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RENDERED: MARCH 23, 2006
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

2004-SC-556-MR

DATE 4-13-06

MICHAEL WARDIA — APPELLANT

V.

APPEAL FROM KENTON CIRCUIT COURT
HON. DOUGLAS M. STEPHENS, JUDGE
04-CR-00004

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING

Appellant, Michael Wardia, was convicted of one count of First-Degree Rape and one count of First-Degree Sexual Abuse for acts perpetrated against his eight year old granddaughter, K.T. Following the jury trial, the court sentenced Appellant to twenty-five years imprisonment. Appellant now appeals to this Court as a matter of right, Ky. Const. § 110(2)(b), and presses a single claim: that the trial court committed reversible error when it ordered that the view between Appellant at counsel's table and K.T. on the witness stand be obscured while she testified against him in open court. Because the trial court failed to make the factual findings required by KRS 403.250 to allow a deviation from the standard practice of a face-to-face confrontation, we agree that the trial court's action was erroneous and hereby reverse.

The trial court gave Appellant the option of using the board as a screen between him and K.T. or having K.T. testify from chambers by closed circuit video. Faced with this choice, Appellant chose the board method. Thus, during K.T.'s testimony, the trial

court ordered that a large white board be placed between K.T. and Appellant. This board blocked the witness's view of Appellant and Appellant's view of the witness, though Appellant 's counsel was able to view K.T. The board was put in place during a break just before K.T.'s testimony. In an apparent attempt to disguise the board's actual purpose, an exhibit was placed on it. The trial court tried not to draw the jury's attention to the board and clearly tried to make it appear that the board was routine and necessary for the use of the exhibit. The attorneys furthered this cause by referring to the exhibit during K.T.'s testimony,

Appellant claims that since the trial court failed to make a factual finding of "compelling need," as required under KRS 421.350, he is entitled to a new trial. Appellant also argues that the use of the board violated the Confrontation Clause of the United States Constitution as per Coy v. Iowa, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988). The Commonwealth responds by arguing that Appellant did not preserve this issue because his objection at trial was only a general objection to the use of the screen without specific grounds.

After the jury retired, the trial court held a short hearing to give the attorneys an opportunity to memorialize certain objections that had been made in chambers during the trial since those discussions in chambers were not recorded. The following discussion occurred at this hearing:

> Judge: I know that before the jury was instructed this morning and last evening, we talked about instructions and, Miss Fucida, were there any objections to the instructions?
>
> Defense Counsel: No, sir.
>
> Judge: Any other motions or issues at this point?
>
> Defense Counsel: I think we do need to do those motions, Judge.

Judge: The avowal and—

Defense Counsel: Yes, sir. I would like to, if I may—we've had a lot of in chamber discussions—if I may head in that direction.

Judge: Okay.

. . .

[Judge proceeds to clear the courtroom at the prosecuting attorney's request.]

. . .

Judge: The record should reflect that Mr. Wardia is present with counsel. Counsel for the Commonwealth is also present. Spectators are absent from the courtroom, and of course the jury is in the jury room deliberating. I think there are issues that we wanted to take up, issues that we have previously discussed that were probably off the record that we wanted to put on the record.

. . .

Defense Counsel: . . . The other motion was for not to have a board in front of Mr. Wardia. We objected before that board was put in place. We did not object in front of the jury, and we did not give any explanation to the jury because we were hoping they wouldn't notice that she could not see Mike Wardia. We changed positions with Jeff [the other defense attorney] and Mike Wardia, so we don't know if the jury took note of that whatsoever. But those are the only motions that— . . .

. . .

Judge: . . . As far as the board, it is true, I advised counsel that either we take testimony in chambers of [K.T.] or we take the testimony in the Court, but I would provide a shield. And recognizing that I was going to do that, counsel opted for the shield without waiving your objection to the separation in its entirety. And hopefully, it's evident on the record, the video record, that it's evident to me that the way in which we did it was as unobtrusive as possible. We had

> this TV monitor and this Elmo set up for a legitimate purpose and that is to show the jury the photograph. That we had the photograph pinned on the board and those things were displayed appropriately in front of the jury. It just so happened that the board was a barrier between [K.T.] and Mr. Wardia, so I think it was a fairly unobtrusive barrier. Of course, counsel was given the option of an admonition, but I think rightfully so, counsel chose to accept the unobtrusive board as opposed to focusing the jury's attention on it.

(Emphasis added.)

As a starting point, we note that RCr 9.22 has long been read to require a contemporaneous objection in order to preserve an error. See Patrick v. Commonwealth, 436 S.W.2d 69 (Ky. 1968); Salisbury v. Commonwealth, 556 S.W.2d 922, 926 (Ky.App. 1977). Though the initial objection to the screening procedure was not recorded, the trial court expressly noted that such an objection took place and the prosecutor failed to claim otherwise. Obviously, some inadvertent failures to record initial objections are inevitable, thus requiring after-the-fact remediation, but trial courts should not regularly utilize such after-the fact procedures, as they do little more than complicate matters on appeal.

