



**In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth**

No. 02-21-00112-CR

TAYTON SETH FINLEY, Appellant

v.

THE STATE OF TEXAS

On Appeal from County Criminal Court No. 5
Tarrant County, Texas
Trial Court No. 1607688

Before Kerr, Bassel, Walker, JJ.
Opinion by Justice Walker

OPINION

Appellant Tayton Seth Finley appeals from his conviction for misdemeanor assault causing bodily injury to his ex-girlfriend, T.G.¹ Finley argues that the trial court denied him his Sixth Amendment Right to Confrontation by allowing T.G. to testify at trial while wearing a mask. We will reverse the trial court's judgment and remand the case for a new trial because the trial court erred in allowing T.G. to testify behind a mask without making any findings related to T.G.'s particular need to wear a mask, and because such error was harmful.

I. BACKGROUND

A. TRIAL PROCEEDINGS

1. T.G. Testifies While Wearing a Mask

Finley's jury trial took place in late July 2021. Masks were voluntary for anyone in the courtroom, including witnesses. T.G.—the sole complainant and eyewitness to the alleged assault—took the witness stand while wearing a surgical mask that covered her nose and mouth. Finley's counsel requested that the trial court require T.G. to remove her mask while she testified, citing Finley's Sixth Amendment right to face-to-face confrontation. Specifically, he worried that the mask would interfere with the jury's ability to evaluate T.G.'s facial expressions and demeanor.

¹In their appellate briefs, both parties refer to the complaining witness by her initials, T.G. We will follow their lead.

The State countered that Finley’s request was nothing more than an attempt to “harass and annoy the victim” and pointed to the “situation in the world” as the basis for allowing T.G. to keep her mask on. The State proffered that the issue boiled down to one of T.G.’s comfort amidst the COVID-19 pandemic:

[I]f [T.G.] feels most comfortable testifying with a mask on in a room with many[,] many people in it and . . . she doesn’t know their background and whether or not they are coughing. I believe it is entirely within her right and it does not affect Crawford or the 6th Amendment right to confront witnesses. I believe actually the Supreme Court orders from Texas have been very clear [that] we should do as much as possible to protect people during in-person proceedings. So for that reason, if she wants to wear a mask, I’d ask that she be allowed to wear a mask.

Finley’s attorney responded that, in his estimation, proper social distancing accommodations had been made in the courtroom in accordance with then-current CDC guidelines and Texas Supreme Court COVID-19 emergency orders.² He did, however, concede that he might need to approach T.G. while she testified “to show her some documents.”

The trial court denied Appellant’s request, citing the emergency orders:

But I think that [the State] is correct. The overall tenure of these orders has been that we do whatever we can to protect each other, the

²At the time of Finley’s trial, the supreme court’s thirty-eighth emergency order was in effect. See *Thirty-Eighth Emergency Order Regarding COVID-19 State of Disaster*, 629 S.W.3d 900, 900 (Tex. 2021). This order required that, “[s]ubject only to constitutional limitations,” courts should take all “reasonable action to avoid exposing court proceedings and participants to the threat of COVID-19.” *Id.* Further, a trial court was permitted to conduct jury proceedings if the local administrative judge had adopted “minimum standard health protocols for court proceedings” to include “masking, social distancing, or both.” *Id.* at 901.

community, from the Covid virus. So if [T.G.] wants to wear a mask, I'm not going to tell her she can't.

2. T.G.'s Testimony

T.G. testified that, after a night out drinking, she and Finley had gotten into an argument on their drive to his house. The argument escalated when they arrived at the house and Finley purposefully crashed his vehicle into a fence outside his house. He then pulled T.G. out of the car by her hair, and he beat her with his fists. According to T.G., Finley then dragged her into the house and continued to beat her with his fists which caused her to lose consciousness. After two days of persistent pain and swelling from the assault, T.G. went to the hospital. She initially reported that she sustained her injuries after falling from a horse. But after examining her injuries, hospital staff asked the police to come to the hospital to speak with T.G. Though reluctant, T.G. eventually explained to police that she had been assaulted by Finley.

