Missouri Court of Appeals

Southern District

Division One

STATE OF MISSOURI,	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	No. SD32063
	)	
JOSE T. BENITEZ,	)	**Filed: June 10, 2013**
	)	
Defendant-Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF JASPER COUNTY

Honorable David C. Dally, Circuit Judge

AFFIRMED

A jury found Jose T. Benitez ("Appellant") guilty of statutory sodomy in the first degree in violation of section 566.062, RSMo Cum.Supp. 2006, and the trial court sentenced Appellant to twenty-five years in the Missouri Department of Corrections. At trial, the trial court, over Appellant's objection and without making any case-specific finding of necessity, permitted the child victim to testify from behind a one-way screen that allowed persons in the courtroom to see the child victim, but prevented the child victim from seeing Appellant. Appellant appeals, and in his single point relied on, claims that the use of the screen in these circumstances violated his constitutional right to

confront the child victim face-to-face. We agree, but affirm the trial court's judgment because the violation of Appellant's constitutional right to confront the child victim face-to-face was harmless beyond a reasonable doubt with the result that the violation does not merit reversal of the trial court's judgment.

Facts and Procedural History

In a hearing slightly less than four weeks before trial, the prosecuting attorney informed the trial court "it is the State's intention to call the child [victim]," and:

> Dawnielle Robertson, Your Honor, is a counselor and at the prelim it was the counselor's opinion that the child was not in a position to testify at trial. And we conducted a 491 hearing and it was the counselor who testified about statements the child made to the counselor.[1]
>
> It's my position at this time that the child is able and willing to testify and that is my intent. But I will say if that doesn't happen I may seek to call the counselor as well and talk about why the child is unable and unwilling to testify. And I have an interview with the counselor today. If she tells me something different we may be back here on a 491 with the counselor as well. But at this point it's my intention that the child will testify and I will not be calling Dawnielle to talk about those statements.

On the morning of trial before selection of the jury, Appellant waived sentencing by the jury. The prosecuting attorney again informed the trial court "I do not intend to call the counselor." A short time later, the following colloquy occurred between the trial court and counsel:

> [COURT]: . . . Anything else we need to take up this morning?
>
> [Defense Counsel Young]: The issue of the screen; do you want to?
>
> [Prosecutor]: Are you all objecting?
>
> [Defense Counsel Mynarich]: Judge, I think not objecting necessarily to it but the fact that procedurally we need to have the Court make a finding the child needs the screen not because she's nervous or

[1] A transcript of a preliminary or section 491.680, RSMo 2000, hearing was not filed with us.

afraid of Court generally but because she specifically [is] afraid of [Appellant]. The Missouri Courts have ruled that the Court needs to find this. Usually has to come through testimony that the child is actually afraid of [Appellant] as opposed to just the proceedings. I could give you case, law for the record.

[COURT]: All right. For the record that we're clarifying here there's a screen. I assume we're not going use this until the child is called; correct?

[Prosecutor]: Correct. We just set it up so you could see what it looks like. We were going to show you kind of what it does.

[COURT]: The screen, which as I understand it, well, it looks like it's about three foot by three foot, maybe a little bit larger than that, which would be put in front of the witness. My understanding is it allows those sitting out in the courtroom to see through it which includes [Appellant] so he can see the person testifying but the person testifying cannot see through it which would keep that person from seeing [Appellant]. The cases would seem to allow for such a device, at least Missouri cases. The child of this case is how old?

[Prosecutor]: She is seven now.

[COURT]: All right. And the allegations in this case are what?

[Prosecutor]: That [Appellant] who is her step-great-grandfather sexually molested her, put his finger in her vagina.

[COURT]: All right. Is [Appellant] objecting to the use of the screen?

[Defense Counsel Mynarich]: Judge, [Appellant] is objecting to the use of the screen without a case-specific finding of the necessity by the Court that this particular child needs it to testify and that the child would be traumatized not by the courtroom generally but by the presence of [Appellant] and also that the Court - without a finding by the Court that the emotional distress suffered by the child witness is more than just de minimis, such as nervousness in the courtroom but specifically being nervous and afraid of [Appellant] specifically.

The trial court deferred ruling on the objection until time for the child victim to testify at trial.

