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IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC13-962
	)	L.T. CASE NO. 4D12-125
CALVIN LEWIS OVERHOLT,	)	
	)	
Respondent.	)	
	)	
_____	)	

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution in the trial court and the appellee in the Fourth District Court of Appeal. Respondent, Calvin Lewis Overholt, was the defendant and appellant, respectively. In the brief, the parties will be referred to by name.

The following symbol will be used:

"R" Record on appeal, followed by the appropriate volume and page numbers

STATEMENT OF THE CASE

Respondent, Mr. Overholt, was charged by information with sexual battery of a child under the age of twelve (Count 1) and lewd or lascivious molestation of a child under the age of twelve (Count 2) (R1/10-11). At his jury trial, the child-victim testified from behind a screen that hid him from Mr. Overholt (R2/4-5, 13). Mr. Overholt's objection to the procedure, arguing that it violated his confrontation rights under the Sixth Amendment to the United States Constitution (R2/12, 16, 76-77), was overruled.

The jury returned its verdicts finding Mr. Overholt guilty of battery as included in Count I and lewd molestation as charged in Count 2 (R1/42). Mr. Overholt was adjudged guilty in accordance with the jury's verdicts (R1/47-48) and sentenced to serve life in prison on Count 2 (R1/50), concurrent with one year in jail on Count 1 (R49).

On direct appeal, the Fourth District Court of Appeal relied on its previous decision in McLaughlin v. State, 79 So.2d 226 (Fla. 4th DCA 2012) and held that placing a screen between the victim and the defendant is not a procedure which is authorized by the statute governing the transmission of testimony to the jury by closed circuit television. Because the use of the screen was inherently prejudicial, Mr. Overholt's conviction was reversed. Overholt v. State, 110 So.3d 530 (Fla. 4th

DCA 2013).

Following the denial of the State's motion for rehearing, it sought and obtained review of this cause in this Court.

STATEMENT OF THE FACTS

P.C. testified that she was the mother of an eleven-year-old daughter and three sons, including S.C., who was born on April 27, 2003 (R2/35-36). S.C. had been diagnosed with ADHD and had problems at school (R2/50). In January, 2011, he was switched to a stronger drug (R2/51).

Mr. Overholt had been married to P.C.'s now-deceased mother, and he had lived in the household with P.C. since she was eleven or twelve (R2/37). His relationship with S.C. was that of a grandfather to his grandson (R2/38). Mr. Overholt often visited the family (R2/38): "He would do anything for the kids" (R2/38).

Mr. Overholt spent Christmas day, 2011, with P.C. and her family, and then spent the night at the house on the couch just a couple of feet from the bedroom used by P.C. and her husband (R2/39). S.C. testified that he got up early the next morning and went into the living room to greet Mr.Overholt (R2/86). He was in his pajamas. S.C. said that Mr. Overholt touched his "private areas" in the front and back inside his underwear (R2/87). After being prompted by the prosecutor, S.C. said that Mr. Overholt put his finger into S.C.'s "butthole" (R2/87). According to S.C., Mr Overholt asked him if that felt good, but it did not (R2/87). S.C. went back to his bedroom and fell asleep (R2/89).

P.C. testified that when she got up at 6:45 a.m. to make breakfast, Mr. Overholt said he was not feeling good and needed to take his medication (R2/41). After he ate, he called for a ride and left (R2/42). S.C. came out into the hallway a couple of times, but did not come further (R2/41). But P.C. commented that "He's – he's done that a couple of times but it wasn't – I didn't think nothing of it" (R2/42).

It was not until two months later that S.C., confronted by his parents about his worsening behavior, told them what had happened (R2/44). Because it was after midnight, P.C. and her husband did not take S.C. to the Sheriff's Office until the next day (R2/44).

Detective Rosemary Farless interviewed S.C., who at first said that he was not sure if Mr.Overholt touched him inside or outside of his clothes (R2/70). He denied that Mr. Overholt touched "that front part he pees from" (R2/71-72). S.C. did not know how Mr. Overholt got his hands in S.C.'s pants (R2/73).

While at the Sheriff's Office, P.C. was asked by the police to call Mr. Overholt on the telephone (R2/46). The conversation was recorded. After denying four times that he ever touched S.C. (R2/101), Mr. Overholt told P.C. that "I did touch him in the private" (R2/102), but then explained that he did not touch S.C.'s private parts, but just stuck his hand down the front of S.C.'s pants (R2/104-105). Mr. Overholt consistently denied touching S.C. in the rear (R2/102, 104, 108).

