

11-1-2015

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Recommended Citation

Marin Keyes, Case Note, *The Skype is the Limit in Montana: City of Missoula v. Duane Gives Skype Testimony Almost Free Rein in Courtrooms*, 76 Mont. L. Rev. Online 163, https://scholarship.law.umt.edu/mlr_online/vol76/iss1/20.

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**The Skype is the Limit in Montana: *City of Missoula v. Duane* Gives
Skype Testimony Almost Free Rein in Courtrooms**

Marin Keyes

“The simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation.”¹

I. INTRODUCTION

Historically, most challenges to the Confrontation Clause have involved the absence of a witness at trial. With the advent of technology, however, the challenges have been rapidly evolving. The constitutionally provided right of the accused to confront witnesses is now being analyzed in situations where the witness is physically absent,² but virtually present in the courtroom through the use of technological platforms. In the past couple decades, courts across the nation have dealt with various issues concerning the use of these platforms and the effect on the Confrontation Clause. The judgments have been diverse, but the general trend permits witnesses to testify via technological platforms, albeit usually with certain requirements the witness must meet.³ In 2015, the Montana Supreme Court followed this trend in *City of Missoula v. Duane* when it held the use of Skype, a two-way audio-video electronic communication program, did not violate the defendant’s right to confront witnesses.⁴ This note examines the Court’s divergent view on what is considered a compelling interest allowing for use of Skype, the lack of statutory authorization for the Court’s decision, and the unanswered questions involving courtroom use of Skype.

II. FACTUAL AND PROCEDURAL BACKGROUND

In early 2013, the city of Missoula charged Michael Arthur Duane and two others with misdemeanor cruelty to animals after police officers discovered detestable living conditions in which Duane and the two other co-owners were keeping their three dogs.⁵ During the officers’ investigation, they also found the body of a fourth puppy — the death of which had been the initial reason for the police investigation — in Duane’s and the co-owners’ motel room.⁶ The police had Dr. Lindsay

¹ United States v. Yates, 438 F.3d 1307, 1315 (11th Cir. 2006).

² U.S. CONST. amend. VI; MONT. CONST. art. II, § 24.

³ See *infra* Part IV(A).

⁴ City of Missoula v. Duane, 355 P.3d 729 (Mont. 2015).

⁵ *Id.* at 731.

⁶ *Id.*

Sjolin examine the dead puppy, and she assessed the cause of death as blunt force trauma.⁷

Though the animal cruelty charges were only brought for the conditions in which the three living dogs were kept, the prosecution sought to have Dr. Sjolin testify against the defendants.⁸ Dr. Sjolin's potential testimony, however, became a problem when Dr. Sjolin relocated to California.⁹ With Dr. Sjolin's move and the separation of the three defendants' trials, the prosecution faced considerable expense and difficulty in physically producing Dr. Sjolin for each trial.¹⁰ Accordingly, the city prosecutor asked the municipal court to either let Dr. Sjolin's supervisor testify in court or to let Dr. Sjolin testify during the trial through Skype — a live two-way audio/visual communication system available online.¹¹ Although Duane objected on the basis of his right to confront the witness against him, the municipal court agreed to let Dr. Sjolin testify either while physically in court or through Skype.¹²

Duane's trial proceeded in August 2013 with Dr. Sjolin testifying through Skype.¹³ The jury found Duane guilty of animal cruelty.¹⁴ Duane appealed to the Fourth Judicial District Court and then to the Montana Supreme Court.¹⁵

III. HOLDINGS

On appeal, Duane argued two issues: first, the use of Skype for Dr. Sjolin's testimony impinged upon his right to confront witnesses against him; second, the district court erred in holding an evidentiary rule, which provided a right to confrontation,¹⁶ only applied to civil cases.¹⁷ The opinion quickly dismissed the second issue, agreeing with Duane that the evidentiary rule applied to both civil and criminal cases, but finding it to be harmless error.¹⁸ The Court devoted much more attention and space to the first issue calling for the interpretation of the Confrontation Clause from Article II, section 24 of the Montana Constitution.

Justice Cotter, writing for the majority, started her analysis by looking to the groundbreaking criminal case in video testimony — *Maryland v. Craig*. In *Maryland* the U.S. Supreme Court held one-way

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Mont. R. Evid. 611(e) states: "Except as otherwise provided by constitution, statute, these rules, or other rules applicable to the courts of this state, at the trial of an action, a witness can be heard only in the presence and subject to the examination of all the parties to the action, if they choose to attend and examine."