In voir dire, no member of the jury panel responded to the prosecuting attorney's question:

> One of the things that we'll be doing kind of - during the course of [the child victim's] testimony we're going to provide a screen like this (indicating). Now this side (indicating) I think you can all - maybe you can all see me through it. This is going to allow [Appellant] and his attorneys and the jurors to see her. But when we flip it around you're not able to see – [the child victim] will not be able to see [Appellant].
>
> I guess my question is: Does anybody think that's unfair? That maybe that gives the State an unfair advantage, the fact that [the child victim] is going to have this screen up and she will not have to actually see [Appellant] during her testimony? Does anybody think that that's not appropriate?

No member of the jury panel responded to defense counsel's later question:

> Okay. Related to that, the prosecution has told you that a screen may be used. [A] screen is often used when a child witness testifies; it's kind of a routine practice. Does that affect your belief that [Appellant] is innocent until proven guilty, the fact that there will be a screen up? Do any of you believe: Well, he must be guilty because there's a screen being used?

Following the selection of the jury and before opening statements, the following colloquy occurred between the trial court and counsel:

> [COURT]: So, let's make our final arguments anybody wants to make on the use of the screen and determine that issue at this point so that when it comes time to call her we can bring the screen in get her in and go with it that way.
>
> [Prosecutor]: Judge, it's the State's position and I have provided the Court with a case from the Southwestern [sic] District that I think entitles us to use the screen. I have met with the witness on two occasions. Both times she indicated to me a willingness to come in and to testify. I told her about a Judge being here and about a jury being present and that she's was going to be asked some questions about what happened. And she has indicated a willingness to do that with one concern and she has repeatedly said to me: Will my grandpa be there? Will I have to see him? And it seems to be a concern for her.
>
> And the State's position - I don't want to bring her in here and have her see him and become frightened or tearful. I think that would be more prejudicial to [Appellant] than to have her come in and take the

stand and sit behind that screen where he can see her and she does not have to see him. Now, I don't have an expert to say that she would be traumatized. I think really the only way to know that is to put her in here and see what happens. But I think that's why we have this provision, this exception to the confrontation clause and the Southern District case, the *Guese* case, specifically states that there's a public policy to protect child victims in cases like this and to try to minimize the trauma of having to testify. So, that's what we intend to do. Betsy was present during those conversations; the mother has expressed some concern about her child having to see [Appellant]. If you want to hear that testimony, I can put those people on and that's what they will say. And if the defense feels like they want to hear that testimony before we proceed, we can do that.

[COURT]: Counsel for the defense; what's your position?

[Defense Counsel Mynarich]: Can I have one moment, Judge?

[COURT]: You may.

[Defense Counsel Mynarich]: Judge, it's [Appellant's] position that although the Southern District has said that use of the screen is an acceptable method of the child testifying while also honoring [Appellant's] confrontation clause rights the United States Supreme Court in *Craig* has held that the trial court must first hear evidence and determine whether the procedure - and, yes, that case was closed circuit television this case it's a screen - but regardless that this procedure is actually necessary to protect the welfare of the child witness and also that the child witness would be traumatized but not just by the courtroom but by specifically the presence of [Appellant].

And while I absolutely believe [the prosecutor] that the child has said this to her, unfortunately, that's just not evidence. And, so, to meet the standard that the Supreme Court has set out the Court has to make a case specific finding of necessity and also that it's not just a de minimis amount of nervousness or a de minimis amount of reluctance but is actually - it would cause the child trauma. That finding is required to be made so that [Appellant's] confrontation rights aren't violated.

[COURT]: Well, this case involves a seven year old child. It's not an adult victim or anything of that sort. I can't imagine what seven year old child would not be traumatized in this situation. The Court's going to allow the use of the screen.

The evidence at trial showed the following. The child victim ("Child") was born on April 4, 2004. Appellant is Child's step-great-grandfather. On Saturday, March 27,

2010, Appellant and Child's paternal, great-grandmother ("Great-grandmother") arrived from California at Child's family's home in Joplin for a visit. Appellant and Great-grandmother arrived with a "camper," and parked the camper a few feet from Child's home in the driveway.[2]

Later that day, Child's mother ("Mother"), older sister, and Great-grandmother went to Dollar Tree to shop. Child was "playing" and chose to stay home. Appellant, Child's father ("Father"), and an older brother also stayed home.

