

## CORONAVIRUS AND COURTS

# Case dismissed after witness balks at mask-free testimony

Jaimie Ding *The Oregonian/OregonLive*

Heather Fawcett did not want to go through a second trial against the man accused of attacking her with a hammer.

When Pedro Sanchez was first accused of hitting her head with a hammer five years ago, she went to court. Sanchez was convicted of assault in the second degree by a jury, 10-2.

But the U.S. Supreme Court in April struck down Oregon's long-held nonunanimous jury verdicts, prompting an appellate court to overturn the conviction and grant Sanchez a retrial.

That would have put Fawcett in front of Sanchez again. And to make it worse, this time Sanchez asserted his right to meet his accuser face-to-face, demanding she testify without a mask, despite the trial being scheduled in the middle of a pandemic.

The 41-year-old McMinnville resident wanted to get justice. But then she thought of her parents, both over 65, one with multiple sclerosis and the other with a failing liver. She ran errands for them, bought groceries and helped clean their houses.

"It's the second time I'm going through this trial, and now you're gonna tell me I have to expose my friends and my family and people that I care about and myself to this virus?" she said in an interview.

She decided she couldn't risk it.

Both of the other witnesses to the assault — her boyfriend at the time and his brother — have died since the first trial. Without her testimony, the case against Sanchez, which was scheduled to go to trial Monday, was dismissed.

Fawcett said she was told by Michelle Enfield, Yamhill County deputy district attorney, she could not wear a mask while testifying because the defendant needed to be able to see her face.

In response to a motion by Sanchez's legal team, Presiding Judge Jennifer Chapman ordered that witnesses must wear a clear face shield and no mask while testifying, according to Enfield.

Chapman's rationale for the decision stems from a so-called "right of confrontation" and the necessity for jurors to see a witness's face while testifying to determine credibility, Enfield said. Under Article 1, Section 11, of the Oregon Constitution, a defendant has the right to meet a witness "face to face."

Former Multnomah County prosecutor

**"I don't understand why I have to be put at risk and why I have to choose putting myself at risk in this way in order to get justice."**

*Heather Fawcett*

Josh Lamborn said the defendant's right to confrontation is so strong judges and prosecutors will almost always "err on the side of caution" to prevent potential mistrials.

Lamborn also said the ability of a juror to "weigh the demeanor of the witness" during testimony is important for a fair trial, and this may include looking at facial cues and expressions that may be covered up by a mask.

When Fawcett asked if she could wear a mask with a window over the mouth — such as the ones that allow the deaf to see the speaker's mouth — she was told the judge ordered them but they would not arrive in time for the trial.

"I don't understand why I have to be put at risk and why I have to choose putting myself at risk in this way in order to get justice," she said between shaky breaths. "(And) choose being able to testify on my own behalf or letting him get off and have the charges dropped just because I want to wear a mask to protect myself."

Rosemary Brewer, executive director of the Oregon Crime Victims Law Center, said it is problematic to deny the victim the ability to wear a mask during her testimony before the trial even starts.

"I'm concerned that courts are not granting victims their rights with the same priority that they are for defendants due to COVID-19," she said. Courts need to protect the victims' constitutional right to be treated with dignity and respect, which includes their health and safety, Brewer said.

A statewide mask order is in effect in Oregon, requiring the use of a mask or facial covering in all public spaces.

An October order by Oregon Chief Justice Martha Walters permits the removal of masks in court should the judge deem it necessary. The presiding judge may "require or permit" a witness to remove a protective face covering when they are testifying, provided a minimum of 6 feet of social distance is consistently maintained.

If the removal is for more than 15 minutes, the judge must use additional protective measures, "such as the use of a face shield or protective physical barrier, additional social distancing, or the use of remote means."

The Centers for Disease Control and Protection does not recommend the use of a face shield as a substitute for a mask.

In "dense settings like an unventilated jury room" with multiple people speaking for hours, the virus can be found in small airborne droplets, Dr. Michele Barry from the Stanford University Center for Innovation in Global Health said in a June 2020 report by the National Defense Lawyers on courts and public health during COVID-19. Research suggests masks not only help prevent wearers from transmitting the virus but from catching it as well.

For Sanchez's trial to even have been scheduled is a rarity in current public health conditions. Since the start of the pandemic, scores of trials have been postponed across the state, in accordance to guidelines set by Walters.

Many hearings have allowed those involved to call in instead of attending in person, which is what Fawcett did for the hearings leading up to the second trial.

Yamhill County has held eight trials since the start of the pandemic in March. With the exception of Sanchez's case, masks were not required to be removed in any of the other trials, according to Yamhill County District Attorney Brad Berry.

The Yamhill court has taken special safety measures with COVID-19 in mind, including staggering the arrival of jurors, requiring social distancing to be maintained throughout the proceeding, regular sanitation of surfaces and requiring face masks be worn by everyone in the courtroom, said Chapman.

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