SUFFOLK ACADEMY OF LAW
The Educational Arm of the Suffolk County Bar Association
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TRIAL PRACTICUM SERIES: LECTURE 3
Direct Examination

FACULTY
Hon. Barbara R. Kahn
Steve Wilutis, Esq.
Mike Colavecchio, Esq.

March 20, 2018
Suffolk County Bar Center, NY

Trial Practicum Lecture #3 – Direct Examination
March 20, 2018

Agenda

6:00 - 6:40 – Mike Colavecchio, Esq.

6:40 - 7:20 – Steve Wilutis, Esq.

7:20 - 7:30 – Break

7:30 – 8:10 – Hon. Barbara Kahn

8:10 – End – Demonstrations with questions and answers

Michael T. Colavecchio

Partner, Lewis Johs Avallone Aviles, LLP

Mike Colavecchio has represented clients for over twenty-five years in all areas of casualty defense, including medical and other professional malpractice, New York Labor Law, vehicular negligence, premises liability, products liability, municipal liability, defamation and copyright infringement. Mike also represents clients in a variety of commercial litigation matters.

For the past seven years, Mike has been selected for inclusion in Super Lawyers, New York Metro edition, which recognizes the top 5% of lawyers in the New York City Metropolitan area. He has also received a Martindale-Hubbell Peer Review rating of AV Preeminent, the highest possible rating.

A well-respected trial lawyer, Mike has tried in excess of one hundred cases throughout his career and continues to maintain a busy trial schedule. With a consistent history of achieving positive trial results for his clients, he has taken verdicts throughout the New York metropolitan area in all areas of casualty defense. Mike has also successfully represented clients at alternative dispute forums and has defended professional clients before disciplinary bodies. He has also drafted and orally argued numerous appeals before the New York State and federal appellate courts, with a high rate of success.

Mike has been invited to lecture locally and nationally to professional and legal organizations. A frequent contributor to Continuing Legal Education programs for the New York State Bar Association, Suffolk County Bar Association and other entities, Mike has lectured on New York Labor Law (2016), Mediation and Trial Techniques (2015), Medical Malpractice Defense (2009 and 2012), Premises Liability (2015), Trial of Medical Malpractice Cases (2005 and 2012), Trial Basics (2013 and 2017), Examinations of Hostile Witnesses (2013), Law School for Insurance Professionals (2008, 2011, 2012, 2013 and 2016), Trial Techniques in Damages Cases (2005), Products Liability (2004), Ethical Challenges in Settling a Civil Lawsuit (2010), "What's My Case Worth?" (2013), The Importance of the Hiring Process (2013) and Insurance Underwriting (2003). He has also given in-house seminars to insurance and self-insured organizations on a variety of matters.

Mike was admitted to practice law in New York in 1991. He is also admitted in the United States District Courts for the Southern and Eastern Districts of New York and in the United States Court of Appeals for the Second Circuit. He is a member of the New York State Bar Association, the Nassau County Bar Association, the Suffolk County Bar Association and the Nassau-Suffolk Trial Lawyers Association. He currently sits on the Suffolk County Bar Association Judicial Screening Committee. Mike coaches basketball in his community and has been active in a number of local charities.

Mike graduated from Hofstra University School of Law in 1990, where he served as a Law Fellow and as Editor-In-Chief of the Hofstra Property Law Journal. In 1987, he received his Bachelor of Arts Degree in Political Science and History from State University of New York at Buffalo.

Direct Examination

By Michael T. Colavecchio
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Perhaps because it lacks the excitement of a cross-examination, or the chance to preach in a good closing, direct examinations are often overlooked and underrated. But for all the points earned on an opening or closing or cross, the direct exam remains the trial's foundation. To be successful, sufficient time must be spent preparing for and developing a good direct.

PREPARATION OF THE WITNESS

In most instances, the witness on direct examination will be a friendly witness, one you want the jury to see in a positive light. Therefore, thorough preparation of the witness is imperative. The goal is for the witness to be fully prepped without looking rehearsed. Responses need to seem natural and sincere; the time it takes to get a witness sufficiently comfortable to achieve that goal is time well spent, and often the difference between winning and losing.

While the lawyer may be comfortable in the courtroom, the witness is likely appearing outside of their normal environment. The entire process should be explained to the witness so that any concerns are alleviated, and the witness can feel as comfortable as possible. If the witness has not been in the courtroom before, it helps to explain who will be in the courtroom, the role of each person, the expected length of time, the meanings of words used in a courtroom (ie. objection, sustained, overruled), the expected approach of the adversary, and any other

specific information that will comfort the witness. Further, as leading is typically not permitted on direct examination, the witness should be prepared for the questions that will be posed and the expected responses. Additionally, the witness should be made to understand the difference between the direct and the cross-examination, and how to comport himself during cross.

Although every attorney's style is different, a well scripted direct examination may prove extremely beneficial to the witness on direct. The attorney and the witness must be on the same wavelength during questioning, and a scripted examination will help get there. While it is common, and likely important in many instances, to move away from the scripted questions during a direct examination, the witness who knows what the general questions will be will likely testify in a more seamless ad credible manner.

DEVELOPING CREDIBILITY

The direct examination of your own witness gives you an opportunity to allow the witness to be the star. It is natural for a trial lawyer to have a big ego, and it can be difficult to allow someone else to have the spotlight, but it is imperative. Witnesses should be prepared sufficiently so that they understand the questions asked. While you might be able to "think on your feet," witnesses are often very nervous and uncomfortable. Make it easy for them to sound cogent and unrehearsed. It is embarrassing, and confusing to the jury, when an attorney asks his own witness a question and the witness doesn't understand the question. Momentum in the telling of the story can be lost. The attorney must be prepared to bring the witness back when it looks like the examination will be derailed by an anxious or confused witness.

To do that, it is important to gauge the strength of your witness. While it is generally impermissible to lead your own witness during direct examination, some witnesses will need

more prodding than others. The witness who is comfortable speaking in front of the jury, and who you can trust to give a narrative, should be permitted to do so (assuming he court gives permission).

Ultimately, the goal of a good direct examination is to set the foundation upon which the claim (or defense) is based. To do that, the jurors must believe the witness you proffer. No matter how much we tell jurors that they must separate themselves from sympathy, and that whether they like or dislike a party is not relevant, how they see a witness clearly impacts their thoughts. Therefore, the first job in cross examination is to introduce the jurors to the parties or witnesses they heard about in jury selection. The successful lawyer will leave the jurors with a good impression of a witness. How to do that will differ depending on the witness, and therefore the attorney must know his witness sufficiently to determine how to best impress the jurors. For example, the attorney who represents a medical doctor in a malpractice case may want her client to speak at length about a medical issue so the jury feels comfortable with the doctor's level of expertise, not only so they give him credibility on the stand, but so that they will doubt that such a knowledgeable physician could make the mistake of which he is accused. That might mean having the doctor speak directly to the jury or have her come off the stand to refer to diagrams, or perhaps spend a significant amount of time on discussing credentials. But the lawyer must know the witness well enough to decide which is the best approach to impressing the jurors.

TELLING A STORY

Once the witness's credibility and credentials have been established, it is important to "tell a story." Jurors, unlike the lawyers, don't have the benefit of trial notebooks and daily transcripts and years of involvement in the case, so the examination must be presented in a way

that will resonate and be retained. Having the witness tell a good story (with questions in between) is a good way to keep the jurors engaged. The direct examination should address the "Who, What, Where, When, Why and How" questions in a logical sequence that leaves an impression with the jurors. If all the pertinent points are made but the jury cannot follow, nothing is accomplished.

The lawyer must not fall into the trap of becoming too tied to their "script" during the questioning. While preparation of a script might be helpful to the witness, if the witness's answers move away from the script, the lawyer must be listening and be prepared to either bring the witness back to the expected testimony or go down the new path created by the witness. But of the lawyer is so connected to his notes that he fails to listen to answers and doesn't appropriately react to the diversion, his ability to tell a story will be lost.

EXPERT WTINESSES

Commonly expert witnesses, because they appear in court more often than lay witnesses, are comfortable in the courtroom. To the extent possible, it is often wise to allow the expert to give long, narrative answers on direct examination by asking very open-ended questions. This allows the jurors to see that he or she really is an expert, not just a "hired gun." Similarly, if you can have the expert come off the stand and refer to demonstrative evidence (such as blow-ups of medical charts or radiological films), the jury will get an even better impression of the expert.

HOSTILE WITNESSES

Generally, an attorney who calls a witness to the stand is estopped from asking that witness leading questions. There are many situations where it is would not otherwise be wise to lead a witness even if such questioning was permitted; for example, if you want your client to

appear credible before a jury, allowing your client to be the primary story teller may be the best way to do so. However, there are times when an attorney is compelled to call a non-friendly witness because that witness has information helpful to his/her case, or may have signed a document that helps the case, or provided otherwise helpful prior testimony. While there are strategic reasons that an attorney might want to ask non-leading questions of his own client, the opposite holds true when the witness is not motivated to help that attorney.

Obviously, one concern would be that the non-friendly witness will not cooperate with the attorney prior to trial. Without an opportunity to prepare the witness, the attorney loses full insight over how the witness will answer and may not be able to appropriately direct a witness to a desired area of inquiry. Of even greater concern, the witness may not answer the questions appropriately if the attorney is compelled to ask non-leading questions. To gain control and be able to direct the scope of the examination, the attorney may want to ask questions in a cross-examination format. If he/she can do so, the attorney can direct the manner in which the examination will proceed and can prompt the witness to an area when the witness does not understand (or feigns ignorance) what the attorney is seeking. To do so, the attorney should seek permission to treat the witness as "hostile." If successful, the attorney's ability to obtain desired responses will be greatly enhanced, as will her chance of obtaining a favorable verdict.

Hostility can be shown by a witness's status, relationship or conduct. Adverse parties are almost always deemed hostile witnesses: "when an adverse party is called as a witness, it may be assumed that such adverse party is a hostile witness, and, in the discretion of the court, direct examination may assume the nature of cross examination by the use of leading questions." *Fox v. Tedesco*, 15 A.D. 3d 538, 789 N.Y.S.2d 742 (Second Department 2005).