¹⁷ *Duane*, 355 P.3d at 731.

¹⁸ *Id.* at 734.

closed circuit television testimony from a child abuse victim did not violate the Sixth Amendment's Confrontation Clause because it did not guarantee "criminal defendants the absolute right to a face-to-face meeting with witnesses against them at trial."¹⁹ Unlike the U.S. Constitution, Article II, section 24 of the Montana Constitution explicitly does guarantee the accused the right "to meet the witnesses against him face to face."²⁰ In *State v. Stock* the Montana Supreme Court recognized section 24 as a greater protection, but in qualifying the right explained, "[W]e have never interpreted that greater protection to entitle a criminal defendant to *literal* face-to-face confrontation with all witnesses."²¹ Additionally, the Court reiterated the requirements of the Confrontation Clause: "physical presence of the witness, testimony under oath, cross-examination of the witness, and observation of the witness's demeanor by the trier of fact."²² Finding testimony via two-way electronic audio-video communication fit into the limitation on the Confrontation Clause while meeting all the other elements, the Court in *Stock* held constitutional a Montana statute permitting a child abuse victim to testify in a trial through the use of such technology.²³

During his appeal to the district court, Duane argued *Bonamarte v. Bonamarte* supported the reversal of his conviction.²⁴ In *Bonamarte* the Court held the telephone testimony of a witness to be reversible error.²⁵ The Court listed various reasons the telephone testimony violated the Confrontation Clause, with particular emphasis on the impairment of cross-examination springing from the lack of ability to observe the witness.²⁶ In Duane's case the Court reasoned *Bonamarte* failed to support the reversal of Duane's conviction, because it actually supported the use of two-way electronic audio-video communication which allows for the observance of the witness.²⁷ Indeed, the Court, applying *Stock's* limitation on the Confrontation Clause, found Dr. Sjolin's Skype testimony met all the elements for the Confrontation Clause. The municipal court trial records showed Dr. Sjolin took the oath, the defense counsel cross-examined her in real time, and Dr. Sjolin was able to hear and see people in the court, as well as the court and jury being able to hear and see her.²⁸

¹⁹ *Maryland v. Craig*, 497 U.S. 836, 844 (1990).

²⁰ MONT. CONST. art. II, § 24.

²¹ *State v. Stock*, 256 P.3d 899, 905 (Mont. 2011) (emphasis in original).

²² *Id.* at 903 (citing *Craig*, 497 U.S. at 845-46).

²³ *Stock*, 256 P.3d at 905.

²⁴ *City of Missoula v. Duane*, 355 P.3d 729, 733 (Mont. 2015).

²⁵ *Bonamarte v. Bonamarte*, 866 P.2d 1132, 1136-37 (Mont. 1994).

²⁶ *Id.* at 1137.

²⁷ *Duane*, 355 P.3d at 733.

²⁸ *Id.*

In its conclusion, after repeating the preferred method of testimony was still the physical presence of the witness in trial,²⁹ the Court took the opportunity to announce a distinct exception:

[W]here a moving party makes an adequate showing on the record that the personal presence of the witness is impossible or impracticable to secure due to considerations of distance or expense, a court may permit the testimony of the witness to be introduced via Skype or a substantially similar live 2-way video/audio conferencing program that satisfies the hallmarks of confrontation as herein set forth.³⁰

The hallmarks, gathered from *Craig* and *Stock*, are an adversarial proceeding, a witness under oath present in real time, and direct and cross-examination with the jury's ability to hear the testimony and observe the witness's demeanor.³¹

In a short concurrence, Chief Justice McGrath remarked how the advancement in communication technology has far surpassed what the Framers of the Montana Constitution could have foreseen.³² McGrath went on to describe how programs such as Skype offer face-to-face communication for all users in real time.³³ As long as the elements of the Confrontation Clause were met, McGrath stated face-to-face communication programs satisfy the face-to-face phrasing in the Confrontation Clause.³⁴

IV. ANALYSIS

As suggested in the introduction, the Court's decision to allow Skype testimony in *Duane* is not surprising; rather, it is another demonstration of the modern trend toward an evolving courtroom. With costs of litigation rising and court dockets reaching saturation, it is no wonder courts are welcoming the cost- and time-saving methods that programs such as Skype offer. The use of Skype may come with many benefits courts are desperately in need of, but Skype comes with dangers as well. Other courts, in realizing the pitfalls of testimony through technology, have created obstacles to be overcome before such technology can be used. Montana has outlined limitations on use as well, but the limitations have fallen short of those imposed by neighboring courts. Also, the Montana Supreme Court acted outside the boundaries

²⁹ *Id.* at 734.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* (McGrath, C.J., concurring).

