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

A Maury County jury convicted the Defendant, William Michael Bowers, of vehicular homicide by intoxication, a Class B felony, and driving under the influence, a Class A misdemeanor. The Defendant appeals, contending that (1) the trial court violated his right to confrontation by allowing a witness to testify via video rather than in person; and (2) the evidence was insufficient to support his convictions. Following our review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

KYLE A. HIXSON, J., delivered the opinion of the court, in which MATTHEW J. WILSON, J., joined. CAMILLE R. MCMULLEN, P.J., filed a separate opinion concurring in part and dissenting in part.

Michael J. Flanagan, Nashville, Tennessee, for the appellant, William Michael Bowers.

Jonathan Skrmetti, Attorney General and Reporter; Benjamin A. Ball, Senior Assistant Attorney General; Brent A. Cooper, District Attorney General; and J. Victoria Haywood, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

On August 21, 2020, a two-vehicle collision on James M. Campbell Boulevard in Columbia resulted in the death of Stella Barnett. A Maury County grand jury indicted the Defendant, the driver of the other vehicle involved in the crash, for vehicular homicide by intoxication and driving under the influence. Tenn. Code Ann. §§ 39-13-213(a)(2), 55-10-401. A jury trial commenced on January 18, 2022.

Cory Bennett testified at trial that on August 21, 2020, he was driving behind the Defendant's vehicle as he crossed the bridge over the Duck River in Columbia. Mr. Bennett described the Defendant's driving as "pretty dangerous" and noted that the Defendant was driving on the side of the road before coming back into the lane of travel. He described that the Defendant "sped up" and "went real fast" before veering to the left and striking the victim's vehicle at the driver's side door.

On the day of the crash, Jonathan Knight was traveling on James M. Campbell Boulevard when he saw the Defendant's truck stopped in the left lane of travel with his brake lights activated. Mr. Knight, who was in the right lane of travel, followed another car to pass the Defendant's truck. As Mr. Knight passed the Defendant, the Defendant drove to block another car in the right lane and almost rear-ended Mr. Knight's vehicle. Mr. Knight stopped his vehicle to watch the Defendant's driving, which he described as "real odd." The Defendant then drove into the left lane and back into the right lane to block approaching vehicles. Mr. Knight had no explanation as to why the Defendant was driving in this manner. As another vehicle tried to pass the Defendant, the Defendant "gunned it." Mr. Knight described, "[Y]ou could see the truck just kind of lift up, because he took off so fast, and shot across the median." Mr. Knight saw the Defendant's truck cross the double-yellow line and strike an oncoming vehicle "head on going full speed." The brake lights on the Defendant's truck were not activated before the collision. "I felt the impact[,]" Mr. Knight described, "He hit that car so hard, you could feel it."

Mr. Knight exited his vehicle to help the occupants of the two vehicles that collided. As he passed the Defendant's truck, he saw that the Defendant's head was bleeding. The Defendant was yelling "crazy things" that "just didn't make sense[.]" The Defendant seemed to be upset that another bystander was telling him to stay in his vehicle.

Phillip Mash, who testified remotely via Zoom, was a captain with the Columbia Fire Department at the time of the crash. While not on duty, Mr. Mash happened to be following the victim's vehicle on Nashville Highway. He had been behind the victim's vehicle for about a half-mile when they both stopped to turn right onto James M. Campbell Boulevard. He noted that the victim used her turn signal, stayed in her lane, and was "not driving fast at all." After turning right, Mr. Mash saw the Defendant's F-150 truck cross over from the oncoming lanes and strike the victim's vehicle at her driver's side door. He stated that the wheels on the Defendant's truck were "turned sharp" and that the Defendant drove "right into the side of" the victim's vehicle.

Mr. Mash called 911 as he checked on the occupants of the vehicles. Mr. Mash opened the door to the Defendant's truck to find that his airbags had deployed and that the Defendant's hands were "flailing" in the air. Mr. Mash asked the Defendant "if he was okay[,]" but the Defendant was "running off at the mouth[.]" Mr. Mash explained that the Defendant spoke rapidly "but nothing [was] making any sense." After attempting to render aid to the victim, Mr. Mash returned to the Defendant, who was "still just hollering and

rambling[.]" The Defendant did not sound as though he was in pain, according to Mr. Mash, but continued speaking loudly.

During a brief cross-examination, Mr. Mash testified that he only saw the Defendant's truck for a couple of seconds before the collision, but he opined that the Defendant was traveling faster than the vehicles traveling in Mr. Mash's direction. Mr. Mash acknowledged providing a statement to a member of the Columbia Police Department ("CPD") at the scene. He told that officer that he initially went to the Defendant's vehicle and proceeded to the other vehicle after he saw that the Defendant was awake and breathing. Mr. Mash stated that his trial testimony on this point was consistent with the account that he provided to the officer at the scene.