While adverse parties present an easy case, the more difficult may be the nonparty. Nonparty witnesses can be deemed hostile if they exhibit hostile behavior or would be obviously hostile based on their relationship to a party (See *Mogollon v. South African Marine Corp.*, 80 A.D.2d 636, 436 N.Y.S.2d 82 (Second Department 1981) (wife of plaintiff a hostile witness to defendant); *McNulty v. McNulty*, 81 A.D.2d 581, 437 N.Y.S.2d 438 (Second Department 1981) (husband's divorce attorney in subsequent suit by wife deemed hostile witness for wife); *Sugarman v. Doctors Hospital,78 A.D.2d 622, 432 N.Y.S.2d 704*(Second Department 1980) (decedent's family hostile witnesses to defendant in wrongful death action); *Mt. Rade Industries Park, Inc. v. Sate of New York,* 81 A.D.2d 1036, 440 N.Y.S.2d 121 (Fourth Department 1981) (a witness who had a legal dispute with State determined to be hostile when questioned by State).

HON. BARBARA KAHN

Justice Barbara Kahn has been a member of the Judiciary since 1996, sitting in the County Court for the last 12 years, initially as the first (and only) woman to be elected to the County Court and currently as an Acting Supreme Court Justice.

Since its inception eleven years ago, Justice Kahn has been the presiding judge of the Sex Offense Court for Suffolk County. In addition to the duties of a County Court felony trial part, Justice Kahn supervises almost 300 probationers with sex offender conditions of probation.

Justice Kahn has given presentations concerning the procedures and practices of the Sex Offense Court to the Suffolk County Bar Association, the Suffolk County Criminal Bar Association, Touro Law School, the 18-b Assigned Counsel Defender Plan, the National Association of Drug Court Professionals, the New York State Association for the Treatment of Sexual Abusers, the Family Violence Task Force and the American Probation and Parole Association.

Judges from Australia, British Columbia and Texas as well as officials from the Federal Department of Probation have all visited with Justice Kahn to observe the operations of this special court.

Justice Kahn has been an invited participant in the National Sex Offender Research and Practice forum sponsored by the U.S. Department of Justice as well as an invited participant in the Sentencing and Management of Sex Offenders Conferences also sponsored by the U.S. Department of Justice. She was selected to attend a Faculty Development Workshop at the National Judicial College in Nevada and was a selected participant and graduate of the Computer Forensics in Court for Judges Program at the National Computer Forensics Institute sponsored by the United States Secret Service.

In 2012 Justice Kahn was honored by the Criminal Bar Association as the Judge of the Year.

Justice Kahn previously served as a Court Attorney in the Law Department of the Supreme Court of Queens County and was the first woman to hold that position in the City of New York.

Justice Kahn is an honors graduate of Queens College of the City University of New York and obtained her law degree from Boston University School of Law.

SCBA Trial Practicum- March 20, 2018

Direct Examination – View from the Bench

Hon. Barbara Kahn

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II. Child Witness

A. CPL §60.20: Evidence given by Children

1. Case Law: People v. Byrnes, 33 NY2d 343

People v. Smith, 104 AD2d 160

People v. Martina, 48 AD3d 1271

2. NYLJ Article: Capacity of Infants to Testify [9/7/17]

B. Executive Law §642-a: Fair Treatment of Child Victims as Witnesses

1. Case Law: People v. Tohom, 109 AD3d 253

C. CPL Article 65: Use of Closed Circuit TV for Certain Child Witnesses

1. Case Law: People v. Beltran, 110 AD3d 153

D. Presence of Victim Advocate during Trial

1. Case Law: People v. Tumminello, 53 Misc3d 34

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*** This section is current through 2013 released chapters 1-340 ***

CRIMINAL PROCEDURE LAW
PART ONE. GENERAL PROVISIONS
TITLE D. RULES OF EVIDENCE, STANDARDS OF PROOF AND RELATED MATTERS
ARTICLE 60. RULES OF EVIDENCE AND RELATED MATTERS

Go to the New York Code Archive Directory

NY CLS CPL § 60.20 (2013)

§ 60.20. Rules of evidence; testimonial capacity; evidence given by children

1. Any person may be a witness in a criminal proceeding unless the court finds that, by reason of infancy or mental disease or defect, he does not possess sufficient intelligence or capacity to justify the reception of his evidence.

2. Every witness more than nine years old may testify only under oath unless the court is satisfied that such witness cannot, as a result of mental disease or defect, understand the nature of an oath. A witness less than nine years old may not testify under oath unless the court is satisfied that he or she understands the nature of an oath. If [fig 1] under either of the above provisions, a witness is deemed to be ineligible to testify under oath, the witness may nevertheless be permitted to give unsworn evidence if the court is satisfied that the witness possesses sufficient intelligence and capacity to justify the reception thereof. A witness understands the nature of an oath if he or she appreciates the difference between truth and falsehood, the necessity for telling the truth, and the fact that a witness who testifies falsely may be punished.

3. A defendant may not be convicted of an offense solely upon unsworn evidence given pursuant to subdivision two.

New York Law Journal

Outside Counsel

Capacity of Infants to Testify

Andrea M. Alonso and Kevin G. Faley, New York Law Journal

September 7, 2017

In New York state, there is no CPLR section regarding the admissibility of testimony of a child witness. Instead, civil cases have adopted the standard created in criminal cases. The rule originates in NY CLS CPL §60.20 which creates a presumption that witnesses under nine-years of age are incompetent to testify. (Although most courts follow the rule that only those under nine are presumed incompetent, two judges in Supreme Court, Kings County—Justice Francois Rivera and Justice Martin Solomon—apply this presumption to anyone 17 years of age or younger.)

This presumption must be rebutted before an infant can give sworn deposition testimony or before an infant can testify at trial. It is adequately rebutted when a trial court conducts a swearability hearing, a voir dire, of the infant and determines that the witness is competent to testify.

It is important that the testimony be sworn as the general rule is "an unsworn statement is not competent evidence, and therefore, is deemed insufficient to either demonstrate entitlement to summary judgment, or to raise a triable issue of fact ... ." *Medina v. City of New York*, 19 Misc. 3d 1121(A) (N.Y. Sup. Ct. April 18, 2008).

'Carrasquillo'

Carrasquillo v. City of New York is a civil case that adopted the criminal presumption. In *Carrasquillo*, plaintiff mother sought to bar her eight-year-old daughter's pretrial deposition testimony at trial. Id. Defendants conducted a deposition of the daughter. However, plaintiffs contended that infant should be deemed unsworn and her testimony precluded.

In regards to the assertion that the daughter was too young to testify, the court stated that "[there] is no precise age at which an infant is competent to testify under oath." Id. Instead the test is an individual one where the party seeking to admit the testimony has to overcome the presumption of incompetence set out in CPL §60.20. In order to do so, the infant has to show sufficient intelligence and capacity and have some conception of the obligations of an oath and the consequences of giving false testimony. That duty to determine the witness's

cmpetency falls to the trial judge and "failure to conduct a preliminary examination is error." Id. Accordingly, the competency determination must be made judicially as a matter of law.

The court did not permit the use of the deposition as evidence because the examination as to plaintiff-daughter's competence was made by a notary public at the time of the deposition instead of by a judge. The court does not allow notaries public to make such determinations for two reasons. The first is that notaries public have "no authority to make the inquiry and determination of the infant's competence." Second, a judge is necessary to ensure there are safeguards for the infant's protection. Id.

The court explained that such testimony would be deemed unsworn as the determination of competence had to occur *before* the oath was taken and not after it was given by the notary public. The court only allowed the deposition for impeachment purposes of the plaintiff-daughter's other testimony.

'Stickland'

Strickland v. Police Athletic League, 22 Misc. 3d 1107(A) (N.Y. Sup. Ct. Jan. 12, 2009), presented similar issues. In *Strickland*, a child attended a movie with a group of children and afterwards a teenage boy pushed the child causing the child to fall and suffer facial injuries. Plaintiff-child had an oath administered to him by a notary public following a voir dire assessing his competence.

The court, in finding that the deposition was invalid, noted that in the plaintiff's voir dire, he responded to questions with mostly one word answers such as "yes," "no," and "huh." The court also noted that the infant-plaintiff was sworn in by a notary public, his swearing in was not on the record, and there were no questions to determine if he understood the consequences of lying under oath. The court said that under these circumstances the deposition under oath could not be sustained and was deemed to be unsworn.

In *Quinones v. Caballero*, 10 Misc. 3d 486 (N.Y. Sup. Ct. June 15, 2005), the court addressed the question of whether it is necessary for the court itself to examine a minor independently if a case relying on a minor's sworn deposition is before the court on a summary judgment motion. In *Quinones*, the infant-plaintiff slipped and fell on defendant's sidewalk At her deposition, her answers indicated that it was likely defendants had properly cleared the sidewalk of snow where she fell. Defendants moved for summary judgment based on this testimony.

The court explained that plaintiff's counsel did not raise any competency issues in the motion papers as counsel needed to rely on the same deposition testimony to prove the case. Therefore, the court ruled that if a party against whom a minor's testimony will be used does not object to it, the court may rely on the account *without* the infant's further appearance and examination and can assess competence from the record itself. The court found the infant-plaintiff to be competent after reviewing the deposition and granted the summary judgment motion.

'Nisoff'

Criminal cases are also illustrative of the determination a court makes in weighing whether to accept a child's testimony. In *People v. Nisoff*, a defendant had been convicted of public lewdness in part because of the testimony of two witnesses, a sworn 10-year-old (an older version of §60.20 applied to those under 12 years) and an unsworn eight-year-old girl. *People v. Nisoff*, 36 N.Y.2d 560 (N.Y. 1975). Defendant argued that the court abused its discretion in allowing the 10-year-old's testimony and that the eight-year-old did not possess sufficient intelligence and capacity to testify as a matter of law.

In weighing these claims, the court explained that, with respect to the nature of an oath, the 10-year-old indicated that an oath meant "to swear to tell the truth." The examination also revealed that she had a high scholastic average, knew the difference between right and wrong, knew that telling a lie was wrong and that lying was a sin. These elements weighed in favor of the 10-year-old and satisfied the trial justice that she should be allowed to testify.

In contrast, although the eight-year-old was able to define an oath, she did not fully understand its complete nature. On the other hand, she was able to differentiate between right and wrong and knew that lying was a sin. The trial court weighed these competing factors and was not satisfied that she had sufficient intelligence to testify. As such, the 10-year-old was permitted to give sworn testimony while the eight-year-old was only permitted to give her testimony unsworn.

The Court of Appeals noted that the tests given to potential child witnesses are "individualistic in nature." *People v. Nisoff*, 36 N.Y.2d 560 (N.Y. 1975). The court noted that there is no set requirement that will absolutely make a child witness eligible versus disqualification. The trial court has a "degree of latitude" in making this determination and a court will not normally discount a trial court's determination of competence. Id. The Court of Appeals ruled that the trial judge did not abuse its discretion in allowing the 10-year-old to give sworn testimony or in letting the 8-year-old give unsworn testimony.

