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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Fairfield County

Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIMOTHY JAMES THOMPSON,

APPELLANT.

APPELLATE CASE NO. 2022-000397

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by allowing state's witness Tommy Bell to testify remotely, where he was located in Fairfield County where appellant's trial was being held, since appellant was entitled to live confrontation with this key state's witness?

STATEMENT OF THE CASE

Appellant was indicted at the December 8, 2020, term of the Fairfield County Grand Jury for the offenses of the murder of Bruce Gibbs and hit-and-run involving death as to the victim Bruce Gibbs. R. p. * Appellant's case was called to trial on March 21, 2022, before the Honorable Brian M. Gibbons, and a jury. William Frick represented appellant. Riley Maxwell and Henry McMaster, Jr. were the assistant solicitors. Tr. 1.

The jury found appellant guilty of both offenses. Tr. 457, l. 21- 458, l. 2. Judge Gibbons sentenced appellant to life imprisonment for murder and imposed a ten-year concurrent sentence for hit-and-run involving death. Tr. 467, ll. 1-7.

This appeal follows.

STANDARD OF REVIEW

“The Sixth Amendment to the United States Constitution guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” This procedural protection applies in both federal and state prosecutions by virtue of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 406 (1965).

“A trial court's decision to allow videotaped or closed-circuit testimony is reversible ‘only if it is shown that the trial judge abused his discretion in making such a decision. ...’” State v. Bray, 342 S.C. 23, 27, 535 S.E.2d 636, 639 (2000) (quoting State v. Murrell, 302 S.C. 77, 82, 393 S.E.2d 919, 922 (1990)). “Where there is evidence to support a trial court's ruling, it will not be overturned for an abuse of discretion. Bray, 342 S.C. at 27, 535 S.E.2d at 639.” State v. Johnson, 422 S.C. 439, 449, 812 S.E.2d 739, 744 (Ct. App. 2018).

ARGUMENT

The court erred by allowing state's witness Tommy Bell to testify remotely, where he was located in Fairfield County where appellant's trial was being held, since appellant was entitled to live confrontation with this key state's witness.

Relevant Facts

Prior to trial on March 21, 2022, Assistant Solicitor Maxwell reminded the judge that there had been a “quick hearing” in Chester on March 11, 2022 – about ten days prior to trial — in which there were arguments about the state's witness Tommy Bell appearing virtually. Maxwell said that Bell was seventy-six-years-old and resided in Pennsylvania. Maxell offered that Bell “could testify remotely for record purposes.” The trial judge said that defense counsel Frick was protected on the record from his ruling during that “quick hearing” that Bell could testify virtually rather than live.

WebEx remote hearing

The hearing they were placing on the record above was held on March 11, 2022, and it was on Webex. Riley Maxwell was the assistant solicitor at that hearing, and William Frick represented appellant. Supp. Tr. 1.

Maxwell told the judge that Tommy Bell was living in Winnsboro at the time of the incident allegedly giving rise to the present charges, but that Bell had moved back to Pennsylvania where he was originally from. Maxwell said that Bell was “a witness in this case. Mr. Bell's told me he is unable to travel by car or plane—due to his age and some health issues. We would just ask that he allowed to testify over the virtual courtroom during the trial term. And he can, I believe, tell you some more about his issues, briefly.” Supp. Tr. 2, ll. 14-22.

The following then occurred:

THE COURT: All right. What's the name again?

MR. MAXWELL: Tommy Bell.

THE COURT: All right. Mr. Bell, how you doing today?

MR. BELL: I'm doing okay. And you?

THE COURT: All right. Good. Can you see me?

MR. BELL: Yes, sir.

THE COURT: Isn't it weird how we're talking virtually even though you're up in Pennsylvania and I'm down in South Carolina?

MR. BELL: Yes, sir.

UNIDENTIFIED SPEAKER: (Indiscernible) y'all came from.

THE COURT: Well, yeah. I understand. That's just one good thing that came out of COVID is that we have these -- we have different accesses to virtual platforms now to allow things to move forward. So I just got a couple of questions for you.

TOMMY BELL, after being duly sworn, testified as follows:

THE COURT: All right. Now, you heard what the solicitor just told me. Do you wish -- do you -- you wish to testify in this case, but you can't come to South Carolina; is that what you're telling me?

MR. BELL: That's right. That's correct.

THE COURT: Tell me why you're not able to come to South Carolina.

