[J-44-2019]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 57 MAP 2018
	:	
Appellee	:	Appeal from the Order of Superior Court at No. 266 MDA 2017 dated April 12, 2018 Vacating the Judgment of Sentence dated January 13, 2016 of the Lackawanna County Court of Common Pleas, Criminal Division, at No. CP-35-CR-0001297-2012 and Remanding for resentencing.
v.	:	
PATRICK TIGHE,	:	
Appellant	:	
	:	ARGUED: May 14, 2019

OPINION ANNOUNCING JUDGMENT OF THE COURT

JUSTICE DOUGHERTY **DECIDED: February 19, 2020**

In this discretionary appeal, we examine whether the trial court improperly limited appellant's right to self-representation in violation of the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution when, during appellant's jury trial for sexual offenses committed against a minor female, the court prohibited appellant, who was proceeding *pro se*, from personally conducting cross-examination of the victim-witness, and instead required stand-by counsel to cross-examine the witness using questions prepared by appellant. We determine there was no constitutional violation and affirm the order of the Superior Court.

On the night of May 29, 2012, appellant, then 58 years old, sexually assaulted a minor female victim, J.E., then 15 years old, by placing his penis in her mouth and vagina. The following day, J.E. told her older sister what had happened. J.E.'s sister called the

police who transported J.E. to the Children's Advocacy Center for medical examination and a rape kit. The examination showed redness, abrasions and exfoliations of J.E.'s internal and external genitalia consistent with trauma. Testing of the contents of the rape kit resulted in a forensic and statistical finding that appellant's and J.E.'s DNA were present on a pubic hair combed from J.E.'s vaginal area. Police conducted a consensual phone intercept between J.E. and appellant, in which appellant made incriminating statements. Police arrested appellant and charged him with rape, involuntary deviate sexual intercourse, indecent assault of a person less than 16 years old, unlawful contact with a minor, and statutory sexual assault.[1]

Prior to trial, in February 2013, appellant informed the court he wished to proceed *pro se*.[2] The court conducted a *Faretta* colloquy, determined appellant knowingly and voluntarily relinquished his right to counsel, granted the request to proceed *pro se* and appointed stand-by counsel, attorney Christopher Osborne. *See Faretta v. California*, 422 U.S. 806 (1975) (Sixth Amendment right to counsel implicitly includes right to self-representation); Pa.R.Crim.P. 121(A)(2) (setting forth minimum inquiry necessary to determine defendant's choice to proceed *pro se* is knowing, voluntary and intelligent); Pa.R.Crim.P. 121(D) ("When the defendant's waiver of counsel is accepted, standby counsel may be appointed for the defendant.").[3]

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[1] *See* 18 Pa.C.S. §3121(a)(1) (rape); 18 Pa.C.S. §3123(b) (involuntary deviate sexual intercourse with a child); 18 Pa.C.S. §3126(a)(8) (indecent assault of person less than 16 years old); 18 Pa.C.S. §6318(a)(1) (unlawful contact with minor); 18 Pa.C.S. §3122.1(b) (statutory sexual assault).

[2] At the time, appellant was represented by Sandra Stepkovich, Esq., of the Lackawanna County Public Defender's Office.

[3] The court also conducted *Faretta* colloquies on June 4, 2013, and July 8, 2013. Each time, the court determined appellant's waiver of the right to counsel was knowing, voluntary and intelligent.

On May 9, 2013, appellant was released on bail from Lackawanna County Prison. One of appellant's bail conditions directed him to have no contact with the victim. On May 20, 2013, J.E. reported to police that appellant had phoned her multiple times that day. The Commonwealth filed a petition for bail revocation, and on June 4, 2013, the court held a bail revocation hearing, at which appellant appeared *pro se* and J.E. was scheduled to testify as a witness for the Commonwealth. The Commonwealth sought to restrict appellant's personal cross-examination of J.E. for the purposes of the hearing. The Commonwealth argued, "One of the relevant conditions … was, in fact, no contact with the victim. …[W]hen we talk about self-representation, the question of forfeiture always arises." N.T. 6/4/13 at 37-38. The Commonwealth argued appellant's flouting of the specific no-contact condition was "willful disregard" of that condition and thus appellant had forfeited the right to question J.E. personally. *Id.* at 38. The Commonwealth also offered evidence that J.E. had been upset and frightened by the calls.

At the hearing, appellant asserted, in part, "There's no history of me threatening the … victim[.]" *Id.* at 36. The court noted a condition of appellant's bail was "no contact with the victim in any form," and ruled, "[f]or purposes of today's proceedings only and for purposes of the complaining witness only, …you will not be permitted to conduct your own cross examination." *Id.* at 34, 39. The court explained to appellant "[y]ou may write down any questions that you want to ask of the complaining witness. And you may have either [stand-by counsel] ask the questions for you or the [c]ourt ask the questions for you." *Id.* at 39.[4]

J.E. then testified on direct-examination that on May 20, 2013, she noticed numerous unanswered calls to her phone from a number she did not recognize, so she

[4] Noting the Commonwealth also sought to restrict appellant's personal cross-examination of the victim at trial, the court stated "[w]e will cross th[at] other bridge when we come to it[.]" N.T. 6/4/13 at 40.

called the number back and asked, "[W]ho's this[?]" *Id.* at 42. A voice replied, "you know who this is[,]" among other things, and J.E. recognized the voice as appellant's. *Id.* She testified, "[Appellant] said, 'Come on. Why [are] you doing this to me? I didn't hurt you. Please don't put me in jail for life. We can make it right baby[;]" to which she replied, "Yes you did hurt me[,]" and hung up. *Id.* Appellant called back several more times and each time J.E. answered and quickly hung up. She also testified she had been frightened, in part because she did not know appellant had been released and she believed he might be looking for her.[5] Stand-by counsel cross-examined J.E., asking her questions prepared by appellant. At the conclusion of the hearing, the trial court revoked appellant's bail.