'Morales'

If *Nisoff* demonstrated the nature of the discretion of the trial judge's power in these determinations, then *People v. Morales* addresses the inquiries that should be guiding that determination. *People v. Morales*, 80 N.Y.2d 450 (N.Y. Dec. 17, 1992)

In *Morales*, defendant was indicted for crimes he committed against his stepchildren. One involved an infant who required a competency assessment. The court explained that the examination typically involves the following inquiries: "does the child know the difference between a lie and the truth; does the child know the meaning of an oath; does the child understand what can happen if she tells a lie; and does the child have the ability to recall and relate prior events." Id. The court explained that a child should generally be able to meet these inquiries in order to be deemed competent.

Conclusion

In New York, the method for assessing a child witness's competency is the same in both civil and criminal cases. Prior to the administration of an oath, the court will conduct a hearing to determine if the child is competent to give sworn testimony. The court will make this

determination sui generis and will seek to determine if the child understands the consequences of lying and telling the truth as well as a general concept of what an oath is. If these standards are not met, and a child does not meet a trial judge's competency standards or if the hearing is conducted by an unauthorized person, the court will not allow the testimony except for impeachment purposes.

Andrea M. Alonso and Kevin G. Faley are partners in the firm of Morris Duffy Alonso & Faley. Maximilian Rodriguez, a paralegal, assisted in the preparation of this article.

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family) refuses or is unable to cooperate or his, her or their whereabouts are unknown,".

L.2006, c. 193, § 2, provides:

"This act shall take effect on the same date and in the same manner as chapter 186 of the laws of 2005, takes effect [L.2005, c. 186, eff. Sept. 1, 2005]."

L.2005, c. 186 legislation

Subd. 1. L.2005, c. 186, § 2, in the first sentence, substituted "shall" for "should" in three instances.

L.1991, c. 301 legislation

Subd. 2-a. L.1991, c. 301, § 1, eff. April 1, 1992, designated existing text as par. (a) and added par. (b).

Former Sections

Former § 642 added L.1967, c. 167; amended L.1968, c. 431; L.1969, c. 490, § 1, related to general structure of crime control council, and was repealed by L.1971, c. 134, § 1, eff. April 14, 1971.

Cross References

Definitions—
Incest, see Penal Law § 255.25.
Police department, see Executive Law § 837-c.
Presentment agency, see Family Court Act § 301.2.
Sex offenses, see Penal Law § 130.00.
Pre-sentence reports, confidentiality, see CPL § 390.50.

New York Codes, Rules and Regulations

Agency responsibilities, see 9 NYCRR 6170.4.
Standards for treatment of victims and witnesses, see 9 NYCRR 6170.3.
Victim assistance education and training, see 9 NYCRR 6170.5.

Rules of the City of New York

Return of evidence, see 38 RCNY §§ 12-02 to 12-06 and 12-16.

Law Review and Journal Commentaries

Restitution, rehabilitation, prevention, and transformation: Victim-offender mediation for first-time non-violent youthful offenders. Nancy Lucas, 29 Hofstra L.Rev. 1365 (2001).

Library References

Criminal Law ⇐1220.
Westlaw Topic No. 110.
C.J.S. Criminal Law §§ 2462 to 2510.

Research References

Encyclopedias

NY Jur. 2d, State of New York § 105, Fair Treatment Standards for Crime Victims.

Forms

Carmody-Wait, 2d § 203:40, Disclosure of Victim Impact Statement.

§ 642-a. Fair treatment of child victims as witnesses

To the extent permitted by law, criminal justice agencies, crime victim-related agencies, social services agencies and the courts shall

L.1991, c. 301 legislation

Subd. 2-a. L.1991, c. 301, § 1, eff. April 1, 1992, designated existing text as par. (a) and added par. (b).

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Former § 642 added L.1967, c. 167; amended L.1968, c. 431; L.1969, c. 490, § 1, related to general structure of crime control council, and was repealed by L.1971, c. 134, § 1, eff. April 14, 1971.

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Fair Treatment Standards for Crime

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comply with the following guidelines in their treatment of child victims:

1. To minimize the number of times a child victim is called upon to recite the events of the case and to foster a feeling of trust and confidence in the child victim, whenever practicable and where one exists, a multi-disciplinary team as established pursuant to subdivision six of section four hundred twenty-three of the social services law and/or a child advocacy center shall be used for the investigation and prosecution of child abuse cases involving abuse of a child, as described in paragraph (i), (ii) or (iii) of subdivision (e) of section one thousand twelve of the family court act, sexual abuse of a child or the death of a child.

2. Whenever practicable, the same prosecutor should handle all aspects of a case involving an alleged child victim.

3. To minimize the time during which a child victim must endure the stress of his involvement in the proceedings, the court should take appropriate action to ensure a speedy trial in all proceedings involving an alleged child victim. In ruling on any motion or request for a delay or continuance of a proceeding involving an alleged child victim, the court should consider and give weight to any potential adverse impact the delay or continuance may have on the well-being of the child.

4. The judge presiding should be sensitive to the psychological and emotional stress a child witness may undergo when testifying.

5. In accordance with the provisions of article sixty-five of the criminal procedure law, when appropriate, a child witness as defined in subdivision one of section 65.00 of such law should be permitted to testify via live, two-way closed-circuit television.

6. In accordance with the provisions of section 190.32 of the criminal procedure law, a person supportive of the "child witness" or "special witness" as defined in such section should be permitted to be present and accessible to a child witness at all times during his testimony, although the person supportive of the child witness should not be permitted to influence the child's testimony.

7. A child witness should be permitted in the discretion of the court to use anatomically correct dolls and drawings during his testimony.

(Added L.1986, c. 263, § 8. Amended L.2006, c. 517, § 3, eff. Feb. 12, 2007; L.2008, c. 574, § 3, eff. March 24, 2009.)

Historical and Statutory Notes

L.2008, c. 574 legislation

Section head. L.2008, c. 574, § 3, substituted "Fair" for "Guidelines for fair".

Subd. 1. L.2008, c. 574, § 3, rewrote subd. 1, which had read:

"To minimize the number of times a child victim is called upon to recite the events of the case and to foster a feeling of trust and confidence in the child victim, whenever practicable, a multi-disciplinary team and/or a child advocacy center involving a prosecutor, law enforcement agency personnel, and social services agency personnel shall be used for the investigation and prosecution of child abuse cases."

L.2006, c. 517 legislation

Subd. 1. L.2006, c. 517, § 3, inserted "and/or a child advocacy center" after "a multi-disciplinary team"; and substituted "personnel shall be used" for "personnel should be used".

L.1986, c. 263 legislation

L.1986, c. 263, § 1, eff. Jan. 1, 1987, provides:

"The legislature recognizes that a significant number of children under sixteen years of age are victimized by crime, and that these children are particularly vulnerable to criminal attacks by adults, including family members. The legislature further recognizes that children who are called upon to testify as witnesses in criminal proceedings involving crimes allegedly committed against them may suffer additional trauma. The legislature finds and declares that special protection, consideration and assistance must be provided child victims and witnesses to minimize such trauma, and any ensuing problems occurring later in life that such trauma may cause.

"This act [adding this section and amending sections 621, 624, 626, 627, 631–a, and 642] accords child victims and witnesses additional rights, protections and services during their involvement with the criminal justice system. The crime victims board is required to advocate for child victims and to ensure that the necessary assistance is provided; the crime victims board is also authorized to promulgate rules and regulations for awarding grants to child victims and their families; and the division of criminal justice services is mandated to search for more effective methods to combat and reduce the incidence of such crimes. The legislature urges the news media to use restraint in revealing the identity of child victims and witnesses, especially in sensitive cases."

Cross References

Grand jury, videotaped examination, see CPL § 190.32.

Library References

Criminal Law ⇐1220.

Witnesses ⇐40.

Westlaw Topic Nos. 110, 410.

C.J.S. Criminal Law §§ 2462 to 2510.

C.J.S. Witnesses §§ 128 to 142.

Research References

Encyclopedias

NY Jur. 2d, State of New York § 105, Fair Treatment Standards for Crime Victims.

Treatises and Practice Aids

New York Practice, New York Family Court Practice § 2:80, Statutory Rules of Evidence—Expert Testimony Regarding Sexual Abuse Victims.

People v Tohom
2013 NY Slip Op 05234
Decided on July 10, 2013
Appellate Division, Second Department
Sgroi, J.
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Decided on July 10, 2013

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT
WILLIAM F. MASTRO, J.P.
THOMAS A. DICKERSON
SANDRA L. SGROI
SYLVIA HINDS-RADIX, JJ.

2011-07111
(Ind. No. 149/10)

[*1]The People of the State of New York, respondent,

v

Victor Tohom, appellant.

APPEAL by the defendant from a judgment of the County Court (Stephen L. Greller, J.), rendered July 28, 2011, in Dutchess County, convicting him of predatory sexual assault against a child and endangering the welfare of a child, upon a jury verdict, and imposing sentence. Thomas N.N. Angell, Poughkeepsie, N.Y. (Steven Levine of counsel), for appellant.

William V. Grady, District Attorney, Poughkeepsie, N.Y.
(Kirsten A. Rappleyea of counsel), for respondent.

OPINION & ORDER

SGROI, J."[Dogs] are such agreeable friends—they ask no questions—they pass no criticisms" (George Eliot, *Scenes of Clerical Life* [1857]), but do they belong in the courtroom? On this appeal, we examine the question of whether the courts of this State should permit the presence of a therapeutic "comfort dog" in a trial setting when the court determines that the animal may provide emotional support for a testifying crime victim. We conclude that this question should be answered in the affirmative.

Background/Pretrial Motion

Pursuant to a Dutchess County indictment dated December 16, 2010, the defendant was accused of committing the crimes of predatory sexual assault against a child (Penal Law § 130.96), a class A-II felony, and endangering the welfare of a child (Penal Law § 260.10), a class A misdemeanor. Specifically, it was alleged that between the summer of 2006 and November 2010, the defendant engaged in multiple acts of sexual misconduct, including frequent sexual intercourse, with his daughter (hereinafter J), who was under the age of 18 years, having been born in 1995. It was further alleged that, as a result of the defendant's misconduct, the victim twice became pregnant, and that on both occasions the defendant arranged for her to undergo an abortion.

