendly."

Even without the explicit instruction from the district court the jury could have easily believed that the closed-circuit television did not have anything to do with the defendant, but rather was just part of taking the testimony of a small child. See e.g. Holbrook v. Flynn, 475 U.S. 560, 569 (1986). In Flynn, the United States Supreme Court held that the presence of additional guards during trial "need not be interpreted as a sign that [the defendant] is particularly dangerous or culpable. Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence." Id. at 569. The same is true here. It is easy for jurors to believe that the district court made allowances for a six-year-old to testify by alternate means because of her young age – and not that the defendant is particularly dangerous or culpable. J.C. was given a child-friendly oath during her testimony, she was given crayons, she was allowed a coloring book, and a support person was allowed to be present during her testimony. (8/12/14 Tr., p. 335, Ls. 2-4, p. 345, Ls. 3-13; R., pp. 415-416.) Regardless what the jurors could have "inferred" the district court explicitly informed the jury that the reason for the alternate method of J.C.'s testimony was because it was "child-friendly."

The state is unaware of any controlling Idaho precedent regarding whether use of a closed-circuit television deprives a defendant of his

presumption of innocence.[5] However, at least two other jurisdictions have held that allowing a child witness to testify via closed-circuit television does not deprive a defendant of his presumption of innocence because the jury could believe that it was simply a child friendly way of taking testimony. See Wildermuth v. State, 530 A.2d 275, 292 (Md. Ct. App. 1987); Marx v. State, 953 S.W. 321, 331-332 (Tx. Ct. App., 1997). In Wildermuth, the appellate court determined that a jury could easily have assumed that a closed-circuit television was a procedure to reduce the child's trauma of testifying in court. Wildermuth, 530 A.2d at 292.

> Nor do we think that the use of the closed-circuit television necessarily suggests anything about a defendant's culpability. The jury was instructed not to give the televised testimony any greater or lesser weight than if it had been given in the courtroom. It might well have assumed that televising a child's testimony was simply a procedure used to reduce the trauma any child might suffer through public testimony. We are not persuaded that this procedure tended to brand McKoy as guilty. The Supreme Court of Iowa reached the same conclusion (with respect to use of an analogous screening procedure) in *State v. Coy,* 397 N.W.2d at 735. Accordingly, we reject this contention.

Id.

[5] The closest case on point is State v. Folk, 151 Idaho 327, 338, 256 P.3d 735, 746 (2011), where the child victim was allowed to testify over closed-circuit television. In Folk, the Idaho Supreme Court determined that requiring the defendant, who was representing himself, to write out questions for his counsel to ask the child on cross examination, violated the Confrontation Clause. Id. at 338-339, 256 P.3d at 746-747. Also, the district court did not make a finding that having the child testifying in the presence of the defendant would result in the child suffering serious emotional distress such that the child could not reasonably communicate. Id. Here Baeza was not restricted in his cross-examination and the district court found that the child would suffer serious emotional distress such that the child could not reasonably communicate. (See R., pp. 195-196, 413-414.)

Even when a court found that closed-circuit television could potentially affect a defendant's presumption of innocence, it held that the importance of protecting children outweighs any potential negative inference when the jury is instructed regarding the testimony. See Marx, 953 S.W. at 331-332. In Marx, the district court informed the jury that "the testimony of children in these types of cases can be taken by what we call closed circuit television[.]" Id. at 331. The Texas Court of Appeals held that this instruction "likely conveyed to the jury the state's general desire to protect children form the intimidating courtroom demeanor rather than implying that the procedure was being used in this particular case due to circumstances involving this particular defendant." Id. The same is true here. The instructions to the jury conveyed that the procedures being used were "child-friendly" and did not indicate the procedures were being used in this particular case due to this particular defendant. Baeza has failed to show that the district court violated his due process rights when it permitted J.C. to testify using child friendly procedures.

