Missouri Court of Appeals

Southern District

Division One

STATE OF MISSOURI,	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	No. SD34983
	)	
JERRY L. EVANS,	)	**Filed: September 17, 2018**
	)	
Defendant-Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF DALLAS COUNTY

Honorable Mark B. Pilley, Associate Circuit Judge

AFFIRMED

A jury found Jerry L. Evans ("Defendant") guilty of one count of statutory sodomy in the first degree and two counts of statutory rape in the first degree. The victim was Defendant's biological daughter who was thirteen at the time of the offenses.[1] Before trial, Defendant waived sentencing by a jury. Following the jury's return of its verdicts, the trial court sentenced Defendant to imprisonment for twenty years on each count with the sentences to run consecutively.

[1] The victim was sixteen at the time of trial.

The victim was the first witness called to testify. The trial court recessed the trial for the day following the completion of the victim's testimony. The next morning following the prosecutor's announcement of the first witness for the day, this exchange took place between an unidentified female, the trial court, and defense counsel:

> THE COURT: Ma'am?
>
> UNIDENTIFIED SPEAKER: I don't know if we're allowed to request anything, but some of us feel -- or I did – I'm going to say me -- if I could see the defendant's more than what we're seeing him sitting there now, could we see like your -- this is all we see of his eyes, and barely his eyes. Is that a do-able thing for us to ask?
>
> THE COURT: I can't say I've ever had that asked before, so –
>
> UNIDENTIFIED SPEAKER: We see nothing of his facial features, expressions. We see nothing at all.
>
> THE COURT: I don't know. Counsel, do you have an objection if he kind of swings around and sits –
>
> [DEFENSE COUNSEL]: He can swing around. I mean, but –
>
> THE COURT: Next to –
>
> [DEFENSE COUNSEL]: -- I need to stay here since I'm –
>
> THE COURT: Right.
>
> [DEFENSE COUNSEL]: And I need my –
>
> THE COURT: I didn't know -- And I don't know. The -- Part of it's just the way that is built. I don't know if he swings around and sits next to co-counsel, if that will make it easier or not.
>
> UNIDENTIFIED SPEAKER: It would. It would.
>
> [DEFENSE COUNSEL]: Jerry, would you -- Maybe he could kind of maybe sit on the corner?
>
> UNIDENTIFIED SPEAKER: It definitely would.
>
> [DEFENSE COUNSEL]: Okay. Does that help?

UNIDENTIFIED SPEAKER: Yep, that works.

[DEFENSE COUNSEL]: Okay. Thank you.

THE COURT: Okay. Very good.

UNIDENTIFIED SPEAKER: Thank you so much.

THE COURT: Okay. All right.

There are no other references in the record to Defendant's behavior or demeanor in the courtroom.[2] Defendant did not testify. The jury did hear and observe portions of an audio/video recording of a pretrial interview of Defendant by law enforcement. The portions played for the jury lasted more than one hour.

Analysis

In a single point, Defendant asserts that the trial court "plainly erred" in violation of the federal and state constitutions "in redirecting the jury's request to observe [Defendant] to defense counsel" "in that 1) [Defendant]'s facial expressions were not properly admitted evidence, nor were they subject to examination, and, 2) by failing to address the question directly, the trial court abdicated its duty to maintain order and decorum in the courtroom and placed the burden of responding to the jury's request on the defense."[3] We reject Defendant's point for three reasons: (1) defense counsel's affirmative conduct in suggesting that Defendant reposition himself to "sit on the corner" and not lodging an objection at the bench waived review of any error; (2) if any error

[2] Other than, possibly, during voir dire, when a venireperson, in response to defense counsel's questioning, stated "I'm pregnant and I think he's -- I – I'm – I've judged him. I think he's a creep. He's done something." And then "Yeah. He looks like he's probably done a lot of things." The venireperson was struck for cause and did not serve on the jury.