On June 17, 2013, the court conducted a pre-trial hearing wherein, among other things, the court addressed appellant's "request … [for] a ruling on who is going to conduct cross examination" at trial. N.T. 6/17/13 at 12. The Commonwealth took the position appellant's willful misconduct in violating the conditions of bail should "be construed as a forfeiture" of appellant's right to question J.E. personally at trial. *Id.* at 13. The Commonwealth specifically argued:

> [Appellant] willfully violated those rules. They were fairly clear, I think, don't contact the victim. He disregarded them. …
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> Now we have from past behavior that whether or not there is an order in place, whether or not there is [a] parameter set up by the court in terms of what is or is not relevant questioning, the manner of questioning, the depth of questioning, the subject matter of questioning, I don't know that anyone can guarantee that [appellant] would follow that

[5] Specifically, when asked on direct examination how she felt upon receiving the calls and hearing appellant's voice, J.E. testified, "I was scared. I was shocked. I didn't know what to think because I wasn't notified that he was out. I felt like I was scared he would find me. I didn't know if he was already trying to find me. So that's when I told my foster mom and contacted the police … [because] I felt like I was in danger." N.T. 6/4/13 at 47.

> because he's demonstrated his willful disregard for a prior order of court.
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> So [we] would simply supplement with what was submitted some time ago with the fact that overlaying that is the question of whether or not [appellant] now forfeits his right because of his own behavior.

Id. at 14-15.

Appellant countered the Commonwealth's assertion of forfeiture by arguing precedent "clearly state[s] … a pro se defendant [shall] represent[] himself in all phases of the trial." *Id.* at 15. Appellant continued:

> And that phone call that was supposedly made, there was no threats, there was no, like, threats, I'm going to kill you, nothing like this, like I'm going to come and get you if you [] testify. There [were] no threats. It was asked, Why are you going to put me in prison for the rest of my life? I never hurt you. …The rules are the rules, and I feel that to have standby counsel cross-examine the victim like that would be very prejudicial to the jury, definitely send a thing to the jury to show a sign to the jury that, like, how could I be representing myself the whole trial but not there. It's almost like saying I'm guilty[.]

Id. at 15-16.

The court deferred ruling on the issue pending its review of pertinent case law.[6] A final pre-trial conference was held on July 3, 2013.[7] At that time, the trial court ruled

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[6] The Commonwealth submitted a Memorandum of Law in support of "its position that [appellant] should be precluded from cross-examining the victim[,]" which, among other things, again asserted appellant's "willfull, intentional wrongdoing … militates strongly in favor of the conclusion that he has forfeited any constitutional claim or right to cross-examine personally his accuser." Memorandum of Law, 7/2/13, at 13-14.

[7] Appellant was brought into court in handcuffs for the final pre-trial conference. The court denied appellant's request to have the handcuffs removed, explaining, "[O]ne of the reasons that I am concerned is that you are a flight risk because you did post bail in this case and you absconded. And you violated the terms of your bail by contacting the alleged victim in this case. So those are additional reasons for the court to be concerned about your behavior in the courtroom." N.T. 7/3/13 at 3.

appellant would not be permitted to cross-examine J.E. personally at trial.[8] The court stated its "number one" reason for the ruling was appellant's "violation of the bail condition of no contact." N.T. 7/3/13 at 9. The court added its ruling also took into account "the age of the victim" and appellant's "position of trust with the minor child." *Id.* at 9-10. Appellant strenuously objected, repeatedly arguing he has a "right to confrontation" under "Crawford versus Washington." *Id.* at 13, 14, 19. Appellant asserted, among many other things, "The prosecution showed no offering of proof that the alleged victim has emotional trauma" or "that I am a threat to this witness." *Id.* at 14, 19. The Commonwealth replied that it could supplement the record, if the court wished, and presented an offer of proof of evidence from a treating psychologist who would testify to the negative emotional impact appellant's personal cross-examination would have on J.E. *Id.* at 20-21. The court replied, "[T]hat's your decision. If you want the opportunity to supplement the record with that testimony, I will grant you the opportunity to do that." *Id.* at 20. Ultimately, the Commonwealth did not supplement the record with additional evidence.