While on the trip to Dollar Tree, Mother received a telephone call from Child. Child "was crying, she sounded frantic like something was wrong. And I kept asking her what was the matter. And she just kept saying: I should have went with you, mommy. I'm so sorry. I should have listened. I should have went with you. And I kept asking her: What's the matter? And she just said: I should have went with you, mommy. I'm sorry." Mother told Child "go inside with daddy and, you know, just go sit down. We're already fixing to come home and we'll be there shortly. And she told me that she was inside with her dad and that she was going to go take a shower." When Mother returned home from Dollar Tree, Child had showered, was dressed in pajamas and a bathrobe, and "she was just better. She was quiet." Mother asked "Are you okay? Did you take a shower? And she said: Yeah. And she didn't say anything."

Appellant and Great-grandmother left on Monday to "camp" and "fish."

In the evening on Wednesday, March 31, Child and Mother were alone at their table at home eating, and Child "kind of just kept, you know, real quiet eating and then she said: Mom, I want to tell you something but I don't want you and grandma to be mad at me. . . . [Appellant] had touched her." Mother told Father about this conversation.

[2] The camper likely was a motor home.

The next day, Child told Mother "[Appellant] had spread her legs and touched her pee pee." Mother then told Father, and Father went to a police station.[3] That evening, Child was interviewed at the Children's Center of Southwest Missouri. Just before leaving for the Children's Center, Child "kind of blurted out: [Appellant] touch[ed] my pee pee and we[']re going to the police" to Child's older sister, the sister's boyfriend, and a great aunt at the home. Because Mother was concerned Child might again say something similar in an inappropriate setting, Mother then told Child on the way to the Children's Center "you cannot be blabbering that kind of information out. That's something that you only talk to mom and daddy about, it's something very private, it's not something that you just run and tell people. And I said: I know you don't understand that but that's not something we want Sissy's boyfriend to know or the next door neighbor or somebody at church, you know, that's a private matter." Mother "was not thinking about her not telling the police."

At the Children's Center, Child initially denied on multiple occasions that anyone had touched her inappropriately. After being asked if there was anything she had not told the truth about, Child told the interviewer Mother had told her something not to tell the interviewer about – it was a bad thing and was about "that" after which Child appeared to point at the vaginal area on a drawing of a girl that Child earlier had labeled "pee pee." The interviewer and Child then took a break in order for Child to ask Mother if Child could talk to the interviewer about the bad thing. After returning, Child told the interviewer Appellant touched Child inside her pee pee under her panties with his "hand"

[3] On cross examination, Mother significantly expanded Child's disclosures to her. Mother testified that on multiple, unspecified occasions during the period Saturday to Wednesday, Child told her "that grandpa had touched her pee pee and that he spread her legs touched her. She told me that []he told her not to tell her mommy what happened." Mother acknowledged she waited until Thursday to "go to the police."

while Child and Appellant were watching baseball on television. Child knew the touch was inside because she "felt" the touch, and it "hurt." Child said "stop" and Appellant said "okay." Child left the camper and went inside her home. Child told the interviewer the touch occurred two days earlier, and Appellant did not say anything about not telling anyone.

The interview was recorded, and the audio and video recording of the interview was played for the jury.

Appellant was interviewed by Joplin police officer Larry Swinehart on Thursday, and admitted to being in the camper alone with Child, "tickling" Child on her "ribs" and "the back of her leg," and "lying" on the bed with Child in the camper. Appellant "repeatedly" denied "what [Officer Swinehart had] been told by the family happened."

Child also was examined by a nurse practitioner. Child told the nurse practitioner that "[Appellant] had touched her privates. . . . She said he slipped his finger under her panties and up inside her privates." Child's examination was "normal" and "inconclusive for sexual abuse," which was not unexpected based on Child's reported history.

Child testified at trial, and told the jury "[Appellant] touched me" "[i]n my private" when she was in the camper with just Appellant, that the touch felt "[b]ad," and that "[Appellant] told me not to tell my mom and dad." Defense counsel did not ask Child any questions on cross examination, and simply reserved, but never exercised, the right to recall Child as a witness.