By notice of motion dated May 12, 2011, the People sought to allow "Rose," a Golden Retriever therapy assistance animal, or "comfort dog," to accompany J on the witness stand while she testified at the defendant's trial. In support of the motion, the People argued that Rose had proven useful during J's interviews and therapy sessions because the presence of the dog made J more at ease and allowed her to become "more verbal." More importantly, J had expressed anxiety about having to testify and be cross-examined at trial regarding the details of the alleged abuse, and J's therapist indicated that Rose's presence would help to alleviate the apprehension, as well as the psychological and emotional trauma that such testimony might engender.

The People acknowledged that there was "no case law or statutory authority in New York for specifically allowing an assistance dog to accompany a witness to the stand, however, there was precedent for allowing a child witness to have a comfort item (e.g., a

teddy bear) while testifying." The People argued that J qualified as a "special witness" under the Criminal Procedure [*2]Law, and that support for allowing Rose to be present with J while she testified could be found in Executive Law § 642-a, which allows for a "person supportive of [a] special witness'" to be "present and accessible" during the testimony of the witness.

In opposition, the defendant argued, inter alia, that Rose's presence would "clearly prejudice the jury against" him. More specifically, the defendant maintained that the dog's presence would convey to the jury that the witness is under stress as a result of testifying about the subject events, and that her stress resulted from "telling the truth." The defendant further argued that the jury would be more "sympathetic" to J if Rose were present, and that cases involving therapy dogs "overwhelmingly" involve preteen witnesses, whereas, at the time of trial, J was 15 years old. Thus, the defendant concluded that J should not be afforded the requested accommodation when she testified at trial.

The County Court scheduled a hearing on the issue of whether Rose should be permitted to accompany J and stay beside her as she testified. However, the hearing was not a scientific-evidence hearing scheduled in accordance with the dictates of *Frye v United States* (293 F 1013 [Ct App DC]) and, notably, the defendant never requested a *Frye* hearing.

At the hearing, testimony was adduced from Lori Stella, an employee of the Dutchess County Office of Child and Family Services, who stated that her title was "licensed Master of Social Work," and that she had four years of experience working with children in the foster-care system. Stella explained that J spent the first 10 years of her life living in Guatemala, where she was raised by her maternal grandparents, that she then came to the United States at the defendant's request, that the abuse began soon thereafter, and that J had virtually no contact with her mother. Stella had been working with J since August 2010, and had seen her professionally about once per week since that time. According to Stella, J had been diagnosed by a psychiatrist with post-traumatic stress disorder as a result of the sexual abuse perpetrated upon her by the defendant. Stella also stated that J was "unable to express her emotions"; that she did not want to discuss the abuse; and that she had trouble sleeping at night. Stella observed that, during J's therapy sessions, "you can visibly see the anxiety; [J] will normally be pulling at her sleeves and not able to sit still [or] make eye contact." Stella further testified that she had utilized Rose during at least three 30-45 minute therapy sessions with J, and that the use of the dog was recommended by Stella's supervisor. Stella stated that when Rose was

present, "J is a lot more verbal, just in general, about her day, her comings and goings." When Stella discussed the fact that J was to testify at trial, and would then see and confront the defendant again after having been away from him for over one year, J "started to experience some anxiety." In particular, Stella explained that J was worried and did not feel safe because of "the way that her family members have made her feel about this situation[,]" as if she were a scapegoat. However, when Rose "placed her head on J's lap, and J began to pet her, [J] was better able to talk about [how] she felt and how she would feel safer if Rose was present with her in the courtroom."

Stella also testified that having J testify in open court about the abuse would be tantamount to "retraumatizing her and causing her to experience post-traumatic stress disorder symptoms and possibly increase those symptoms." In fact, Stella noted that, "even in therapy when J is very upset about something, she completely shuts down." In Stella's opinion, Rose's presence with J while she testified "would have a soothing impact on [J]"; would allow J to "be able to better express herself verbally"; and would "decrease her levels of physiological stress." Stella stated that it is easier for J to talk about matters "[w]hen she maintains her composure."

At the conclusion of Stella's examination and cross-examination, the People argued that Rose should be permitted to accompany J to the stand, explaining that "if Rose senses J's anxiety [she] will [simply] sit up and put her head on J's lap." Indeed, Rose had been trained since the age of eight weeks "to sense stress and anxiety and act in such a way to help reduce that" by raising herself up and offering herself to the person to be petted. The People also noted that the court could provide instructions to the jury with regard to the dog. The defendant requested that the court deny the People's motion and instead allow Stella to be present "anywhere in the courtroom, except . . . directly behind [the witness] at the stand."

The County Court then observed that if Stella were to sit in the back of the courtroom, J would not see her, but that if Stella were to sit near the front, "there's a far greater chance that a person can be deemed to be influencing the child's testimony than the dog, who can't speak, who can't speak to the child, [and] the child can't speak back to the dog." The court determined that Stella's presence near J could lead the witness "to inadvertently look towards her therapist for support and that could be deemed by the jury as looking for answers, and be [*3]misinterpreted that she's afraid to answer without checking with her therapist first, or that the therapist is influencing what she's about to say." The court found that "there's a far lesser

chance of that happening with the dog, which has been recognized in the case law."

The County Court's Decision

In an order dated June 1, 2011, the County Court granted the People's motion. The court concluded, inter alia, that Executive Law § 642-a, "which establishes guidelines for the fair treatment of *child victims* as witnesses[,]' is applicable to the 15 year-old victim in this case" since the intent of that law "is to protect children under 16 years of age who are victimized by crime" (emphasis added). The court also found that J's trial testimony was "likely to cause severe emotional, mental and psychological stress," which "necessitates the consideration of procedures to protect [her] mental and emotional well-being while testifying." However, the court also stated that it did "not take the defendant's argument lightly that to permit Rose to accompany the victim while she is testifying may be prejudicial." Accordingly, although the court granted the People's request to allow the comfort dog to accompany J during her testimony, pursuant to Executive Law § 642-a(4), it noted that "[w]ith an appropriately fashioned instruction to the jury, any possible prejudice will be minimized, if not eliminated [,]" and "in this regard [defense counsel is invited] to prepare proposed limiting and curative instructions [which], if appropriate . . . will be adopted by the court."

Trial/Sentence/Motion to Vacate Conviction

On June 2, 2011, the defendant proceeded to a jury trial before the County Court. Before J testified, the court instructed the jury as follows:

> "Ladies and gentlemen, the next witness is [J] who is obviously sitting in the jury box. As you might recall, I previously spoke to you about the companion animal that's with her. As I indicated before and I reiterate to you now, during the testimony of [J] she will be accompanied by a companion dog. The decision to allow this was one the court made and you may not speculate in any way as to why that decision was made. You must not draw any inference either favorably or negatively from either side because of the dog's presence. You must not permit sympathy for any party to enter into your considerations as you listen to this testimony, and this is especially so with an outside factor such as a companion dog permitted to be present in the courtroom. Each witness's testimony must be evaluated based upon the instructions I give you during my charge and on nothing more."

The trial transcript reveals no other mention of Rose's presence during J's testimony or at any other point during the rest of the trial. The County Court repeated the above comments regarding the presence of the dog in its instructions to the jury, given prior to deliberation.

At the conclusion of the trial, the jury returned a verdict convicting the defendant of predatory sexual assault against a child and endangering the welfare of a child. On July 28, 2011, the defendant was sentenced to an indeterminate term of imprisonment of 25 years to life on his conviction of the count of predatory sexual assault against a child and a definite sentence of 1 year of incarceration on his conviction of the count of endangering the welfare of a child, to run concurrently with each other.

The defendant moved, pursuant to CPL 330.30(1), to set aside the verdict, arguing, inter alia, that Rose's presence during J's testimony deprived him of a fair trial, and violated his right to confront and cross-examine witnesses against him. The defendant also argued, among other things, that Rose's presence in the courtroom was not authorized under the Executive Law, and that the court should have conducted a *Frye* hearing on the matter.

In an order dated July 27, 2011, the County Court denied the motion to set aside the verdict, holding that the defendant "had provided no authoritative proof that [the court's decision regarding Rose's presence] requires reversal as a matter of law as mandated by CPL § 330.30(1) [and that] it is particularly noteworthy that defendant cannot demonstrate actual prejudice." The court also noted that it had offered the defense an opportunity to submit proposed jury charges with regard to the dog's presence at trial, but that the defense declined to submit such proposed charges.

Appellate Arguments

On appeal, the defendant repeats many of the arguments that he made in support of [*4] his motion to set aside the verdict, and he also, inter alia, challenges the County Court's conclusion that CPL 60.42 (the so-called Rape Shield Law) barred him from presenting certain evidence in his defense. With respect to the comfort-dog issue, the defendant argues that Executive Law § 642-a does not specifically permit the presence of a comfort dog at a criminal trial; that the County Court's interpretation of the statute so as to permit such presence improperly invaded the domain of the Legislature; and that the dog's presence violated the defendant's due process right to a fair trial and impaired his right to confront witnesses against him. The defendant also contends, for the first time on appeal, that Executive Law § 642-a is unconstitutional; that the People committed prosecutorial misconduct because they were allegedly instrumental in providing the comfort dog for J's use; and that the court was required to make a finding of necessity before allowing such accommodation.

Discussion

Executive Law § 642-a

The issue of whether a therapeutic comfort dog may be employed at trial is one of first impression in this State. While the issue has been addressed in other jurisdictions, New York courts have not yet had the occasion to analyze this development. It is also true, as the People noted in their moving papers before the County Court, that there is no New York statute which *specifically* states that comfort dogs are permissible in a trial setting. However, the Legislature has generally addressed the treatment of crime victims, and it has endeavored to ensure that those who are victimized by criminal acts are treated fairly during the subsequent judicial process. To that end, in 1984, New York passed article 23 of the Executive Law, entitled "Fair Treatment Standards for Crime Victims." In 1986, the Legislature added a new section to this article, section 642-a, entitled "Fair treatment of child victims as witnesses." The purpose of the legislation was to address the emotional stress which a child victim might endure as a result of his or her necessary involvement with criminal proceedings. As explained above, the statute was relied upon by the People in support of their motion and was found to be applicable herein by the County Court. In our opinion, the County Court's conclusion in this regard was correct and, thus, we reject the defendant's first argument, which was that there is no statutory authority in New York permitting a trial witness to be accompanied by a therapy assistance animal. Specifically, we conclude that Executive Law § 642-a applies in this case.

Executive Law § 642-a states, in pertinent part:

"To the extent permitted by law, . . . the courts shall comply with the following guidelines in their treatment of child victims:

"(4) The judge presiding should be sensitive to the psychological and emotional stress a child witness may undergo when testifying.