On the first day of trial, the court again conducted a *Faretta* colloquy and determined appellant's decision to represent himself was knowing, voluntary and intelligent. Thereafter, appellant strenuously objected to the court's prior ruling that stand-by counsel would conduct cross-examination of J.E. The court replied, "I understand you're making a record, but it has been decided, sir. Your Sixth Amendment right to represent yourself is not absolute." N.T. 7/8/13 at 19. The court stated it had engaged in

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[8] As the record plainly shows, the trial court prohibited appellant from personally cross-examining the victim at trial in response to the Commonwealth's motion alleging appellant had forfeited the right to do so by his own pre-trial behavior. Indeed, the record clearly demonstrates the court **twice** determined that issue in favor of the Commonwealth — on June 4, 2013, the court granted the Commonwealth's forfeiture motion for purposes of the bail revocation hearing, and on July 3, 2013, the trial court granted the Commonwealth's forfeiture motion for purposes of trial based on the same pre-trial behavior. *See* N.T. 6/4/13 at 39, 7/3/13 at 9.

a balancing test "between your right to represent yourself and protecting any potential witnesses from potential harm." *Id.* In response to appellant's continued argument against the court's ruling, the court responded:

> The grounds for my ruling, sir, hinged largely upon the nature of the bail violation. The fact that there was a [c]ourt order in place at the time you were released on bail and you were reminded of that because it was written on the new bail piece. The piece that was produced at the time that you were actually released; no contact with the victim. Then we had an evidentiary hearing in which [J.E.] testified that on multiple occasions, on the same date, you called her. She said that she had no warning that you had been released from jail. She had no idea. Yet, she's getting more than one phone call to her cell phone from you. The fact that you spoke to her, I found at the end of the hearing that you did, in fact, violate the terms of the bail.

Id. at 20-21.

The court noted "[t]hose facts" coupled with other factors such as J.E.'s age and appellant's occupying a "position of trust" with her, were the "reasons that I made the ruling that I did and we are not going to discuss it any further." *Id.* at 21-22.[9] At the outset of trial, the court instructed the jury appellant was representing himself, that he had stand-by counsel who, as a procedural matter, may take a more active role at some point in the proceedings, but the jury was to take no negative inference against appellant in that event. During trial, stand-by counsel cross-examined J.E., using questions provided by appellant. Appellant called J.E. as a witness during his defense case, and stand-by counsel conducted the direct examination, again using questions prepared by appellant. Appellant conducted all other aspects of his defense and testified in his own defense. At the conclusion of the three-day trial, the jury convicted appellant of all charges and the

[9] Implicit in the court's statement is that its ruling decided the Commonwealth's forfeiture motion alleging appellant had forfeited his right to cross-examine the victim at trial by his willful pre-trial misconduct. *See* Memorandum of Law, 7/2/13, at 13-14.

court sentenced him to 20 to 40 years' imprisonment. Appellant filed a counseled post-sentence motion alleging, in relevant part, that he did not voluntarily waive his right to counsel but was "forced to represent himself[,]" because the court erred in denying his request for "new counsel" to "lead the defense[,]" when appellant informed the court stand-by counsel allegedly had a conflict with appellant based on a prior representation. *See* Post-Sentence Motion *Nunc Pro Tunc*, filed 10/19/15 at 2-3.[10] The court denied appellant's post-sentence motion.

Appellant then appealed from the judgment of sentence raising eleven issues, the first of which alleged the trial court violated his constitutional right to self-representation by refusing to allow him to personally cross-examine "the victim at any time during trial or bail hearing, but instead required standby counsel to ask the victim all questions on [a]ppellant's behalf using written questions prepared by [a]ppellant in advance of cross-examination and/or questioning[.]" *See Commonwealth v. Tighe*, 184 A.3d 560, 565 (Pa. Super. 2018). In its Rule 1925(a) opinion, the trial court did not discuss forfeiture as a basis for its decision to deny appellant the right personally to cross-examine J.E., but instead noted appellant's violation of the bail condition resulted in J.E. experiencing emotional trauma. The trial court reasoned "that denying [appellant] the right to personally cross-examine J.E. was necessary to protect her from additional and unnecessary emotional trauma." Trial Ct. Op., 7/28/16 at 30 (internal quotation marks omitted).

[10] Appellant retained counsel for post-sentence proceedings and all subsequent stages of this litigation, including the present appeal. Appellant raises no issue in this Court challenging the voluntariness of his decision to represent himself *pro se* at trial.

The Superior Court affirmed in relevant part.[11] The panel first observed that, although appellant had "explicitly distance[d] himself" from any analysis focused on the Sixth Amendment right of confrontation, the trial court relied on case law from other jurisdictions drawing parallels between that right and the Sixth Amendment right to self-representation. *Tighe*, 184 A.3d at 566. The panel noted the right to self-representation is implicit in the Sixth Amendment, citing *Faretta*, while the right to confrontation is explicit therein, citing U.S. CONST. AMEND. VI, and began its analysis by reviewing case law pertaining to the right of confrontation. *Id*. at 566-67.[12] The panel considered *Maryland v. Craig*, 497 U.S. 836 (1990), where the High Court held a "State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *Tighe*, 184 A.3d. at 567, *quoting Craig*, 497 U.S. at 853.[13] The Superior Court explained the Maryland statute at issue in *Craig* permitted the testimony of a child abuse victim to

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[11] The panel also determined several of appellant's convictions merged for sentencing purposes, and thus vacated the judgment of sentence and remanded for resentencing. *Tighe*, 184 A.3d at 585. There are no issues in the present appeal related to this separate determination.

[12] The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. CONST. AMEND. VI. In *Faretta*, the High Court ruled the Sixth Amendment right to counsel implicitly includes the right to self-representation.