CPD Officer Josh Akers responded to the scene and observed the Defendant grabbing his own face, incoherently mumbling, and shouting in a carefree manner, "I love opiates[,]" and "Opana." Based upon his belief that the victim was deceased, and based upon his observations of the Defendant, Officer Akers requested that the EMS personnel collect a blood sample. Officer Akers observed a sample of the Defendant's blood being taken at approximately 3:13 p.m. Later, at the hospital, Officer Akers observed the execution of a search warrant for a second sample of the Defendant's blood at approximately 5:20 p.m.

CPD Detective Darrell Freeman conducted multiple interviews of the Defendant on the day of the crash, both at the scene of the crash and later at the hospital. Recordings of the interviews, as captured on Det. Freeman's bodycam, were entered into evidence. The Defendant initially told Det. Freeman that he was not under the influence and that he had passed out while driving. Later, however, the Defendant told Det. Freeman that he had stopped his truck and "shot up" with heroin prior to the crash. This occurred at the site of the Defendant's former residence, which was in close proximity to the crash scene. During a search of the Defendant's truck, Det. Freeman found several needle caps, used and unused needles, cotton filters, and empty medicine wrappers, including one for buprenorphine and naloxone. Det. Freeman testified that all of these items are consistent with being drug paraphernalia. Det. Freeman conceded that he had no way of knowing when any of these items were used. He further conceded that the Defendant was "clear headed" during the interviews, his speech was not slurred, and he showed no signs of impairment at that time.

Tennessee Bureau of Investigation Agent Melissa Klingaman, an expert in forensic toxicology and "the effect of drugs on driving," tested the Defendant's two blood samples. The first blood sample contained fentanyl at seven nanograms per milliliter. The second blood sample contained fentanyl at four nanograms per milliliter. Neither sample contained alcohol nor any other "basic drugs." Agent Klingaman described fentanyl as an opioid that is used in a medical setting for pain relief and as an anesthetic. Agent Klingaman explained that individuals who use fentanyl may experience "euphoria, dizziness, sedation, [and] loss of consciousness." Illicit usage of fentanyl may create loss

of consciousness, dizziness, and mental cloudiness. A driver using fentanyl would have difficulty maintaining their lane, experience issues with critical judgment, and encounter issues with reaction times. Fentanyl users will experience the effects of the drug differently based upon their dosage and pattern of usage. Agent Klingaman was unable to opine specifically on the effects of fentanyl on the Defendant as "[d]rugs affect each person differently."

Dr. Chester Gwin performed the victim's autopsy, and Dr. Shannon Crook, an expert in forensic pathology, testified as to Dr. Gwin's findings. The autopsy results confirmed that the victim died as a result of blunt force trauma. Testing revealed that the victim's body was negative for drugs and alcohol.

The jury convicted the Defendant of vehicular homicide by intoxication and driving under the influence. The trial court merged the convictions and sentenced the Defendant to serve twelve years. The trial court denied the Defendant's motion for new trial. This timely appeal followed.

II. ANALYSIS

A. Right to Confrontation

The trial court allowed Mr. Mash to testify at trial remotely via Zoom's two-way videoconferencing. The Defendant argues on appeal that this violated his confrontation rights under both the Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution. The State argues that the Defendant did not raise a confrontation objection during the trial and that the issue is therefore waived. Further, the State contends that the Defendant has failed to establish that he is entitled to plain error relief.

Before addressing these issues, we will provide a brief summary of what occurred in the trial court related to Mr. Mash's testimony. The jury in this case was impaneled on the morning of January 18, 2022. That afternoon, the prosecutor informed the trial court that she had learned over the lunch break that Mr. Mash, whom she had anticipated calling as a witness the following day, had provided documentation that he had "COVID and the flu." The prosecutor described Mr. Mash as an important and material eyewitness "because he was coming from the same direction as the victim; whereas the [other eyewitnesses] were coming from the opposite direction." The trial court asked if the parties could agree to allow Mr. Mash to testify via Zoom, to which defense counsel did not agree. The trial court requested to see "medical confirmation" regarding Mr. Mash's diagnoses, and the

prosecutor referenced a "letter."[1] The trial court found there to be "concrete proof" that Mr. Mash had COVID-19 and added, "I think the Supreme Court would honor a decision that he can testify by Zoom if he is material." The trial court indicated that it would "go on the record later with [the Defendant's] objection . . . [s]ince we have sworn the jury," to which defense counsel acquiesced. The trial court and the prosecutor then engaged in a discussion regarding the layout of the courtroom, with the trial court noting that "we will take a break [before Mr. Mash's testimony] and make sure that everybody can see and hear."

