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IN THE COURT OF APPEALS OF INDIANA

Keesha R. Johnson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 24, 2023

Court of Appeals Case No. 22A-CR-427

Appeal from the Marion Superior Court

The Honorable Elizabeth Christ, Judge

The Honorable Ronnie Huerta, Magistrate

Trial Court Cause No. 49D24-1902-F6-7259

Mathias, Judge.

[1] Keesha R. Johnson was convicted in Marion Superior Court of Class A misdemeanor criminal recklessness. Johnson appeals her conviction and raises one issue for our review: whether she was denied her federal and state

constitutional rights to confront her accusers face-to-face because the witnesses wore face masks during her trial.

[2] We affirm.[1]

Facts and Procedural History

[3] Jeffrey Johnson and Shanetra Bonds have three children together but had not been involved in a romantic relationship for approximately ten years. Jeffrey continued to help Shanetra with the children and home repairs. On January 29, 2019, Jeffrey changed the locks on Shanetra's house at her request, but he forgot to leave her new keys with her. Shanetra attempted to call Jeffrey to ask him to bring her the keys, but he did not answer his phone. The next day, at approximately 8:00 p.m., Shanetra went to Jeffrey's house, where he lived with Johnson and their children.

[4] Shanetra believed that Jeffrey likely left her keys in his van, which was parked behind his house. The van was unlocked, and Shanetra began to look inside the van for her keys. Shanetra did not tell anyone inside the Johnsons' home that she was on their property.

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[1] Johnson requested oral argument in this appeal. Our court granted Johnson's request and held argument on December 5, 2022, at the Allen County Courthouse in Ft. Wayne, Indiana. We extend our sincere thanks to the Allen County Bar Association and court personnel for their exceptional hospitality. And special thanks to John McGauley and George James of the Allen County Courts and Gina Zimmerman and Melissa Widenhofer of the Allen County Bar Association for inviting us and assisting with our Appeals on Wheels event. Finally, we also thank counsel for the quality of their written and oral advocacy.

[5] After Shanetra was unable to find her keys, she shouted Jeffrey's name. No one responded, and she shouted his name a second time. At that point, a light inside the house turned on and the balcony door swung open. Johnson appeared on the balcony with a gun in her hand. She pointed the gun in Shanetra's direction but over her head and fired two shots. Johnson then said "bye" and reentered her home. Tr. Vol. 3, p. 13. Shanetra left the Johnsons' home and drove to the police station where she filed a police report.

[6] Johnson's neighbors, Angela and Carl Hawkins, heard the gunshots. Angela was so startled she fell down her stairs. Carl called 9-1-1 to report the gunshots. The Hawkins then discovered that the bullets had pierced the exterior walls of their home, which damaged interior walls and a door.

[7] On February 26, the State charged Johnson with Level 6 felony criminal recklessness. During the final pretrial conference held on December 7, 2021, Johnson's counsel asked the court if clear face shields would be available for witnesses. The court and parties discussed obtaining clear shields for trial. Counsel stated that he wanted "to make sure that everyone's faces can be seen by the jurors." Tr. Vol. 2, p. 113. The court reporter stated that she would try to obtain six face shields but would notify counsel if she was not able to do so. *Id.* at 114. It is not clear on the record whether face shields were available on the date of Johnson's trial.

[8] Johnson's jury trial commenced on December 14. On that date, court policy promulgated by the Executive Committee for the Marion County Courts provided in pertinent part that

> [a]ll individuals involved in a Jury trial, including but not limited to . . . witnesses . . . must wear a mask throughout the Jury proceedings. Masks must be worn in the public assembly room or any other pretrial location in the City County Building, while prospective jurors are present in the courtroom during all Jury trial proceedings and the Jury deliberation room while jurors are present.