[13] The *Craig* Court held: "[W]here necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation." *Maryland v. Craig*, 497 U.S. at 857.

be presented to the jury via one-way closed circuit television, but only if the trial judge made a finding that testifying in the courtroom, in the presence of the alleged abuser, would "result in the child suffering serious emotional distress such that the child cannot reasonably communicate." *Id.*, *quoting Craig*, 497 U.S. at 841. The panel observed the *Craig* Court declined to specify the minimum showing of emotional trauma required to outweigh the confrontation right but held the Maryland statute's requirement of serious emotional distress such that the child cannot reasonably communicate passed constitutional muster. *Id.* at n.3

The panel then observed the trial court in the present matter "extensively relied on *Fields v. Murray*, 49 F.3d 1024 (4th Cir. 1995) (*en banc*)[, *cert. denied*, 516 U.S. 884 (1995)]," a decision wherein the United States Court of Appeals for the Fourth Circuit held "[i]f a defendant's Confrontation Clause right can be limited in the manner provided in *Craig*, we have little doubt that a defendant's self-representation right can be similarly limited." *Id.* at 568, *quoting Fields*, 49 F.3d at 1035. The panel disagreed with appellant's fundamental assertion that the right of self-representation is an absolute right that can never be curtailed. *Id.* at 569, *citing McKaskle v. Wiggins*, 465 U.S. 168, 176-77 (1984) (*Faretta* indicates no absolute bar on stand-by counsel's participation even without express consent of *pro se* defendant). The panel stated, "Instead, the question is whether the principles announced in *Craig*, which permitted a procedure that limited the Confrontation Clause rights due to the countervailing interests of the victim when the procedure otherwise preserved the reliability of the cross-examination, should be adopted in this Commonwealth as a permissible restriction on the right of self-representation." *Id.* Ultimately, the panel concluded the answer to that question "is yes." *Id.* The panel stated it was "persuaded by the analysis set forth in *Fields* that, if the constitutional right of confrontation can be limited on the basis of emotional trauma to the victim, then it follows

that the same State interest serves to justify the [self-representation] restriction at issue." *Id.* at 571.[14] Accordingly, the panel determined appellant's right to self-representation was not violated and the trial court committed no error in restricting that right under the present circumstances. As noted, the panel did not discuss forfeiture as a potential alternative basis for denying appellant the right to personally cross-examine J.E.

In the present appeal, the following questions, as phrased by appellant, are presented for our review:

> (1) In an issue of first impression, after a knowing, voluntary and intelligent *Faretta* colloquy where the trial court approves the right of self-representation during a criminal trial, whether the trial court can thereafter limit or deny the guaranteed right to self-representation by forcing standby counsel to participate during the trial for reasons other than waiver or forfeiture of that right?
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> (2) Whether the Superior Court disregarded the limits set for standby counsel by Pennsylvania Rule of Criminal Procedure 121(D) and legal precedent reached in *Commonwealth v. Spotz*, 47 A.3d 63 (Pa. 2012), by authorizing standby counsel to participate during trial before jury over the objections of the accused and absent waiver or forfeiture of the accused's right to self-representation?

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[14] The panel also noted "whether the Commonwealth sufficiently established as a matter of degree that J.E. would suffer emotional trauma as contemplated by *Craig* is not before us," because appellant's position on appeal was his right to self-representation is absolute regardless of any trauma to the witness. *Tighe*, 184 A.3d at 571 n.8. The panel simultaneously stated, however, that, "[C]onsistent with *Craig*, [ ] the limitation could be justified as a matter of law only if the Commonwealth established that this minor victim was likely to suffer some emotional trauma by being directly cross-examined by her accuser [sic] beyond the natural trauma accompanying that confrontation. To hold otherwise would apply a presumption of trauma, which *Craig* indicates is impermissible." *Id.* The panel concluded, "[w]e find that the extra evidence adduced by the Commonwealth respecting [a]ppellant's violation of the no contact order and J.E.'s testimony regarding her fear of [a]ppellant served to remove this case from that unconstitutional presumption." *Id.* The panel did not amplify its reasoning regarding appellant's violation of the no-contact order or address whether that misconduct might be construed as a forfeiture of his right to conduct a *pro se* cross-examination of J.E.

> (3) Whether it was sufficiently established that the minor victim would suffer emotional trauma making her unable to reasonably communicate if questioned by the accused during trial thereby making it necessary to deny and/or limit the right to self-representation?

Commonwealth v. Tighe, 195 A.3d 850 (Pa. 2018) (*per curiam*).

The arguments appellant sets forth in support of his first and third issues overlap; accordingly, and because our determination of these two issues is dispositive, we will present and address them together. Appellant now concedes the right to self-representation is not absolute, but can be waived or forfeited. Appellant's Brief at 12. Appellant acknowledges a trial judge may terminate self-representation where a *pro se* defendant "deliberately engages in serious and obstructionist misconduct." *Id.* at 13, *quoting Faretta*, 422 U.S. at 834 n.46. Appellant recognizes "the right to self-representation is 'only to the extent that [a defendant] is able and willing to abide by the rules of procedure and courtroom protocol.'" *Id.*, *quoting McKaskle*, 465 U.S. at 173. Despite the fact the Commonwealth explicitly framed its request to restrict appellant's cross-examination of J.E. at trial based on an alleged forfeiture of his right to self-representation due to his willful violation of a no-contact-with-the-victim bail condition, appellant argues "[t]here is no suggestion" he forfeited his right by his actions and maintains "[t]he court did not find [him] disrespectful or disruptive, nor was it implied or indicated in the record." *Id.* at 14.[15]

Appellant asserts the Commonwealth's motion "to limit or deny [appellant's] right to self-representation[,]" was based primarily on a concern J.E. would "suffer emotional trauma" as a result of being questioned by appellant. *Id.* at 15. Appellant further argues the trial court did not address this concern until it issued its Rule 1925(a) opinion stating