³³ *Id.* (McGrath, C.J., concurring).

³⁴ *Id.* at 735 (McGrath, C.J., concurring).

set by the Montana legislature when it permitted Skype trial testimony of adult witnesses. Finally, the Court glossed over the impact the use of Skype testimony will inevitably have on the judicial system as a whole.

A. Contrary to Other Courts, Montana Holds Cost and Distance as Compelling Reasons for Permitting Skype Testimony

Of the cases dealing with the intersection between the Confrontation Clause and testimonial technology, the U.S. Supreme Court's decision in *Maryland v. Craig* is the foremost authority. As discussed above, *Craig* accepted the practice of using one-way closed circuit television when a child abuse victim was testifying.³⁵ However, the Court qualified its decision by declaring the Confrontation Clause was only satisfied if the physical absence of the witness was necessary to further an important public policy.³⁶ Most courts have chosen to implement the public policy test in their own jurisdictions. Courts have found the test necessary because judges have held electronic communications programs are inherently different from and less forceful than physical presence at trial,³⁷ thus the use of such programs deserves scrutiny.³⁸

In applying *Craig*'s public policy test, courts have uniformly held the test satisfied by certain kinds of witnesses deserving heightened protection, typically afforded through their courtroom absence; these classes include child abuse victims and those fatally ill or otherwise infirm.³⁹ ⁴⁰ The Montana Supreme Court itself applied the public policy test in *Stock*, finding the protection of child abuse witnesses from further trauma was a compelling state interest.⁴¹ Another kind of witness, not quite deserving special protection, but nonetheless furthering public policy interests is out-of-country witnesses.⁴² By allowing such

³⁵ *Maryland v. Craig*, 497 U.S. 836, 844 (1990).

³⁶ *Id.* at 850.

³⁷ *United States v. Yates*, 438 F.3d 1307, 1315 (11th Cir. 2006) ("The simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation.").

³⁸ *People v. Wrotten*, 923 N.E.2d 1099, 1103 (N.Y. 2009) ("Live televised testimony is certainly not the equivalent of in-person testimony, and the decision to excuse a witness's presence in the courtroom should be weighed carefully.").

³⁹ *Craig*, 497 U.S. at 852–53.

⁴⁰ *Wrotten*, 923 N.E.2d 1099, 1101, 1103 (N.Y. 2009) (two-way video testimony permitted where travel would endanger witness's health); *Horn v. Quarterman*, 508 F.3d 306, 320 (5th Cir. 2007) (two-way closed circuit television testimony of terminally ill witness permitted); *United States v. Benson*, 79 F. App'x 813, 820–21 (6th Cir. 2003) (video conference testimony of elderly witness too ill to travel permitted); *United States v. Gigante*, 166 F.3d 75, 81–82 (2d Cir. 1999) (two-way closed circuit television testimony permitted from combined facts of witness's illness and placement in Federal Witness Protection Program).

⁴¹ *State v. Stock*, 256 P.3d 899, 905 (Mont. 2011).

⁴² *El-Hadad v. United Arab Emirates*, 496 F.3d 658, 668–69 (D.C. Cir. 2007) (Internet video testimony permitted where witness had been denied a visa to the United States); *In re Marriage of Swaka*, 319 P.3d 69, 72–73 (Wash. Ct. App. 2014) (Skype testimony permitted where mother was in Spain and international travel would substantially burden herself and her children); *United States v.*

witnesses to testify through electronic communications programs, the courts further the public policy of having necessary and relevant witnesses at a trial when the witnesses would otherwise be unavailable.⁴³