Following that day's proof, the jury was excused, and the trial court revisited the issue. The prosecutor elaborated that Mr. Mash was not in the hospital, nor was he "unavailable" to testify, but that he was contagious. Defense counsel stated, "I would object to Zoom. I will just leave it at that and let the [c]ourt decide." The prosecutor indicated that Mr. Mash had given a prior written statement, which had been provided to the Defendant, and she anticipated, based upon her recent conversation with Mr. Mash, that Mr. Mash would testify at trial consistently with this statement. Defense counsel would not concede that Mr. Mash would testify consistently with his prior statement and added, "I think I can do a more effective cross-examination personally." Defense counsel agreed that he had Mr. Mash's phone number and address, and that he would have had the right to speak with Mr. Mash prior to trial, but stated, "I did no[t] want to talk to him before he testified under oath." Defense counsel conceded that Mr. Mash had testified at the preliminary hearing on this matter—which occurred thirteen days after the crash—and that defense counsel had a recording of this proceeding. Based upon this prior testimony, defense counsel further conceded, "I think I know what his testimony should be." Following this discussion, the trial court ruled that it would allow Mr. Mash to testify via Zoom. The trial court and the parties then conducted a test with Mr. Mash on Zoom. After making audio adjustments, the trial court was able to communicate with Mr. Mash and confirmed with him that he would be able to testify the following morning.

On the morning of January 19, 2022, the trial court and the parties had a brief discussion about Mr. Mash's testimony prior to the jury's arrival. Based on our review of the record, it appears that the trial court utilized an "Owl" device that would "follow" whomever was speaking in the courtroom and allow Mr. Mash to see that person over the Zoom connection. Once the jury entered the courtroom, the trial court confirmed that all jurors could see the screen displaying Mr. Mash. Mr. Mash then testified as set forth above. The record does not suggest that there were any technical difficulties during Mr. Mash's testimony, other than a "little delay" that was noted by defense counsel at the beginning of his cross-examination.

[1] This letter was later described as a document from Maury Regional Health signed by "Angel Simpson, APN." The letter is not included in the record on appeal, but the Defendant does not challenge the validity of Mr. Mash's diagnoses.

In his motion for new trial, the Defendant alleged, "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, defense counsel argued that a decision from a panel of this court held that "the Tennessee Constitution provides more protection than the federal [C]onstitution and face-to-face confrontation means face-to-face confrontation."[2] Defense counsel said that the referenced case "talks about what it's like for a human being to have to come to court physically and look at the person they are testifying against." Defense counsel continued, "My position is that under the Tennessee Constitution, if you are going to testify against somebody, you need to be in a courthouse." The trial court noted that Mr. Mash "didn't testify as to anything really material[,]" and asked defense counsel how the use of Zoom technology affected the outcome of the trial. Defense counsel argued that he did not have to demonstrate prejudice because an error of this nature is not subject to harmless error analysis. The trial court denied the motion for new trial.

1. The State's Waiver Argument

The State argues on appeal that the Defendant has waived any confrontation issue related to Mr. Mash's testimony because the Defendant did not raise a confrontation objection during the trial. The State contends, "[T]o the extent that the [D]efendant raised an objection, it was generally to the use of the specific application Zoom." The Defendant did not file a reply brief to address the State's waiver argument but posited at oral argument that the confrontation issue was sufficiently raised below so as to allow for plenary review in this court. We agree with the Defendant.

"An appellate court's authority 'generally will extend only to those issues presented for review.'" *State v. Bristol*, 654 S.W.3d 917, 923 (Tenn. 2022) (quoting Tenn. R. App. P. 13(b)). Further, the appellate rules do not require relief to be granted "to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of the error." Tenn. R. App. P. 36(a). Appellate jurisdiction "extends to those issues that 'ha[ve] been formulated and passed upon in some inferior tribunal.'" *Bristol*, 654 S.W.3d at 925 (alteration in original) (quoting *Fine v. Lawless*, 205 S.W. 124, 124 (Tenn. 1918)). The party who wishes to raise an issue on appeal first has an obligation to preserve that issue by raising a contemporaneous objection in the trial court. *See State v. Vance*, 596 S.W.3d 229, 253 (Tenn. 2020). An objection must state "the specific ground of objection if the specific ground was not apparent from the context[.]" Tenn. R. Evid. 103(a)(1). Further, in order to preserve an issue for appeal, it is sufficient for the objecting party to inform the trial court of "(1) the action that the party desires the court to take; or (2) the party's objection to the action of the court and the

[2] From context, including defense counsel's identification of the appellant's attorney in the referenced case, we assume that defense counsel was referring to *State v. Seale*, No. M2019-01913-CCA-R9-CD, 2020 WL 4045227 (Tenn. Crim. App. July 20, 2020).

grounds for the objection." Tenn. R. Crim. P. 51(b). If such an objection is made, the party must also include the issue in a motion for new trial in order to avoid appellate waiver. *See* Tenn. R. App. P. 3(e); *State v. Harbison*, 539 S.W.3d 149, 164 (Tenn. 2018) ("Grounds not raised in a motion for new trial are waived for purposes of appeal.") (citations omitted).

