

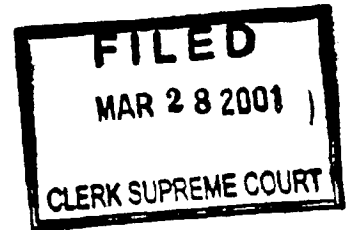
IN THE COURT OF APPEALS OF IOWA

No. 0-729 / 00-0094
Filed March 28, 2001

**STATE OF IOWA,
Plaintiff-Appellee,**

vs.

**JAMES TERRANCE MOSLEY,
Defendant-Appellant.**



Appeal from the Iowa District Court for Webster County, Joel E. Swanson (motions) and Allan L. Goode (trial), Judges.

James Terrance Mosley appeals the district court's judgments and sentences entered upon his convictions for second-degree burglary as an habitual offender in violation of Iowa Code sections 713.1, 713.5(2) and 902.8 (1999) and assault while participating in a felony (second-degree burglary) as an habitual offender in violation of Iowa Code sections 708.3 and 902.8 (1999). He contends he was denied his right to fact-to-face confrontation when the trial court allowed closed-circuit testimony. **JUDGMENT CONDITIONALLY AFFIRMED; RULING ON MOTION REVERSED; REMANDED WITH DIRECTIONS.**

Linda Del Gallo, State Appellate Defender, and Shellie L. Knipfer, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Ron Robertsen, County Attorney, and Timothy N. Schott, Assistant County Attorney, for appellee.

Heard by Vogel, P.J., and Mahan and Miller, JJ.

MILLER, J.

~~James~~ Terrance Mosley appeals the judgments and sentences entered upon his convictions, following bench trial, for second-degree burglary as an habitual offender, and assault while participating in a felony (second-degree burglary) as an habitual offender. The trial court allowed a child witness, B.W., to testify both during her deposition and at trial via closed-circuit television. Mosley contends the procedure violated his right to be confronted by witnesses against him as guaranteed by the Sixth Amendment to the United States Constitution and Article I, section 10 of the Iowa Constitution because there were inadequate showings and findings of necessity. We reverse the trial court's ruling allowing testimony by closed-circuit television at trial and remand for further proceedings.

I. BACKGROUND FACTS AND PROCEEDINGS

On the morning of May 28, 1999 eight-year old B.W. was awakened by a strange man in her bed. She alleged the man was touching her and pulling on the top of her underwear. B.W. got out of bed, ran and opened her bedroom door, opened her mother's bedroom door, and jumped into bed with her mother. B.W. awakened her mother and reported there was a strange man in her bedroom. B.W.'s mother was met by a black man coming out of B.W.'s room. The two proceeded to stand in the hallway adjacent to the open door of the mother's bedroom and talk for several minutes. The man stated he was lost and they discussed a mutual acquaintance. After approximately fifteen minutes the man walked into the living room, walked back into the bedroom to get his duffel bag and left. After he left B.W.'s mother called the police.

B.W.'s mother described the man to police officers as wearing a matching blue or gray shorts outfit, two pairs of socks and tennis shoes, and as having dreadlocks and braided hair. At approximately 8:00 a.m. that same morning a police officer observed Mosley walking in the same neighborhood as B.W.'s mother's apartment, carrying a duffel bag. Mosley was arrested on other grounds. Later that day or the next B.W.'s mother found a paycheck stub with Mosley's name on it at the bottom of the stairs to her apartment. B.W.'s mother identified Mosley from a photo line-up as the man in her home. Mosley was charged with second-degree burglary, assault while participating in a felony and indecent contact with a child. He was charged as an habitual offender on both the burglary and assault counts.

Prior to trial the State sought to have the deposition of B.W. taken outside of Mosley's presence under Iowa Rule of Criminal Procedure 12(2)(b). A hearing was held on the motion. Both B.W.'s mother and B.W.'s guardian ad litem (GAL) testified, and the court granted the motion. The State subsequently moved to have B.W. testify at trial by closed-circuit television. A hearing was also held on that motion with both B.W.'s mother and the GAL testifying once again. The court again granted the motion and allowed B.W. to testify at trial via closed-circuit television.

Mosley was found guilty of second-degree burglary as an habitual offender, in violation of Iowa Code sections 713.1, 713.5(2) and 902.8 (1999), and assault while participating in a felony (second-degree burglary) as an habitual offender, in violation of Iowa Code sections 708.3 and 902.8. Mosley

was sentenced to a term of incarceration not to exceed fifteen years on each conviction, with the two terms ordered to run consecutively.

