IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
June 21, 2023 Session

STATE OF TENNESSEE v. WILLIAM MICHAEL BOWERS

Appeal from the Circuit Court for Maury County
No. 28513 Stella L. Hargrove, Judge

No. M2022-00949-CCA-R3-CD

CAMILLE R. MCMULLEN, P.J., concurring in part, dissenting in part.

I must respectfully disagree with the conclusion reached by the majority in holding the Appellant properly preserved the issue of whether the trial court violated his right to confrontation by allowing a witness to testify via Zoom rather than in person. I believe the Appellant has waived the confrontation clause issue for failure to specify at trial whether he was objecting based on the federal constitution,[1] the state constitution,[2] or both. Given the lack of a properly developed record, I would have concluded that the issue was not entitled to plenary review and declined review for plain error. Accordingly, I dissent.

In order to preserve an issue for appeal, the defendant must object contemporaneously *and* identify the reason for his objection. See Tenn. R. Evid. 103(a)(1) (providing that timely objection for purposes of preserving the issue for appeal must state "the specific ground of objection if the specific ground was not apparent from the context"); see also State v. Vance, 596 S.W.3d 229, 252-55 (Tenn. 2020) (plain error review applied to defendant's confrontation clause challenge to state and federal constitution because it was raised for the first time in motion for new trial). While the rule provides different requirements for situations in which the evidence is excluded or admitted, in both instances, the objecting party has the duty to state the specific basis for the objection. State v. Biggs, 218 S.W.3d 643, 667 (Tenn. Crim. App. 2006). The failure to identify the grounds for the objection constitutes waiver of the issue. See T.R.A.P. 36(a), Advisory Commission Comments ("The last sentence of this rule is a statement of the accepted principle that a party is not entitled to relief if the party invited error, waived an error, or failed to take whatever steps were reasonably available to cure an error."). In

[1] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

[2] "That in all criminal prosecutions, the accused hath the right . . . to meet the witnesses face to face." Tenn. Const. art. I, § 9.

addition, "[w]hen . . . a party abandons the ground asserted when the objection was made and asserts completely different grounds in the motion for a new trial and in this [c]ourt, the party waives the issue." State v. Adkisson, 899 S.W.2d 626, 635 (Tenn. Crim. App. 1994).

The record reflects the jury had been sworn and jeopardy had attached when the State received notice that the witness in question had COVID-19 and the flu. Upon the trial court's suggestion of testimony via Zoom, the extent of the Defendant's response at this point was, "I can't agree with that." After determining the witness may be material, the trial court advised the parties they would "go on the record" later with defense counsel's objection. The trial commenced, other witnesses testified, and the court received additional information from the State concerning the health of the witness in question, which was exhibited for identification to the trial. Prior to the testimony of the witness, the State formally requested permission from the court for the witness to testify "via Zoom or some other application." The court asked, "What other application is there?" The State responded, "I don't know. Just some sort of electronic application would satisfy the State." When the court asked for defense counsel's position, the extent of defense counsel's response was the following two sentences: "Your Honor, I would object to Zoom. I will just leave it at that and let the [c]ourt decide." The court then engaged in a lengthy exchange with the State concerning the materiality of the witness and again asked defense counsel, *"[Y]ou are going to stop at your statement that you oppose the Zoom testimony*?" (emphasis added). Defense counsel replied:

> I do, Your Honor. I feel like I have to on behalf of my defendant. Plus[,] this witness got out, felt for a pulse. There is more than just viewing the driving. And I have gone over his statement. I am not going to concede that he is going to testify consist[ently] with it. And I think I can do a more effective cross-examination personally.

In his motion for new trial, the Appellant framed the issue in a single sentence: "The trial court erred in allowing a State's witness to testify via video, rather than in person, denying the Defendant's right to confrontation." At the motion for new trial hearing, the Appellant provided the trial court with an unspecified case which defense counsel claimed, "basically says the Tennessee Constitution provides more protection than the federal constitution and face-to-face confrontation means face-to-face confrontation." The Appellant offered no other argument or authority.