Id. at 134. The Marion County Court policy was more restrictive than our Supreme Court's orders relating to the COVID-19 pandemic, which required

> all participants of in-person court proceedings to wear appropriate masks or face shields (as a reasonable accommodation for those who cannot wear a mask for medical reasons or other circumstances) throughout the proceedings except for witnesses, who may remove their masks for the limited period of providing a verbal response to questions, and other limited individual circumstances.

In re Admin. Rule 17 Emergency Relief for Ind. Trial Cts. Relating to the 2019 Novel Coronavirus, 155 N.E.3d 1191, 1192 (Ind. 2020), *available* at https://www.in.gov/courts/files/order-other-2020-20S-CB-123o.pdf.

[9] The trial court read the Marion County policy to exclude the use of face shields and to mandate the use of face masks. The court thus ordered the witnesses at Johnson's trial to testify while wearing opaque face masks. Johnson objected and argued that permitting the witnesses to wear opaque masks violated her

Sixth Amendment and Article 1, Section 13 confrontation rights. Tr. Vol. 2, p. 135. Johnson requested the use of transparent face shields in lieu of masks. The court denied Johnson's request. The trial court stated, "I think that face shield[s] would be sufficient but . . . I'm not going to overrule what I was told to follow. But I will say this, you have the option to continue the Jury [trial.]" *Id.* at 138. Johnson decided not to file a motion to continue her jury trial.

[10] During her jury trial, Johnson testified and did not deny shooting her gun twice on January 30, 2019. Johnson testified that she fired the gun because she believed that someone was trying to vandalize or break into her house. Tr. Vol. 3, p. 90. Johnson claimed she pointed the gun towards the sky as she pulled the trigger. *Id.* at 92. She testified that she did not realize that the person making noise was Shanetra until Johnson saw her get into her vehicle to drive away from Johnson's property. *Id.* at 93. Johnson admitted that she deliberately fired the first shot but stated that when she turned to go back into her home, she slipped and accidently fired a second shot. *Id.* at 94. The State argued that Johnson failed to prove that she was defending her property, and that her actions were reckless under the facts presented in the case.

[11] The jury found Johnson guilty of Level 6 felony criminal recklessness. At the sentencing hearing, the trial court granted Johnson's request to reduce her conviction to a Class A misdemeanor. The court then imposed a forty-day sentence.

[12] Johnson now appeals.

Johnson's Sixth Amendment Claim

[13] The Confrontation Clause of the Sixth Amendment guarantees defendants the right "to be confronted with the witnesses against [them]." U.S. Const. amend. VI. The Supreme Court has interpreted this clause as guaranteeing "the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Coy v. Iowa*, 487 U.S. 1012, 1016, 108 S. Ct. 2798, 2801, 101 L. Ed. 2d 857 (1988). The Supreme Court has also held that the right to face-to-face confrontation is not absolute; however, that "does not . . . mean that it may easily be dispensed with." *Maryland v. Craig*, 497 U.S. 836, 850, 110 S. Ct. 3157, 3166, 111 L. Ed. 2d 666 (1990).

[14] "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Id.* at 845. Importantly, the word confront, "means a clashing of forces or ideas, thus carrying with it the notion of adversariness." *Id.* In its earliest case interpreting the Confrontation Clause, the Court observed:

> The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling 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 in which he gives his testimony whether he is worthy of belief.

Id. at 845 (citation omitted).

[15] The right guaranteed by the Confrontation Clause includes not only a "personal examination" but also

> (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; [and] (3) *permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.*

Id. at 845-46 (emphasis added; citation and footnote omitted).

[16] "Literal face-to-face confrontation is not the *sine qua non* of the confrontation right." *Id.* at 847. And "physical confrontation may constitutionally be denied where the denial is necessary to further an important public policy and 'the reliability of the testimony is otherwise assured.'" *Id.* (citations omitted). Moreover, face-to-face confrontation at trial is preferred, but that preference . . . "must occasionally give way to considerations of public policy and the necessities of the case[.]" *Id*. at 849 (citations omitted). For this reason, the Confrontation Clause must "be interpreted in the context of the necessities of trial and the adversary process." *Id.* at 850.