MR. BELL: Because the doctor won't let me call -- come because of my breathing heavy and my health condition.

THE COURT: You can't fly? You cannot fly?

MR. MAXWELL: Yeah, it's on mute, I think.

THE COURT: No. He's fine. Something's happening. Sir, I can't hear you. Did you accidentally hit a button on the phone there? Okay.

UNIDENTIFIED SPEAKER 2: Turn off the Bluetooth. Bluetooth. He's in the car.

MR. MAXWELL: All right. I think he got it now. (Indiscernible).

UNIDENTIFIED SPEAKER 2: Hold on, sir. I pulled up and the Bluetooth connected. Hold on, please. Hold on. I don't know how to turn it off.

THE COURT: I'll stay.

UNIDENTIFIED SPEAKER 2: Okay. There. Go, go, go. Is it (indiscernible). Hello?

THE COURT: Hello.

UNIDENTIFIED SPEAKER 2: Oh, my gosh, it's still connected. Hold on. I changed it.

MR. MAXWELL: One reason I want to do it this way because --

UNIDENTIFIED SPEAKER: One second. Let me take this (indiscernible).

THE COURT: Mr. Bell, can you hear me?

UNIDENTIFIED SPEAKER: Hold on one second. I got to take you off of -- my wife pulled up with the car, and it -- it -- my blue (audio interference).

THE COURT: Okay.

UNIDENTIFIED SPEAKER: My Bluetooth. Hold on one sec.

THE COURT: All right.

UNIDENTIFIED SPEAKER 2: Can you hear now?

THE COURT: Yeah, I can hear you.

UNIDENTIFIED SPEAKER 2: Okay.

MR. BELL: All right. Hi. I'm back.

THE COURT: All right. You were telling me you're not able to fly and you can't drive that long or travel that long?

MR. BELL: That's right. That's right.

THE COURT: And that's per your doctor's orders?

MR. BELL: Yes, sir.

THE COURT: All right. What's the Defense's position on this, Mr. Frick?

MR. FRICK: Your Honor, I am concerned. First, we just had some technical issues right there. I am concerned about my client's right to full confrontation. I mean, I understand I can cross-examine Mr. Bell over the technology, but I would prefer it to be in person if possible.

THE COURT: All right. Well, here's what I'm -- I'm going to allow you to testify virtually, Mr. Bell. When the trial comes up, the solicitor will give you --

MR. BELL: Yes, sir.

THE COURT: -- (audio interference) to show up, just like you're doing in this virtual courtroom, and you'll be --

MR. BELL: Yes, sir.

THE COURT: -- (audio interference) in front of a jury in Fairfield County without actually being there. It'll be just like you testified in court, as if you were in court. I'm going to overrule the Defense objection and allow this to happen, based upon the risk to your health and safety. And you're just one witness out of whatever else the State's presenting. So I am going to allow that to happen. Okay?

MR. BELL: All right, sir.

THE COURT: All right. Thank you, sir.

Pre-trial hearing continued

Assistant Solicitor Maxwell said at the March 21, 2022 hearing: “[O]nce you open up the virtual courtroom, we’ll have a, I guess a computer here for us to talk into that would be hooked up to the screen. So, the jury will be able to see him, and we might make it where he is the only person on the screen, I think I had that option. Like, if I’m part of your virtual courtroom, it’s an option of who I’m looking at, I can make somebody a big screen versus seeing all parties.” Tr. 10, ll. 2-22.

The judge then offered that they could test the virtual technology by having the victim’s mother appear virtually “for the purpose of the bond hearing or something. Let’s patch her into the big screen and let’s see how she sounds and how everything coincides.” Tr. 10, l. 21- 12, l. 1.

The trial

The attorneys revisited this legal issue during the trial. At the conclusion of the testimony of the pathologist, Dr. Rose, the judge sent the jury out of the courtroom. Defense counsel Frick then renewed his objection to allowing Tommy Bell to testify virtually. “I believe he is now in Fairfield County. He is down the road. I would ask that we get him transported here so I can have live testimony...” Tr. 200, ll. 12-22. Defense counsel Frick also said a chief concern, in addition, was apparently impeaching Bell about a previous statement which “I think this is going to be problematic and very difficult. I’m not exactly sure how we’re going to execute that. I’ve got him queued up and ready to go to attempt it though.” Tr. 200, ll. 19-24.