SUMMARY OF THE ARGUMENT

The use of a screen to prevent a witness from seeing the defendant is inherently prejudicial, since it incites the jury to believe that the witness is afraid of the defendant, rather than afraid of the court proceeding. Where a defendant does not confess to the crime and the witness's testimony provides the crux of the State's case against him, the error is not harmless.

ARGUMENT

POINT I

THE USE OF A SCREEN TO PREVENT A WITNESS FROM SEEING THE DEFENDANT DURING HIS TESTIMONY IS INHERENTLY PREJUDICIAL AND CONSTITUTED HARMFUL ERROR IN THIS CASE WHERE MR. OVERHOLT DID NOT ADMIT COMMITTING THE CRIMES WITH WHICH HE WAS CHARGED.

In its decision dated April 3, 2013, the Fourth District Court of Appeal reversed Mr. Overholt's conviction and remanded this cause for a new trial on the authority of McLaughlin v. State, 79 So.3d 226 (Fla. 4th DCA 2012), which held that the use of a screen to prevent the victim from seeing the defendant during his or her testimony is inherently prejudicial, requiring reversal of the conviction if the error is not harmless. Overholt v. State, 110 So.2d 530 (Fla. 4th DCA 2013). The State now asserts that the Court's decision in the instant case conflicts with this Court's decision in Hopkins v. State, 632 So.2d 1372 (Fla. 1994) and with Hughes v. State, 819 So.2d 815 (Fla. 1st DCA 2002) as to whether such an error requires reversal in all cases. In fact, there is no conflict in the decisions, since the Court employed a harmless error analysis in this case, albeit not expressly stated.

Preservation

Contrary to the State's representation, initial brief on the merits at 13, Mr. Overholt specifically objected to the procedure utilized in this case:

> Well, I think the state attorney has provided the Court with the relevant case law and in fact there's many cases and also virtually a memorandum here that hits all these points, so for the record, I'm inquired [sic] to express Mr. Overholt's objection under his confrontation rights under the Sixth Amendment. The Court's required to make case specific findings as to why this child would – there's a substantial likelihood that this child would suffer emotional – at least moderate emotional harm by testifying. So the objections is required to be specific, which is what I'm attempting to do and the testimony of Ms. Crum, aside from the nightmares, appears just to be generalized and speculative fear that she knows her son and this is going to bother him. And I'm not sure that rises to the standard that's present under the case law that's been provided to the Court. And that's particularly Hopkins vs. State.

R2/11-12).

The trial court responded by noting that the statute referred to by Mr. Overholt permitted testimony by closed circuit television, and "That's not what we're doing today." As the court had at the beginning of trial (R2/3-5), it touted the superiority of the system it had devised for presenting testimony from behind a screen (R2/12-13). The court then overruled Mr. Overholt's objection (R2/16).

Mr. Overholt renewed his objection prior to the victim's testimony ("At this time, just prior to the child testifying and the State erects the barrier between he [sic] and the Defendant, we would again raise our objection under the confrontation clause, the Sixth Amendment as previously argued") (R2/76). The trial court responded by noting that

> Putting a partition screen up does implicate the Confrontation Clause. Now I think it's a matter of degree. I think when you talk about the Statute which authorizes 92.54, testimony via closed circuit television, I think there's a quantitative difference between a closed circuit television broadcast from a remote location. In *Coney v. State*, 643 So.2d 654[,] there was some concern about the constitutional right to – assistance of counsel and confronting and cross-examining because the Defendant couldn't have instantaneous communication with his attorney during the testimony because his attorney was off with the State at some remote location and they – I guess they had to use a certified legal intern to run questions back and forth. That's obviously not going to happen here. . . . the trial court here is exercising its inherent authority and its discretion to protect a child witness [from] at least moderate emotional harm.

(R2/76-77).

In Thomas v. State, 419 So. 2d 634 (Fla. 1982), this Court announced that, in order to meet the requirements of the contemporaneous objection rule, the defendant must make the trial court aware that an objection has been made, present specific grounds, and give the trial judge the clear opportunity to rule. *See also*, Anderson v.

State, 546 So. 2d 65 (Fla. 5th DCA 1989), which observed that the purpose of the rule requiring a specific objection is to permit the judge to understand the issue raised and to give the adverse party sufficient notice of the alleged defect.