2. The United States Supreme Court Has Held The State Has A Compelling Interest In Protecting Child Victims Of Sexual Assault From The Trauma Of Testifying In Court

Baeza argues that the alternate method of J.C.'s testimony was not necessary to advance an essential state policy. (See Appellant's brief, pp. 20-23.) It is not clear from the cases cited by Baeza or the applicable statutes that the district court is required to find an "essential state policy" before it allows an alternate form of testimony. See, e.g., I.C. §§ 9-1805-1806. For example, Idaho Criminal Rule 43.3 allows an alternate method of testimony without any

"essential state policy" finding. See I.C.R. 43.3. Even if the district court is required to find a necessary state interest, the United States Supreme Court has found that the state's interest in protecting minor victims of sex crime from further trauma and embarrassment is a "compelling" one. See Maryland v. Craig, 497 U.S. 836, 852 (1990). In Craig, the United States Supreme Court analyzed a statute allowing a child victim to testify via alternate means and held that the state has a "transcendent interest" in protecting children such that it would allow the use of a special procedure for child testimony. See id. at 853.

> Given the State's traditional and "'transcendent interest in protecting the welfare of children,'" and buttressed by the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court, we will not second-guess the considered judgment of the Maryland Legislature regarding the importance of its interest in protecting child abuse victims from the emotional trauma of testifying. Accordingly, we hold that, if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

Id. (internal citations omitted).

Baeza argues the use of the closed-circuit television "undermined, rather than protected, the central concern of the presumption of innocence." (Appellant's brief, p. 21.) However, Baeza is unable to deny that the State has a compelling and necessary interest in protecting child victims of sexual assault from the trauma of testifying. Because the state's interest is compelling, and because the procedures used were not inherently prejudicial, Baeza has failed to show a violate of his due process rights.

3. Even If It Was Error To Allow J.C. To Testify Via Alternate Means The Error Was Harmless Because The Outcome Of The Trial Would Have Been The Same If J.C.'s Testimony Was Taken In The "Normal" Way

It was not error to allow J.C. to testify via closed-circuit television. However, even if permitting the alternate method of testimony was error, it was harmless error and the result of the trial would have been the same had J.C.'s testimony been taken in the "normal" way. "Where a defendant alleges error at trial that he contemporaneously objected to, this Court reviews the error on appeal under the harmless error test." State v. Almaraz, 154 Idaho 584, 600-01, 301 P.3d 242, 258-259 (2013) (citation omitted). "[T]he error is harmless if the Court finds that the result would be the same without the error." Id. at 598, 301 P.3d at 256 (citation omitted). Baeza argues that the closed-circuit television testimony altered the result of the trial because this method infringed on his presumption of innocence. (Appellant's brief, pp. 23-25.)

For the reasons articulated above, allowing six-year-old J.C. to testify via closed-circuit television is not inherently prejudicial and any potential prejudice was ameliorated by the district court's repeated instructions. Further, Baeza's argument does not address the substantial evidence of his guilt. J.C. testified that Baeza touched her private parts, under her clothes, with his finger. (8/12/14 Tr., p. 343, L. 6 – p. 344, L. 4, p. 347, Ls. 2-5.[6]) J.C.'s mother, Ms. Patlan-Baeza, testified that when J.C. got back from Baeza's house J.C. went straight to the bathroom and Ms. Patlan-Baeza saw a toilet bowl full of blood. (8/12/14 Tr., p. 371, L. 20 – p. 372, L. 2.) When Ms. Patlan-Baeza checked J.C.'s underwear,

she saw that J.C.'s underwear was bloody and saw blood on J.C.'s vagina. (8/12/14 Tr., p. 372, Ls. 6-21.) Ms. Patlan-Baeza testified that J.C. told her that Baeza touched her. (8/12/14 Tr., p. 372, L. 24 – p. 375, L. 7.) Antonio Corona, J.C.'s father, testified that J.C. also told him that Baeza stuck his fingers in her vagina. (8/12/14 Tr., p. 409, Ls. 1-4.) Dr. Robertson testified that she observed a small abrasion inside of J.C.'s vagina. (8/13/14 Tr., p. 544, Ls. 4-25.) The abrasion could be caused by something penetrating the vagina. (8/13/14 Tr., p. 550, Ls. 18-24.) Sergeant Ornales testified that Baeza eventually admitted it was possible that his hand could have slipped under J.C.'s underwear and made penetration. (8/13/14 Tr., p. 475, L. 11 – p. 477, L. 11.) Angela Brady, a nurse at the Saint Luke's emergency room, testified that J.C. told her that Baeza caused her injuries. (8/13/14 Tr., p. 529, Ls. 19-25.)

In light of the above evidence and the instructions that directed the jury not to give J.C.'s testimony any different weight, any potential error regarding the method by which J.C. testified was harmless. Having J.C. testify via closed-circuit television did not affect the outcome of the trial.