As stated, the State argues that the Defendant did not raise a confrontation objection at trial but rather objected "generally to the use of the specific application Zoom." After a thorough review of the record, we respectfully disagree with the State's characterization of the Defendant's objection. Nothing in the record indicates that the Defendant would have agreed to Mr. Mash's remote testimony had it been transmitted on a platform other than Zoom. The context of the proceedings makes clear that the Defendant was objecting to Mr. Mash's remote testimony, regardless of the platform used.

If this point was not clear from the context alone, it became clear when defense counsel informed the trial court that counsel could conduct "a more effective cross-examination personally." While defense counsel did not say "confrontation" or cite to a specific constitutional provision, he did not have to in this instance. Because it is well-established that the confrontation clauses of both the federal and state constitutions provide "the right to physically face witnesses and the right to cross-examine witnesses[,]" *State v. Brown*, 29 S.W.3d 427, 430-31 (Tenn. 2000), the specific grounds of his objection were "apparent from the context[,]" *see* Tennessee Rule of Evidence 103(a)(1). *See Fahey v. Eldridge*, 46 S.W.3d 138, 143 (Tenn. 2001) (analyzing issue preservation in the context of a motion for new trial under Tennessee Rule of Appellate Procedure 3(e) and noting that "precise citation to a rule, statute, or case as the legal ground for the alleged error is normally not required to preserve the issue for appeal").

The Defendant specifically alleged in his motion for new trial that Mr. Mash's remote testimony violated his confrontation rights. He expounded upon this point at the hearing on the motion for new trial by making the same argument that he now makes before this court—that this remote testimony violated his confrontation rights under the federal Constitution as well as the Tennessee Constitution, which he argues provides an even greater confrontation protection than its federal counterpart. By doing so, he "formulated" his appellate argument below and caused it to be "passed upon in some inferior tribunal." *See Fine*, 205 S.W. at 124. Thus, this is not a situation where appellate review is foreclosed because the trial court was never given an opportunity to "avoid or rectify an error before [the] judgment [became] final." *See State v. Minor*, 546 S.W.3d 59, 65 (Tenn. 2018).

We acknowledge that the Defendant's objection at trial could have been more detailed and that "parties must endeavor to specifically state the issues raised so as to avoid any potential for future waiver[.]" *Fahey*, 46 S.W.3d at 143. However, we are mindful that our supreme court in *Fahey* discouraged "needlessly favoring 'technicality in form' over substance" and instructed that we "should resolve any doubt as to whether the issue and its grounds were specifically stated in favor of preserving the issue." *Id*. While *Fahey*

dealt with issue preservation in a motion for new trial under Rule 3(e), we believe that its principles are even more applicable to objections made in the heat of trial. Under these circumstances, we conclude that the Defendant appropriately preserved his confrontation issues for appellate purposes and will proceed to plenary review.

2. Sixth Amendment Analysis

The Defendant argues that Mr. Mash's remote testimony violated the Confrontation Clause of the Sixth Amendment. The State does not address the merits of the Defendant's claim, other than contending as part of its plain error argument that no clear and unequivocal rule of law was breached.

Generally, questions concerning the admissibility of evidence rest within the sound discretion of the trial court, and this court will not interfere with the exercise of that discretion in the absence of a clear showing of abuse appearing on the face of the record. *State v. McCoy*, 459 S.W.3d 1, 8 (Tenn. 2014) (citations omitted). Issues of constitutional interpretation, on the other hand, are questions of law, which we review de novo without any presumption of correctness given to the legal conclusions of the courts below. *Id*. (citation omitted).

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The right of confrontation is fundamental and applies to the states through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403 (1965); *State v. Henderson*, 554 S.W.2d 117, 119 (Tenn. 1977). "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." *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

"[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988). "[A] fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried[.]" *Kirby v. United States*, 174 U.S. 47, 55 (1899). "[I]t is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause[.]" *California v. Green*, 399 U.S. 149, 157 (1970).

In *Maryland v. Craig*, however, the United States Supreme Court noted that it had "never held . . . that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial." 497 U.S. at 844 (emphasis in original). *Craig* involved a Confrontation Clause challenge to a Maryland law that allowed a child sexual assault victim to testify via one-way, closed circuit television if the trial judge determined "that testimony by the child victim in the courtroom

will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." *Id*. at 840-41 (quoting Md. Cts. & Jud. Proc. Code Ann. § 9-102(a)(1)(ii) (1989)). If this determination is made, the Maryland law allowed for the child witness, prosecutor, and defense counsel to withdraw to a separate room where the examination of the child would be transmitted to the courtroom for display to the judge, jury, and defendant. *Id*. at 841. During this time, the witness cannot see the Defendant. *Id*.