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[15] Justice Wecht asserts, "the parties do not address the subject of forfeiture by conduct of the right to self-representation." Slip op. at 3 (Wecht, J. concurring and dissenting). However, appellant's brief devotes several pages to this precise issue. *See* Appellant's Brief at 12-14.

it "was persuaded J.E. would suffer 'emotional trauma' if she was subject to cross examination by [appellant]." *Id.* at 18, *quoting* Trial Ct. Op., 7/28/16 at 29. Complaining there was no hearing or evidence presented that J.E. would actually suffer emotional trauma or be unable to testify accurately as a result of being questioned by appellant, he asserts "[t]he trial court clearly confused the right to confront one's accuser with the right to self-representation and while the right to confrontation may have been maintained, the right to self-representation was not." *Id.*

Appellant similarly faults the Superior Court for holding the principles announced in *Craig* limiting the right to confrontation should be adopted in Pennsylvania as a permissible restriction on the right of self-representation, in part because self-representation ceases when stand-by counsel questions witnesses over a defendant's objections, and in part because there was no evidence here that J.E. would suffer emotional trauma so severe she could not reasonably communicate as required by *Craig*. Appellant further argues that while the Superior Court indicated it was adopting the principles announced it *Craig*, "it seems more accurate to state that it was adopting the principles announced in *Fields*[.]" *Id.* at 23. Appellant criticizes the *Fields* decision because "the *Fields* court did not require a hearing to determine whether the victim would suffer emotional trauma[,]" but simply presumed "it is 'far less difficult to conclude that a child sexual abuse victim will be emotionally harmed by being personally cross-examined by her alleged abuser than being required merely to testify in his presence.'" *Id.* at 24 n.13, *quoting Fields*, 49 F.3d at 1036.[16]

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[16] The *Fields* court continued: "Further, the right denied here, that of cross-examining witnesses personally, lacks the fundamental importance of the right denied in *Craig*, that of confronting adverse witnesses face-to-face. As a result, we do not believe it was essential in this case that psychological evidence of the probable emotional harm to each of the [child victims] be presented in order for the trial court to find that denying Fields personal cross examination was necessary to protect them." *Fields*, 49 F.3d at 1036-37

Appellant additionally observes *Fields* acknowledged that denying a self-representing defendant the right to personally cross-examine witnesses slightly reduces the defendant's ability to present his chosen defense, and inhibits the defendant's "dignity and autonomy to some degree by affecting the jury's perception that [he is actually] representing himself." *Id.* at 24, *citing Fields*, 49 F.3d at 1035. Appellant claims in the face of a reduction in autonomy affecting the jury's perception, the Superior Court's determination his self-representation right was "otherwise assured" was error, because it had already been lost. *Id.* at 25, *citing Tighe*, 184 A.3d at 570 (finding appellant's "right to cross-examine J.E. was met in a broad sense, and … limited only in the narrow sense that he was not allowed to personally ask the questions").

Moreover, appellant observes this Court has repeatedly held, with respect to the face-to-face confrontation right formerly set forth in Article I, Section 9 of the Pennsylvania Constitution,[17] society's interest in protecting victims of sexual abuse does not prevail over an accused's constitutional right to confrontation. *Id.* at 27-33, *citing Commonwealth v. Ludwig*, 594 A.2d 281 (Pa. 1991) (use of closed circuit television to transmit testimony of witness violated Article I, Section 9 of Pennsylvania Constitution's face-to-face confrontation right guarantee); *Commonwealth v. Lohman*, 594 A.2d 291 (Pa. 1991) (same; companion case to *Ludwig*); *Commonwealth v. Louden*, 638 A.2d 953 (Pa. 1994) (Legislature's enactment of statutes intended to provide protection to child witnesses, while perhaps laudable, violates Pennsylvania's Constitution which specifically, clearly and unambiguously guarantees to an accused the right to face-to-face confrontation with

(footnote omitted). We note, whatever the import of the *Fields* court's rationale distancing itself from the High Court's decision in *Craig*, it is clear Fields was represented by counsel and his "right to self-representation was not violated[,]" in part because "Fields failed to invoke his right to self-representation clearly and unequivocally." *Id.* at 1034.

[17] As will be discussed *infra*, Article I, Section 9 was amended to delete the "face-to-face" confrontation guarantee in 2004.

his accuser). Appellant suggests the express right to self-representation contained in Article I, Section 9 similarly cannot give way to society's interest in protecting victims of sexual abuse.

Amicus Curiae, Defender Association of Philadelphia ("DAP"), has filed a brief on behalf of appellant, stating it "is mindful that this Court can affirm a trial court order if correct for any reason. Therefore Amicus will examine whether the facts as found by the trial court justify a forfeiture even though the trial court itself never made the requisite finding of forfeiture." Amicus Brief at 18. DAP argues that "[b]oth *Faretta* and *McKaskle* contemplate forfeiture by conduct that occurs during the trial itself, and that disrupts the orderly processes of that trial." *Id*. at 16, *citing McKaskle,* 465 U.S. at 173 (*Faretta* recognizes that "an accused has a Sixth Amendment right to conduct his own defense, provided only that he knowingly and intelligently forgoes his right to counsel and that he is able and willing to abide by rules of procedure and courtroom protocol."). DAP further contends, even a "liberal extension of what might constitute a forfeiture under *Faretta/McKaskle* would contemplate out-of-court or pretrial conduct only to the extent that it strongly portends future courtroom disruption of orderly trial processes." *Id*. at 16, *quoting United States v. Smith*, 830 F.3d 803, 810 (8th Cir. 2016) ("[p]retrial activity is relevant [to continued *pro se* status] only if it affords a strong indication that the defendant … will disrupt the proceedings in the courtroom.") (construing *Faretta*) (additional citations omitted).