[3] Defendant raised a similar, but not identical, argument in his motion for a judgment of acquittal or a new trial.

occurred, the error was not plain; and (3) there is nothing in the record that indicates Defendant's behavior or demeanor in the courtroom resulted in manifest injustice to him.

Standard of Review

> Unpreserved claims of error can only be reviewed, in our discretion, for plain error. Rule 30.20. Plain errors must be "evident, obvious, and clear." *State v. Taylor*, 466 S.W.3d 521, 533 (Mo. banc 2015). Review for plain error is a two-step process. *State v. Walter*, 479 S.W.3d 118, 131 (Mo. banc 2016). "First, the Court determines whether the claim of error facially establishes substantial grounds for believing that a manifest injustice or miscarriage of justice has resulted." *Id*. Second, if the first step is satisfied, we determine whether the alleged error actually resulted in manifest injustice. *Id*.
>
> . . . .
>
> The defendant bears the burden of establishing manifest injustice, which is determined by the individual facts and circumstances of a case. *State v. Mayes*, 63 S.W.3d 615, 624 (Mo. banc 2001). In any event, plain error can only serve as the basis for granting a new trial on direct appeal if the error was outcome determinative. *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. banc 2006) (quoting *Deck v. State*, 68 S.W.3d 418, 427 (Mo. banc 2002)).

State v. Mendez-Ulloa, 525 S.W.3d 585, 590, 595 (Mo.App. E.D. 2017). Further,

> even plain error review is waived as to particular allegations of error when counsel has affirmatively acted in a manner precluding a finding that the failure to object was a product of inadvertence or negligence, such as by affirmatively stating that the defendant has no objection to the admission of particular evidence. *State v. Johnson*, 284 S.W.3d 561, 582 (Mo. banc 2009); *State v. Goers*, 432 S.W.3d 276, 282 (Mo. App. E.D. 2014).

State v. Boston, 530 S.W.3d 588, 590-91 (Mo.App. E.D. 2017).

Discussion

Review of Error, If Any, Was Waived

First, when this interruption occurred, defense counsel did not request to approach the bench or lodge any other objection or request a mistrial. Instead, defense counsel first stated "[h]e can swing around," and, subsequently, affirmatively suggested that

Defendant reposition himself to "sit on the corner" – a suggestion that was adopted by the trial court and satisfied the unidentified speaker's concern. In these circumstances, we believe defense counsel's affirmative conduct precludes a finding that defense counsel's failure to object was a product of inadvertence or negligence, and review of any error was waived.

In his reply brief, Defendant argues that review of any error was not waived because the unfair prejudice to him of requiring him to oppose a juror's request in open court made it unnecessary for him to object. In support of his argument, Defendant refers us to one of our decisions that is more than ninety years old – ***State v. Sickles***, 286 S.W. 432 (Mo.App. Spfd. 1926). In ***State v. Sickles***, we held that a trial objection was unnecessary in the context of a juror who asked blatantly improper questions of the defendant while the defendant was a witness. ***Id.*** at 433-34. Here, Defendant did not take the stand and no juror asked him any questions.

Much more recently, our Supreme Court instructed us in ***State ex rel. Nixon v. American Tobacco Co.***, 34 S.W.3d 122, 129 (Mo. banc 2000), that "[a]n issue that was never presented to or decided by the trial court is not preserved for appellate review." The Supreme Court reminded us of this rule again in ***Brown v. Brown***, 423 S.W.3d 784, 788 & n.4 (Mo. banc 2014), and confirmed that "[a]n issue must be presented to the trial court to be preserved for appeal."[4] The Supreme Court also has instructed as follows:

> Driskill asserts that he objected repeatedly to appearing by closed-circuit television because the trial court denied his motion for a competency hearing. However, the record demonstrates that Driskill never presented an objection to the trial court that he was denied his right to be present.