While I agree the Appellant made *a statement* which can be interpreted as an objection to the witness testifying via Zoom, the relevant inquiry is upon what legal grounds. Fahey v. Eldridge, 46 S.W.3d 138, 146 (Tenn. 2001) (noting that a factual basis that does not also assert the legal grounds relied upon is not properly preserved for review). Significantly, "[t]he phrasing of the state constitutional provision differs from the text of the Sixth Amendment and has been described as imposing 'a higher right than that found

in the federal constitution.'" State v. Dotson, 450 S.W.3d 1, 62 (Tenn. 2014) (citing State v. Deuter, 839 S.W.2d 391, 395 (Tenn. 1992) (comparing the "face-to-face" language in Pennsylvania's constitution to the "face-to-face" language in our constitution and concluding that the procedure utilized in that case violated state and federal constitution)). Although Tennessee courts have expressly adopted and applied the same analysis to evaluate federal and state confrontation clause claims, Dotson, 450 S.W.3d at 62, we have never construed the "face-to-face" requirement of Article I, § 9 of our Constitution to be coexistence with or the same as the Confrontation Clause of the Sixth Amendment. Moreover, Tennessee has yet to squarely address whether the "face-to-face" language in our state confrontation clause is violated by a procedure, such as Zoom, of allowing a witness to testify outside of the defendant's physical presence. While Maryland v. Craig, 497 U.S. 836, 845 (1990), seemingly addressed this issue for federal courts, Craig relied heavily upon its understanding of the confrontation clause as articulated in Ohio v. Roberts, 448 U.S. 56, 63 (1990), which has now been overturned by Crawford v. Washington, 541 U.S. 36, 62 (2004). Compare White v. Illinois, 502 U.S. 346, 357 (1992) (distinguishing between the "in-court procedures" constitutionally required to guarantee a defendant's rights under the confrontation clause and what requirements the confrontation clause imposes as a predicate for the introduction of out-of-court declarations and concluding that "[t]here is thus no basis for importing the 'necessity requirement' announced in [Craig] into the much different context of out-of-court declarations admitted under established exceptions to the hearsay rule") with United States v. Cox, 871 F.3d 479, 492-93 (6th Cir. 2017) (Sutton, J., concurring) (questioning the viability of Craig because it is in tension with Crawford on at least six grounds and listing other cases and treatises with similar view).

With the above legal backdrop in mind, to properly preserve the issue presented for our review, the Appellant had to contemporaneously object to the witness testimony based on a violation of the federal and state confrontation clause. The record shows he did not. From the context of the above exchange, it is unclear whether the Appellant was objecting based upon the type of platform to be used for the testimony, an aspect of the trial court's materiality analysis, the federal confrontation clause, the state confrontation clause, or some combination thereof. The uncertainty as to the grounds in support of the Appellant's statement is evidenced by the trial court's three attempts to seek clarity and the trial court's final question of defense counsel emphasized above, "[Y]ou are going to stop at your statement that you oppose the Zoom testimony?"

The failure to state a specific objection forces the majority to improperly glean the grounds in support of the Appellant's objection from the context of the Appellant's motion for new trial. However, the Tennessee Supreme Court has noted that a trial court cannot evaluate an objection that was never made, and a denial of relief on a defendant's motion for new trial does not serve to alleviate the consequences of a defendant's failure to properly object at trial. Vance, 596 S.W.3d at 254. Moreover, upon review of the motion for new trial and the transcript of the hearing, the Appellant objected to the witness

testimony based solely on the state confrontation clause, and he has raised an additional challenge based on the federal confrontation clause for the first time on appeal. Accordingly, based on the Appellant's failure to specify the legal grounds in support of his objection at trial which were not apparent from the context, I would have agreed with the State and concluded that this issue was waived.

Because the Appellant has failed to even respond to the State's waiver argument, failed to request plain error relief, and consequently, failed to provide any analysis of the five factors required for plain error review, see Tenn. R. App. P. 36(b) (providing that, "[w]hen necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal"); State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)) (outlining the five factors for plain error relief), I decline review for plain error.

I would also deem this issue waived based on the Appellant's inadequate briefing and authority, which presents much like his lackluster objection and the limited presentation at the motion for new trial. See Tenn. Ct. Crim. App. R. 10(b) ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."); Tenn. R. App. P. 27(a)(4), (7); Hodge v. Craig, 382 S.W.3d 325, 335 (Tenn. 2012). The extent of the Appellant's argument on this issue in his brief is as follows: "The face-to-face language found in the Tennessee Constitution gives defendants a greater protection than the United States Constitution." While the Appellant cites a few cases, he has provided this court with only conclusory statements and no constitutional analysis or argument. Our role is not "to research or construct a litigant's case or arguments for him or her, and where a party fails to develop an argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived." Sneed v. Bd. of Prof'l Responsibility, 301 S.W.3d 603, 615 (Tenn. 2010). Accordingly, I would have waived the Appellant's claim on this ground as well.

Based upon the above reasoning and authority, I respectfully dissent from Part II, sections (A)(1)-(3) of the majority opinion in this case. In all other respects, I concur.

_____

CAMILLE R. MCMULLEN, PRESIDING JUDGE