[17] Before the right to face-to-face confrontation can be abridged there must be a "case-specific" finding of necessity. *Id*. at 855. In *Coy*, the defendant challenged the constitutionality of an Iowa statute that allowed child victims of sexual abuse to "testify either via closed-circuit television or behind a screen." 487

U.S. at 1014. The Court held that this statute's creation of a "legislatively imposed presumption of trauma" was insufficient to abridge the defendant's right to a face-to-face confrontation. *Id.* at 1021. The Court further held that any exception to the face-to-face requirement would require "individualized findings that these particular witnesses needed special protection" rather than the "generalized finding" found in the statute. *Id.*

[18] Johnson argues that the Marion County Court's Executive Order was "a generic county-wide order and fails to satisfy the case-specific finding of necessity required by" the *Coy* Court. Appellant's Br. at 19. And Johnson asserts that the trial court "was not only free to disregard the [E]xecutive [C]ommittee's order, it was required to do so in order to safeguard Johnson's constitutional right to confrontation." Reply Br. at 14.

[19] In support of this argument, Johnson relies on *Meredith v. State*, 679 N.E.2d 1309 (Ind. 1997), wherein our supreme court stated:

> a court should not blindly adhere to all of its rules. "Although our procedural rules are extremely important, it must be kept in mind that they are merely a means for achieving the ultimate end of orderly and speedy justice. We must examine our technical rules closely when it appears that invoking them would defeat justice; otherwise we become slaves to the technicalities themselves and they acquire the position of being the ends instead of the means." Before a court may set aside its own rule, and it should not be set aside lightly, the court must assure itself that it is in the interests of justice to do so, that the substantive rights of the parties are not prejudiced, and that the rule is not a mandatory rule.

Id. at 1311 (quoting *American States Ins. Co. v. State*, 258 Ind. 637, 283 N.E.2d 529, 531 (1972) and citing 20 Am.Jur.2d Courts § 53 (1995); 21 C.J.S. Courts § 130 (1990); 7 I.L.E. Courts § 42 (1996 Supp.)).[2]

[20] In our consideration of the issue presented we observe that the COVID-19 pandemic has created significant challenges for our court system. And "[s]temming the spread of COVID-19" has been an "unquestionably . . . compelling interest." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 208 L. Ed. 2d 206, 141 S. Ct. 63, 67 (2020). Wearing masks protects both the person wearing the mask and others present in the same room. Jurisdictions that have addressed similarly raised confrontation claims have determined that defendants' confrontation rights were not violated when courts allowed or required the use of facial-coverings due to COVID-19. *See e.g.*, *State v. Modtland*, 970 N.W.2d 711, 718-19 (Minn. Ct. App. 2022); *People v. Lopez*, 75 Cal. App. 5th 227, 233 (2022);*United States v. Tagliaferro*, 531 F. Supp. 3d 844 (S.D.N.Y. 2021); *State v. Jesenya O.*, 493 P.3d 418, 432 (N.M. Ct. App. 2021).

[21] Johnson acknowledges the importance of preventing the spread of COVID-19 but argues that the trial court was required to make a case-specific finding of necessity that the opaque masks were required over clear face shields, which the court did not do. Instead, the trial court found that it was required to follow the

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[2] In *Meredith*, our supreme court affirmed the trial court's decision to waive compliance with a local rule after concluding that failing to follow the local rule did not impede the defendant's ability to fully present a defense. *Id*. at 1311-12.

Executive Committee's order. The trial court personally agreed with Johnson that face shields would provide sufficient protection but did not agree with Johnson that the court's personal opinion trumped the Executive Committee order.