Despite the traditional use of the public policy test in a past case, however, in *Duane* the Montana Supreme Court found cost and distance to be a compelling factor in allowing Skype testimony.⁴⁴ In only a handful of cases have other courts found distance alone to be a compelling factor, yet those cases dealt with international witnesses beyond subpoena power,⁴⁵ an international party who was refused a United States visa,⁴⁶ and an international party who faced considerable expense in flying to the United States and the added burden of either bringing her children with her — children who had health issues — or leaving them behind.⁴⁷ Opposed to those cases, *Duane* involved a witness who relocated to another state.⁴⁸ Interstate distance has typically been found to be a factor in cases where the witness was also suffering from health problems.⁴⁹ As for the compelling nature of cost, one case found the estimated cost of \$10,000 may be compelling when combined with other difficulties in obtaining international witnesses.⁵⁰ *Duane* did not include an estimated monetary cost for presenting Dr. Sjolín in the trials of *Duane* and the other two co-owners, nor was there a cost for presenting Dr. Sjolín at *Duane*'s trial alone.

B. Lack of Statutory Authorization for Skype Testimony

The Court in deciding *Duane* did not rely on any state statute, but that is not to say there are no statutes governing the use of two-way electronic audio-video communication. The Montana Legislature has seen fit to enact such statutes in three specific areas. First, a statute allow the use of audio-video communication in mental illness hearings.⁵¹ The statute specifically defines the respondent or patient as present in a hearing even when using audio-video communication programs, as long as the program meets certain set out requirements.⁵² Second, the state has passed a series of statutes enabling a defendant to not physically appear in multiple stages of a criminal proceeding including setting bail,

Guild, 2008 U.S. Dist. LEXIS 3605, *9 (E.D. VA Jan. 17, 2008) (strong case for allowance of video conference in situation where the witnesses are foreign nationals where physical presence in court cannot be secured in other ways).

⁴³ *Guild*, 2008 U.S. Dist. LEXIS at *9.

⁴⁴ *City of Missoula v. Duane*, 355 P.3d 729, 734 (Mont. 2015).

⁴⁵ *Guild*, 2008 U.S. Dist. LEXIS at *9.

⁴⁶ *El-Hadad*, 496 F.3d at 668–69.

⁴⁷ *Swaka*, 319 P.3d at 72–73.

⁴⁸ *Duane*, 355 P.3d at 731.

⁴⁹ *People v. Wrotten*, 923 N.E.2d 1099, 1101, 1103 (N.Y. 2009); *United States v. Benson*, 79 F. App'x 813, 820–821 (6th Cir. 2003).

⁵⁰ *Guild*, 2008 U.S. Dist. LEXIS at *7–8.

⁵¹ MONT. CODE ANN. § 53–21–140 (2015).

⁵² *Id.*

initial appearances, guilty pleas and plea agreements, and sentencing.⁵³ Noticeably missing from the list is the ability of a defendant to appear through two-way electronic audio-video communications during the fact-finding trial. Additionally, most of the statutes contain language detailing the requirements of the two-way electronic audio-video communications and the necessary agreement of parties to the use of such technology, with the defendant having the ability to object to it.⁵⁴ Third, statutes let child abuse witnesses testify via two-way electronic audio-video communications.⁵⁵ These statutes codify the requirements to be met for the use of the such technology, provide for a hearing upon motion to use such technology, factors to be examined when granting the motion, and the ability of the court to order the use of such technology.⁵⁶ Moreover, the Court upheld the constitutionality of these statutes in *Stock*.⁵⁷

Notwithstanding the abundance of Montana statutes addressing the use of two-way electronic audio-video communications, the Court did not see fit to base its *Duane* decision on the statutes. The Court did not even attempt to examine the statutes and compare them to the issue in the case. The Court overlooked a vital part of the interpretation of law when it failed to assess the legislature's past action in the realm of two-way electronic audio-video communications. Acting outside established legislative parameters, the Court in *Duane* has created a rule with no statutory backing. Indeed, as argued in *People v. Wrotten*, it is reasonable to believe the legislature intentionally excluded the use of technology in certain circumstances, when the legislature expended considerable time and effort to draft statutes expressly allowing the use of such technology in defined circumstances.⁵⁸ Currently, the next legislative session will decide whether the *Duane* rule will be codified, amended, or rejected.