Appellant also testified, and told the jury he "tickle[d]" Child in the "ribs" while she was lying down watching "monkeys" on the television. Appellant denied touching Child inappropriately. Appellant testified "I never do that. I tell the Detective at the time

about a hundred times I tell him I never do that. I don't need to do nothing like that because I got my wife with me." On cross examination, Appellant acknowledged he and Child were "lying on [t]he bed . . . within arm's reach" of one another.

After a little more than two hours of deliberation, the jury returned a verdict finding Appellant guilty of statutory sodomy in the first degree.

The trial court sentenced Appellant to twenty-five years in the Missouri Department of Corrections.

Discussion

In his sole point relied on, Appellant claims that the use of a screen during Child's testimony "so that she could not see him" violated his constitutional right to confront Child because the trial court did not make "a case-specific finding that [Child] would be traumatized by testifying in view of [Appellant]." We agree that the trial court erred in permitting the use of the screen without making the case-specific findings required by ***Maryland v. Craig***, 497 U.S. 836 (1990), but affirm the trial court's judgment because the error was harmless beyond a reasonable doubt.

Standard of Review

"The question of whether a defendant's rights under the Confrontation Clause were violated by a ruling of the trial court is a question of law that we review *de novo*." ***State v. Hill***, 247 S.W.3d 34, 39 (Mo. App. E.D. 2008).

Analysis

In ***Coy v. Iowa***, 487 U.S. 1012 (1988), the United States Supreme Court held that the use of a screen that "blocked [the defendant] from [the] sight" of two child witnesses violated the defendant's Sixth Amendment right to be confronted with the witnesses

against him. ***Id.*** at 1014, 1015.[4] After concluding the Confrontation Clause of the Sixth Amendment "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact", ***Id.*** at 1016, 1015-20, 1021, the plurality opinion in ***Coy*** stated:

> The screen at issue was specifically designed to enable the complaining witnesses to avoid viewing appellant as they gave their testimony, and the record indicates that it was successful in this objective. . . . It is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter.

Id. at 1020. The Supreme Court continued to "leave for another day, however, the question whether any exceptions [to the rule announced] exist." ***Id.*** at 1021, 1022-25.

The plurality opinion also noted that error in denying face-to-face confrontation is not reversible error if the error was harmless beyond a reasonable doubt, and that:

> 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.

Id. at 1021-22.

Not quite two years later in ***Maryland v. Craig***, 497 U.S. 836 (1990), the United States Supreme Court, in the context of child witnesses who testified "by one-way closed circuit television" in circumstances where the witness could not see the defendant while testifying, decided the question reserved in ***Coy***. ***Id.*** at 840, 840-42, 845, 851. The Supreme Court held that the Confrontation Clause of the Sixth Amendment does not

[4] It appears the screen used in this case differed slightly from the screen used in ***Coy***. In ***Coy***, "[a]fter certain lighting adjustments in the courtroom, the screen would enable appellant dimly to perceive the witnesses, but the witnesses to see him not at all." ***Coy***, 487 U.S. at 1014-15. In this case, the screen prevented Child from seeing Appellant as in ***Coy***, but appears to have permitted Appellant to see Child clearly when she was on the witness stand. This difference does not affect our analysis as the Supreme Court's focus in ***Coy*** was on the fact the screen prevented the child witnesses from seeing the defendant as they testified. *See also* ***Maryland v. Craig***, 497 U.S. 836, 844 (1990) ("The procedure challenged in ***Coy*** involved the placement of a screen that prevented two child witnesses in a child abuse case from seeing the defendant as they testified against him at trial.")

guarantee a defendant "the *absolute* right to a face-to-face meeting with witnesses against them at trial," ***Id.*** at 844, but rather "'reflects a *preference* for face-to-face confrontation at trial,' *[Ohio v.] Roberts*, 448 U.S. [56,] 63 [(1980)] (emphasis added; footnote omitted), a preference that 'must occasionally give way to considerations of public policy and the necessities of the case,' *Mattox [v. United States]*, 156 U.S. [237,] 243 [(1895)]." ***Id.*** at 849. The Supreme Court stated:

> That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with. As we suggested in ***Coy***, our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.
>
> . . . .
>
> 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.
>
> The requisite finding of necessity must of course be a case-specific one: 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. See ***Globe Newspaper Co. [v. Superior Court of Norfolk County]***, 457 U.S. [596,] 608-609 [(1982)] (compelling interest in protecting child victims does not justify a *mandatory* trial closure rule); [additional citations omitted]. The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. [citations omitted]. Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, i.e.,

> more than "mere nervousness or excitement or some reluctance to testify[.]" [citations omitted].