"(5) In accordance with the provisions of article sixty-five of the criminal procedure law, when appropriate, a child witness as defined in subdivision one of section 65.00 of such law should be permitted to testify via live, two-way closed circuit television.

"(6) In accordance with the provisions of section 190.32 of the criminal procedure law, a person supportive of the child witness' or special witness' as defined in such section should be permitted to be present and accessible to the child witness at all

> times during his testimony, although the person supportive of the child witness should not be permitted to influence the child's testimony."

CPL 190.32(1)(a) defines "Child witness" as:

> "a person twelve years old or less whom the people intend to call as witness in a grand jury proceeding to give evidence concerning any crime [defined in article 130 or 260 or section 255.25, 255.26 or 225.27 of the penal law] of which the person was a victim."

CPL 190.32(1)(b)(ii) defines "Special witness" as: [*5]

> "a person whom the People intend to call as a witness in a grand jury proceeding and who is [m]ore than twelve years old and who is likely to suffer very severe emotional or mental stress if required to testify in person concerning any crime [defined in article 130 or 260 or section 255.25, 255.26 or 225.27 of the penal law] of which the person was a victim."

CPL 65.00 defines "child witness" as:

> "a person fourteen years old or less who is or will be called to testify in a criminal proceeding, other than a grand jury proceeding, concerning an offense [defined in article 130 or 260 or section 255.25 of the penal law] which is the subject of such criminal proceeding."

Insofar as Executive Law § 642-a defines the terms "child witness" and "special witness," it does so only by reference to CPL 190.32, a provision which applies *only in the context of grand jury proceedings*. In addition, insofar as Executive Law § 642-a defines the term "child witness" *in the context of a trial setting*, as a person 14 years old or less, it defines that term, by reference to CPL 65.00, only for the purpose of determining whether the witness can testify by closed-circuit television.

Executive Law § 642-a does not define the term "child witness" in the context presented at bar, to wit, where the witness is testifying in person at the trial of the defendant accused of victimizing that witness. Even more significantly, for purposes of the issue on appeal, Executive Law § 642-a(4), the subdivision of the statute that is the most all-inclusive, does not separately define the term child witness. Nor does Executive Law § 642-a define the term "child victim," which is used both in the statute's preface, as well as in the first three subdivisions thereof. Additionally, as noted by the County Court, the statute employs the

phrases "child victim" and "child witness" somewhat interchangeably and, arguably, uses the terms in reference to the same individual.

Given the foregoing observations, it is not readily discernible from the language of Executive Law § 642-a whether its provisions were meant to be applicable to the present situation, which involves a witness who was 15 years old at time of trial. Accordingly, under such circumstances, examination of the legislative intent is in order.

As stated by the Court of Appeals in *People v White* (73 NY2d 468, 473-474, *cert denied* 495 US 859):

> "The controlling principle in interpreting statutes is the legislative intent (*Ferres v City of New Rochelle*, 68 NY2d 446, 451; *Matter of Albano v Kirby*, 36 NY2d 526, 529-530; *Matter of Petterson v Daystrom Corp.*, 17 NY2d 32, 38). Obviously, evidence of it is first sought in the words the Legislature has used (*Sega v State of New York*, 60 NY2d 183, 191; *Riegert Apts. Corp. v Planning Bd.*, 57 NY2d 206, 209; *People v Graham*, 55 NY2d 144, 151). But we may not stop there; the spirit and purpose of the act and the objects to be accomplished must also be considered (*New York State Bankers Assn. v Albright*, 38 NY2d 430, 436; *Ferres v City of New Rochelle*, supra, at 446; *Uniformed Firefighters Assn. v Beekman*, 52 NY2d 463, 471)."

In the case at bar, examination of the legislative intent behind the passage of Executive Law § 642-a is illuminating, and supports the conclusion that the statute was specifically meant to encompass a child victim who must bear in-person witness against an individual accused of his or her victimization. In particular, the Legislature made the following statement in connection with the passage of Executive Law § 642-a:

> "The legislature recognizes that a significant number of children under sixteen years of age are victimized by crime, and that these children are particularly vulnerable to criminal attacks by adults, including family members. The legislature further recognizes that children who are called upon to testify as witnesses in criminal [*6]proceedings involving crimes allegedly committed against them may suffer additional trauma. The legislature finds and declares that special protection, consideration and assistance must be provided child victims and witnesses to minimize such trauma, and any ensuing problems occurring later in life that such trauma may cause.
>
> "This act [adding § 642-a and amending §§ 621, 624, 626, 627, 631-a, and 642] accords child victims and witnesses additional rights, protections and services during their involvement with the criminal justice system" (L 1986, ch 263).

Moreover, review of other legislative material that was generated attendant to the passage of Executive Law § 642-a clearly reveals that the statute was intended to cover "child victims and witnesses" who were under the age of sixteen years (Bill Jacket, L 1986, ch 263).

It cannot be disputed that, at least in a colloquial sense, J was a child victim, inasmuch as the criminal acts committed against her took place when she was between the ages of 11 and 15 years. Given this fact, and in light of the above expression of intent by the Legislature indicating that it desired to afford special protection to "children under sixteen years of age [who] are victimized by crime" (L 1986, ch 263) and who are called upon to testify, the County Court properly concluded that J came within the purview of Executive Law § 642-a. In particular, the court properly relied on subdivision (4) of the statute, which, as noted, simply states: "[t]he judge presiding should be sensitive to the psychological and emotional stress a *child witness* may undergo when testifying" (emphasis added).

Further, there is precedent for interpreting Executive Law § 642-a(4) to permit a child witness to hold a "comfort item," such as a teddy bear, while testifying in order to alleviate the child's psychological and emotional stress. In *People v Gutkaiss* (206 AD2d 628), which involved the prosecution of a defendant accused of sexually abusing two boys, the Appellate Division, Third Department, concluded that the statute provided a basis for permitting a child witness to have a teddy bear with him as a comfort item while testifying. In relevant part, the Court stated:

> "Defendant further claims he was prejudiced by the fact that victim A held a teddy bear while he testified. We disagree since County Court informed the jury that the teddy bear had nothing to do with the truth or falsity of this witness' [sic] testimony, . . . you should [not] consider and evaluate the witness on [the] basis . . . he had a teddy bear in his possession.' Additionally, permitting victim A to hold the teddy bear was entirely appropriate in view of Executive Law § 642-a(4), which directs the Judge presiding at a trial of this type to be sensitive to the psychological and emotional stress a child witness may undergo when testifying" (*id.* at 631).

Cases from other jurisdictions are in accord (*see State v Dickson*, 337 SW3d 733, 743-744 [Mo Ct App] [holding that trial court did not improvidently exercise its discretion in allowing a child victim to hold a comfort item after balancing the benefit to the witness against any potential prejudice to the defendant]; *State v Powell*, 318 SW3d 297, 304 [Mo Ct App] [the Missouri Court of Appeals permitted 16 year old to have a teddy bear while testifying, and stated, "[w]e . . . emphasize that trial courts must be cognizant of the possibility that comfort

items or other accommodations for minors may unfairly engender sympathy for complaining witnesses; . . . Nevertheless, in this case, we conclude that the trial court properly weighed the impact of the teddy bears on the witnesses and the jury"]; *State v Marquez*, 124 NM 409, 411, 951 P2d 1070, 1072 [the court held it was not error to allow a child victim of sexual assault to hold a teddy bear while testifying when court "properly balanced" her need against possibility of prejudice]).

Of course, the case at bar involves a live animal, as opposed to an inanimate object. Nevertheless, we perceive no rational reason why, as per the broad dictate of Executive Law § 642-a(4), a court's exercise of sensitivity should not be extended to allow the use of a comfort dog where it has been shown that such animal can ameliorate the psychological and emotional stress of the testifying child witness. Morever, contrary to the defendant's argument, the conclusion that Executive Law § 642-a(4) can be interpreted to permit the use of a comfort dog at trial does not [*7]usurp the province of the Legislature.

As explained above, the clear mandate of Executive Law § 642-a is to render the judicial process less threatening to child victims who necessarily become engaged in that process. Hence, the statute sets out specific ways to accomplish its intended purpose, to wit, allowing children to testify "via live, two-way closed-circuit television" (Executive Law § 642-a[5]), permitting a "person supportive of the child witness'" to accompany the child witness (Executive Law § 642-a[6]), and allowing the child witness "to use anatomically correct dolls and drawings during his [or her] testimony" (Executive Law § 642-a[7]). However, before these specific accommodations are enumerated, the statute contains the broadly worded subdivision (4), which provides that a judge "should be sensitive to the psychological and emotional stress a child witness may undergo when testifying." Since it included what can be characterized as a preceding "catch-all" provision (i.e., subdivision 4), it is apparent that the Legislature did not intend the subsequent specific measures (i.e., subdivisions 5, 6, and 7) to be the sole means by which the court could accommodate a child witness. Instead, the Legislature recognized that a trial court should be provided with the flexibility to adopt or permit additional accommodations, other than those specifically mentioned in the other sections of the statute.

Indeed, the language of subdivision 4 is so general that it can only be interpreted as authorizing a trial judge to utilize his or her discretion in fashioning an appropriate measure to address a testifying child witness's emotional or psychological stress, based upon the particular needs of that child (*see People v Gutkaiss*, 206 AD2d 628; *cf. People v McNair*, 87

NY2d 772; *see also Goings v United States*, 377 F2d 753, 762 [8th Cir] [a "trial judge should exercise his [or her] discretion with wide latitude to assure an atmosphere in which a witness will feel at ease in telling the truth"]; *State v Cliff*, 116 Idaho 921, 924, 782 P2d 44, 47 ["[i]n cases . . . where it is necessary to receive testimony from young children, the court must strike a balance between the defendant's right to a fair trial and the witness's need for an environment in which he or she will not be intimidated into silence or to tears"]).

Insofar as the defendant contends that the County Court was required to make a finding of necessity, i.e., that J needed Rose to be able to testify, before the court allowed such accommodation, the defendant failed to raise this argument before the County Court and it is, thus, unpreserved for appellate review (*see* CPL 470.05[2]). In any event, this argument is without merit. Executive Law § 642-a(4) does not set forth any "necessity" criterion for a court to adopt measures intended to address the stress which a child witness may experience on the witness stand. Indeed, the statute specifically recites that the trial judge should be sensitive to the "psychological and emotional stress a child witness *may undergo* when testifying" (emphasis added), and not the stress which the witness will definitely experience. Nor have other jurisdictions adopted a "compelling-need" standard in this regard. "Instead, courts that have addressed the issue have emphasized the need to strike a balance between the right of the accused to a fair trial and the need to mitigate the intimidating environment for some child witnesses" (*State v Brick*, 163 Wash App 1029, *2 n 5; *see State v Powell*, 318 SW3d 297 [Mo App 2010]; *State v Marquez*, 124 NM 409, 951 P2d 1070; *State v Cliff*, 116 Idaho 921, 782 P2d 44). Here, the testimony given by Stella provided ample evidence that Rose's presence alleviated J's anxiety and allowed her to more easily discuss the conduct which was perpetrated against her, which, of course, was the very subject of the trial.