Both of these considerations were satisfied below. The trial court knew that it was using a procedure unauthorized by statute and consistently maintained from the very outset of this trial that its procedure was better than the one approved by the legislature. It was well aware of the nature of the Sixth Amendment challenge to the procedure, and had concluded that the defendant's right to confront the witnesses against him was not damaged by the use of the screen. Mr. Overholt's specific reference to the Sixth Amendment was more than sufficient to preserve the issue in this case for appellate review. *See* Hopkins v. State, 632 So.2d at 1375 (objection to witness being allowed to testify outside presence of defendant and jury sufficiently preserved Confrontation Clause claim, including sufficiency of trial court's factual findings to support victim's testimony by closed circuit television); *see also* Steele v. State, 561 So. 2d 638 (Fla. 1st DCA 1990) (even where defense counsel made no formal objection to a trial court's failure to instruct the jury on an element of possession of drug paraphernalia, where the manner in which the issue was developed at trial clearly brought the error to the attention of the trial judge and afforded him the opportunity to correct or avoid the error, the appellate court would review the issue).

The use of a screen to separate a witness from the defendant violates the Confrontation Clause.

In Coy v. Iowa, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988), Justice Scalia, writing for the United States Supreme Court, observed that that Court "had never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier-of-fact." 487 U.S. at 1016, 108 S.Ct. 2798. "It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' " Id. at 1019. In Coy, the Iowa statute permitted the use of a screen placed to enable the complaining witness to avoid viewing the defendant. The Court expressly left to another day "the question of whether any exceptions [to the right to face-to-face confrontation] exist." *Id*. at 1021. Instead, it rejected the application of the exception created in the Iowa statute because there had been no individualized findings that the particular witnesses in the case required special protection. *Id.*

In Florida, the legislature has enacted Section 92.54, Fla. Stat., to address the Sixth Amendment concerns which exist when "there is a substantial likelihood that the child . . . will suffer at least moderate emotional or mental harm due to the presence of the defendant if the child . . .is required to testify in open court." In such cases, and after making the necessary findings, the trial court is authorized to permit

the child's testimony to be taken outside of the courtroom and shown via closed circuit television.

Not included in this statute[1] is any authority for the use of a screen to be placed between the defendant and the witness while the witness is testifying in the courtroom, as was done in this case. *See* Disinger v, State, 569 So.2d 824, 826-27 (Fla. 5th DCA 1990) ("the type of screen used in the instant case, which obscures the defendant's observation of a witness, never has been authorized by Florida law"); Hughes v. State, 819 So.2d 815 ("Moreover, section 92.54 provides for the use of closed circuit television but not a partition").

In State v. Parker, 276 Neb. 661, 757 N.W.2d 7, 18–19 (2008), during the testimony of the alleged victim, the court placed a large screen in the courtroom to block the defendant and victim from seeing one another. Critically, this procedure, which the jury fully sees, results in an inescapable inference that the witness who so testifies needs to be protected from the defendant. Declaring that the practice violated the defendant's right to a fair trial, the Nebraska court stated:

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[1]In fact, the statute is titled "Use of closed circuit television in proceedings involving victims or witnesses under the age of 16 . . . ." Section 92.53, Fla. Stat., provides, as its title states, for the "Videotaping of testimony of victim or witness under the age of 16. . ." That statute permits the use of a two-way mirror if it permits the defendant to view the witness while she is testifying. The videotape may then be used at trial in lieu of live testimony. Thus, the jury does not see the two-way mirror between the defendant and the witness.

> [T]he screen unduly compromised the presumption of innocence fundamental to the right to a fair trial. The presence of the screen in the courtroom, in an obvious and peculiar departure from common practice, could have suggested to the jury that the court believed [the victim] and endorsed her credibility, in violation of [the defendant's] right to a fair trial.

Id. at 11; *see also* Coy v. Iowa, 487 U.S. 1012, 1020, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988) (stating that "[i]t is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter" than screen-shielding the child accuser from the defendant).

> The use of a screen to separate witness from the defendant is inherently prejudicial.