Recognizing that Sixth Amendment rights must be "interpreted in the context of the necessities of trial and the adversary process[,]" the *Craig* court held "that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id*. at 850 (citations omitted). The *Craig* court held that the reliability prong had been met in that case because the presence of elements of confrontation other than face-to-face confrontation—*i.e.*, "oath, cross-examination, and observation of the witness' demeanor"—"adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." *Id*. at 851. These reliability safeguards, the *Craig* court held, "preserve[d] the essence of effective confrontation" in that case. *Id*. at 857. "The critical inquiry" in *Craig* therefore became "whether use of the procedure [utilized in *Craig*] [was] necessary to further an important state interest." *Id*. at 852. The court remanded the case for the trial court to make a case-specific finding that the relaxation of face-to-face confrontation was necessary because testimony by the child in the courtroom, in the presence of the defendant, would result in the child suffering serious emotional distress such that the child could not reasonably communicate. *Id*. at 858.

There is no question in this case that the Defendant was denied his right to physically confront Mr. Mash face-to-face. While the United States Supreme Court has never explicitly extended the balancing test of *Craig* to two-way video testimony such as was utilized in this case, *see State v. Rogerson*, 855 N.W.2d 495, 500 (Iowa 2014), we agree with a prior panel of this court that concluded, after an exhaustive caselaw review, "the test articulated in *Craig* provides the bare minimum protections for testimony via two-way communication." *Seale*, 2020 WL 4045227, at *8; *see also State v. Holmes*, No. E2021-01489-CCA-R3-CD, 2022 WL 167369768, at *16 (Tenn. Crim. App. Nov. 7, 2022) (applying *Craig* to a waived confrontation challenge in plain error review), *perm. app. denied* (Tenn. Feb. 8, 2023). Applying *Craig*, in order to determine whether the deprivation of physical confrontation in this case nevertheless comports with the Sixth Amendment, we must consider whether the deprivation was necessary to further an important public policy and whether the reliability of Mr. Mash's testimony was otherwise assured.

a. Necessity

On March 13, 2020, the Tennessee Supreme Court declared a state of emergency for the Judicial Branch of Tennessee government in response to the COVID-19 pandemic. *In re: COVID-19 Pandemic*, No. ADM2020-00428 (Tenn. Mar. 13, 2020) (Order). Our courts remained under this state of emergency until June 8, 2023, a period that included the Defendant's January 2022 trial. *See In re: COVID-19 Pandemic*, No. ADM2020-00428 (Tenn. June 8, 2023) (Order Ending State of Emergency). While jury trials were allowed during certain interim periods of this state of emergency, conducting these trials "in the midst of a global pandemic brought another set of considerations with which trial judges had not previously been confronted." *State v. Daniels*, 656 S.W.3d 378, 386 (Tenn. Crim. App. 2022). "The public policy considerations present [during that time] were to ensure the health and safety of those present in the courtroom in the midst of a global pandemic." *Id*. at 387.

Our supreme court issued a number of administrative orders during this emergency period to govern the conduct of Tennessee judicial proceedings during the pandemic. On August 26, 2021, the court issued such an order, wherein it noted that hospitalizations were rising "as COVID-19 variants continue to increase positive case rates and burden the health care system[.]" *In re: COVID-19 Pandemic*, No. ADM2020-00428 (Tenn. Aug. 26, 2021) (Order). In light of this, the court ordered, "Judges shall not require *or allow* any individual who has tested positive for COVID-19 to appear or be present in court." *Id*. at 2 (emphasis added). Additionally:

> The Court further reiterates that courts that have been conducting business by means other than in-person court proceedings should continue to do so. Courts that are not utilizing technology available to them to conduct business by means other than in-person court proceedings should implement the use of telephone, teleconferencing, email, video conferencing or other means that do not involve in-person contact. All of these methods should be the preferred option over in-person court proceedings to competently, promptly, and diligently perform judicial and administrative duties.

Id. These provisions were to remain in effect pending further order of the court, *id*., and were in force at the time of the Defendant's trial.

In light of Mr. Mash's positive COVID-19 test, the trial court in this case was prohibited by order of our supreme court from allowing him to be present in the courtroom at the Defendant's trial. *See* Tenn. Code Ann. § 16-3-501 (giving the supreme court "general supervisory control over all the inferior courts of the state"); *see also Moore-Pennoyer v. State*, 515 S.W.3d 271, 277 (Tenn. 2017) (citing article II, section 2 of the Tennessee Constitution for the proposition that the supreme court "has the authority to prescribe rules, policies, and procedures relating to matters essential to the judicial

function"). Although the Defendant did not seek a trial continuance to allow time for Mr. Mash to recover, an indefinite continuance under these circumstances would have been untenable given that jeopardy had attached and that there was no way of knowing when, or if, Mr. Mash would recover. *See State v. Tate*, 985 N.W.2d 291, 303-04 (Minn. 2023) (the possibility of a continuance did not undercut a showing of necessity under *Craig* where the trial court did not know whether the COVID-exposed witness "would get sick, how sick he would become if infected or low long it would be until he could appear in person, and whether, in the meantime, anyone else involved in the trial would get sick, leading to additional continuances"). In short, the trial court was prohibited by supreme court order from allowing Mr. Mash to physically enter the courtroom, and a continuance was not a viable option under these circumstances. We conclude that Mr. Mash's remote testimony was necessary to further the important public policy of ensuring the health and safety of those present in the courtroom.