The following then occurred between the court, Tommy Bell, sheriff’s deputies, and Defense Counsel:

“Why can't you come to court?”

MR. BELL: I've got -- I've got my back --lower lumbar disc in my back is ruptured. So that's why and my back is all upset and I can't go to court.

THE COURT: All right. And who is sitting there with you?

MR. BELL: We've got two -- there's a --

MR. LEWIS: Judge, it's myself Keith Lewis, Julie Hall and we've got Bill Dove from the sheriff's office, he had a WiFi hotspot that we need.

THE COURT: Did y'all attempt to try to get him in the car to bring him up to the courthouse.

MR. LEWIS: Yes, sir. We tried to get him up out of his chair, but he's in a lot of pain when he tries to move. And he says he's been sitting here at this table for a good while this morning.

THE COURT: Thank you. Based upon my prior ruling, I'm going to allow this witness to testify over the objection of the defense. I'm gonna allow this witness to testify remotely via my virtual courtroom. We'll just deal with the sound issues, the acoustics issues, the best we can. But you're protected in the record Mr. Frick.

MR. FRICK: Thank you, your Honor."

Tr. 201, l. 12- 202, l. 10,

The judge again repeated that he was allowing Tommy Bell to testify over defense objection virtually, and that the defense was protected on the record.

Trial evidence

Victim, "Bruce Gibbs," was hit and run over by an automobile in the early morning hours of September 6, 2020, in Winnsboro. Fairfield County sheriff's deputy Alan McCoy was working seven p.m. to seven a.m. patrolling Winnsboro on that fatal night. Tr. 80, l. 6- 81, l. 19. While driving on Columbia Road near Eleventh Street in Winnsboro, he noticed an automobile that appeared to be driving with only its fog lights on. Tr. 81, ll. 13-22. When McCoy drove

closer to this vehicle, he noticed it had a flat tire on the back right side. Tr. 82, l. 1- 83, l. 16. Shortly after this, McCoy heard over his police radio that a 911 call had identified “a juvenile laying in the roadway.” McCoy then drove towards the “burned down” part of Winnsboro where the body was apparently in the road. Tr. 85, l. 23-87, l. 20.

McCoy noticed a body lying in the road, which was that of victim Bruce Gibbs. McCoy checked the victim’s pulse and found none. He retrieved the victim’s wallet to find his identification, and he noticed the victim’s tennis shoes and cellphone laying nearby. Tr. 89, l. 15-91, l. 16.

Fairfield County sheriff’s deputy Chris Childers remembered the victim’s death was quickly ruled a hit-and-run, and the police immediately began looking for the vehicle responsible. Tr. 104, l. 11-106, l. 23.

Highway patrolman Tyler Holland remembered being dispatched at about one-twenty in the morning to the scene of the hit-and-run. Tr. 120, ll. 6-24. Holland remembered finding the victim’s shoes, cellphone, and pocketknife, and he also remembered seeing tire tracks going through the grass and a vehicle part that had been left behind at the scene of the hit-and-run. Tr. 122, l. 13-123, l. 19. Holland said the MAIT team was also called in to investigate. Tr. 126, ll. 9-13.

Earlier that evening, a fish fry was held on Doty Street near Eleventh Street in Winnsboro. It apparently started at about three p.m. Miranda Sawyer was good friends with Felicia Johnson. Felicia’s son, Bruce, was the victim in this case. Miranda remembered the Saturday, September 5, 2020, fish fry which many people attended. Tr. 143, l. 21-146, l. 3. Miranda said the fish fry lasted from about three in the afternoon to ten o’clock that night.

The decedent, Bruce Johnson, was with his girlfriend, Nikki Thompson. Appellant, who went by the name “Gus,” was also at the fish fry. Tr. 146, ll. 2-21.

Miranda remembered that Nikki and Bruce were having an argument near the mailbox on the road that evening, they were only arguing orally and there was no physical action involved. Miranda said that appellant went to the scene of the argument and said “Bruce, Bruce, Bruce. I’m tired of you arguing with my sister.” The victim, Bruce, responded “I’m tired of you always in our business. Stay out of our business.” Miranda maintained that appellant then said he was going to get Bruce. Bruce apparently responded “we can do it one-on-one. We can get it now. We can do it one-on-one.” Tr. 148, l. 2-149, l. 18.