Parker recognized that the use of the screen, like requiring a defendant to appear for trial in shackles, is "inherently prejudicial." 757 N.W.2d at 15. *See* Pozo v. State, 963 So.2d 831, 836 (Fla. 4th DCA 2007) ("[A] defendant must either show inherent prejudice or actual prejudice to the fairness of the fact-finding process in order to establish a violation of the defendant's constitutional right to a fair trial.") (Citing Holbrook v. Flynn, 475 U.S. 560, 572, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986)). "Actual prejudice requires some indication or articulation by a juror or jurors that they were conscious of some prejudicial effect." Shootes v. State, 20 So.3d 434, 438 (Fla. 1st DCA 2009). "Inherent prejudice, on the other hand, requires

a showing by the defendant that there was an unacceptable risk of impermissible factors coming into play." *Id.*

The procedure employed in the absence of statutory authority in the instant case is somewhat like Spoerri v. State, 561 S o.2d 604 (Fla. 3d DCA 1990), where a similar trial practice was held to be prejudicial and a violation of the defendant's right to a fair trial. Spoerri was charged with three counts of sexual abuse upon a child. Prior to trial, and over the defendant's objection, the trial court permitted the State to testify through the use of two-way closed circuit television. *Id.* at 605. At trial, the child began her testimony in open court but then continued it at some point from the judge's chambers. The Third District Court of Appeal found that the procedure highlighted the child's "fear of the defendant," thereby prejudicing him.

In Parker, the court recognized that there was evidence that the victim would be unable to testify completely and accurately if forced to view the defendant face-to-face. Yet the Parker court concluded that inherently prejudicial practice could not pass close scrutiny because the trial judge had available another equally effective method of protecting the witness: closed circuit television. *Id*. at 18. That procedure, unlike the use of a screen, is not inherently prejudicial. *Id.* *See also*, Maryland v. Craig, 497 U.S. 836, 852, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) (holding that testimony by closed circuit television "does not impinge upon the truth-seeking or

symbolic purposes of the Confrontation Clause"). *See also* Marx v. State, 987 S.W.2d 577, 580 (Tex. Crim.App. 1999) (the closed-circuit procedure would probably be viewed by the jury as suggesting that the witness was "fearful of testifying in the court room setting rather than fearful of testifying while looking at the defendant"). The court's discretion to fashion a remedy does not permit it to employ inherently prejudicial remedies when a remedy which is not inherently prejudicial is available.

> *A trial courts discretion to fashion necessary remedies does not authorize the routine use of a screen to separate a witness form the defendant.*

The State seeks to distinguish Parker on the grounds that the Nebraska statute did not expressly authorize the use of a screen. Parker, 757 N.W.2d at 18. Of course, neither does Section 92.54. The decision in Parker did not, however, hinge upon the inclusion of omission of the screen from the statute. Indeed, "Nebraska law provides that, upon a showing of compelling need, in lieu of normal courtroom testimony, the court may allow videotaped pretrial deposition testimony, in camera closed-circuit testimony, *or any other accommodation* of a child victim or child witness to a felony." [Footnote omitted.] Parker, 757 N.W. 2d at 12 (emphasis added).

Nebraska's statute thus makes express what this Court generally noted in State v. Tarrago, 800 So.2d 300 (Fla. 2001): that all courts in Florida possess the inherent powers to "do all things that are reasonable and necessary for the administration of

justice within the scope of their jurisdiction, subject to valid existing laws and constitutional provisions." 800 So.2d at 302 (quoting State v. Ford, 626 So.2d 1338, 1345 (Fla. 1993).

This general principle certainly does not create *carte blanche* for every judicial innovation. In Tarrago, this Court was addressing the testimony of a 17-year-old (over the age of sixteen), undeniably impaired (but not mentally disabled) child who did not (quite) fit the statutory requirements for testifying via closed circuit television. Based on this "unique and compelling scenario," this Court found that the trial judge could permit this witness to testify by television. 800 So.2d at 302. That carefully limited decision does not justify a general rush toward the use of a screen in any case where a child witness testifies and would be troubled by facing the defendant.

Parker certainly found no such authorization in the Nebraska's statute's permission for "any other accommodation." Instead, it determined, after analysis of the impact to each side, defense and witness, that the use of the screen was inherently prejudicial. A similar analysis was undertaken by this Court in State v. Ford, 626 So.2d 1338. There, the State was allowed to use videotaped testimony by a child witness at the defendant's trial. This Court held that the absence of statutory authority for the procedure in a case which did not involve child abuse or sexual abuse did not automatically entitle the defendant to a new trial. *Id*. at 1345.