Mosley appeals his convictions and sentences. He argues that both the court's ruling allowing B.W.'s deposition outside of his presence and the ruling allowing her trial testimony to be conducted by closed-circuit television lack adequate factual support and that in both rulings the district court failed to make findings of necessity adequate to outweigh his constitutional right to face-to-face confrontation of witnesses. Error was preserved by Mosley's resistances to the State's requests for such procedures and the trial court's rulings.

II. STANDARD AND SCOPE OF REVIEW

When determining whether the trial court erred in granting protection under section 915.38 of the Iowa Code we review for errors at law. *State v. Rupe*, 534 N.W.2d 442, 444 (Iowa 1995). Because Mosley's appeal raises constitutional issues, we review de novo the totality of the circumstances. *Id.*

III. MERITS

The Sixth Amendment guarantees a defendant the right "to be confronted with the witnesses against him." This is referred to as the Confrontation Clause and has been interpreted as guaranteeing "the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Coy v. Iowa*, 487 U.S. 1012, 1016, 108 S. Ct. 2798, 2801, 101 L. Ed. 2d 857, 864 (1988). The Confrontation Clause does reflect a preference for face-to-face confrontation at trial. *Ohio v. Roberts*, 448 U.S. 56, 63, 100, S. Ct. 2531, 2537, 65 L. Ed. 2d 597, 606 (1980). However, the rights conferred by the confrontation clause are not absolute and may give way to other important interests. *Coy*, 487 U.S. at 1020, 108 S. Ct. at

2803, 101 L. Ed. 2d at 866. In *Coy* the U.S. Supreme Court found it unnecessary to decide whether any exceptions existed to the right to face-to-face confrontation at trial, but did state that any exception to this right "would surely be allowed only when necessary to further an important public policy." *Id.* at 1021, 108 S. Ct. at 2803, 101 L. Ed. 2d at 867. In determining that the Iowa statute in question in *Coy* violated the defendant's right to confrontation the Supreme Court suggested that something more than the generalized finding underlying the "legislatively imposed presumption of trauma" contained in the statute involved in that case was necessary to overcome this constitutional right. *Id.*, 108 S. Ct. at 2803, 101 L. Ed. 2d at 867. The Supreme Court held that because there had been no "individualized findings that these particular witnesses needed special protection" the judgment could not be sustained. *Id.*, 108 S. Ct. at 2803, 101 L. Ed. 2d at 867.

In *Maryland v. Craig*, 497 U.S. 836, 845, 110 S. Ct. 3157, 3163, 111 L. Ed. 2d 666, 678 (1990) the Supreme Court was faced with a trial court decision that did make individualized findings and thus was required to decide the question reserved in *Coy*, whether exceptions exist. The Supreme Court concluded that the protection of a child witness from trauma was one public policy that *may* be sufficiently important, *at least in some cases*, to outweigh a defendant's right to face his or her accusers in court. *Id.* at 853, 110 S. Ct. at 3167, 111 L. Ed. 2d at 683. It stated,

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. at 855, 110 S. Ct. at 3169, 111 L. Ed. 2d at 685.

Craig sets forth a three-part test to determine necessity, a determination which must be case specific. First, the trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. *Id.* Second, the trial court must find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. *Id.* at 856, 110 S. Ct. at 3169, 111 L. Ed. 2d at 685. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than mere nervousness or excitement or some reluctance to testify. *Id.*, 110 S. Ct. at 3169, 111 L. Ed. 2d at 685.

The Court in *Craig* found that it need not decide the minimum showing of emotional trauma required for use of the special procedure because the statute in question, which required a determination that the child witness would suffer "serious emotional distress such that the child cannot reasonably communicate," clearly sufficed to meet constitutional standards. *Id.*, 110 S. Ct. at 3169, 111 L. Ed. 2d at 685. The Court concluded,

[W]here necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, *at least where such trauma would impair the child's ability to communicate*, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation.

Id. at 857, 110 S. Ct. at 3170, 111 L. Ed. 2d at 686 (emphasis added). The Supreme Court found consistent with its own holding the Maryland Court of

Appeals' conclusion that as a prerequisite to the application of the child victim protection statute procedure,

~~[T]he~~ Confrontation Clause requires *the trial court* to make a *specific finding* that testimony by the child in the courtroom *in the presence of the defendant* would result in the child suffering serious emotional distress such that the child *could not reasonably communicate*.