Appellant then left the party and walked towards his father’s house. Tr. 149, ll. 22-23. Miranda also testified that appellant drove a black Impala. Tr. 149, l. 25-150, l. 1.

Felicia Johnson also testified that appellant drove a black Impala on the night of the fish fry. Tr. 163, ll. 1-6. The state’s case was an effort through circumstantial evidence to tie appellant to the 2004 Chevy Impala which police believed was the car involved in the hit-and-run causing the death of the victim, Bruce Gibbs. Dr. Kelly Rose testified that the victim died of skull fractures and bleeding in his brain. He said these injuries were consistent with being hit and run over by a car. Dr. Rose opined the cause of death was blunt force trauma. The victim had a blood alcohol reading of .062, and he had marijuana in his system. Tr. 179, l. 20-188, l. 18.

Virtual testimony of Tommy Bell

Prior to the virtual testimony of Tommy Bell, the trial judge told the jury that they were going to see a state’s witness testify virtually “[v]ia my virtual courtroom. One of the good things that’s arguable, but one of the good things that came about as a result with COVID with

the court system, was video court. We were able to move a lot of cases and conduct a lot of business using virtual court.” Tr. 203, ll. 17-25. The judge also told the jury that there were some problems with acoustics, “there’s reverberations, nobody knows what’s happening, we’re going to try to make the best of it so listen carefully. Even though this witness is appearing virtually, it’s as if—for your purposes, you are to consider his testimony and give it the weight and credibility you believe it deserves even though he may not physically be present testifying. I’ve already ruled on that as a matter of law. So, I want you to imagine that he is sitting in this witness stand like everybody else testifying. I’m going to swear him in and he’s going to be asked questions and I’m hoping this will go smoothly with reverberations and the acoustics, we’ll try and make the best of it.” Tr. 204, ll. 1-17.

Tommy Bell testified he was seventy-six-years-old. He said he was from South Carolina but had moved to Pennsylvania to be with his son for a while but had now moved back to South Carolina. Tr. 205, l. 11-206, l. 1.

Bell said in September 2020, he was living on Blair Circle, number 23, in Winnsboro. Bell said he knew appellant, who they called “Gus.” Tr. 206, ll. 2-22. Bell said appellant lived next door to him for a year or two before he was convicted. Tr. 206, l. 7-207, l. 18.

Bell said he talked with appellant a lot, and they sat on the porch together when appellant lived next door to him. Tr. 207, ll. 19-25.

Bell said on the evening of September 5, 2020, appellant came over to visit his house between eleven and eleven-thirty, and Bell maintained appellant was trying to get a gun. Tr. 208, ll. 1-22. Bell said appellant was driving a black Chevy Impala at the time. Bell also claimed appellant told him that he was going “to kill my grandson. I told him, I said, ‘well, what’s going on?’”

The following also occurred with Bell:

“He said, well, he had called his sister a bitch, so I assumed -- before I said nothing, I said, ‘Did you talk to his momma?’ He said, no, he hadn't talked to her. So I told him, ‘Well, go back over there and talk to his momma. His momma get that straight.’ So he said, ‘No, sir. I'm not gonna do that.’ He said, ‘I'm not gonna do this here.’ I made sure that he had left about 12:00 or 12 o'clock that night.

Q. When he said he was going to kill your grandson, do you know who he was referring to?

A. Yes, sir. Referring about my grandson, Bruce.

Q. Bruce Gibbs?

A. Yes, sir.

Q. Did he say anything else about what his intentions were that night towards your grandson?

A. Well, he didn't say no more about it because like I said after 12 After there, he went after 12 -- after 12, he left, he and his sister came back around because she was in her vehicle and he was in his following with them. So he came back -- took about five minutes and he came back.

Q. And that was all around midnight, before midnight?

A. Yes, sir. Yes, sir.

Q. Just to jump back to make sure we're covering what he said to you. You mentioned something about a gun earlier. What did he say about a gun?

A. Yeah. He asked, did I know anybody he could get a gun from? When he said that, I told him, ‘No.’ He said he was trying to get one from his dad, step-dad. And after that, like I was saying, I don't think his step-dad even have a gun.

Q. Did he mention anything on what he would do if he wasn't able to find a gun?

A. No, sir. He didn't mention nothing else. He just said he was going to kill him about midnight that night.”

Tr. 209, ll. 12-210, ll. 25.