DAP insists appellant comported himself in a wholly appropriate manner during all pre-trial and trial proceedings, that the trial court never suggested his courtroom conduct disrupted courtroom processes, and a "review of the record discloses no instances of such disruption." *Id.* at 17. "Nor does the trial court suggest that any out-of-court or pretrial activity by appellant constitutes a strong indication — or indeed any indication at

all — that appellant would inappropriately disrupt orderly trial processes during cross-examination of the complainant at trial." *Id.* With specific reference to the trial court's partial reliance on appellant's violation of the no-contact bail condition as a reason to deny him the right to personally cross-examine J.E., DAP asserts the behavior could not constitute a forfeiture because it did not occur during trial or portend future disruption of orderly trial processes. DAP concludes, "appellant did not forfeit by conduct any component of his right to self-representation." *Id.*

The Commonwealth responds that appellant and DAP are "incorrect" to the extent they suggest the Commonwealth supports forfeiture as a basis for denying appellant the right to personally cross-examine J.E. Commonwealth's Brief at 15 n.2. "Rather, the Commonwealth's position is that the right can be 'narrowly limited' as the Superior Court concluded." *Id.* In support of that position, the Commonwealth argues the United States Supreme Court's decisions in *Faretta* and *McKaskle* recognize the Sixth Amendment right to self-representation is not absolute, and the Superior Court here properly found a parallel between the Sixth Amendment right of confrontation under *Craig* and *Fields* and the Sixth Amendment right to self-representation.[18]

The parties agree the current appeal presents questions of law for which this Court's standard of review is *de novo* and scope of review is plenary. *Commonwealth v. Brown*, 185 A.3d 316, 324 (Pa. 2018). We turn first to appellant's reliance on *Ludwig*, *Lohman*, and *Louden*, to support his argument based solely on an interpretation of Article I, Section 9 of the Pennsylvania Constitution, which provides as follows:

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[18] Amici, "Pennsylvania Coalition Against Rape," and "23 Organizations Dedicated to Improving Societal Responses to Sexual Violence," filed briefs in support of the Commonwealth. Both offer argument to support the view that Pennsylvania has a long history of protecting the well-being of sexually abused children, and that the trial court appropriately exercised its discretion in prohibiting appellant from personally conducting cross-examination of J.E.

§ 9. Rights of accused in criminal prosecutions.

> In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land. The use of a suppressed voluntary admission or voluntary confession to impeach the credibility of a person may be permitted and shall not be construed as compelling a person to give evidence against himself.

PA. CONST. art. I, §9.

This provision was amended to its current wording in 2004. This Court has explained:

> The amendment [to Article I, Section 9 of the Pennsylvania Constitution] removed the [prior] right of an accused person to confront the witnesses against him or her "face-to-face." *See Bergdoll v. Commonwealth of Pennsylvania*, 858 A.2d 185, 190-91, 201-02 (Pa. Cmwlth. 2004) (*en banc*), *affirmed*, 874 A.2d 1148 (Pa. 2005) (*per curiam*). Thus, the text of the Pennsylvania Constitution guaranteeing accused persons the right to confront the witnesses against them was made identical to the text of the Confrontation Clause in the Sixth Amendment to the United States Constitution. Specifically, the accused has the right "to be confronted with the witnesses against him." In *Bergdoll*, the Commonwealth Court rejected a challenge to the 2003 amendment, and this Court affirmed. As the Commonwealth Court explained, the amendment was proposed after we had ruled that laws permitting children to testify outside the physical presence of the accused, *e.g.*, by closed circuit television, violated the Pennsylvania Constitution because such laws denied the accused the right to confront witnesses against him or her "face-to-face." *Bergdoll*, *supra* at 190. By removing the "face-to-face" language from the Pennsylvania Constitution and making the confrontation clauses of the Pennsylvania Constitution and the Sixth Amendment identical, the amendment was designed

> to permit the enactment of laws or the adoption of rules that would permit child victims or witnesses to testify in criminal proceedings outside the physical presence of the accused. *Id.* at 190-91.

Commonwealth v. Williams, 84 A.3d 680, 682 n.2. (Pa. 2014).

Appellant argues *Ludwig*, *Lohman*, and *Louden*, which held Pennsylvania's interest in protecting victims of sexual abuse does not supersede an accused's constitutional right to confront his accusers, should control this self-representation case as well. We first note appellant makes no claim the Pennsylvania Constitution offers greater protection than the United States Constitution with respect to the right to self-representation. Moreover, the Pennsylvania cases appellant cites were decided prior to the constitutional amendment referenced above, and have only tangential applicability to the current question regarding the parameters of the self-representation right, which, of course, implicates the pertinent language of Article I section 9, providing a defendant has the right "to be heard by himself and his counsel[.]" PA. CONST. art. I, §9.