[4] *See also* ***State v. Stone***, 430 S.W.3d 288, 290, 290-91 (Mo.App. S.D. 2014) (referring to ***Brown*** in denying review of points raised by the State in its appeal of a trial court's interlocutory order suppressing evidence in a criminal case).

> "To properly preserve an issue for an appeal, a timely objection must be made during trial." *State v. McFadden*, 369 S.W.3d 727, 740 (Mo. banc 2012) (quoting *State v. Cooper*, 336 S.W.3d 212, 214 (Mo.App. E.D. 2011)). The objection at trial must be specific and made contemporaneously with the purported error. *State v. Shockley*, 410 S.W.3d 179, 204 n.4 (Mo. banc 2013). To preserve a constitutional claim of error, the claim must be raised at the first opportunity with citation to specific constitutional sections. *State v. Tisius*, 362 S.W.3d 398, 405 (Mo. banc 2012). On appeal, the objection presented to the trial court may not be broadened. *Id*.
>
> Accordingly, Driskill's challenge to his right to remain present in the courtroom on the grounds that it violated his constitutional rights can be reviewed only for plain error. Rule 30.20.

State v. Driskill, 459 S.W.3d 412, 425-26 (Mo. banc 2015). Further:

> Including a claim of error in a motion for new trial is a requirement of preserving an issue for review, but a claim of error is not wholly preserved absent a timely objection at trial. Therefore, including a claim of error that was not raised at trial in a motion for a new trial does not change the standard of review from plain error to the lower standard of review for an abuse of discretion. For an allegation of error to be considered preserved and to receive more than plain error review, it must be objected to during the trial and presented to the trial court in a motion for new trial.

State v. Walter, 479 S.W.3d 118, 123 (Mo. banc 2016).

We believe the portion of our decision in ***Sickles*** in which we indicated that a timely trial objection was unnecessary is inconsistent with the Supreme Court's instruction in ***American Tobacco Co.***, ***Brown***, ***Driskill***, and ***Walter***, and should no longer be followed. We also note that Defendant's waiver of review resulted not from defense counsel's failure to object timely at trial, but instead from defense counsel's affirmative conduct in suggesting a solution to the unidentified speaker's concern that ultimately was adopted by the trial court. Even if a timely objection were not required, Defendant still would have waived review of the claimed error because defense counsel invited the action ultimately taken by the trial court.

Error, If Any, Was Not Plain

Second, any error that occurred was not evident, obvious and clear. As support for his position that the trial court erred, Defendant refers us to ***State v. Davis***, 190 S.W. 297, 298 (Mo. 1916), in which the Supreme Court stated:

> The record discloses that during the course of the prosecuting attorney's argument, he made the following remarks:
>
> > "If your daughter--and I expect all of you have them--if your daughter were taken and placed upon a bed in the manner that that little child said she was, and that big stalwart young man who can bring--"
>
> And then the following statement:
>
> > "Does he seem to think that you 12 men are about now to pass upon his guilt or innocence? Does he seem to be at all annoyed with the situation? Has he shed a tear? Has he been anxious? Has he counseled his attorneys? Has he done a thing but to sit there in that stolid way of his without a change of expression? Gentlemen of the jury, I want to tell you something. If you or I were charged with this crime and were sitting here to-night and await our punishment, can you imagine that we would sit like he sits?"
>
> In these statements counsel went clearly beyond the bounds of legitimate argument. The defendant's demeanor while testifying was a proper subject of comment, the same as that of any other witness, but of this counsel was not speaking. By express statutes state's counsel is precluded from making reference to any failure on the part of any defendant to testify, and to this extent he is clothed with privileges and protection even greater than that of the ordinary witness. If such be the policy of the law, his actions, physical expressions, etc., during his forced presence in the courtroom and at times other than when testifying, should not be commented upon. Such matters are outside of the record and such argument smacks too much of an appeal to prejudice, and whether made for such purpose or not is clearly calculated to engender it. If this practice were permissible a defendant would be in an ill position to protect himself unless perchance he possessed the attainments of a stage dignitary. If at an unpsychological moment he smiled, or shed a tear, or refrained from so doing, or, if at a given time, bore one instead of another facial expression; or if, as state's counsel charged in this case, he left his defense to his

> counsel, instead of conducting it himself, he would suffer. It is not by these standards that innocence or guilt is determined.