3. Additional State's Evidence

A nurse testified that she had helped treat T.G. at the hospital. Her testimony consisted mainly of reading from T.G.'s medical records because, at the time of trial nearly two years after the incident, the nurse did not specifically remember treating T.G. The medical records showed that T.G. had indicated to the nursing staff that her injuries were caused by Finley beating her. These injuries included deep bruises to her chest and shoulder.

The State also called multiple police officers who had interviewed T.G. about the assault allegations. One of the officers who spoke with T.G. at the hospital noticed bruising on her arm and described her as “anxious” and “concerned.” Another officer who spoke with T.G. on the phone testified that he had viewed photographs of T.G. after the alleged assault and that her injuries appeared consistent with those obtained during an assault. He also viewed photographs of the driveway where Finley reportedly crashed his vehicle and testified that “the ground appeared to be chewed up” and that part of the fence was missing its panels.

Finally, a victim assistance specialist for the police department testified as an expert about the various cycles of domestic violence. She testified that she did not know any details about Finley’s case but that it was common for victims of domestic violence to be fearful of talking to law enforcement or of prosecuting an assault allegation. She also testified that it was common for victims to have trouble remembering certain details of a traumatic event.

4. The Verdict

During deliberations, the jury informed the trial court that it could not reach a unanimous decision. However, after receiving an *Allen* charge from the trial court, the jury returned a guilty verdict. *See Allen v. United States*, 164 U.S. 492, 501, 17 S.Ct. 154, 157 (1896). Finley was sentenced to 300 days in jail and fined \$4,000. This appeal followed.

B. APPEAL ABATED FOR PARTICULARIZED FINDINGS

Beyond the non-evidentiary arguments of the parties, no evidence was offered to explain T.G.'s need to wear a mask, and the trial court failed to announce on the record or file any findings related to T.G.'s particular need to wear a mask. Accordingly, and on our own motion, we abated this appeal and ordered that the trial court supply us with “case-specific, evidence-based findings pertaining to whether it was necessary for T.G. particularly to wear a mask while she testified.” *See Maryland v. Craig*, 497 U.S. 836, 855, 110 S. Ct. 3157, 3169 (1990) (holding that the trial court must hear evidence and make case-specific findings that use of special courtroom procedure that permitted a child to testify in the absence of face-to-face confrontation of defendant was necessary “to protect the welfare of the particular child witness”); *Haggard v. State*, 612 S.W.3d 318, 325–28 (Tex. Crim. App. 2020) (applying *Craig* necessity-findings rule in Texas case involving an adult witness); *see also Romero v. State*, 136 S.W.3d 680, 684–85 (Tex. App.—Texarkana 2004), *aff'd*, 173 S.W.3d 502 (Tex. Crim. App. 2005) (same).

In response to our order, the trial court did not supply any particularized findings but rather supplemented the clerk's record with three documents devoid of any explanation: (1) a COVID-19 operating plan for the Tarrant County judiciary implemented by the local administrative judge, (2) an order of assignment showing

that Finley’s case had been assigned for all purposes to a retired judge, and (3) a case docketing sheet.³

The operating plan, which went into effect on June 7, 2021, permitted in-person proceedings but required judges to take “reasonable steps to protect judges and court staff from contracting COVID-19.” People who had been exposed to or were showing COVID-19 symptoms were prohibited from entering court facilities. Further, courts were ordered to establish policies and procedures to minimize the likelihood that court participants would violate social distancing rules. The plan did not address the wearing of masks.