This Court, however, then determined that the procedure violated the constitutional right to face-to-face confrontation. This Court agreed that the State had an interest in protecting a child who witnesses the violent death of a parent, and it also agreed that the trial court made sufficient case-specific findings to support a conclusion that the child would suffer "at the very least, moderate emotional or mental harm." *Id.* at 1346. Yet, even though the defense was provided with a full and fair opportunity to question the child, this Court held that the videotaped testimony was insufficiently reliable to justify its admission because it was not given under oath, nor was there any inquiry to determine that the child knew the importance of telling the truth. This Court ultimately found that the erroneous admission of the videotaped testimony was not harmless, requiring reversal of the defendant's conviction.

Thus, while Parker, Tarrago, and Ford all recognize that in certain circumstances the trial court may use remedies that are not specifically included in the statute to accommodate a child witness, none of them stand for the proposition that any time a child witness testifies, the court may use whatever remedy it takes a fancy to without regard for the defendant's rights to confrontation and to a fair trial.

Harmless error.

In Coy v. Iowa, 487 U.S. at 1021-22, the Supreme Court addressed whether harmless error can apply to Confrontation Clause violations. It answered that harmless error did apply. But it warned that

> An assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence.

See also State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

In Hopkins v. State, 632 So.2d at 1377, this Court held that the trial court failed to make sufficiently specific factual findings to comply with the statute authorizing a child victim's testimony to be heard *via* closed circuit television. As to the offenses to which the defendant made admissions, this Court found that the Confrontation Clause error was harmless. But this Court held that the error required reversal on the other charges to which no admissions had been made. 632 So.2d at 1377.

By the same token, in Hughes v. State, 819 So.2d at 816, the appellate curt declined to reverse the conviction despite the use of a screen during the victim's testimony because the defendant confessed to several investigators. Employing the same test, McLaughlin v. State, 79 So.2d at 229, held that the wrongful use of the

screen was not harmless, because the defendant "never admitted to committing the acts on the victims, and the state's entire case depended upon their testimony."

The State now maintains that the Fourth District Court did not employ a harmless error analysis in the instant case. Initial brief on the merits at 21. It does so despite the district court's citation in its decision to McLaughlin, which expressly employed that very harmless error analysis. Overholt v. State, 110 So.3d 530. And it does so despite the fact that McLaughlin itself cited to Hughes v. State, 819 So.2d 815 (Fla. 1st DCA 2002). McLaughlin v. State, 70 So.3d 226.

The State suggests that the error in the instant case was harmless because "the defendant admitted the lesser included offense of battery and the jury convicted him of such." Initial brief on the merits at 21. The State overlooks the fact that the jury also convicted Mr. Overholt of lewd or lascivious battery, an offense which he did *not* admit committing, and he was sentenced to life imprisonment on that count.

Specifically, in his statement over the phone to the child's mother, Mr. Overholt denied touching the boy's anus, and the jury acquitted him of Count 1. But although Mr. Overholt admitted putting his hand down the front of S.C.'s pants, he denied touching his penis (R2/104-105). S.C. himself denied to the police that Mr.Overholt touched "that front part he pees from" (R2/71-72). Further, the prosecutor elicited testimony from S.C. that he delayed reporting the incident for two

months because he was scared and that he had nightmares that Mr. Overholt would kill him (T2/90), even though there was absolutely no evidence that Mr. Overholt ever threatened the child.

The reliance of the Fourth District in this case on McLaughlin is, accordingly completely apt:

> McLaughlin never admitted to committing the acts on the victims, and the State's entire case relied upon their testimony. Both of the victims testified that McLaughlin used threats to keep them from telling anyone about the alleged abuse. Therefore, the jurors could have made the inference that the screen was used because the court believed the victims needed to be protected from testifying in the presence of McLaughlin.

As in McLaughlin, the jury below may have been swayed in arriving at its verdict convicting Mr. Overholt of Count 2 by the prejudicial impact of the screen. Because the State cannot satisfy its burden of establishing that the error did not actually contribute to the jury's verdict, the error must be deemed harmful. State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986). Consequently, Mr. Overholt's conviction must be reversed and this cause remanded for a new trial.

CONCLUSION

Based on the foregoing argument and the authorities cited, Respondent requests that this Court should AFFIRM the decision of the Fourth District Court of Appeal below.

Respectfully submitted,

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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief has been prepared in 14 point Times New Roman font, in compliance with Fla. R. App. P. 9.210(a)(2).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Melanie Dale Surber, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by e-mail at CrimAppWPB@myfloridalegal.com this 24th day of OCTOBER, 2013.

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