Craig, 497 U.S. at 858, 110 S. Ct. at 3170, 111 L. Ed. 2d at 686-87 (first, second and fourth emphases added).

Iowa's statutory provision for protection of child victims, which the trial court relied upon here, is similar to the Maryland provision approved by the Supreme Court in *Craig*. It provides, in relevant part,

[A] court may protect a minor . . . from trauma caused by testifying in the physical presence of the defendant where it would impair the minor's ability to communicate, by ordering that the testimony of the minor be taken in a room other than the courtroom and be televised by closed-circuit equipment for viewing in the courtroom. However, such an order shall be entered only upon a specific finding by the court that such measures are necessary to protect the minor from trauma.

Iowa Code § 915.38. In interpreting this statute our supreme court has held, "If this trauma [from testifying in a defendant's physical presence] impairs or handicaps a child's ability to communicate, protective measures must be adopted." *State v. Rupe*, 534 N.W.2d 442, 444 (Iowa 1995).¹

In this case Mosley challenges two separate orders of the district court, the one allowing B.W.'s deposition to be taken using closed-circuit equipment and the one allowing her trial testimony to be given using closed-circuit

¹ The court in *Rupe* was interpreting the current statute's predecessor, section 910A.14. However, section 915.38, which was enacted in 1998, contains essentially the same language and protective measures available to child victims as the former Code provision.

equipment. Mosley argues that both of these rulings violated his right to be confronted with a witness against him, B.W., both because there were inadequate facts to support the orders and because the trial court did not make the findings of necessity required by the Confrontation Clause and section 915.38. We will address the court's ruling regarding B.W.'s deposition testimony first.

A. Deposition Testimony.

Iowa Rule of Criminal Procedure 12(2)(b) provides:

The court may upon motion of a party and notice to the other parties order that the testimony of a victim or witness who is a child, as defined in Iowa Code section 702.5, be taken by deposition for use at trial. Only the judge, parties, counsel, persons necessary to record the deposition, and any person whose presence, in the opinion of the court, would contribute to the welfare and well-being of the child may be present in the room with the child during the child's deposition.

The court may require a party be confined to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child's deposition, but does not allow the child to see or hear the party. However, if a party is so confined, the court shall take measures to insure that the party and counsel can confer during the deposition and shall inform the child that the party can see and hear the child during deposition.

The State filed a "Motion for Court Order to Regulate Discovery of Child Witness." It stated the charges against the defendant, that the victim was eight years of age and a child as defined by Iowa Code section 702.5, and that it would be in the child's best interest and the interest of justice that any deposition of the child be taken with the defendant confined to an adjacent room or behind a screen or mirror so that the child does not see or hear the defendant. The defendant resisted, citing *Coy* and urging that rule 12(2)(b) violated the United States Constitution in the same manner as the procedures used in *Coy*. In ruling

on the motion the trial court noted the charge of indecent contact and found that B.W. was eight years of age and a child as defined in Iowa Code section 702.5. Its further findings and order were as follows:

Rule 12(2)(b), Iowa Rules of Criminal Procedure, provide for Court regulation of in court testimony or deposition testimony of a victim or a witness who is a child. Rule 12 provides that the Court may require a party to be confined in an adjacent room or behind a screen or a mirror which would allow the party to see and hear a child during deposition testimony, but not allowing the child to see or hear the party. The reasons for this become obvious when an alleged victim in a case such as is before the Court is eight years of age. The Court finds from the testimony presented that it would be in the best interests of the alleged minor child victim that her deposition be taken in such a manner that she is not able to see or hear the Defendant, James Terrance Mosley.

IT IS THEREFORE THE ORDER OF THE COURT that the Motion as filed by the State is hereby sustained to the extent that the deposition testimony of the alleged minor child victim shall be taken in such a manner that she is not able to see or hear James Terrance Mosley. The deposition should be conducted in a manner consistent with Rule 12(2)(b), Rules of Criminal Procedure.