II. ANALYSIS

The Confrontation Clause is an important facet of the United States Constitution. It is imperative that defendants have the opportunity to confront their accusers face-to-face. When that accuser is masked while testifying at a jury trial against the defendant, the Confrontation Clause is implicated because the jury is denied the opportunity to read the accuser’s face and fully judge their credibility. This is particularly true when the accuser is the sole eyewitness to the alleged crime. There is good reason, after all, why we have expressions in American parlance such as “bald-faced lie,” or the older expression of “bare-faced truth”—because much can be

³The docketing sheet, which already existed in the original clerk’s record before this court, merely recited basic information about Finley’s case such as plea, verdict, and punishment details.

gleaned about a person’s demeanor and truthfulness from their unobstructed facial expressions.

In a single issue, Finley argues that his Sixth Amendment right to face-to-face confrontation was violated when T.G. was permitted to testify while wearing a mask that covered her nose and mouth. Among several sub-issues, Finley posits that reversal is required because the trial court made no case-specific findings as to why it was necessary for T.G., in particular, to wear a mask at trial.

The State responds that Finley’s confrontation right was not violated because the trial court’s decision to allow T.G. to wear a mask furthered an important public policy—“ensuring the safety of everyone in the courtroom during a global pandemic”—and because the reliability of T.G.’s testimony was not impaired by doing so. On the issue of particularized findings, the State argues that particularized findings are not required in the COVID-19 context. In any event, says the State in its appellate brief, the trial court’s pronouncement at trial that courts shall “do whatever we can to protect each other, the community, from the Covid virus” satisfied any such need for particularized findings.⁴

⁴Notably, the attorney for the State conceded outright at oral argument before this court that the trial court had not, in fact, made any such findings particular to T.G.

A. PARTICULARIZED FINDINGS

1. Applicable Law

The Sixth Amendment protects an accused's right to confront, face-to-face, any witness that testifies against him. U.S. CONST. amend. VI; *Coy v. Iowa*, 487 U.S. 1012, 1017, 108 S. Ct. 2798, 2801 (1988); *Haggard v. State*, 612 S.W.3d 318, 324 (Tex. Crim. App. 2020). The primary aim of this confrontation right is to not only test a witness's memory and conscience but to compel him "to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner which he gives his testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242–43, 15 S. Ct. 337, 339 (1895). A jury's ability to view a witness's facial expressions is paramount to the confrontation right because the face is "the most expressive part of the body and something that is traditionally regarded as one of the most important factors in assessing credibility." *Romero v. State*, 173 S.W.3d 502, 505–06 (stating that allowing a witness to testify while disguising his face would "remove the 'face' from 'face-to-face confrontation'").

However, "[a]lthough face-to-face confrontation forms the core of the values furthered by the Confrontation Clause, [the Supreme Court] has nevertheless recognized that it is not the *sine qua non* of the confrontation right." *Craig*, 497 U.S. at 847, 110 S. Ct. at 3165 (internal citations and quotations omitted). Instead, a defendant's confrontation right may be satisfied absent a physical, face-to-face confrontation "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.” *Id.* at 850. To show such necessity, the trial court must hear evidence and then make a case-specific, evidence-based finding that the departure from the face-to-face confrontation right is necessary to protect the well-being of the particular witness. *Id.*; see *Haggard*, 612 S.W.3d at 324–26; *Romero*, 136 S.W.3d at 690–91.

2. No Findings Made

The record here does not contain any individualized, evidence-based findings that T.G. needed to wear a mask to protect her particular well-being—a fact that the State ultimately conceded at oral arguments before this court. Because the trial court did not mandate face coverings during Finley’s trial, it apparently believed its participants were adequately protected in the courtroom without needing to wear masks. But we are given no explanation as to why T.G. herself needed special protection when others did not. Neither a generalized pronouncement by the trial court that courts were to protect against COVID-19 exposure nor the existence of a governing, county-level COVID-19 operating plan met this case-specific burden. See *Romero*, 136 S.W.3d at 690–91 (“Satisfaction of this general standard requires more than a mere showing that public policy would be served; instead, it demands that trial courts make case-specific findings of necessity, justifying the infringement of a defendant’s right to confront his or her accusers face to face.”)