We note that there was discussion both at trial and at the motion for new trial hearing as to whether Mr. Mash's testimony was "material." Because the materiality concept is embedded in our definition of "relevant evidence," *see* Tennessee Rule of Evidence 401, Advisory Comm'n Cmt., we may assume that if Mr. Mash's testimony was relevant, it was also material. A materiality determination, however, is problematic in the context of a confrontation analysis. The plain text of the Confrontation Clause applies to "witnesses against [the accused]," without regard to the relative materiality of their testimony. Further, while the State would have a greater interest to present a witness whose testimony was of higher materiality than other witnesses, it seems that the accused would also have a greater interest to confront that witness face-to-face. In any event, materiality was not included in the two-part test of *Craig*, and we need not address the question in this opinion. Mr. Mash's remote appearance was necessary in this instance regardless of the relative materiality of his testimony.

b. Reliability

Turning to the second prong of the *Craig* test, we consider whether the reliability of Mr. Mash's testimony was assured by means other than face-to-face confrontation. As stated, reliability requires that the testimony is "subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." *Craig*, 497 U.S. at 851. While true equivalence can never exist between in-person and video testimony due to the "many subtle effects face-to-face confrontation may have on an adversary criminal proceeding," the combination of other elements of confrontation can substitute the right to face-to-face confrontation and "preserve[] the essence of effective confrontation." *Id*. at 851, 857. These elements are the swearing-in of the witness, the ability to cross-examine, and the jury's ability to observe the witness' demeanor. *Id*. at 857.

We conclude that the reliability prong of *Craig* has been met in this case. Mr. Mash was placed under oath and cross-examined by the Defendant, and the trial court ensured that, prior to his testimony, all jurors could see the screen displaying his image, thus allowing them to observe his demeanor while testifying. At the time of cross-examination, the Defendant possessed a prior written statement from Mr. Mash as well as a recording of his prior testimony at the preliminary hearing. The prosecutor had previously speculated that Mr. Mash would testify consistently with his prior statements in the case, and Mr. Mash explicitly stated during his cross-examination that he had so testified. While the attorneys in *Craig* were in the same room as the testifying witness, *id*. at 841, the record here reflects that Mr. Mash was able to see the attorneys during questioning through use of the "Owl" device. Other than a "little delay" in the video transmission, it does not appear that defense counsel's lack of physical presence during his questioning of Mr. Mash in any way hindered the effective cross-examination of the witness. The record does not expressly reveal whether Mr. Mash was able to see the Defendant during his testimony, but as we have seen in *Craig*, this sole fact is not determinative of the reliability question because it was clear that the witness in *Craig* could not see the accused in that case. *Id*.

As in *Craig*, we conclude that the practice employed here "preserve[d] the essence of effective confrontation[,]" *id*. at 857, and thus ensured the reliability of Mr. Mash's testimony. Both prongs of *Craig* having been satisfied, the Defendant is not entitled to relief pursuant to the Sixth Amendment.

3. Article I, Section 9 Analysis

The Defendant contends that Mr. Mash's remote testimony violated his confrontation rights under the Tennessee Constitution because its face-to-face language provides greater protection than the United States Constitution. Again, the State does not address the merits of this issue but instead relies upon its waiver argument as set forth above.

Article I, section 9 of the Tennessee Constitution provides "[t]hat in all criminal prosecutions, the accused hath the right . . . to meet the witnesses face to face[.]" The Confrontation Clause of article I, section 9 "provide[s] two protections for criminal defendants: the right to physically face witnesses and the right to cross-examine witnesses." *Brown*, 29 S.W.3d at 430-31 (citations omitted). "The phrasing of the state constitutional provision differs from the text of the of the Sixth Amendment and has been described as imposing 'a higher right than that found in the federal [C]onstitution.'" *State v. Dotson*, 450 S.W.3d 1, 62 (Tenn. 2014) (quoting *State v. Deuter*, 839 S.W.2d 391, 395 (Tenn. 1992)). Despite this textual difference, "when deciding claims based on the right of confrontation provided in article I, section 9," our supreme court has "expressly adopted and applied the same analysis used to evaluate claims based on the Confrontation Clause of the Sixth Amendment." *Id*. (citing multiple cases but noting that the defendant had not

"argued that the Tennessee Constitution affords greater protection or that a different standard governs our analysis of his state constitutional claim").