Similarly, the Commonwealth's further claim about Appellant's failure to give specific reasons for the objection is unconvincing. "The trial counsel must state his grounds for objection only on request of the trial court." Ross v. Commonwealth, 577 S.W.2d 6, 16 (Ky.App. 1977). And though we have noted that it is preferable for the trial court to request grounds from attorneys because "[i]t prevents the entrapment of the trial court by a general objection when there is a specific and valid ground therefor . . . ," West v. Commonwealth, 780 S.W.2d 600, 603 (Ky. 1989) (quoting 7 W. Bertelsman and K. Philipps, Kentucky Practice, Rule 46 at 156 (4th ed. 1984)), we cannot find an error unpreserved where, as in this case, the trial court has not asked for specific grounds.

Moreover, while the attorneys did not engage in a highly technical discussion of the relevant law in this matter, the grounds for Appellant's objection are sufficiently clear given the subject matter of the objection.

The Commonwealth also claims that Appellant has offered different grounds for the objection on appeal than were offered at trial. Essentially, the Commonwealth states that Appellant's objection at trial was to the application of the statute itself, whereas here the claim is that the trial court failed to follow the statute in making findings of fact as to compelling need. This is a difficult argument to swallow, especially given its conflict with the Commonwealth's other argument that Appellant's objection at trial was too general. However, we have repeatedly upheld the principle that "[a] new theory of error cannot be presented on appeal." Ruppee v. Commonweath, 821 S.W.2d 484, 486 (Ky. 1991); see also Kennedy v. Commonwealth, 544 S.W.2d 219, 222 (Ky. 1976) ("The appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court."). Appellant's claims on appeal, however, simply are not the type of bait-and-switch litigation that we have traditionally been concerned with. And in this case, we will not hold against Appellant the trial court's failure to record the actual hearing where the objection was originally made.

Ultimately, we conclude that the trial court's statement at the after-the-fact hearing demonstrates that defense counsel made a timely objection. We also conclude that Appellant's objection was sufficient to encompass both aspects of his present argument, namely, that the trial court failed to make the statutorily required factual findings and that the screening method used by the trial court was unconstitutional. Therefore, Appellant's claim of error was properly preserved and is properly before this Court.

Turning to the substance of Appellant's arguments, we must first review the statute in question. KRS 421.350(2) states:

> The court may, on the motion of the attorney for any party and upon a finding of compelling need, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence the court finds would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant.

(Emphasis added.) "Compelling need" is defined as the "substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced by the defendant's presence." KRS 421.350(5).

The mandatory nature of KRS 421.350 is clear. A trial court may impair a criminal defendant's right of confrontation by utilizing the closed circuit method prescribed in the state only upon "a motion of the attorney for any party and upon a finding of compelling. . . ." We have previously made it clear that the "procedure described in KRS 421.350(2) may not be utilized absent proof and a specific finding of a compelling need therefor." Price v. Commonwealth, 31 S.W.3d 885, 894 (Ky. 2000). As we further noted in Price, this individualized case-by-case factual finding is what allows the procedure provided in the statute to survive a challenge under the Confrontation Clause of the Sixth Amendment of the United States Constitution. Id. at 893.

The record does not reveal that any party moved to invoke the statute. More importantly, the record does not reveal that the trial court even discussed, much less made, the finding of compelling need to invoke the procedures allowed under the statute. In fact, a competency hearing was held a few days before trial by the trial court where the trial court questioned K.T. At that hearing, which would have been an appropriate setting for proof and findings pursuant to KRS 421.350, the record reveals that there was no inquiry into compelling need as defined by KRS 421.350. The Commonwealth argues that such a finding is implicit in the trial court's ruling to allow the screening procedure. This argument seems at odds with the Commonwealth's claim that Appellant failed to state specifically the grounds for his objection. Regardless, unlike the objection and the trial court's resultant ruling discussed above, the findings of fact that the Commonwealth urges us to assume were made simply were not memorialized in the record, even after the fact. Given the importance of the finding of compelling need to support what would presumably be an unconstitutional practice otherwise, we cannot assume that the findings were made if there is no record of them. Because a finding of compelling need is a necessary prerequisite to employing a method that allows a witness to testify without being directly confronted by a criminal defendant, we are forced to conclude that the trial court's failure to make such a finding in this case led to an impairment of Appellant's rights.

In addition, having reviewed the trial, we cannot conclude that this error was harmless. K.T. was the key witness against Appellant, and her testimony, no doubt, was crucial in the jury's decision to convict. We therefore hold that the trial court's failure to make the proper findings of fact as required by KRS 412.350 was a harmful and therefore fatal error.

We need not reach any of the specific constitutional claims made by Appellant as to the validity of the use of the white board as a screening mechanism. The trial court acknowledged that use of the board was only as an alternative, agreed to by Appellant, to the closed circuit television approach contemplated with KRS 421.350(2). Since the trial court failed to comply with KRS 421.350(2), any impairment of Appellant's confrontation right was erroneous. Thus, the fact that Appellant agreed to the use of the board as a lesser evil compared to the closed circuit television method has no relevance since the trial court had no right to utilize either method.

It is regrettable that K.T. will have to undergo another trial. However, criminal defendants are entitled to the protections given to them by the law, and in this specific area, those protections—stemming from the United States Constitution, the Kentucky Constitution, and KRS 421.350—are numerous. Since the record reveals that the trial court failed to comply with the fact finding procedure described in KRS 421.350(2), Appellant's conviction is reversed.

Lambert, C.J.; Cooper, Graves, Roach and Scott, JJ., concur. Johnstone, J., concurs in result only. Wintersheimer, J., dissents without separate opinion.

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