The State argues that this is not an issue of concern because the trial court was imbued with the authority to allow masked testimony by Texas Supreme Court

COVID-19 emergency orders that ordered trial courts to take all reasonable action to protect participants from the virus. *See, e.g., Thirty-Eighth Emergency Order Regarding COVID-19 State of Disaster*, 629 S.W.3d 900 (Tex. 2021).

We are not persuaded by this argument for two reasons. Chiefly, the reasonable-action mandate from those orders was specifically made “subject only to constitutional limitations.” *See, e.g., id.* at 900. In other words, trial courts were ordered to take protective steps against COVID-19 only if those steps did not infringe upon a defendant’s constitutional rights—such as his Sixth Amendment right to confrontation. *See id.* Additionally, the order effective in July 2021 at the time of Finley’s trial did not contain a face covering mandate, which shows an evolution away from the stricter directives of previous orders that *did* require face coverings in the courtroom. *Compare id.* (containing no face-covering requirement) *with Thirty-Sixth Emergency Order Regarding COVID-19 State of Disaster*, 629 S.W.3d 897, 898 (Tex. 2021) (requiring face coverings to be worn over the nose and mouth).

Finally, the State argues that particularized findings as to the individually masked witnesses are not required in the COVID-19 context given the important public-policy need for courts to protect their participants from the disease. The State points us to several non-Texas cases to support this contention.⁵ We are not swayed

⁵*See United States v. James*, No. CR-19-08019-001-PCT-DLR, 2020 WL 6081501, at *1 (D. Ariz. Oct. 14, 2020); *United States v. Crittendon*, No. 4:20-CR-7 (CDL), 2020 WL 4917733, at *6 (M.D. Ga. Aug. 21, 2020); *State v. Modtland*, 970 N.W.2d 711, 720 (Minn. Ct. App. 2022).

by these cases largely because they either ignore or outright abandon—without precedent—the clear directive from *Craig* that courts make such findings. Instead, the State invites us to follow suit and to fashion a COVID-19-pandemic exception which would obviate the need for the trial court to enter the requisite findings. We decline the invitation.

We have found no pandemic-era Texas cases applying the *Craig* factors to a masked-witness situation. However, one of our sister courts was recently asked to determine whether a defendant’s confrontation right was violated when two witnesses were permitted to testify at trial via two-way Zoom teleconferencing technology. *See Dies v. State*, No. 05-20-00951-CR, 2022 WL 3097816, at *6 (Tex. App.—Dallas Aug. 4, 2022, no pet. h.). In *Dies*, the trial court heard evidence that one witness had just tested positive for COVID-19 and that the other was 38 weeks pregnant, lived two hours away, and had been advised by her doctor not to travel. *Id.* at *1–2. The trial court found that these conditions warranted allowing the witnesses to testify remotely. *Id.* at *4. The Fifth Court of Appeals held—after explaining that Texas courts indeed must make evidentiary, case-specific findings before dispensing with the face-to-face right—that the *Craig* factors had been satisfied by the trial court. *Id.* at *6.

We will follow the *Dies* court’s lead in declining to abandon the *Craig* particularized-findings requirement in the pandemic context. Accordingly, we hold that the trial court erred when it allowed T.G. to testify while wearing a mask without making any particularized findings as to her particular need to do so.

B. HARM ANALYSIS

Having held that the trial court erred, we must determine whether such error was harmful. *See Haggard*, 612 S.W.3d at 328.

1. Applicable Law

A denial of physical, face-to-face confrontation is reviewed for harmless error. *Coy*, 487 U.S. at 1021, 108 S. Ct. 2798; *see Chapman v. California*, 386 U.S. 18, 23, 87 S. Ct. 824, 827–28 (1967). Constitutional error is harmful unless a reviewing court determines beyond a reasonable doubt that the error did not contribute to the conviction. Tex. R. App. P. 44.2(a). The State has the burden to prove that the error is harmless beyond a reasonable doubt. *Haggard*, 612 S.W.3d at 328. That is, if we are unable to conclude beyond a reasonable doubt that the error did not contribute to the conviction, we must reverse and order a new trial. *Langham v. State*, 305 S.W.3d 568, 582 (Tex. Crim. App. 2010).