This pronouncement appears to place Missouri within the majority judicial view that the "courtroom demeanor of a non-testifying criminal defendant is an improper subject for comment by a prosecuting attorney." *See* ***United States v. Mendoza***, 522 F.3d 482, 491, 490-91 (5th Cir. 2008) (quotation and collecting federal cases); ***Smith v. State***, 669 S.E.2d 98, 104 & n.8, 9 (S.Ct.Ga. 2008) (collecting federal and state cases).

A prosecutor's comment on Defendant's courtroom behavior or demeanor is not what happened in this case. Defendant does not assert that the prosecutor commented on his courtroom behavior or demeanor, and the record does not identify any comment by the prosecutor, trial court or a juror on Defendant's courtroom behavior or demeanor. Rather, an unidentified speaker asked for Defendant to be repositioned in the courtroom so that the speaker could better see his "facial features, expressions." On that point, the law is much less clear.

In 1910, the United States Supreme Court stated:

> Another objection is based upon an extravagant extension of the 5th Amendment. A question arose as to whether a blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It is objected that he did this under the same duress that made his statements inadmissible, and that it should be excluded for the same reasons. But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof. Moreover, we need not consider how far a court would go in compelling a man to exhibit himself. For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent. *Adams v. New York*, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372.

Holt v. United States, 218 U.S. 245, 252-53 (1910). Subsequently, in ***State v. Jackson***, 444 S.W.2d 389, 392 (Mo. 1969), our Supreme Court stated, "it must be remembered that the safeguard against self-incrimination refers to evidence, 'testimonial compulsion'; it does not mean that the accused may not be subjected to the observation of witnesses and jurors—in the absence of his being required to perform some affirmative act in aid of observation. 22A C.J.S. Criminal Law ss 649, p. 539, 652, p. 553."

If a defendant in a criminal case can be compelled to be present at trial, it seems unlikely that jurors would be prohibited from observing the defendant in the courtroom. Defendant has referred us to no authority, and we are not aware of any authority, that directs the trial court to screen a criminal defendant from the jury's view or even to instruct the jury that it cannot consider Defendant's behavior and demeanor in the courtroom as evidence unless that behavior and demeanor occur on the witness stand. If the trial court erred in permitting a juror to request that Defendant reposition himself in the courtroom in order to permit the juror to better observe Defendant's facial features and expressions, and then in accepting defense counsel's suggestion for resolving the juror's concern, that error was not evident, obvious and clear error, and plain error review is not available.

Defendant Cannot Meet His Burden to Show Manifest Injustice

Lastly, Defendant does not identify *any* specific behavior or demeanor in the courtroom that Defendant believes prejudiced him. And, the record before us does not describe, or even reference, *any* specific behavior or demeanor by Defendant in the courtroom. Defendant contends that he suffered from several illnesses which required significant medications. Defendant concludes that it is common knowledge that these

medications would affect Defendant's facial expressions. There is nothing in the record to support those assertions. The trial court was not advised, nor are we, that any of Defendant's medications actually affected Defendant's facial expressions.[5] In these circumstances, Defendant cannot meet his burden to show that any plain error with respect to the unidentified speaker's request that he reposition himself in the courtroom resulted in manifest injustice to him. Defendant's point is denied, and the trial court's judgment is affirmed.

Nancy Steffen Rahmeyer, J. – Opinion Author

Don E. Burrell, P.J. – Concurs

Gary W. Lynch, J. – Concurs

[5] As the last aside, we also do not know from the record if the unidentified speaker who requested that Defendant reposition himself in the courtroom was an alternate juror who was excused immediately before deliberations began or a juror.