Unlike the appellant in *Dotson*, the Defendant here argued at the motion for new trial hearing, in his appellate brief, and at oral argument that the face-to-face language in the Tennessee Constitution provides greater protection than that found in its federal counterpart. The question then becomes whether a more stringent standard exists in Tennessee than what was enunciated by the *Craig* court in its Sixth Amendment analysis.

Our supreme court first addressed *Craig* in its 1992 decision in *State v. Deuter*. *Deuter* involved a confrontation challenge to the admission of prior, videotaped statements of alleged child victims given to police officers in the defendant's trial for aggravated sexual battery. 839 S.W.2d at 392. In conducting its analysis under article I, section 9, the *Deuter* court noted, "Justice Scalia's dissent in *Craig* puts the issue in a starker and perhaps more realistic perspective than does the majority's balancing test." *Id*. at 395. The *Deuter* court continued, "The [*Craig*] dissent asserts that the constitutional right of confrontation is more than a 'preference.' It begins: 'Seldom has [a court] failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion.'" *Id*. at 395 (quoting *Craig*, 497 U.S. at 860 (Scalia, J., dissenting)).

The *Deuter* court's pronouncement that "[t]he 'face-to-face' language found in the Tennessee Constitution has been held to impose a higher right than that found in the federal constitution[]" was based upon the Pennsylvania Supreme Court's then-recent decision to reject the *Craig* balancing test in light of language in the Pennsylvania Constitution that was, at the time, "identical to the confrontation provision in the Tennessee Constitution." *See id*. at 395-96 (analyzing *Commonwealth v. Ludwig*, 594 A.2d 281, 284 (Penn. 1991)).[3] In *Deuter*, our supreme court quoted the Pennsylvania Supreme Court's reasoning for rejecting *Craig*:

> When a constitutional guarantee is clear and explicit, as in this instance, an interest balancing analysis is the wrong approach. The [C]onfrontation [C]lause does not guarantee reliable evidence but rather it guarantees specific trial procedures that were thought to assure reliable evidence.

Id. at 396 (quoting *Ludwig*, 594 A.2d at 283). *Ludwig* held that the Pennsylvania Constitution allows exceptions to its confrontation provision "only in those instances in which the accused has already had the opportunity to confront the witnesses against him face to face." *Ludwig*, 594 A.2d at 284. Ultimately, however, instead of expressly rejecting *Craig* for the purposes of Tennessee constitutional interpretation, the *Deuter* court noted

[3] The "face to face" language was removed from the Pennsylvania Constitution by a 2003 amendment. *See Commonwealth v. Atkinson*, 987 A.2d 743, 745 n.2 (Penn. 2009).

that the statutory provision at play in that case had already been declared unconstitutional[4] and held it was therefore unnecessary at that time to decide "the extent to which our constitution exceeds the protection provided by federal constitution[.]" *Deuter*, 839 S.W.2d at 398.

Since *Deuter*, our supreme court has cited to *Craig* on occasion, *see McCoy*, 459 S.W.3d at 13; *State v. Sexton*, 368 S.W.3d 371, 407 (Tenn. 2012); *State v. Lewis*, 235 S.W.3d 136, 142 (Tenn. 2007); *State v. Maclin*, 183 S.W.3d 335, 343 (Tenn. 2006), but it has never held that the balancing test of *Craig* is the appropriate analysis for a challenge such as the one at bar. Further, while our supreme court has "expressly adopted" the federal analysis for confrontation claims based upon article I, section 9, it bears noting that none of the cases cited for this proposition in our caselaw involved the precise issue presented in this case. *See State v. Davis*, 466 S.W.3d 49, 67-68 (Tenn. 2015) (concerning the admission of a prior written statement and prior testimony of a forgetful testifying witness); *McCoy*, 459 S.W.3d at 12-16 (deciding the constitutionality of Tennessee Code Annotated section 24-7-123, which allows for the admissibility of a child victim's prior recorded statement so long as the victim authenticates the statement and appears for cross-examination at trial); *Dotson*, 450 S.W.3d at 62-74 (conducting an analysis under *Crawford v. Washington*, 541 U.S. 36 (2004), concerning the admissibility of autopsy reports and hearsay statements relayed by testifying police witnesses); *State v. Parker*, 350 S.W.3d 883, 897-903 (Tenn. 2011) (analyzing a challenge to the admission of hearsay statements made by a victim as relayed at trial by testifying witnesses); *State v. Franklin*, 308 S.W.3d 799, 809-10 (Tenn. 2010) (deciding whether a witness' written identification of a suspect's van's tag number was inadmissible testimonial hearsay); *State v. Cannon*, 254 S.W.3d 287, 300-08 (Tenn. 2008) (conducting a *Crawford* analysis concerning the admissibility of a non-testifying victim's medical records and hearsay statements); *Lewis*, 235 S.W.3d at 142-45 (considering the admissibility of a victim's dying declaration and the admissibility of the testimony of a DNA expert who did not actually analyze the evidence in the case); *Maclin*, 183 S.W.3d at 343-53 (concerning the admission of a non-testifying victim's hearsay statements to police); *State v. Bush*, 942 S.W.2d 489, 510-11 (Tenn. 1997) (concerning the limitation of cross-examination of a witness at a suppression hearing); *State v. Middlebrooks*, 840 S.W.2d 317, 332-33 (Tenn. 1992) (concerning the defendant's access to the confidential medical records of a testifying witness); *State v. Causby*, 706 S.W.2d 628, 631-32 (Tenn. 1986) (analyzing the admissibility of the former testimony of an unindicted coconspirator); *State v. Armes*, 607 S.W.2d 234, 236-39 (Tenn. 1980) (considering the admissibility of the preliminary hearing testimony of an allegedly unavailable witness); *Henderson*, 554 S.W.2d at 117 (concerning the admissibility of toxicology reports through a witness who did not perform the tests).