[22] On December 16, 2022, our supreme court decided *In re B.N. v. Health and Hospital Corporation*, 199 N.E.3d 360 (Ind. 2022). In that case, the court addressed whether case-specific findings were required under Indiana Administrative Rule 14 to conduct proceedings remotely over a party's objection. *Id.* at 363. In response to the COVID-19 pandemic, the Court had amended Rule 14 to give trial courts greater authority to conduct remote or virtual hearings. *Id.* Under the amended rule, if a party objects to remote proceedings, the trial court is required to "make findings of good cause to conduct the remote proceeding.'" *Id*. (quoting *In re Admin. Rule 17 Emergency Relief for Ind. Trial Cts. Relating to the 2019 Novel Coronavirus*, 144 N.E.3d 197, 198 (Ind. 2020)). In *B.N.*, the trial court made no case-specific findings in overruling B.N.'s objection to proceeding remotely and, instead, merely referenced the COVID-19 pandemic. *Id*.

[23] On appeal, our supreme court agreed with B.N. that the trial court had failed to make a requisite case-specific finding of good cause. The court rejected the appellee's argument that the trial court's reference to COVID-19 was "sufficient good cause." *Id. at 363-64.* The court observed that good cause requires a "particular and specific demonstration of fact." *Id.* at 364. (citing *Ramirez v. State*, 186 N.E.3d 89, 95 (Ind. 2022)).

> Applying that standard here, recall that the court decided to proceed remotely "due to the COVID-19 pandemic." But this generic reference does not amount to findings of good cause—especially when the pandemic was the impetus for modifying Rule 14. This is not to say that COVID-19-related concerns or constraints cannot satisfy the rule's requisite findings. Indeed, in *In re I.L.*, a trial court found good cause to hold a termination-of-parental-rights hearing remotely, citing several specific considerations: the pandemic was severe at that time, the courtroom would not allow for social distancing, and the litigants would still receive a full and fair hearing. 177 N.E.3d 864, 869 (Ind. Ct. App. 2021), *adopted in part and summarily aff'd in part by* 181 N.E.3d 974, 976 (Ind. 2022). By contrast, here, the only "finding" is the court's general reference to the pandemic. Simply put, this record is devoid of any COVID-19-related concerns or constraints specific to the moment, the region, the courtroom, the parties, the type of proceeding, or any other circumstances that justified conducting the commitment hearing remotely over B.N.'s timely objection.

Id.

[24] However, our supreme court also concluded that the trial court's failure to enter case-specific findings was harmless. *Id.* at 365. A trial court's error is harmless when "its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties." Ind. Appellate Rule 66(A). The court noted that B.N. was present throughout her commitment hearing and actively participated in that hearing. *B.N., 199 N.E.3d at 365.* Moreover, she was able to confer with counsel in a separate virtual room. *Id*. In addition, "the record reveal[ed] that B.N.'s counsel skillfully objected to witness testimony and vigorously cross-examined each of [the opposing] witnesses. And

those witnesses provided ample evidence supporting the trial court's decision to impose a regular commitment." *Id.* Our supreme court concluded "the probable impact of the court's error—in light of B.N.'s active participation during the virtual hearing, the lack of technological issues which may have adversely impacted her, and counsel's zealous advocacy—was sufficiently minor such that we conclude it did not affect B.N.'s substantial rights." *Id.*

[25] Following our supreme court's *B.N.* decision, we would be hard-pressed to conclude that the trial court's absence of a case-specific finding here was adequate. *Coy* and *Craig* were decided in the pre-pandemic era, and, in a vacuum, one might reasonably conclude that the trial court's determination here that it was required to follow the Executive Committee's order relating to masks was sufficient given the compelling interests in preventing the spread of COVID-19. But in *B.N.*, our supreme court specifically rejected that a general reference to the COVID-19 pandemic was a sufficient finding of good cause. *Id.* at 364. Although that case involved the administrative rule governing remote proceedings, it would be unreasonable to conclude that the same reasoning does not apply with even greater force to a defendant's constitutional right to confrontation.