Bell said he did not take appellant seriously, apparently because he thought appellant had been drinking. Tr. 211, ll. 1-10. Bell said he called his daughter. Bell recalled “[s]o he left a voicemail saying he was going to kill her son. I let her know he [appellant] was going to kill Bruce, her son.” The following then occurred between the solicitor and Bell by virtual testimony:

“Q. Did you make any effort to let anybody know what he had told you?

A. Yes, sir. I called my daughter. My fiancé, she called my daughter and told my daughter, but she wasn't at home. She was probably at POPS, so we left a voicemail saying he said he was going to kill her son. I let her know he was going to kill Bruce, her son.

Q. Do you remember finding out about Bruce being killed?

A. Yes, sir. My daughter, Felicia, she had called me and told me that did, I know Bruce is dead. I said, no, I don't. But on the day, after I got up and got dressed and went over to my daughter's house. Then that's when I find out, he did get ran over with the car.

Q. Did you provide at that time, tell your daughter and other family members what Mr. Thompson had told you the night before?

A. Yes, sir. I sure did.

Q. Did you and someone also talk with the highway patrol when they were investigating this case?

A. Yes, sir. I sure did.

Q. Did you tell them what Mr. Thompson told you that night at your house?

A. I definitely did. I sure did.

Q. Do you recall if he said anything about, it might end up in the paper or the media?

A. No, sir. I don't remember that.

Q. How was Mr. Thompson acting? What was your observation of how he was acting when his arrived at your house?

A. Well, he was doing a lot of staring and he was sweating a lot, you know, head, so I figured that he must have been high off of something, you know? I don't know what it was, but he was acting high on something.

Q. When he left your house, was he driving the black Impala?

A. That's right.”

Tr. 211, l. 11-212, l. 23.

On cross-examination, defense counsel Frick asked Bell if he had told a highway patrolman that this incident happened on a Thursday night. Bell said the incident happened on a Saturday night, not a Thursday night. Bell refused to admit that he told the highway patrolman that incident happened on a Thursday night and not a Saturday. Bell said he did recall the statement to the trooper saying that appellant told him “That your grandson will be dead between twelve and one.” Tr. 214, ll. 20-23.

During this cross-examination, there was an apparent problem with the virtual testimony. The judge mentioned “low bandwidth” and told Bell to not leave while they switched computers. Tr. 214, l. 24-215, l. 9. The following then occurred:

“THE COURT: Low bandwidth. Mr. Bell, can you hear me? Stay with us, don't leave.

MR. FRICK: Mr. Bell, can you hear me?

THE COURT: Come stand right in front of me.

MR. FRICK: Mr. Bell, sorry I had to switch computers. Can you hear me?

MR. BELL: Yes, sir.

Q. (By Mr. Frick) Let's see. Gus was over at your house. He left about midnight; correct?

A. (Audio disruption.)

Q. (By Mr. Frick) All right. Mr. Bell, we're still working on this thing. Can you hear me again?

A. Yes, sir.

Q. Okay. Thank you. So you didn't have any concerns when really when Gus said what you say he said; right?

A. Well, I don't because -- (unintelligible.)

Q. So you didn't call anybody and you just didn't have a concern?

A. That's right.

Q. Did you see Gus again that evening?

A. Yes, sir. He was with his sister. Came back through with his sister and ran through there and came through there -- last time I seen him.

Q. About when was that?

A. That was the same night.

Q. About what time. He had already left your house at midnight?

A. That was somewhere around almost 1:00.

Q. Around 1:00?

A. Yes, sir.

Q. Was there anymore conversation?

A. No, sir. I ain't have no more conversations with him."

Tr. 215, l. 3-216, l. 13.

On redirect examination, Bell repeated that appellant had been to his house on Saturday night, and he learned his grandson had been killed that Sunday morning. Tr. 216, l. 25-217, l. 16. The virtual testimony then ended.

Santana “Nikki” Thompson testified appellant was her brother. Tr. 225. l. 3-226, l. 3. The decedent was the father of one of her children.

Nikki remembered arguing with the decedent at the fish fry. Nikki said she gave the decedent fifty dollars to get her some marijuana, and she told him during the argument: “I don’t got time for you attitude and stuff like that no more. I don’t need this and all that.” Tr. 228, l. 21-229, l. 3. Nikki said she thought appellant was living in his car, a black Chevrolet Impala, during this time. Tr. 230, ll. 7-17.