If error, even of constitutional magnitude, is harmless, reversal is not required, but in cases of error of constitutional magnitude the State must prove beyond a reasonable doubt that the error did not prejudice the defendant. *State v. Griffin*, 576 N.W.2d 594, 597 (Iowa 1998). In the case before us no claim or showing is made that the State used B.W.'s deposition in any manner at trial. Mosley, however, used it to his apparent advantage on cross-examination of B.W., using it to challenge her credibility by comparing her deposition testimony to her trial testimony and statements she had earlier made to investigators and her mother, showing inconsistencies, omissions, and possible falsehoods. We conclude that under the facts of this case any error by the trial court in allowing B.W.'s deposition to be taken by closed-circuit television was harmless beyond a reasonable doubt because it caused no prejudice to Mosley. We therefore need

not decide whether Rule 12(2)(b) is unconstitutional or the trial court erred in allowing B.W.'s deposition to be taken pursuant to that rule.

EE Trial Testimony.

The trial court held a hearing on the State's motion to allow B.W. to testify at trial using closed-circuit television. B.W.'s mother testified that B.W. was still seeing victim advocate Dixie Lovain for counseling at the time of hearing. Ms. Lovain did not testify, and no evidence was presented concerning the nature or purpose of her counseling. B.W.'s mother further testified that in her opinion B.W. was afraid to be in the same room with Mosley, and that she felt B.W. would have trouble communicating exactly what happened if she was in the same room as Mosley. B.W.'s guardian ad litem also recommended the closed-circuit procedure be used based on his discussions with B.W.'s mother and Lovain. However, he had never personally spoken with B.W. He testified that Ms. Lovain felt the closed circuit procedure should be used based on the success of the similar procedure used at deposition, B.W.'s "potential reticence involving the entire procedure," and that without the use of closed-circuit television B.W.'s ability "to fairly and accurately recount what the situation was may be compromised."

The district court stated its basis for allowing B.W. to testify by closed-circuit television as follows:

The Court finds that the alleged victim, Jane Doe, is eight years of age and since the date of the alleged criminal activity has been required to obtain counseling, has been unable to sleep in her own bedroom, the room where the alleged crime took place, and has had to sleep with her mother. That she is fearful of the Defendant. The Court agrees with the Guardian Ad Litem and believes that testimony of the alleged victim would create trauma for her and that based upon the previous closed-circuit deposition testimony, the

Defendant would have the ability to observe the victim, be able to cross-examine her, and also communicate with his attorney. This Court believes that the protection of small children as witnesses in sexual abuse matters is of the utmost importance. The Defendant's constitutional rights will not be violated and the child will not be subjected to the trauma of in-person courtroom testimony.

The court correctly found that Iowa Code section 915.38 preserves the defendant's basic right to confrontation while protecting the minor victim from the trauma which often results from testifying in a defendant's physical presence. *See Rupe*, 534 N.W.2d at 444. The Confrontation Clause does not prohibit the use of a closed-circuit procedure, such as was used here, because the procedure ensures the reliability of the evidence by subjecting such testimony to rigorous adversarial testing by insuring Mosley will be able to observe the minor child's testimony, he will have a right of cross-examination, he will be in direct communication with his attorney, and the jury will observe the witness's testimony. *See Craig*, 497 U.S. at 857, 110 S. Ct. at 3170, 111 L. Ed. 2d at 686. However, this exception to the Confrontation Clause is only justified when the State has made an adequate showing of necessity for implementing this special procedure and the trial court has made a case-specific finding of necessity by making the findings required by *Craig*.

The evidence presented at the hearing might well support a finding on the first *Craig* factor, that the closed-circuit procedure was necessary to protect the welfare of B.W. The trial court's statement it agreed with the guardian ad litem that "testimony of the alleged victim would create trauma for her" can be seen as implying such a finding. However, the trial court made no express finding that the first *Craig* factor existed. (We assume the trial court meant testimony in the presence of Mosley.) The evidence might well support a finding on the second

Craig factor, that B.W. would be traumatized specifically by Mosley's presence. The trial court's finding that "she is fearful of the defendant" can be seen as implying such a finding. However, the trial court made no express finding that the second *Craig* factor existed. Most importantly, however, the trial court's findings do not, either expressly or by necessary or reasonable implication, include a finding on the third *Craig* factor, that any emotional distress suffered by B.W. in the presence of Mosley would be more than mere nervousness or excitement or some reluctance to testify, and the related requirement of Iowa Code section 915.38(1), that the "trauma caused by testifying in the physical presence of the defendant . . . would impair the minor's ability to communicate." We conclude the trial court failed to make the findings that *Craig* and Iowa Code section 915.38(1) require to support its ultimate finding of necessity.

