Court of Appeals of Kansas.

Perry A. HILSON, Appellee,
v.
STATE of Kansas, Appellant.
No. 99,421.
Feb. 6, 2009.
Review Denied Sept. 2, 2009.

Appeal from Sedgwick District Court; Anthony J. Powell, Judge.
Boyd K. Isherwood, assistant district attorney, Nola Tedesco Foulston, district attorney, and Stephen N. Six, attorney general, for appellant.

Michael P. Whalen, of Law Office of Michael P. Whalen, of Wichita, for appellee.

Before RULON, C.J., GREENE, J. and LARSON, S.J.

MEMORANDUM OPINION

RULON, C.J.

*1 The State of Kansas appeals from the district court's decision granting movant Perry A. Hilson a new trial following a remand hearing ordered by this court on movant's K.S.A. 60–1507 motion in *Hilson v. State,* No. 94,867, unpublished opinion filed October 20, 2006. The State appeals pursuant to K.S.A.2007 Supp. 60–2102(a)(4). We affirm and remand for further proceedings.

The 60–1507 court held an evidentiary hearing on the two issues remanded by this court. The parties asked the 60–1507 court to take judicial notice of the underlying criminal file, including that portion of the trial transcript reflecting the movant's absence during his jury trial. This portion of the transcript begins immediately following the testimony of the victim and just prior to the calling of the State's second witness, who was the owner of the house where the movant was ultimately apprehended by law enforcement officers. The relevant portion of the trial transcript reads:

"THE COURT: Thank you. You may step down. Next witness.

"[Defense counsel]: Your Honor, my client has made an urgent request to use the restroom, if the court would permit him.

"THE COURT: He may do so at this time. Get your next witness in.

"[The State]: Thank you.

"THE COURT: The record should reflect [movant's] voluntarily excusing himself

from the courtroom for a couple minutes.

"(The defendant left the courtroom.)"

After taking notice of the transcript, the 60–1507 court heard testimony from the movant and his trial counsel. Trial counsel testified that, at trial, movant needed to use the restroom and left to do so, whereupon the trial judge told the State to call its next witness, even though counsel expected the trial court to wait for movant to return before proceeding. Trial counsel testified the trial transcript failed to reflect trial counsel stood up and told the court that movant "would like to be present for this part of the trial or this testimony," but the trial court denied the defense request.

Movant testified his trial counsel had actually tried to ask for a restroom break earlier in the trial but was told to sit down by the trial court before he could ask. Movant later asked counsel to request a restroom break again, which let to the events detailed in the transcript. Movant said he was under the impression a recess would be taken for him to use the restroom.

After hearing argument from the parties, the 60–1507 court found there was no merit to movant's ineffective assistance of counsel claim, and this decision is not at issue on this appeal.

The 60–1507 court then considered movant's issue regarding movant's absence from his trial and stated it was unusual to continue a trial while the defendant was using the restroom, and the trial court's statement in the transcript that the absence was voluntary "doesn't make it so." Further, the 60–1507 court noted movant and trial counsel both testified they expected the trial to stop while movant was gone, and trial counsel testified he objected to the trial court's actions in proceeding with testimony without the defendant's presence.

*2 The 60–1507 court found the trial court committed error in proceeding in the movant's absence, over the objection of movant's trial counsel, and then considered whether the error was harmless.

The 60–1507 judge found:

"And so I guess the Court has to decide well, is that harmless or not. I struggle—I'm struggling with it because the Court of Appeals seems to be concerned about this part. The Court of Appeals indicates that because the witness, who at the time was a Mr. Clark, testified about his relationship with [movant] Hilson and the events on the night of the crime, they—the Court of Appeals indicates they believe that issues of fairness were implicated. What does that mean? Is that harmless or not?

"I've got to say that it's not harmless error, I just do. I just—I just—this Court

would never conduct a hearing without the presence of the defendant. I would just not do it. And I have to agree with [defense counsel] that that it was simply name, rank and serial number information on the part of the witness, that probably would clearly be harmless. But when the witness then starts getting into the facts of the case, it just strikes me that we're going further than that. And I would agree it wasn't a long time.

"This is a close call but it seems to me that when we've got a close call here, we ought to [err] on the side of protecting the defendant's right to be present, a constitutional right to be present. And so I think the Court has no choice but to find that there was error here. And the Court's going to order a new trial. And that's going to be the order of the Court."

On appeal, the State asserts the 60–1507 court erred in finding the trial court's decision to proceed with the trial in the movant's absence was not harmless error. According to the State, the testimony of trial counsel and movant at the 60–60–1507 hearing on remand showed the challenged error was harmless beyond a reasonable doubt.

The movant contends the 60–1507 court's decision was correct; but he suggests the 60–1507 court should not have conducted a harmless error analysis, as Kansas case law indicates the denial of a defendant's constitutional right to be present at critical stages of a criminal proceeding is structural error and not subject to a harmless error analysis. Movant further contends that, even under a harmless error analysis, he was still aggrieved by missing part of the testimony of a significant witness and by the trial court's attitude toward his absence.

The 60–1507 court held a full evidentiary hearing on movant's 60–1507 motion following remand. In reviewing the 60–1507 court's decision, this court must determine whether the 60–1507 court's factual findings are supported by substantial competent evidence. "Ultimately, the district court's conclusions of law and its decision to grant or deny the 60–60–1507 motion are reviewed using a de novo standard. [Citation omitted.]" *Bellamy v. State,* 285 Kan. 346, 355, 172 P.3d 10 (2007).