D. Baeza's Alternative Argument – That The District Court Did Not Address All Of The Factors Under Idaho Code § 9-1806 Is Not Preserved And Fails On The Merits

Under Idaho Code § 9-1806, the district court is required to examine seven factors, including "[t]he relative rights of the parties." I.C. § 9-1806(4). Baeza argues, in the alternative that the district court did not "adequately

[6] Baeza does not argue that use of the closed-circuit television altered the substance of J.C.'s testimony.

consider the relative rights of the parties under I.C. § 9-1806" before allowing J.C. to testify by closed-circuit television "because it did not address Mr. Baeza's due process assertion that his rights to a fair trial and the presumption of innocence would be violated." (Appellant's brief, pp. 25-26.)

Baeza's argument fails for several reasons. First, he has not preserved this argument for appeal. Baeza did not argue below that the district court failed to consider his due process rights when weighing the relative rights under Idaho Code § 9-1806(4). "Generally, issues not raised below may not be considered for the first time on appeal." State v. Wilson, 159 Idaho 412, __ 361 P.3d 1275, 1277 (Ct. App. 2015) (citing State v. Fodge, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992)). In State v. Perry, 150 Idaho 209, 245 P.3d 961 (2010), the Idaho Supreme Court held that an "appellate court should reverse an unobjected-to error when the defendant persuades the court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) is clear or obvious without the need for reference to any additional information not contained in the appellate record; and (3) affected the outcome of the trial proceedings." Id. (citing Perry, 150 at 226, 245 P.3d at 978.) Here Baeza claims for the first time on appeal that the district court "did not adequately consider the relative rights of the parties under I.C. § 9-1806 before ordering the alternative method of allowing J.C. to testify by closed circuit television." (Appellant's brief, p. 25.) A statutory violation does not rise to the level of violating the defendant's constitutional rights and thus Baeza fails the first prong of the Perry fundamental

error test. See Perry, 150 Idaho at 228, 245 P.3d at 980 (where the error relates to violation of a rule or statute the fundamental error doctrine is not invoked).

Second, even if preserved, Baeza's argument fails because the district court did properly consider all seven factors, including the relative rights of the parties and considered Baeza's due process rights. (See R., p. 196 ("The Court has thoroughly considered all of the factors listed in I.C. § 9-1806."), p. 413 ("[T]his court has considered the factors in I.C. Sec. 9-1806.").) The district court went through all of the factors, including determining that "Defendant's rights take priority over the other interests in the case." (R., p. 414; see also 7/1/14 Tr., p. 42, L. 20-p. 43, L. 4.) When it was analyzing all of the factors, the district court determined that placing a screen in front of Baeza was "unduly prejudicial." (R., p. 197.) The district court also considered Baeza's rights and changed the method of alternate testimony to better protect Baeza's rights. (R., pp. 414-415.) This change in alternate method was, in part, to address Baeza's due process rights. (R., p. 415 ("Additionally all of the rights to due process and communication with an attorney are important[.]").) The district court also took care to make sure J.C.'s testimony was "more like a regular witness examination" by putting only J.C. in a separate room, that way the defendant, jury, court and counsel would see the same thing. (R., p. 415.) Additionally, the district court considered Baeza's due process rights because the district court instructed the jury not to give any different weight to J.C.'s testimony. This instruction addressed the due process concern that the jury may give different weight to J.C.'s testimony due to the alternate method used to take her testimony. (See

8/14/14 Tr., p. 672, Ls. 20-22.) Contrary to Baeza's argument, the district court considered all of the factors under I.C. § 9-1806 and took care to consider the relative rights of the parties including Baeza's due process rights.

Finally, even if the court erred by not specifically articulating its consideration of Baeza's "presumption of innocence claim," the error is harmless. This court freely reviews application of constitutional principles to facts. For the reasons set forth in Section C, supra, application of those principles to undisputed facts of this case shows no due process violation.

CONCLUSION

The state respectfully requests that this Court affirm the judgment of the district court.

DATED this 19th day of January, 2016.

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 19th day of January, 2016, served a true and correct digital copy of the foregoing BRIEF OF RESPONDENT by emailing the brief to:

BEN P. McGREEVY
DEPUTY STATE APPELLATE PUBLIC DEFENDER
briefs@sapd.state.id.us

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

TST/dd