Inherent Power of Trial Judge

In a similar vein, we note that New York courts have long held that a judge conducting a public trial is empowered to control the proceedings in whatever manner may be consistent with the demands of decorum and due process (*see People v Hagan*, 24 NY2d 395, 397, *cert denied* 396 US 886; *People v Mendola*, 2 NY2d 270, 276; *People ex rel Karlin v Culkin*, 248 NY 465; *People v Hargrove*, 60 AD2d 636, 637, *cert denied* 439 US 846; *see also People v Sorge*, 301 NY 198, 202 [trial courts possess "wide latitude and . . . broad discretion . . . to administer a trial effectively"]; Bowers, Judicial Discretion of Trial Courts [1931], § 262, pp. 296-297). Here, the defendant has made no showing that Rose's presence had any identifiable impact on the proceeding. Moreover, as indicated above, the County Court specifically

informed the jury that it was not to draw any inference in favor of or against either side because of the dog's presence. Thus, in addition to the statutory basis afforded by Executive Law § 642-a, the County Court's decision to allow Rose into the courtroom and at the witness stand during J's testimony was also a proper exercise of its inherent power and discretion to control the trial proceedings (*see e.g. People v Spence*, 212 Cal App 4th 478, 513 [a therapy dog could accompany the child witness based, inter alia, upon "the general [*8]discretionary standards set forth in [the California Evidence Code] for control of a courtroom"]; *Sexton v State*, 529 So2d 1041, 1044-1045 [Ala Cr App] [affirming a defendant's conviction even though the prosecutor sat with the five-year-old victim as she testified, and explaining that the "trial judge was in the best position to determine what, if any, probable effect this action would have on the jury"]).

Due Process/Prejudice

Turning to the defendant's second argument, we conclude that Rose's accompaniment of J to the witness stand did not adversely affect the defendant's due process right to a fair trial or compromise his constitutional right of confrontation. In *Holbrook v Flynn* (475 US 560), the United States Supreme Court explained that

> "[w]henever a courtroom arrangement is challenged as inherently prejudicial, therefore, the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether an unacceptable risk is presented of impermissible factors coming into play'. . . [I]f the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over" (*id.* at 570, quoting *Estelle v Williams*, 425 US 501, 505).

The defendant offered no support for his contention that Rose's presence was inherently prejudicial and, thus, violated his due process right to a fair trial, because Rose allegedly conveyed the impression that J was being truthful as she testified. Indeed, the defendant admits that Rose was trained merely to respond to a person's stress level. It is beyond dispute that a dog does not have the ability to discern truth from falsehood and, thus, cannot communicate such a distinction to a jury. Nor can it be concluded that any actual prejudice resulted from the concededly unobtrusive presence of the dog in the courtroom.

We are not unmindful that Rose may have engendered some sympathy for J in the minds of the jurors. However, there is no proof that such sympathy was significantly greater than the normal human response to a child's testimony about his or her sexual abuse at the hands

of an adult. Moreover, the County Court gave the jury specific instructions that it must not permit sympathy to enter into its considerations, especially with respect to "an outside factor such as a companion dog permitted to be present in the courtroom." A jury is presumed to follow the legal instruction provided by the trial court (*see People v Guzman*, 76 NY2d 1, 7). Nor did defense counsel suggest any further instruction regarding Rose's presence.

We are also guided by some recent decisions from foreign jurisdictions which have had occasion to address the topic of whether a defendant is prejudiced by the presence of a dog during trial testimony. For example, in a case from the State of Washington, *State v Dye* (170 Wash App 340, 283 P3d 1130, *lv granted* 176 Wash2d 1011, 297 P3d 707), which was decided in August 2012, the Washington Court of Appeals concluded that the trial court properly allowed a comfort/service dog court named Ellie to accompany a mentally disabled adult victim/witness to the stand while he testified at the defendant's trial. In *Dye*, the court specifically rejected many of the same arguments that the defendant raises on this appeal regarding the prejudice and due process issues. In particular, the *Dye* court stated:

> "[In support of its pretrial motion to allow the dog to accompany the witness on the stand] the State represented that [the victim] is experiencing significant anxiety regarding his upcoming testimony' which diminished when [the victim] was with Ellie. [The defendant] contends [, inter alia,] that Ellie's presence deprived him of a fair trial . . . by improperly inciting the jury's sympathy and encouraging the jury to infer [the victim's] victimhood, and by giving [the victim] an incentive to testify in the prosecution's favor . . . Here, the necessary balancing is implicit in the court's ruling. The court did not think Ellie would distract the jury, and observed that the dog was very unobtrusive [and] will just simply be next to the individual . . . Given [the victim's] significant emotional trauma,' the court concluded Ellie's presence was appropriate" (*State v Dye*, 170 Wash App at 344, 348, 283 P3d at 1132, 1134).

[*9]
In *People v Spence* (212 Cal App 4th 478), decided in December 2012, the California Court of Appeals engaged in a thorough discussion of the issue and sanctioned the use of a therapy dog at the trial of a defendant who was ultimately convicted of the sexual abuse of a ten-year-old girl. In part, the *Spence* Court stated:

> "[Regarding] the use of the therapy dog, the [trial] court referred to the discretion granted to it under [California] Evidence Code section 765 to control court proceedings in the search for truth, and commented that there would be no prejudice in allowing the therapy dog to be present in the courtroom. The court said it was comparable to [the witness] holding a cute teddy bear in her hands' to provide her comfort. The court explained to counsel that this particular therapy

> dog had been in the same courtroom before, and she's almost unnoticeable once everybody takes their seat on the stand. She's very well behaved . . . The record does not show any [issues or improper behavior by the dog] arose [during the course of the trial].
>
> "In addition to the general discretionary standards set forth in Evidence Code section 765, for control of a courtroom, the provisions of section 868.5, subdivision (a) apply to a [prosecution] witness in a case involving a . . . sex offense. The witness shall be entitled, for support, to the attendance of *up to two persons of his or her own choosing* . . . at the trial, . . . during the testimony of the prosecuting witness . . . [I]t is easy to conclude that therapy dogs are not persons' within the meaning of section 868.5 [and] since subdivision (b) of section 868.5 refers to the court's duty to give admonitions under section 868.5 that the advocate must not sway or influence the witness, we cannot imagine that the Legislature intended that a therapy dog be so admonished, nor could any dog be sworn as a witness. In any case, the trial court took care to ensure that the therapy dog would be mainly unnoticeable once everybody took their seats, and that corrective action would be taken if there was a problem, which there was not.
>
> "[Accordingly, although] the circumstances of this case with respect to the use of the therapy dog simply do not fall within the coverage of section 868.5 [, nevertheless,] [t]he court appropriately exercised its discretion under Evidence Code section 765, subdivision (b), to set reasonable controls upon the mode of interrogation of the child witness, by providing a therapy dog in this exercise of special care to protect [the witness] from undue harassment or embarrassment'" (*id.* at 513-513, 517).

As was true in both of the above cases, the County Court herein balanced J's demonstrated need for Rose during her testimony against the potential prejudice to the defendant. It then properly concluded that, with clarifying instructions to the jury, the unobtrusive presence of the dog was appropriate in this case.

Right of Confrontation

There is no merit to the defendant's contention that Rose's presence violated his constitutional right to confront witnesses against him. The defendant first contends that, at certain points during J's testimony, the dog physically impeded the jury's ability to observe J as she testified. However, no such complaint or any objection was ever made during the trial. Indeed, at the conclusion of J's testimony, the following colloquy took place:

> "Prosecutor: Just so the record is clear, I want to make a record of Rose's behavior during [J's] testimony, that she sat unobtrusively with the witness. There were no noises coming from the dog. She did not move around. Certainly, [defense counsel] did not bring anything to the court's attention about her behavior during

> the actual [*10]testimony, and I think the record should be clear that the dog sat peacefully and quietly on the stand.
>
> "Court: [addressing defense counsel] [I]s that unfair?
>
> "Defense Counsel: No, Judge.
>
> "Court: I mean initially the dog was being petted by the witness, and then the dog apparently disappeared. *The dog was innocuous, in no way obtrusive*" (emphasis added).

Thus, there is no basis to conclude that Rose physically interfered with the defendant's right to confront a witness against him (*cf. Coy v Iowa*, 487 US 1012, 1019-1020 [a defendant's right of confrontation was violated when the court permitted a screen to be placed in front of the testifying witness so as to shield the witness from the defendant's view]).

The defendant also contends that Rose's presence infringed on his right of confrontation because the dog's "presence made it unlikely that the jury was able to utilize [its] common sense and experience in making a determination as to J's truthfulness." To the extent that the defendant argues that Rose's presence made it more likely that the jury would credit J's testimony as truthful, we disagree. "Normally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses" (*Pennsylvania v Ritchie*, 480 US 39, 53). Here, defense counsel engaged in extended and thorough cross-examination of J. Consequently, our review of the record does not suggest to us that Rose impeded defense counsel's right to cross-examine the central witness in the People's case against the defendant (*see State v Dye*, 170 Wash App at 346, 283 P3d at 1133).

There is also no indication that the jury deemed Rose's presence to be, in effect, a corroboration of J's testimony. In *People v Adams* (19 Cal App 4th 412, 437), the California Court of Appeals addressed that issue in the context of a California statute which allows a victim/witness to have a support person present during trial testimony. As the *Adams* court explained:

> "The presence of a support person at the stand does not necessarily rob an accused of dignity or brand him or her with an unmistakable mark of guilt. The presence of a second person at the stand does not require the jury to infer that the support person believes and endorses the witness's testimony, so it does not *necessarily* bolster the witness's testimony. Finally, the presence of a support person does not interfere with the decorum of the judicial proceedings. Consequently, in the

> absence of an articulable deleterious effect on the presumption of innocence, we must reject the contention that use of a support person at the stand deprives the defendant of a fair trial" (*id.* at 437).