We now address the parameters of that right and the corresponding Sixth Amendment right in the resolution of appellant's primary contention of trial and Superior Court error centered on an alleged misreading or misapplication of *Craig*. Given the Superior Court's correct observation there was no evidence presented to the trial court indicating J.E. would be traumatized if questioned by appellant directly, we are hesitant to determine whether the permissible limitation on the confrontation right as it applies to child victims of sexual abuse, *see Craig*, has a parallel paradigm applicable to the self-representation right. In *Craig*, "[t]he expert testimony … suggested that each child would have some or considerable difficulty in testifying in Craig's presence." *Craig*, 497 U.S. at 842. The High Court explained, "if the State makes an adequate showing of necessity,"

a special procedure that permits a child witness to testify against a defendant "in the absence of face-to-face confrontation with the defendant" can be justified. *Id.* at 855. The Court noted "[t]he requisite finding of necessity" requires the trial court to "hear evidence" regarding whether the special procedure is necessary to "protect the welfare of the particular child[,]" and "[t]he trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant." *Id.* at 855-56. If there is a parallel between limitations of the confrontation and self-representation rights guaranteed by the Sixth Amendment and Article I, Section 9 of the Pennsylvania Constitution, relevant evidence would presumably be required to justify those limitations in any given case. Accordingly, this case is a poor vehicle to decide the matter, as there simply was no evidentiary showing with respect to J.E.'s emotional response to direct questioning by appellant. Nevertheless, this Court can affirm if the lower tribunal's decision was correct for any other reason supported by the record. *In re A.J.R.-H.*, 188 A.3d 1157, 1175-76 (Pa. 2018) ("[R]ight-for-any-reason" doctrine "allows an appellate court to affirm the trial court's decision on any basis that is supported by the record."). In our view, as will be explained below, appellant forfeited his constitutional right to personally cross-examine J.E. by his willful misconduct in violating the no-contact bail condition.[19]

A defendant's right to act as his own counsel has long been recognized under the law. As noted above, it is implicit in the Sixth Amendment to the United States

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[19] As we decline to decide the case on the same rationale as the Superior Court, we need not adopt that court's discussion of *Craig*. Nevertheless, we note our disagreement with the Superior Court's rationale to the extent it determined J.E.'s potential emotional trauma arising from being personally cross-examined by her abuser could be proved absent specific, targeted evidence. *See* n.12, *supra*, *citing Tighe*, 184 A.3d at 571 n.8.

Constitution and explicit in Article I, Section 9 of the Pennsylvania Constitution. "The right to self-representation, however, is not absolute." *Commonwealth v. Brooks*, 104 A.3d 466, 474 (Pa. 2014). In *Faretta*, the High Court recognized that a defendant may forfeit his right to self-representation. *Faretta*, 422 U.S. at 834 n.46 (trial court "may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct[;] … self-representation is not a license to abuse the dignity of the courtroom" or to fail to "comply with relevant rules of procedural and substantive law"). The California Supreme Court, for example, has held *Faretta* does not limit the "serious and obstructionist misconduct" potentially supporting a finding of forfeiture, to behavior occurring in the courtroom. *See, e.g.*, *People v. Carson*, 104 P.3d 837, 840 (Cal. 2005), *citing Faretta*, 422 U.S. at 834 n.46. We find this approach persuasive. Although trial may be the central event in a criminal prosecution, we recognize it is the culmination of many weeks or months of preparation and related proceedings, not all of which take place in the courtroom; accordingly, misbehavior affecting the right to self-representation is not restricted to the courtroom and the "relevant rules of procedure and substantive law" are not limited to those occurring only in the trial itself. *Id.* at 841, *quoting Faretta*, 422 U.S. at 834 n.46. Ultimately, it is the effect and not the location of the misconduct and its impact on the core integrity of the trial that will determine whether forfeiture is warranted. *Id.*

One form of serious and obstructionist misconduct is "witness intimidation, which by its very nature compromises the fact[-]finding process and constitutes a quintessential 'subversion of the core concept of a trial.'" *Id.*, *quoting United States v. Dougherty*, 473 F.2d 1113, 1125 (D.C. Cir. 1972). We agree with the California Supreme Court that

threatening or intimidating a potential trial witness subverts the core concept of a fair trial and we find that such behavior is serious and obstructionist misconduct under *Faretta*, which if properly shown was committed by a *pro se* defendant, can properly result in the complete or partial forfeiture of his or her *pro se* status.[20]

Here, some three months after the court granted appellant's request to represent himself, he was released on bail and as a condition thereof, was ordered to have no contact with the victim. However, appellant called J.E. repeatedly. When she hung up on him, he called again and again. J.E. testified she was "scared" and "shocked" by the calls. N.T. 6/4/13 at 47. Appellant admits he violated the no-contact condition, but has insisted, in response to the Commonwealth's position the violation amounted to a forfeiture of his right to personally cross-examine J.E., that he never threatened J.E when he contacted her. Nevertheless, appellant does not dispute that he beseeched J.E. not to put him in jail for the rest of his life and insisted to her he did not hurt her.[21] Whether or not appellant's improper communications with J.E. might be described as including a "threat," the record would clearly support a finding his purpose was to manipulate J.E. in an attempt to influence her participation in the criminal proceedings against him to his benefit. Moreover, J.E. testified she "felt like [she] was in danger" after being contacted

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[20] As we conclude that appellant's violation of the no-contact order constituted a form of witness intimidation, we disagree with DAP's contention that this out-of-court conduct did not "portend[] future courtroom disruption of orderly trial processes." Amicus Brief at 16. To the contrary, because appellant willfully violated a no-contact order designed to protect from intimidation the very witness appellant sought to cross-examine, the record would support the possibility similar disruptive behavior could occur during trial.