Nevertheless, despite the *Deuter* court's apparent reservations to *Craig*'s applicability under the Tennessee Constitution, we consider ourselves bound by the

[4] *See State v. Pilkey*, 776 S.W.2d 943 (Tenn. 1989).

precedent of multiple cases which states that our supreme court has "expressly adopted" a Sixth Amendment analysis for claims based on the right of confrontation in article I, section 9. *See Davis*, 466 S.W.3d at 68; *McCoy*, 459 S.W.3d at 12; *Dotson*, 450 S.W.3d at 62. Therefore, we apply the balancing test of *Craig* to the Defendant's challenge under the Tennessee Constitution. Because we have held that both prongs of the *Craig* test were satisfied in this case, the Defendant is not entitled to relief under article I, section 9.

B. Sufficiency of the Evidence

The Defendant argues on appeal that the evidence was insufficient to show that he was impaired. The State contends the opposite. We agree with the State.

The United States Constitution prohibits the states from depriving "any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1. A state shall not deprive a criminal defendant of his liberty "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). In determining whether a state has met this burden following a finding of guilt, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Because a guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt, the defendant has the burden on appeal of illustrating why the evidence is insufficient to support the jury's verdict. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). If a convicted defendant makes this showing, the finding of guilt shall be set aside. Tenn. R. App. P. 13(e).

"Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). Appellate courts do not "reweigh or reevaluate the evidence." *Id.* (citing *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978)). "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). Therefore, on appellate review, "the State is entitled to the strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom." *Cabbage*, 571 S.W.2d at 835.

As pertinent to this case, "[v]ehicular homicide is the reckless killing of another by the operation of an automobile, . . . as the proximate result of . . . [t]he driver's intoxication, as set forth in § 55-10-401." Tenn. Code Ann. § 39-13-213(a)(2). "Intoxication" includes drug intoxication. *Id*.

> "Reckless" means that a person acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the

> person is aware of, but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint[.]

Id. § 39-11-106(a)(34). Vehicular homicide by intoxication is a Class B felony. *Id*. § 39-13-213(b)(2)(A).

The Defendant was also convicted of driving under the influence, and the vehicular homicide statute references Tennessee Code Annotated section 55-10-401, which codifies the prohibition against driving under the influence. The Code provides in pertinent part,

> It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or on any streets or alleys, or while on the premises of any shopping center, trailer park, or apartment house complex, or any other premises that is generally frequented by the public at large, while . . . [u]nder the influence of any intoxicant, marijuana, controlled substance, controlled substance analogue, drug, substance affecting the central nervous system, or combination thereof that impairs the driver's ability to safely operate a motor vehicle by depriving the driver of the clearness of mind and control of oneself that the driver would otherwise possess[.]

Id. § 55-10-401(1). In this instance, driving under the influence is a Class A misdemeanor. *See id*. § 55-10-402(a)(1)(A).

The evidence in this case, viewed in the light most favorable to the State, shows that the Defendant admitted to stopping his truck to inject drugs before the crash occurred. Multiple witnesses observed the Defendant driving erratically and aggressively immediately before the crash. The Defendant, for no apparent reason, "gunned" his truck across a double-yellow line and struck the victim's vehicle in the oncoming lane of traffic. After the crash, multiple witnesses observed the Defendant speaking incoherently and shouting, in a carefree manner, "I love opiates[,]" and "Opana." The Defendant's truck contained a plethora of paraphernalia consistent with intravenous drug usage. Separate samples of the Defendant's blood contained fentanyl, an opioid that causes multiple symptoms, including dizziness, sedation, and loss of consciousness. Agent Klingaman described to the jury the negative effects that fentanyl could have on a driver, effects that were all present in the witnesses' descriptions of the Defendant both immediately before and after the crash. The proof is sufficient to support the jury's finding of impairment. The Defendant is not entitled to relief.

III. CONCLUSION

In consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed.

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KYLE A. HIXSON, JUDGE