C. *The Unanswered Questions Relating to Skype Testimony*

With the Montana Supreme Court approving Skype use for witness testimony, Skype's courtroom use will undoubtedly soar. Lawyers may now be able to afford an expert witness, without prohibitive travel costs, or regain the ability to present a witness who was

⁵³ See *id.* § 46-1-105 (entry of guilty pleas); § 46-7-101 (initial appearance of arrested person); § 46-9-201 (admit to bail); § 46-9-206 (setting bail); § 46-10-202 (presentation of evidence at preliminary examination); § 46-12-201 (manner of conducting arraignment); § 46-12-211 (plea agreement procedure); § 46-16-123 (receiving verdict or sentence); § 46-18-102 (rendering judgment and pronouncing sentence); and § 46-18-115 (sentence hearing).

⁵⁴ See, e.g., MONT.CODE ANN. § 46-12-201(4).

⁵⁵ *Id.* §§ 46-16-226 to 229.

⁵⁶ *Id.*

⁵⁷ *State v. Stock*, 256 P.3d 899, 906 (Mont. 2011).

⁵⁸ *People v. Wrotten*, 923 N.E.2d 1099, 1104 (N.Y. 2009).

previously physically unavailable. Furthermore, an entirely new area of trial strategy has opened. Litigators will be able to manage the presentation of cases by selecting certain witnesses to appear through Skype or not. Most likely litigators will try to produce negative testimony through Skype, thereby lessening the impact, while having key emotional witnesses testify in person.

Unfortunately for counsel, however, the procedures regulating the use of Skype are exceedingly vague. In *Duane* the Court refrained from setting concrete guidelines for Skype testimony beyond having the testimony satisfy the elements of the Confrontation Clause, yet copious practical considerations remain. Basic questions abound with examples being the quality of the Skype video, issues with lag and choppy video, the setting the Skype call may take place in,⁵⁹ the people allowed to be present on the witness's side of the monitor, the concern over off-screen coaching of witnesses, and many others. Without knowing the guidelines for using Skype, counsel runs the risk of incorrectly introducing Skype testimony. The potential pitfalls surrounding Skype use may lead to an influx in appeals focusing on Skype issues. Another pitfall of Skype that may result in more appeals is the susceptibility of Skype to hackers or other interruptions.⁶⁰

One final concern is the question of preliminary hearings. In *Duane* the prosecutor moved for the ability to have a witness testify via Skype.⁶¹ The municipal court granted the motion after a preliminary hearing in which the defendants were able to voice their objections.⁶² The statutes allowing child abuse victims to testify through two-way electronic audio-video communications also require the motion of the requesting party and a preliminary hearing to be conducted by the court.⁶³ Missing from the *Duane* opinion is the insistence on a preliminary hearing. The Court's silence on the necessity of preliminary hearings is a cause for unease in criminal trials. If courts do not have a preliminary hearing before allowing the use of Skype testimony, then a defendant loses a forum in which to bring an objection. A criminal defendant facing the potential loss of liberty through jail time deserves a chance before trial to object to Skype testimony and argue his or her reasoning for the objection.

V. CONCLUSION

⁵⁹ Dr. Sjolín in *Duane* was allowed to testify from her own home. Brief of Appellee at 10, City of Missoula v. Duane, 355 P.3d 729 (Mont. 2015) (No. DA 13-0813).

⁶⁰ See, e.g., Erin Donaghue, *George Zimmerman Trial: Skype Disruption Prompts Confusion During Witness Testimony Wednesday*, CBS NEWS (July 10, 2013, 2:38 PM), <http://www.cbsnews.com/news/george-zimmerman-trial-skype-disruption-prompts-confusion-during-witness-testimony-wednesday/>.

⁶¹ City of Missoula v. Duane, 355 P.3d 729, 731 (Mont. 2015).

⁶² *Id.*

⁶³ MONT. CODE ANN. §§ 46-16-227 to 229 (2015).

The implementation of Skype testimony in courtrooms will doubtlessly lead to relief of the overburdened court system. Skype testimony will lessen the financial drain on parties proceeding with litigation; it will also save time and increase efficiency by rendering more witnesses available for trial despite their location, health problems exacerbated by travel, or fear of testifying against an opposing party in person. The advantages of Skype, however, should not blind the courts in respect to its downfalls. To negate the shortcomings of Skype, courts should work with the legislature to generate strict and clear rules for the use of Skype testimony. Especially in criminal cases, the defendant threatened with jail time warrants extra safeguards through the practice of preliminary hearings. Lest the Confrontation Clause be eroded to a toothless protection for the accused, the defendant must retain the ability to argue for his or her right to confront the witness in person.