The State argues that a finding, to a certitude, of B.W.'s complete inability to communicate in the presence of Mosley is not required and that a reasonable likelihood of that occurring is all that is needed under *Craig*. Further, the State contends any omission of express findings does not require reversal because the record shows the need for the special procedure used in this case. In other words, the State argues we can determine whether the record supports the findings necessary to support the trial court's ultimate finding of necessity, even though the trial court made no such findings. Moseley, on the other hand, asserts reversal of his convictions is required not only because the trial court did not make the findings required by *Craig* and section 915.38(1), but also because the record will not support such findings.

The United States Court of Appeals for the Eighth Circuit has expressed doubt as to whether a court other than the trial court in the criminal proceeding has the authority under *Craig* to determine whether the record supports a case-specific finding of necessity. See *Hoversten v. State of Iowa*, 998 F.2d 614, 616 (8th Cir. 1993) ("Although the Supreme Court in *Craig* declined to prescribe any 'categorical evidentiary prerequisites' for the use of child protection devices, it held that *the trial court* must make 'a case-specific finding of necessity'.") (emphasis added). For reasons that follow, we conclude reversal of the trial court's ruling and remand to the trial court for application of the correct legal standard as set forth in *Craig* and section 915.38(1) is appropriate. We therefore conclude that reversal of Mosley's convictions is not required.

Upon our de novo review of the record we find the record may support the required findings. However, any findings on the *Craig* factors (and the requirement of section 915.38(1)) depend entirely upon the testimony of the guardian ad litem and the testimony of B.W.'s mother, their testimony being the only evidence presented on the motion for closed-circuit testimony at trial. The guardian ad litem had not met or talked to B.W. His testimony was a combination of hearsay and opinions that were not case-specific. Questions arise as to what weight should be given to his testimony. B.W.'s mother understandably has a strong, personal interest in protecting B.W. from harm, trauma, and experiences that might be unpleasant, which testifying in the same room as the defendant might be. This personal interest raises questions concerning her credibility in expressing opinions regarding any fears B.W. may

have and B.W.'s ability to communicate facts to the jury when testifying in the same room as Mosley.

By allowing testimony using closed-circuit television without making the findings required by *Craig* and section 915.38(1) the trial court failed to apply the correct legal standard. It therefore applied an incorrect legal standard in reaching its decision. When an incorrect legal standard is applied we remand for new findings and application of the correct standard. See *State v. Ellis*, 578 N.W.2d 655, 658-59 (Iowa 1998) (reversing denial of new trial and remanding for application of the correct legal standard); *State v. Robinson*, 506 N.W.2d 769, 770-71 (Iowa 1993). Findings on the *Craig* and section 915.38(1) factors may well involve determining the weight of the evidence and credibility of witnesses in this case. Remand to the trial court to make findings on whether those factors exist appears particularly appropriate because the weight of the evidence and credibility of witnesses are primarily to be determined by the fact finder, here the trial court, *State v. Ruiz*, 496 N.W.2d 789, 792 (Iowa Ct. App. 1992); *State v. King*, 344 N.W.2d 562, 563 (Iowa Ct. App. 1983), and although our review is de novo trial court findings on credibility of witnesses are entitled to considerable deference by this court, *State v. Liggins*, 524 N.W.2d 181, 186 (Iowa 1994); *State v. Evans*, 495 N.W.2d 760, 762 (Iowa 1993).

We conclude that reversal of Mosley's conviction is not necessary because a fact finder may appropriately find the existence of the *Craig* and section 915.38(1) factors, but that reversal of the trial court's ruling and remand to the trial court for application of the correct legal standard is appropriate unless the trial court's error was harmless, an issue to which we now turn.

Finally, the State argues that any error on the part of the district court in allowing B.W. to testify by closed-circuit television was harmless beyond a reasonable doubt. However,

An assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence.

Coy v. Iowa, 487 U.S. 1012, 1021-22, 108 S. Ct. 2798, 2803, 101 L. Ed. 2d 857, 867 (1988). Reversal is not required if error is harmless, even if it is of constitutional magnitude, but in cases of error involving constitutional rights the State must prove beyond a reasonable doubt that the error did not prejudice the defendant. *Griffin*, 576 N.W.2d at 597.