[26] But, as our supreme court concluded in *B.N.*, here the court's error in failing to make case-specific findings of necessity was harmless.[3] In this case, the

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[3] Our courts may apply a harmless error analysis to a violation of a defendant's confrontation rights. *See Koenig v. State*, 933 N.E.2d 1271, 1273-74 (Ind. 2010).

witnesses and the defendant testified in open court. All witnesses were placed under oath and subject to cross-examination. The jury was able to assess witness credibility by viewing the witnesses' body language and overall demeanor. The jurors were also able to see the witnesses' eyes and hear the tone of their voices.

[27] Finally, Johnson admitted that she fired her gun twice. At least one shot was fired over Shanetra's head. Both bullets penetrated the walls of the neighboring home. Johnson's own testimony is sufficient to sustain her conviction for criminal recklessness. *See* Ind. Code § 35-42-2-2.

[28] For these reasons, and most importantly, because the witnesses testified in open court in Johnson's presence, the jury was able to observe their demeanor and body language, and because the witnesses were subject to cross-examination, we conclude that the trial court's error by failing to make a case-specific finding of necessity was harmless.

The Indiana Constitutional Claim

[29] Although our harmless error analysis applies equally to Johnson's Indiana Constitutional claim, we elect to consider the claim on its merits. But first we note that the State contends that Johnson waived her claim by citing the Sixth Amendment and Article 1, Section 13 together while not providing "a separate explanation of reasons why this Court should reach a different result on state-law grounds." Appellee's Br. 12. The State relies on *Watson v. State*, 134 N.E.3d 1038 (Ind. Ct. App. 2019), in support of its argument, but, in that case, the

court held that the party's claim was waived because the appellant failed to cite any authority actually addressing the issue under the Indiana Constitution. *Id.* at 1044.

[30] Johnson cites to cases discussing the confrontation issue under the Indiana Constitution and observes that the Indiana Constitution is more explicit in its guarantee of face-to-face confrontation with witnesses. Appellant's Br. at 16. Johnson's Indiana Constitutional argument is cursory, but, as our Supreme Court has recognized, "[t]o a considerable degree, the federal right of confrontation and the state right to a face-to-face meeting are co-extensive." *Brady v. State*, 575 N.E.2d 981, 987 (Ind. 1991). For these reasons, we will address Johnson's Article 1, Section 13 claim on its merits.

[31] The State did not respond to Johnson's Indiana Constitutional Claim and simply relied on its argument that her claim is waived. "Appellee's failure to respond to an issue raised in an appellant's brief is, as to that issue, akin to failing to file a brief." *Cox v. State*, 780 N.E.2d 1150, 1162 (Ind. Ct. App. 2002). But the State's failure to respond to her argument "does not relieve us of our obligation to correctly apply the law to the facts in the record in order to determine whether reversal is required." *See id.* Johnson must only establish that the trial court committed prima facie error. *Id.* Prima facie means at first sight, on first appearance, or on the face of it. *Id.*

[32] Our supreme court has recognized that Article 1, Section 13 provides "a right to cross-examine as well as the literal right to 'meet the witness face to face.'"

Wilder v. State, 716 N.E.2d 403, 406 (Ind. 1999) (*quoting Brady v. State*, 575 N.E.2d 981, 988 (Ind. 1991)). Because Indiana's confrontation clause specifically provides a right to meet witnesses "face to face," the right to a face-to-face meeting "has a special concreteness and is more detailed" in Indiana. *Brady*, 575 N.E.2d at 987. But confrontation rights under the Indiana Constitution are not absolute and "must occasionally give way to considerations of public policy and the necessities of the case."[4] *State v. Owings*, 622 N.E.2d 948, 951 (Ind. 1993); *see also Pierce v. State*, 29 N.E.3d 1258, 1268 (Ind. 2015) (noting the right of confrontation is "subject to reasonable limitations, which we trust our trial judges to impose").