The same is true when considering the presence of a therapy animal at or near the witness stand. In fact, permitting a comfort dog to accompany a child victim to the stand during testimony can be considered less prejudicial than allowing "support persons." As explained in "Using Dogs for Emotional Support of Testifying Victims of Crime," an article by Marianne Dellinger for the "Animal Law Review" of Lewis and Clark Law School:

> "While dogs may signal the innocence of a witness, any signal from a dog will be much weaker than that emitted from an adult attendant. An adult, especially one who can understand the entirety of the case, including its legal underpinnings, may be seen by a jury to add credibility to the arguments of the plaintiff's witness. In contrast, a dog is neutral' and does not understand any of the legal and factual arguments. *It serves the limited function of physically and emotionally standing by the testifying witness*" (Marianne Dellinger, *Using Dogs for Emotional Support of Testifying Victims of Crime*, 15 Animal L 171, 187 [2009] [emphasis added]).

[*11]
Furthermore, it should again be noted that the County Court specifically informed the jury that it was not to draw any inference in favor of or against either side because of the dog's presence, and it must be presumed that the jury followed the legal instructions it was given (*see People v Baker*, 14 NY3d 266, 274; *People v Guzman*, 76 NY2d 1, 7; *People v Ward*, 106 AD3d 842).

Finally, if, as the defendant contends on appeal, Rose was, in effect, a silent witness against him, defense counsel had the opportunity to explore such possibility. Tellingly, however, defense counsel did not pose any questions to J during cross-examination regarding Rose's presence or the effect that the dog had on J. Nor did defense counsel make any reference to Rose during his summation to the jury.

Use of Dogs for Emotional Therapy

The defendant failed to preserve for appellate review his argument that the County Court should have conducted a *Frye* hearing before it ruled on whether to permit Rose to be present while J testified (*see* CPL 470.05[2]). This argument is without merit in any event. "There is already a significant amount of research showing that the mere presence of a dog can have dramatic emotional and psychological benefits" (Andrew Leaser, *See Spot Mediate: Utilizing the Emotional and Psychological Benefits of Dog Therapy' in Victim-Offender Mediation*, 20 Ohio St J on Disp Resol 943, 961 [2005]).

> "Dogs have a natural ability to calm humans as well as a positive effect on our emotional and psychological states. [They] help us break down the barriers of fear, distrust[,] and anxiety so we can get to the truth [and] [s]cientific studies have shown that dogs help people by reducing blood pressure, stress and anxiety, improving feelings of self-worth and decreasing loneliness" (Marianne Dellinger, *Using Dogs for Emotional Support of Testifying Victims of Crime*, 15 Animal L at 178, 179 [2009] [internal quotation marks omitted]).

There is also substantial anecdotal evidence that dogs have been found to have beneficial effects on the emotional and even physical well-being of hospital patients, residents of nursing homes, and those suffering from psychological trauma, including the victims of the recent shootings in Newtown, Connecticut, and the Boston Marathon bombings (*see* Michael Walsh, "Comfort Dogs Head to Help Victims of Boston Bombings," New York Daily News, April 17, 2013). Given this background, the utilization of a comfort dog to support vulnerable witnesses who are called upon to testify in court is an "accommodation" which, under appropriate circumstances, not only fully comports with this State's legislation intended to assist such witnesses, but should also be encouraged as an effective and beneficial courtroom measure in administering a trial.

Remaining Issues

Contrary to the defendant's contention, the County Court did not improvidently exercise its discretion under CPL 60.42(5), the so-called rape shield law, in precluding evidence concerning the victim's sexual history. This statute generally provides that "[e]vidence of a victim's sexual conduct shall not be admissible in a prosecution for [rape]" (CPL 60.42). A trial court's rape-shield ruling will be upheld unless it was an improvident exercise of the court's discretion, and deprived the defendant of his right of confrontation (*see People v Mandel*, 48 NY2d 952, 954; *People v Reardon*, 141 AD2d 869, 870). Here, the defendant's offer of proof as to whether another man had impregnated J consisted of the fact that this man had lived next door to her, possibly at the time of conception, that J had been seen texting people, and that, at an uncertain time, J had made a drawing with a picture of a heart, a baby, and the other man's name. The defendant's offer of proof that J became pregnant by someone other than the defendant was based on pure speculation and, therefore, was insufficient to overcome the presumption that such evidence should be precluded pursuant to the rape-shield law (*see* CPL 60.42; *People v Wieners*, 33 AD3d 637, 638; *People v Mitchell*, 10 AD3d 554, 555; *People v Rendon*, 301 AD2d 665). Finally, we note that the defendant was given ample opportunity to develop evidence to support his contention that the victim's alleged behavioral problems motivated her to accuse him falsely of the charged crimes (*see People v Russillo*, 27 AD3d 493).

The defendant's remaining contentions are unpreserved for appellate review.

Conclusion

Under the circumstances of this case, the County Court properly allowed Rose, the comfort-therapy dog, to accompany the child victim/witness on the witness stand during her [*12]testimony. The defendant has not shown that this accommodation was impermissible under Executive Law § 642-a; or that it impaired his right to a fair trial; or that it compromised his constitutional right of confrontation and cross-examination. Moreover, as explained above, none of the defendant's remaining arguments requires reversal. Accordingly, the judgment is affirmed.

MASTRO, J.P., DICKERSON and HINDS-RADIX, JJ., concur.

ORDERED that the judgment is affirmed.

ENTER:

Aprilanne Agostino

Clerk of the Court

Return to Decision List

*** This section is current through 2013 released chapters 1-340 ***

CRIMINAL PROCEDURE LAW
PART ONE. GENERAL PROVISIONS
TITLE D. RULES OF EVIDENCE, STANDARDS OF PROOF AND RELATED MATTERS
ARTICLE 65. [EXPIRES AND IS REPEALED SEPT 1, 2015] USE OF CLOSED-CIRCUIT TELEVISION FOR CERTAIN CHILD WITNESSES

Go to the New York Code Archive Directory

NY CLS CPL § 65.00 (2013)

§ 65.00. [Expires and is repealed Sept 1, 2015] Definitions

As used in this article:

1. "Child witness" means a person fourteen years old or less who is or will be called to testify in a criminal proceeding, other than a grand jury proceeding, concerning an offense defined in article one hundred thirty of the penal law or section 255.25, 255.26 or 255.27 of such law which is the subject of such criminal proceeding.

2. "Vulnerable child witness" means a child witness whom a court has declared to be vulnerable.

3. "Testimonial room" means any room, separate and apart from the courtroom, which is furnished comfortably and less formally than a courtroom and from which the testimony of a vulnerable child witness can be transmitted to the courtroom by means of live, two-way closed-circuit television.

4. "Live, two-way closed-circuit television" means a simultaneous transmission, by closed-circuit television, or other electronic means, between the courtroom and the testimonial room in accordance with the provisions of section 65.30.

5. "Operator" means the individual authorized by the court to operate the closed-circuit television equipment used in accordance with the provisions of this article.

6. A person occupies "a position of authority with respect to a child" when he or she is a parent, guardian or other person responsible for the custody or care of the child at the relevant time or is any other person who maintains an ongoing personal relationship with such parent, guardian or other person responsible for custody or care, which relationship involves his or her living, or his or her frequent and repeated presence, in the same household or premises as the child.

WESTLAW

NOTES OF DECISIONS (5)

Vulnerable child witness

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
§ 65.10 Closed-circuit television; general rule; declaration of vulnerability
McKinney's Consolidated Laws of New York Annotated Criminal Procedure Law Effective August 15, 2007 (Approx 2 pages)
Title D. Rules of Evidence, Standards of Proof and Related Matters
Article 65. Use of Closed-Circuit Television for Certain Child Witnesses (Refs & Annos)

Proposed Legislation

Effective August 15, 2007

McKinney's CPL § 65.10

§ 65.10 Closed-circuit television; general rule; declaration of vulnerability

Currentness

<[Expires and deemed repealed Sept 1, 2019, pursuant to L 1985, c. 505, § 5]>

1. A child witness shall be declared vulnerable when the court, in accordance with the provisions of section 65.20, determines by clear and convincing evidence that it is likely that such child witness will suffer serious mental or emotional harm if required to testify at a criminal proceeding without the use of live, two-way closed-circuit television and that the use of such live, two-way closed-circuit television will diminish the likelihood or extent of, such harm.

2. When the court declares a child witness to be vulnerable, it shall, except as provided in subdivision four of section 65.30, authorize the taking of the testimony of the vulnerable child witness from the testimonial room by means of live, two-way closed-circuit television. Under no circumstances shall the provisions of this article be construed to authorize a closed-circuit television system by which events in the courtroom are not transmitted to the testimonial room during the testimony of the vulnerable child witness.

3. Nothing herein shall be contrued to preclude the court from exercising its power to close the courtroom or from exercising any authority it otherwise may have to protect the well-being of a witness and the rights of the defendant.

Credits

(Added L.1985, c. 505, § 1. Amended L.2007, c. 548, § 1, eff. Aug. 15, 2007.)
<[Expires and deemed repealed Sept. 1, 2019, pursuant to L.1985, c. 505, § 5]>

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Peter Preiser

2007

A 2007 amendment to subdivision one of this section liberalized the criteria for declaring a child witness vulnerable by eliminating the requirement of showing "extraordinary circumstances" for a likelihood that courtroom testimony will cause "severe" mental or emotional harm and substituting a finding that the use of two-way closed-circuit television will diminish the likelihood of "serious" mental or emotional harm to the child that would otherwise ensue. Note though that an accompanying amendment to § 65.20 (new subd. 2) adds an additional

requirement for the finding, to wit, a showing that courtroom testimony would substantially impair the child's ability to communicate with the finder of the fact.

PRACTICE COMMENTARIES

by Peter Preiser

Subdivision 1 provides the standard for declaring that a child witness is "vulnerable." Most importantly, note that the finding cannot rest solely upon the fact that use of closed-circuit television will avoid severe mental or emotional harm to a "child witness" (§ 65.00[1]). The harm must be tied to "extraordinary circumstances." A listing of factors that qualify for that office is set forth in CPL § 65.20[a].

Although subdivision two appears to leave the court no room for discretion once it has found the child witness is vulnerable and that appropriate equipment is available ("it *shall* ... authorize"), note that CPL § 65.20[11], which specifically deals with the decision on the motion, conveys a contrary message ("it *may* enter an order").