In order to prove Mosley guilty of burglary, the State had to prove that he entered B.W.'s mother's apartment with the intent to commit an assault (he was found guilty for entering with the intent to commit an assault), and to prove him guilty of assault while participating in a felony (burglary) the State had to show he assaulted B.W. B.W.'s mother testified that when she had gone to bed both the door to her bedroom and the door to B.W.'s bedroom were open. B.W. testified that she was awakened by someone touching her, someone "tugging up" on her panties. B.W. also testified that upon being awakened the door to her room was closed, as was the door to her mother's room, and that she opened both doors to go from her room to her mother's. The only other evidence concerning what had occurred in B.W.'s bedroom was B.W.'s mother's testimony, on cross-examination and on recross-examination, that B.W. had told her the person in her bedroom was tugging on her underwear. B.W. did not mention this to her

mother until some eighteen hours after the incident, after she had gone to school for the day, had gone to the babysitter's after school, and her mother had picked her up from the babysitter about midnight after working the evening shift.

In finding that Mosley had entered with the intent to commit an assault, the trial court relied on the trial testimony of B.W., that the bedroom doors were closed, as circumstantial evidence Mosley had closed the doors and intended to commit an assault when he entered. B.W.'s testimony must be excluded in analyzing the evidence for harmless error. Coy, 487 U.S. at 1021-22, 108 S. Ct. at 2803, 101 L. Ed. 2d at 867. There was no other evidence concerning the position of the doors at the time of the events giving rise to the charges against Mosley. Therefore, unless B.W. was properly allowed to testify by closed-circuit television the Confrontation Clause was violated and Mosley's burglary conviction cannot stand.

The only evidence that Mosley had assaulted B.W. consisted of B.W.'s trial testimony, which must be excluded in analyzing for harmless error, and B.W.'s mother's trial testimony about what B.W. had told her almost a day after the incident. B.W.'s mother's testimony is prima facie hearsay, and nothing in the record indicates that any hearsay exception applies. It is improper to speculate whether these hearsay statements would have been offered by the defendant (they came in during cross-examination and recross-examination), or would have been admitted if offered by the State, and for what purpose, at a hypothetical trial at which B.W. did not testify. See *Hoversten*, 998 F. 2d at 617 (holding that in the case of a Confrontation Clause violation, for harmless error purposes a court must exclude hearsay evidence of what the child said as well

as exclude her in-court testimony). Therefore, unless B.W. was properly allowed to testify by closed-circuit television the Confrontation Clause was violated and Mosley's assault while participating in a felony conviction cannot stand.

IV. CONCLUSION

Notwithstanding the trial court's failure to make findings on the *Craig* and section 915.38(1) factors, we conclude it is not necessary to reverse Mosley's convictions at this point because a fact finder applying the correct legal standard could find those factors all exist. We believe the appropriate remedy, one which will protect Mosley's rights, is to affirm his conviction on condition, reverse the trial court's ruling on the motion to allow trial testimony by closed-circuit television, and remand to the district court to rule on that motion applying the proper legal standard. See e.g., *State v. Rubino*, 602 N.W.2d 558, 566 (Iowa 1999) (conditionally affirming conviction while reversing ruling denying "reverse waiver" to juvenile court because of ineffective assistance, and remanding to trial court for new "reverse waiver" hearing); *State v. Watkins*, 463 N.W.2d 411, 415-16 (Iowa 1990) (conditionally affirming convictions and remanding for hearing on Sixth Amendment issue concerning jury composition where trial court erred in denying a hearing); *State v. Bailey*, 452 N.W.2d 181, 183-84 (Iowa 1990) (conditionally affirming conviction while remanding for reopening of suppression hearing where trial court erroneously rejected evidence offered by the State). The district court shall rule on the motion, on the basis of the existing record, by addressing each of the three *Craig* and section 915.38(1) factors. If it makes positive findings on each of those factors, our affirmance of Mosley's convictions

shall stand. If it does not, it must set Mosley's convictions aside and order a new trial.

V. SUMMARY

Error, if any, in allowing B.W.'s deposition to be taken by closed-circuit television was harmless beyond a reasonable doubt. The trial court applied an incorrect legal standard in ruling that B.W. could testify at trial by closed-circuit television. We conditionally affirm the defendant's convictions, reverse the trial court's ruling allowing trial testimony by closed-circuit television, and remand to the district court to rule on that motion applying the proper legal standard.

JUDGMENT CONDITIONALLY AFFIRMED; RULING ON MOTION REVERSED; REMANDED WITH DIRECTIONS.