On cross-examination, Frick asked Nikki about the testimony of Tommy Bell “over the computer.” Nikki said she heard that testimony, but she said the part about her and appellant going over to his house “that didn’t happen.” Tr. 231, ll. 16-25. Nikki explained that this did not happen “because I have two—all six kids and we was already kind of behind [schedule] anyway. I was at home getting them situated for bed.” Tr. 232, ll. 1-13.

State’s witness Calvin Sampson testified he considered appellant a friend. Sampson described an incident where he claimed appellant came by his house between twelve and one o’clock in the morning driving an Impala. Sampson claimed appellant asked him if he knew where he could get a gun. Sampson maintained he told appellant “there ain’t no gun around here,” and appellant left. Tr. 235, l. 14-237, l. 10.

Sampson said around twelve-thirty, he left to get some cigarettes in downtown Winnsboro. Sampson maintained he saw a car driving recklessly, and he could tell this car was

an Impala by its headlights. Tr. 238, l. 6-239, l. 19. Sampson did not remember, or could not tell, the color of the Impala. Tr. 239, ll. 18-19.

On cross-examination, Sampson continued to claim that appellant wanted to trade his car for a gun on the evening he came by. Tr. 241, ll. 8-10. Sampson admitted he could not have a gun because he was a convicted felon. Tr. 242, ll. 3-8.

Highway patrolman Donovan Lang testified following the hit-and-run accident, that a black Impala was seen near I-20 “near the Flying J in Columbia.” Flying J was a gas station with a Denny’s restaurant attached. Tr. 246, l. 8-247, l. 19. Lang said the Chevy Impala had a dent in its hood and had a spare tire on it. There was also a white substance all over the car, which Lang believed was caused by bleach. Tr. 248, l. 5-249, l. 6.

Highway patrolman Scott Darby testified that the police had information appellant was seen walking on Fairfield Road in Richland County near the Flying J truck stop. Tr. 272, ll. 8-25. The black Impala registered to appellant was found near the truck stop. Darby said there was damage to the front grill of the Impala. Tr. 273, l. 1-275, l. 13.

Trooper Darby also said appellant was seen on the video tape in the area and that car he was driving was a black Chevy Impala.¹ Tr. 278, ll. 15-23.

Fairfield County sheriff’s deputy Jonathan Harris remembered doing a “security check” on a motorist who had a flat tire in the early morning hours of September 6, 2020. Tr. 292 l. 9-294, l. 23. Harris remembered stopping and talking with a black male with dreadlocks who was changing a tire. Harris asked the man if everything was alright, and this man confirmed that everything was alright at that time. Harris remembered the vehicle this man was driving being an older-model black Impala. Tr. 295, l. 11-298, l. 23.

¹ During the testimony of Trooper Darby, defense counsel Frick played an audio tape of Darby interviewing Tommy Bell inside his patrol car. Tr. 288, l. 13-289, l. 1.

Travis McKinney was with the MAIT team. He was recognized as an expert in accident reconstruction. He testified the Chevy Impala had grill damage to it and had streaks which were caused by the use of a liquid. The bottle of bleach was found in the backseat of the Impala, the Impala also had a spare tire on it, and a zip tie held the headlight assembly in place. Tr. 306, l. 18-317, l. 25.

MAIT team member Jeremy Sisler estimated the vehicle was going forty-seven miles per hour when it hit and killed the victim. The police also found a clip that fit the Impala at the scene of the hit-and-run. Tr. 361, l. 18-376, l. 7.

Discussion

The Sixth Amendment to the United States Constitution guarantees the accused “the right ...to be confronted with the witnesses against him.” In State v. Johnson, 422 S.C. 439, 812 S.E.2d 739 (Ct.App. 2018), this Court found that the trial judge erred by permitting an investigator to testify via Skype in violation of the Confrontation Clause of the Sixth Amendment.² See, also, United States v. Yates, 438 F.3d 1307 (11th Cir. 2006) (allowing overseas witness beyond the subpoena power of the United States to testify via two-way video conference violated the defendant’s Sixth Amendment right to confrontation).

This was a murder case that did not involve a child, and it was not a criminal sexual conduct or child sex case. Therefore, that limited case law created exception to the Confrontation Clause for such a witness recognized in Maryland v. Craig, 497 U. S. 836 (1990), and Coy v. Iowa, 487 U.S. 1012, and State v. Murrell, 302 S.C. 77, 393 S.E. 2d. 919 (1990),

² This Court found the error harmless in Johnson, and certiorari was denied on August 3, 2018. As explained infra, Tommy Bell was a critical state’s witness in this case and he was even in Fairfield County at the time of appellant’s trial.

simply does not apply in this case. Appellant recognizes that appellate court's have nonetheless considered this cases as strong precedent in non-criminal sexual conduct cases.