*3 "[T]he Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment require a defendant's presence at every critical stage of the criminal proceedings against him or her. [Citations omitted.]" *State v. Engelhardt,* 280 Kan. 113, 122, 119 P.3d 1148 (2005). Further, K.S.A. 22–3405(1) states that the "defendant in a felony case shall be present ... at every stage of the trial ... except as otherwise provided by law. In prosecutions for crimes not punishable by death, the defendant's voluntary absence after the trial has been commenced in such person's presence shall not prevent continuing the trial to and including the return of the verdict." Our Supreme Court has stated that these constitutional and Kansas statutory requirements regarding a defendant's right to be present at any critical stage of a criminal proceeding are

"analytically and functionally identical." *Engelhardt,* 280 Kan. at 122.

Here, the State does not dispute the movant's absence during his jury trial was *involuntary* and at a "critical stage" of the proceedings and that the trial court erred in proceeding in the defendant's absence. According to the State, the only question is whether the error was harmless. On the other hand, the movant argues we should first consider whether the error should be considered structural error, which would preclude a harmless error analysis.

In arguing the error here should be considered structural, the movant cites *State v. Calderon,* 270 Kan. 241, 13 P.3d 871 (2000). In *Calderon,* the defendant in a murder trial required an interpreter, and one was provided prior to and for all stages of the trial. However, prior to closing argument, the trial court instructed the interpreter to not translate for the defendant during the closing arguments. The defendant challenged this action on appeal, asserting such action denied him his fundamental due process right to be present at a critical stage of the proceedings and asserted the alleged error was not subject to the usual harmless error analysis.

After reviewing case law from the United States Supreme Court and various federal and state jurisdictions regarding the right to a translator and the difference between structural and trial error, the *Calderon* court decided in favor of the defendant and held:

> "The United States Supreme Court and lower courts have struggled with the [*Arizona v. Fulminante,* 499 U.S. 279, 113 L.Ed.2d 302, 87 S.Ct. 1246 (1991),] trial/structural error dichotomy and found that not all errors can be analyzed within the structure. The right to be present at one's criminal trial is a fundamental right. To be 'present' requires that a defendant be more than just physically present. It assumes that a defendant will be informed about the proceedings so he or she can assist in the defense. A defendant's right to be present includes a right to have trial proceedings translated into a language that he or she understands so that he or she can participate effectively in his or her own defense.
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> *4 "The United States Supreme Court has stated that it is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table. This assumption derives from the right to be present at trial, which in turn derives from the right to testify and rights under the Confrontation Clause. *Riggins v. Nevada,* 504 U.S. 127, 142, 118 L.Ed.2d 479, 112 S.Ct. 1810 (1992). At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial. 504 U.S. at 142.

"Here, the trial court denied Calderon a meaningful presence during closing argument, an error which implicates the basic consideration of fairness. Under these circumstances, this court is not permitted to determine that it was harmless beyond a reasonable doubt even though the error might have had little, if any, likelihood of having changed the result of the trial." 270 Kan. at 253–54.

Since *Calderon,* our Supreme Court has decided several similar cases. In *State v. Lopez,* 271 Kan. 119, 131–34, 22 P.3d 1040 (2001), the trial judge and counsel questioned a potential juror regarding the potential juror's knowledge of the victim's family. The defendant was not present for this questioning, but the *Lopez* court determined the defendant's absence did not deny the defendant a meaningful presence at a critical stage of the trial, nor did it "implicate the basic consideration of fairness or undermine the function of a criminal trial." 271 Kan. at 134. As such, the defendant's absence was not structural error under *Calderon* and could therefore be subjected to a harmless error analysis. *Lopez,* 271 Kan. at 134.

In *State v. Mann,* 274 Kan. 670, 680–81, 56 P.3d 212 (2002), the trial court had various conversations with four jurors regarding the presence and behavior of the defendant's uncle in the courtroom. Neither the defendant nor counsel were present for these conversations. The *Mann* court determined this was error, reviewed both *Calderon* and *Lopez* to determine if the harmless error analysis should be applied, and concluded, as in *Lopez,* the trial court's actions "did not implicate a basic consideration of fairness or undermine the function of a criminal trial." *Mann,* 274 Kan. at 683. Again, the error was not structural error, but rather a trial error allowing application of a harmless error analysis. 274 Kan. at 683.

Most recently, in *Engelhardt* the defendant challenged the trial court's decision to permit the jury to view the crime scene outside the defendant's presence, asserting this violated his rights under K.S.A. 22–3405 and the Confrontation and Due Process Clauses of the United State Constitution to be present at all critical stages of his trial. The *Engelhardt* court determined there was no error and stated the situation was distinguishable from *Calderon* both factually and legally. Further, the *Engelhardt* court stated even if there was error, such error would be harmless. The harmless error analysis could be properly applied notwithstanding *Calderon,* according to the *Engelhardt* court, because *Mann* and *Lopez* had "limited [*Calderon's*] structural error approach to its unique facts." *Engelhardt,* 280 Kan. at 124.

*5 Here, the factual situations presented is much closer to *Calderon* than the factual situation in *Mann, Lopez,* or *Engelhardt.* In fact, the movant's exclusion here may more directly implicate the movant's rights under the Confrontation Clause than did the situation even in *Calderon* because the movant here was absent during the testimony of a State's witness. The challenged error here is at least as much a violation of the letter and spirit of the Confrontation Clause as

being unable to understand closing arguments, if not more so. See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him[.]").

We conclude, under the specific facts of this case, the challenged error was structural in nature and denied the movant a fair trial.

We affirm the 60–1507 court's order granting movant a new trial and remand for further proceedings.