In the context of the denial of face-to-face confrontation, the harm analysis “cannot include consideration of whether the witness’ testimony would have been unchanged, or the jury’s assessment unaltered, had there been confrontation” because “such an inquiry would obviously involve pure speculation.” *Coy*, 487 U.S. at 1021–22, 108 S.Ct. at 2803. Instead, harm must be determined based on “the remaining evidence.” *Id.* While our determination should consider “any circumstance apparent in the record that logically informs the harm issue,” a number of factors can aid our analysis: (1) importance of the witnesses’ testimony to the prosecution’s case,

(2) whether the testimony was cumulative, (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, (4) the extent of cross-examination otherwise permitted, and (5) the overall strength of the prosecution's case. *Haggard*, 612 S.W. at 329.

2. Error Not Harmless Beyond a Reasonable Doubt

Arguing that any error was harmless here, the State focuses on factors three, four, and five. According to the State, many of the details testified to by T.G. were corroborated by other evidence at trial, such as medical records and police interviews. Further, the State argues that the extent and duration of T.G.'s cross-examination—which spanned nearly three hours—bears in favor of the error being harmless. Finally, the State contends that its case was strong because T.G.'s testimony itself was strong.

We see it differently than the State. Having found error in allowing T.G. to testify while wearing a mask, we must set aside her testimony and analyze harm based on the remaining State's evidence. *See Haggard*, 612 S.W.3d at 628. Materially, that evidence consisted of:

1. the nurse's testimony, derived mainly from medical records, concerning T.G.'s injuries;
2. testimony from multiple police officers describing T.G. as “anxious” and “concerned” two days after the alleged assault, characterizing her injuries as consistent with an assault, and indicating that pictures showed that the ground near Finley's driveway appeared “chewed up” and that his fence was missing some panels;

3. pictures of T.G. taken at the hospital that showed bruising; and
4. expert testimony from the victim assistance specialist that domestic violence victims are often reluctant to report their abuse and often have trouble remembering details of their trauma.

Viewing this evidence, and considering the significance of T.G.'s testimony to the State's case, we are unable to conclude beyond a reasonable doubt that the trial court's error did not contribute to Finley's conviction. T.G. was the purported victim and sole eyewitness to the alleged assault. Thus, she was not only important to the State's case; she was its main witness. Without her testimony, the State's case would have been severely weakened because it had no other first-hand account of the offense. Such weakness is accentuated by the fact that—even with T.G.'s testimony—the jury was initially unable to reach a unanimous decision, returning its guilty verdict only after receiving an *Allen* charge.

Accordingly, we hold that the State failed to meet its burden establishing from other evidence that the error was harmless beyond a reasonable doubt. *Id.*

III. CONCLUSION

A defendant's Constitutional right to face-to-face confrontation—which includes allowing the jury to analyze the facial expressions of each witness—cannot be easily dispensed with. Safeguards have been constructed to ensure that the right is infringed upon only when there exists an important and articulated reason to do so. And it is easy to see why: a witness's face conveys vital information to the jury about the veracity and reliability of their testimony. *See Mattox*, 156 U.S. at 242–43, 15 S. Ct.

at 339. Allowing a witness's face to be obscured from the jury would, as the Court of Criminal Appeals has stated, "remove the 'face' from 'face-to-face confrontation.'" *Romero*, 173 S.W.3d at 505–06. It is for these reasons that we cannot overlook the trial court's failure to make findings explaining why Finley was not entitled to have the jury fully analyze T.G.'s facial expressions when she testified.

Thus, having held that the trial court erred by failing to make particularized findings explaining why T.G. needed to wear a mask during her testimony and that such error was not harmless, we reverse and remand for new trial.

/s/ Brian Walker

Brian Walker
Justice

Publish

Delivered: September 22, 2022