In Maryland v. Craig, 497 U.S. 836, 846-847 (1990) *citing* Coy v. Iowa, 487 U.S 1012, 1019 (1988), observed: "It is always more difficult to tell a lie to a person 'to his face' than 'behind his back'... that face-to-face presence may, unfortunately upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser... Therefore, the United States Supreme Court has stated that the right to be confronted with the witness against the defendant means that the defendant "[m]ust have the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact." California v. Green, 399 U.S. 149, 156 (1970).

"The phrase still persists, 'look me in the eye and say that.' Given these human feelings of what is necessary for fairness, the right of confrontation 'contributes to the establishment of the system of criminal justice in which the perception as well as the reality of fairness prevails.' Lee v. Illinois, 476 U.S. 530, 540 (1986)." Coy v. Iowa, 487 U.S. 1012, 1018 (1988).

A confrontation on a television screen is not the same as a physical face-to-face confrontation. While the video in this case appears to be very far from the best, video technology cannot replicate to face-to-face in-person testimony where the witness stands face-to-face where the jury can look at him, and judge his demeanor upon the witness stand before them in the manner in which he gives his testimony to determine whether that witness is worthy of belief. See Mattox v. United States, 156 U.S. 237, 242-43 (1985).

It has long been understood that a criminal defendant can only be convicted on the testimony of "[s]uch witnesses as meet him face-to-face at the trial, who give their testimony in

his presence, and give to the accused an opportunity for cross-examination.” Dowdell v. United States, 221 U.S. 325, 330 (1911). See, also, Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987).

Again, this is not a case involving criminal sexual conduct or a child. However, as then Justice Scalia, who later authored Crawford v. Washington, 531 U.S. 36 (2004), wrote in his dissent in Maryland v. Craig, along with Justices Brennan, Marshall, and Stevens about the prevailing opinion or policy interest in dispensing with face-to-face accusation by the child of his or her accuser in court:

“[B]ecause of this subordination of explicit constitutional text to currently favored public policy, the following scene can be played out in an American courtroom for the first time in two centuries; a father whose young daughter who has been given over to the exclusive custody of the estranged wife, or the mother whose young son has been taken into custody by the state’s child welfare department, is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, personally or through counsel, ‘it is really not true, is it, that I- your father (or mother), whom you see before you - did these terrible things?’ Perhaps that is a procedure today’s society desires; perhaps (though I doubt it) it is even a fair procedure; but it is assuredly not a procedure permitted by the constitution. Because the text of the Sixth Amendment is clear, and because the constitution is meant to protect against, rather than conform to, current ‘widespread belief,’ I respectfully dissent.” According to the Court ‘we cannot say that [face-to-face] confrontation [with witnesses appearing at trial] is an indispensable element of the Sixth Amendment’s guarantee of the right to confront one’s accusers *Ante* at 3166. That is rather like saying ‘we cannot say that being tried before a jury is an indispensable element of the Sixth Amendment’s guarantee of the right to a jury trial.’”

Maryland v. Craig, 497 U.S. 836, 861-62 (1990).

Tommy Bell was a key state’s witness in this case. As seen above, Bell claimed on the evening of September 5, 2020, appellant came over to his house between eleven and eleven-

thirty that night, and Bell maintained that appellant was trying to get a gun. Bell said that appellant told him he was going to kill his grandson and Bell said he called his daughter and told her appellant was going to kill Bruce, her son. Bell said he later found out from his daughter, Felicia, that Bruce was dead. To say this is damning testimony is an incredible understatement.

As seen, there were technical problems with the virtual testimony during defense counsel Frick's cross-examination of witness Bell. However, on virtual redirect-examination, Bell repeated that appellant came to his house on a Saturday night, and he learned his grandson had been killed that Sunday morning. Tr. 216, l. 25- 217, l. 16.

The virtual testimony of witness Tommy Bell violated appellant's right to confrontation, and appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing argument, appellant's conviction should be reversed and this case remanded to the Fairfield County Court of General Sessions for a new trial.



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Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of March, 2023.