[33] A face-to-face meeting occurs when persons are positioned in the presence of one another so as to permit each to see and recognize the other. *Brady*, 575 N.E.2d at 987,

> Indiana's confrontation right contains both the right to cross-examination and the right to meet the witnesses face to face. It places a premium upon live testimony of the State's witnesses in the courtroom during trial, as well as upon the ability of the defendant and his counsel to fully and effectively probe and challenge those witnesses during trial before the trier of fact through cross-examination. The defendant's right to meet the witnesses face to face has not been subsumed by the right to cross-examination. That is to say, merely ensuring that a defendant's right to cross-examine the witness is scrupulously honored does not guarantee that the requirements of Indiana's Confrontation Clause are met. The Indiana Constitution recognizes that there is

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[4] There is nothing in our case law interpreting Article 1, Section 13 requiring a case specific finding of necessity that was established for Sixth Amendment claims in *Coy*.

> something unique and important in requiring the face-to-face meeting between the accused and the State's witnesses as they give their trial testimony. While the right to cross-examination may be the primary interest protected by the confrontation right in Article I, § 13 of the Indiana Constitution, the defendant's right to meet the witnesses face to face cannot simply be read out of our State's Constitution.

Id. at 988.

[34] In *Brady*, the court found that allowing an alleged child sexual abuse victim to testify via videotaped testimony did *not* violate the defendant's rights under the Sixth Amendment but *did* violate his rights under Article 1, Section 13 of the Indiana Constitution. *Id.* The child's testimony was videotaped in the presence of the judge, counsel, and the child's mother. *Id.* at 984. But the defendant was only able to see and hear the child's testimony via a closed-circuit television. The defendant was able to communicate with counsel while the child was questioned, but the child was not aware that the defendant was able to see or hear the child. *Id.* In holding that this procedure violated the defendant's Article 1, Section 13 confrontation rights, the court considered the importance of the literal meaning of face-to-face confrontation, requiring people to be positioned in the presence of each other without the interposition of other bodies in a way that allows them "to see and recognize the other." *Id.* at 987.

[35] Johnson does not claim that she was unable to see or recognize the masked witnesses at trial. But she could not see the entirety of the witnesses' faces. We agree that the defendant's and the jury's inability to see the entire testifying

witness's face encroaches on the defendant's state constitutional right to confrontation.[5]

[36] Violations of the Indiana Constitution's Confrontation Clause are also reviewed under a harmless error standard. *See Torres v. State*, 673 N.E.2d 472, 474 n.1 (Ind. 1996); *Brady*, 575 N.E.2d at 989. Importantly, unlike the defendant in *Brady*, Johnson was still able to look at the masked witnesses in the eye and observe their demeanor and body language, as was the trier of fact. The witnesses were placed under oath and subject to cross examination. Finally, Johnson admitted that she fired her gun twice and the bullets penetrated the walls of the neighboring home. Johnson's own testimony is sufficient to sustain her conviction for criminal recklessness. *See* Ind. Code § 35-42-2-2.

[37] For these reasons, we conclude that the violation of Johnson's Article 1, Section 13 right to confrontation was harmless.

Conclusion

[38] Under the facts and circumstances of this case, the trial court violated Johnson's federal and state constitutional rights of confrontation when the court required

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[5] Recently, another panel of our court addressed a defendant's claim that his confrontation rights were violated under Section 13 when the trial court required him to wear a mask. *See Mills v. State*, 198 N.E.3d 720 (Ind. Ct. App. 2022). But the defendant in that case failed to object to the mask requirement, and therefore, his claim was waived. *Id.* at 725. Also, in *Mills*, the defendant was required to wear a mask while seated at counsel's table. But, during trial, Mills lowered his mask for the purposes of identification and removed his mask while testifying. *Id.* at 724. Likewise, the witnesses were not required to wear masks while testifying because plexiglass had been installed to surround the witness stand. *Id.* at 726. For these reasons, we do not rely on *Mills* in our consideration of the claims presented in this appeal.

the witnesses to wear masks while testifying. However, the violations of Johnson's constitutional rights of confrontation were harmless. We therefore affirm her conviction for Class A misdemeanor criminal recklessness.

[39] Affirmed.

Robb, J., and Vaidik, J., concur.