[21] Appellant reportedly stated, in part, "Come on. Why [are] you doing this to me? I didn't hurt you. Please don't put me in jail for life. We can make it right baby[.]" N.T. 6/4/13 at 42.

by appellant. *Id.*at 47. Thus, even if appellant merely attempted to manipulate J.E., which we conclude would itself be enough to subvert or obstruct the truth-determining process, J.E. clearly felt threatened and/or intimidated thereby. Accordingly, we hold the trial court's ruling prohibiting appellant from himself cross-examining J.E. but requiring stand-by counsel to do so, using appellant's own questions, was proper under the facts of this case, which included appellant's deliberate violation of a no-contact order with the Commonwealth's chief witness in an attempt to influence the outcome of the criminal proceedings against him. Appellant's serious and obstructionist misconduct compromised the core truth-determining function of a trial, and he thus forfeited his right to personally cross-examine J.E.[22, 23] We find no constitutional violation and thus affirm the decision of the Superior Court.

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[22] Because we conclude appellant forfeited his right to personally conduct cross-examination of J.E., we need not address appellant's second issue questioning whether, absent waiver or forfeiture, the court's ruling failed to observe the proper role of stand-by counsel set forth in Pa.R.Crim.P. 121(D).

[23] Justice Wecht takes issue with our reliance on *People v. Carson*, 104 P.3d 837 (Cal. 2005), and asserts the record in this matter is insufficient to support a finding of forfeiture under *Carson* in our application of the right-for-any-reason doctrine. Slip Op. at 5 (Wecht, J. concurring and dissenting). To be sure, *Carson* instructs the record in these matters should answer several important questions; "[m]ost critically a reviewing court will need to know the precise misconduct on which the trial court based the decision to terminate." *Id.* at 842. *Carson* additionally suggests that, for purposes of appellate review in a case involving out-of-court misconduct, a trial court should preserve a chronology of events because "it is incumbent on the trial court to document its decision to terminate self-representation with some evidence reasonably supporting a finding that the defendant's obstructive behavior seriously threatens the core integrity of the trial." *Id.* Justice Wecht opines "[t]he record before us informs these questions only glancingly, if at all, and only to the extent we choose to make our own factual determinations where the trial court did not." Slip Op. at 5 (Wecht, J. concurring and dissenting). Notwithstanding Justice Wecht's interpretation of the record, it is clear the trial court repeatedly found that appellant's behavior in contacting the victim in violation of a court order justified partial forfeiture. Indeed, the court made that ruling in open court twice, once on June 4, 2013 with respect to appellant's cross-examining the witness at the bail revocation hearing,

Order affirmed.

Justices Baer and Donohue join the Opinion Announcing Judgment of the Court.

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and again on July 3, 2013, with respect to his cross-examining the witness at trial. On both occasions, the court explained the rationale for its ruling, and in both instances, the court's ruling was made in response to the Commonwealth's motions requesting partial forfeiture. Justice Wecht nevertheless suggests we should not consider forfeiture as a basis on which to resolve this appeal because we accepted petitioner's phrasing of the issues as asking whether the decisions below were correct **absent** waiver or forfeiture. Although we accepted the questions as phrased by appellant — which included his self-serving representations that he neither waived nor forfeited his right — we are not obligated to accept those representations as true, particularly when they are not supported by the record or when, as here, a party's argument diverges from his own issue statement. In the present appeal, appellant concedes the right to represent himself is not absolute, but he argues he did not, by his conduct, forfeit the right. DAP, on behalf of appellant, agrees and devotes an entire section of its brief to that precise issue. Our review of the record shows, as Chief Justice Saylor saliently acknowledges in concurrence, the "forfeiture dynamic" played a "prominent role" in this case. Slip Op. at 2 (Saylor, C.J. concurring). The record is replete with references to potential partial forfeiture. The trial court clearly expressed to appellant, "[y]our Sixth Amendment right to represent yourself is not absolute[,]" and explained the grounds for its ruling "hinged largely" upon appellant's behavior. N.T. 7/8/13 at 19. While the tribunals below also considered potential emotional trauma to the victim-witness if personally questioned by appellant, the foundation of the trial court's restriction was always primarily based on appellant's out-of-court misconduct and flouting of a court order mandating he have no contact with the victim. Not only does the record properly support our consideration of partial forfeiture as an alternative basis to resolve the issue raised, our determination of partial forfeiture is supported by the evidence of record. The trial court clearly documented its decision to partially terminate self-representation with evidence reasonably supporting a finding that appellant's obstructive behavior threatened the integrity of the trial, and the court properly held hearings and solicited the parties' respective arguments with respect thereto. *See Carson*, 104 P.3d at 842. At these hearings, appellant represented himself, and in the face of the Commonwealth's forfeiture motions, argued his self-representation right was absolute, maintaining he did not threaten the victim in any event. The court disagreed. We hold the totality of the circumstances warranted the court's exercise of its discretion to partially limit appellant's self-representation right due to his out-of-court behavior. *See id.* at 843. Finally, because our decision in this matter to affirm on other grounds criticizes the Superior Court's rationale, *see supra* at 19, n.18, our decision does not have the same practical effect as would a dismissal of the appeal as improvidently granted, as Justice Wecht suggests. *See* Slip op. at 15 (Wecht, J. concurring and dissenting).

Chief Justice Saylor and Justice Todd and Mundy file concurring opinions.

Justice Wecht files a concurring and dissenting opinion.