Id. at 850, 855-56.

In this case, the trial court did not hear evidence of necessity, and made none of the case-specific findings required by ***Craig*** in order for Child to be permitted to testify while her view of Appellant was blocked by a one-way screen. Instead, the trial court made a generalized finding based solely on Child's age and the nature of the State's allegations. As the Eastern District of this Court observed in ***Hill***, 247 S.W.3d at 40-41, in discussing the standard for a finding of trauma under section 491.680 in the course of analyzing the State's use at trial of a podium to block the defendant's and two child witnesses' view of each other:

> Trauma may not be established merely by "'knowledge of the child's age and the sensitive nature of the subject involved.'" ***[State v.] Sanders***, 126 S.W.3d [5,] 16 [(Mo.App. 2003)] (quoting ***Kierst [v. D.D.H.]***, 965 S.W.2d [932,] 941 [(Mo.App. 1998)]).

As a result, the trial court erred in permitting Child to testify at trial from behind a one-way screen in the absence of the case-specific findings based on evidence required by ***Craig*** because that procedure violated Appellant's Sixth Amendment right to confront Child face-to-face.[5]

The trial court's error was harmless beyond a reasonable doubt, however, and does not merit reversal of the jury's verdict. Constitutional error is harmless if it appears

[5] As support for its argument that the one-way screen did not violate Appellant's constitutional right to face-to-face confrontation, the State refers us to our opinion in ***Guese v. State***, 248 S.W.3d 69 (Mo. App. S.D. 2008). ***Guese*** is distinguishable from this case in that (1) ***Guese*** was an appeal under a "clearly erroneous" standard of review from a motion court's denial of a post-conviction motion filed under Rule 29.15, Missouri Court Rules (2007) (***Id***. 71, 72), (2) the primary claim of error in ***Guese*** was that trial counsel was ineffective because trial counsel failed to object at trial to the admission of a child victim's extrajudicial statements (not the child victim's in-court testimony) (***Id***. 71-74), and (3) ***Guese*** did not involve a one-way screen but rather involved turning the witness stand at trial so that the child victim whose extrajudicial statements were at issue was able "to testify without being required to face [the defendant] directly" (***Id***. 72, 71-72, 73).

beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. ***Hill***, 247 S.W.3d at 41-42. And, under ***Coy***, the harmlessness of a violation of a defendant's right to face-to-face confrontation is determined based on the remaining evidence.

In this case, Child's live testimony at trial was brief and entirely cumulative of other admitted evidence. Child's live testimony added no new evidence that was not included in her pre-trial statements to Mother, the Children's Center interviewer, and the nurse practitioner. Child's live testimony also was not the sole opportunity the jury had to observe Child's demeanor while making her accusations against Appellant as the jury was shown the audio and video recording of her interview at the Children's Center. In addition, the jury had the benefit of Appellant's testimony including his denial that he touched Child inappropriately, as well as his acknowledgement that he tickled Child while lying with Child on the camper bed within arm's reach of Child (which acknowledgement was corroborated by his pre-trial statement to Officer Swinehart). Finally, the fact Appellant's counsel chose not to cross examine or recall Child strongly indicates that Child's pre-trial statements contained no important infirmities.

Under the facts of this case, it appears beyond a reasonable doubt that the trial court's violation of Appellant's constitutional right to face-to-face confrontation did not contribute to the jury's verdict. As a result, the trial court's error is harmless beyond a reasonable doubt. Appellant's point relied on is denied, and the trial court's judgment is affirmed.[6]

[6] Although we have found the trial court's error in this case to be harmless, we remind trial courts of the applicable legal authority and the need to base a decision on evidence. It also appears that the State acknowledged that it may not have the necessary evidence. We reiterate that generalized knowledge of the child's age and the sensitive nature of the subject involved are not sufficient.

Nancy Steffen Rahmeyer, J. – Opinion Author

Gary W. Lynch, P.J. – Concurs

William W. Francis, Jr., J. – Concurs