The provision in subdivision 3 purporting to preserve the court's power to close the courtroom without regard to the availability of the televised testimony procedure poses a potential trap for the unwary. U.S. Supreme Court holdings mandate strict prerequisites, including consideration of reasonable alternatives, before resorting to closure (see e.g., *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 [1984]). Thus it seems clear that the availability of the television procedure will have to be taken into account as an alternative when considering closure for the purpose of insulating a child from the effects of public presence during recitation of sensitive testimony. And, if this be so, the impact of this new procedure will be to diminish the freedom to order closure.

Notes of Decisions (6)

Footnotes

1 So in original. Probably should be "construed".

McKinney's CPL § 65.10, NY CRIM PRO § 65.10
Current through L.2018, chapter 1.

End of Document

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1 Vulnerable child witness

§ 65.10 Closed-circuit television; general rule; declaration of vulnerability

McKinney's Consolidated Laws of New York Annotated Criminal Procedure Law Effective: August 19, 2007 (Approx. 2 pages)

1 Vulnerable child witness

Trial court's finding that victim in prosecution of defendant for various criminal sexual acts involving infants at day-care center was vulnerable witness, and could be allowed to testify via two-way closed circuit television, was supported by court's questioning and observation of victim, and by testimony of social worker and report to court. People v Wall, 1994, 84 N.Y.2d 946, 620 N.Y.S.2d 817, 644 N.E.2d 1373. Witnesses ⇔ 228

Child victim was a vulnerable witness, and trial court properly permitted child to testify outside of the physical presence of the defendant through two-way closed-circuit television, in prosecution for sexual abuse in the first degree: child was seven years old at the time of the trial and thus was particularly young, defendant occupied a position of authority, as he was child's great uncle by marriage, the child regarded him as a family member, he was responsible for the care of the child at the time the crime occurred, he had frequent contact with her, and the emotional trauma the child experienced when she attempted to testify in open court about the crime substantially impaired her ability to communicate with the jury. People v. Bellrun (2 Dept. 2013) 110 A.D.3d 853, 970 N.Y.S.2d 269, leave to appeal denied 23 N.Y.3d 1018, 992 N.Y.S.2d 800, 16 N.E.3d 1283. Witnesses ⇔ 228

Six-year-old victim of sexual conduct was properly permitted to testify at bench trial via closed circuit television, even though expert testimony was not presented, based on court's observations of child and testimony of two witnesses as to severe emotional or mental harm that child was likely to suffer if she testified in defendant's presence. Pedule v Peramaro (1 Dept. 2001) 288 A.D.2d 53, 732 N.Y.S.2d 410, leave to appeal denied 97 N.Y.2d 759, 742 N.Y.S.2d 620, 769 N.E.2d 356, habeas corpus denied 203 F.Supp.2d 285, on reconsideration, affirmed 93 Fed.Appx. 327, 2004 WL 603411. Witnesses ⇔ 228

Child sexual abuse victim was vulnerable witness, and hence was statutorily entitled to testify via two-way closed circuit television; manner of commission of offense of which defendant was accused of committing was particularly heinous, defendant occupied position of authority with respect to witness, and defendant admonished victims that he would go to prison if they divulged what had occurred, and social worker who counseled female victim opined that if she were to testify in court with defendant present, she would suffer severe mental or emotional harm. People v. Pierce (3 Dept. 1999) 266 A.D.2d 721, 698 N.Y.S.2d 753, leave to appeal denied 94 N.Y.2d 951, 710 N.Y.S.2d 8, 731 N.E.2d 625. Witnesses ⇔ 228

Child who feared physical retribution from defendant if he testified to defendant's alleged sexual abuse was "vulnerable witness," entitled to testify outside of defendant's physical presence. People v. Logan, 1988, 141 Misc.2d 793, 535 N.Y.S.2d 327. Criminal Law ⇔ 667(1)

People v Beltran
2013 NY Slip Op 05638
Decided on August 14, 2013
Appellate Division, Second Department
Hinds-Radix, J., J.
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Decided on August 14, 2013

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT
PETER B. SKELOS, J.P.
L. PRISCILLA HALL
LEONARD B. AUSTIN
SYLVIA HINDS-RADIX, JJ.

2010-07150
(Ind. No. 880/09)

[*1]The People of the State of New York, respondent,

v

Ruben Beltran, appellant.

APPEAL by the defendant from a judgment of the Supreme Court (Abraham Gerges, J.), rendered June 23, 2010, and entered in Kings County, convicting him of course of sexual conduct against a child in the first degree (two counts) and sexual abuse in the first degree, upon a jury verdict, and imposing sentence.

Lynn W. L. Fahey, New York, N.Y. (Allegra Glashausser of counsel), for appellant, and appellant pro se.
Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard

Joblove, Keith Dolan, Catherine Dagoneses, and Melissa Causey of counsel), for respondent.

OPINION & ORDER

HINDS-RADIX, J. The defendant was convicted of two counts of course of sexual conduct against a child in the first degree involving one complainant, and one count of sexual abuse in the first degree involving a second complainant. The first complainant, who was 16 years old at the time of the trial, testified in open court as to events occurring more than eight years earlier. The second complainant (hereinafter the child), who was seven years old at the time of the trial, testified with the use of live, two-way closed circuit television pursuant to CPL article 65.

CPL article 65 permits the use of closed circuit television in the prosecution of certain sex crimes (*see* Penal Law article 130; Penal Law §§ 255.25, 255.26, 255.27) to elicit the testimony of child witnesses (*see* CPL 65.00[1]) who are "declared to be vulnerable" (CPL 65.00[2]). The primary issue on this appeal is whether the Supreme Court properly declared that the child was a vulnerable witness.

The child was born in 2002. The crime against her occurred in March 2008, when she was six years old. She was able to testify in open court about her ability to take an oath, and with regard to general background material about her family. She described the defendant as her "Uncle Ruben." The child's mother testified that the defendant was married to the mother's aunt, and the aunt and the defendant regularly cared for the child in their residence while the child's mother was at work.

Although the child was able to answer general background questions about her family in open court, when questioned about the incident, in the words of defense counsel, she became "overwhelmed to the point where she was just crying and could not . . . respond." The prosecutor made an oral application pursuant to CPL article 65 asking the court to declare that the child was a vulnerable witness, and noted that the People were "prepared to go forward with a hearing . . . with a social worker who could testify about the trauma . . . that would result from forcing the victim to [*2]testify in a public courtroom in front of the

defendant." Over defense counsel's objection, the Supreme Court directed a hearing on the issue of whether the child was a vulnerable witness within the meaning of CPL article 65. The Supreme Court found that such a hearing was warranted because the child appeared terrified on the witness stand, was crying constantly, and could not speak. The Supreme Court commented that "there are certain instances when a picture is worth a thousand words," noting that it "had the ability to visually watch this child and saw the trauma that she was going through."

At the ensuing hearing, a social worker who had met with the child on at least five prior occasions testified that the child could describe the sexual abuse to her without becoming visibly upset, but became "very emotionally distraught" in open court when she tried to describe the abuse in the presence of the defendant. She also noted that it took the child "a very long time to calm . . . down after she had left the courtroom." The social worker had never seen the child behave in that manner before. The child told the social worker that she was afraid to talk about the incident with the defendant in the room. The social worker stated that it was her "professional assessment" that the child would suffer "severe mental or emotional harm by testifying in open court." Although the social worker testified as to her professional qualifications, the Supreme Court did not declare her to be an expert witness.

The Supreme Court ruled, on the record, that the child was a vulnerable witness, on the grounds that:

> "From the Court's vantage point on the bench approximately three feet from where the witness was seated, it was clear that the child was in severe emotional distress and appeared terrified. Based on the Court's own observations and the testimony of the social worker, it is apparent that being in court is exceptionally traumatic for this young child and that she is suffering from severe mental or emotional harm and is unable to testify. While the Court is mindful of the defendant's constitutional rights, the CPL does authorize this testimony. The Court will permit a two-way video feed . . . and we're making sure that the jury will be able to see her testifying and that she will be able to see the complete courtroom."

During the child's testimony, the defendant remained in the courtroom. The prosecutor and defense counsel were in the room with the child, and provisions were made for defense counsel and the defendant to communicate with each other during the testimony.

On appeal, the defendant contends that allowing the child to testify via closed-circuit television outside his physical presence violated his Federal and State constitutional right to

confront the witnesses against him because there was no clear and convincing evidence before the court that the child was a vulnerable witness within the meaning of CPL article 65. In support of his position, the defendant emphasizes that the court declared the child to be a vulnerable witness based only on its own observations and the lay opinion of the social worker. The People respond that the court properly declared the child to be a vulnerable witness, pointing out that the testimony of an expert witness is not required to support a finding of vulnerability. The People further contend that the record establishes the presence of at least two of the statutory factors which are relevant to a determination that a child is a vulnerable witness.

We begin our analysis by examining the statutory framework of CPL article 65. CPL article 65 was first enacted in 1985 (*see* L 1985, ch 505, § 1) for an experimental period of three years, and has thereafter been periodically renewed for additional periods of from one to five years [FN1]. A child witness was initially defined as a person twelve years old or less, but the definition was [*3]amended in 2004 by substituting "fourteen" for "twelve" (L 2004, ch 362, § 2).

CPL 65.10(1) now states:

> "A child witness shall be declared vulnerable when the court, in accordance with the provisions of section 65.20, determines by clear and convincing evidence that it is likely that such child witness will suffer serious mental or emotional harm if required to testify at a criminal proceeding without the use of live, two-way closed circuit television and that the use of such live, two-way closed-circuit television will diminish the likelihood or extent of such harm."

Subsection 2 of the statute adds a further requirement that the "serious mental or emotional harm . . . would substantially impair the child witness' ability to communicate with the finder of fact without the use of live two-way closed-circuit television" (CPL 65.20[2]; *see* Peter Preiser, 2007 Supp Practice Commentaries, McKinney's Con Laws of NY, Book 11A, CPL 65.20, 2013 Pocket Part at 90).

A declaration of vulnerability may be sought by motion "made in writing at least eight days before the commencement of trial or other criminal proceeding upon reasonable notice to the other party and with an opportunity to be heard" (CPL 65.20[3]). However, pursuant to CPL 65.20(11):

> "Irrespective of whether a motion was made . . . the court, at the request of either

> party or on its own motion, may decide that a child witness may be vulnerable based on its own observations that a child witness who has been called to testify at a criminal proceeding is suffering severe mental or emotional harm and therefore is physically or mentally unable to testify or to continue to testify in open court or in the physical presence of the defendant and that the use of live, two-way closed-circuit television is necessary to enable the child witness to testify."

A motion, or a determination that a child witness may be vulnerable pursuant to CPL 65.20 (11), triggers the obligation of the trial court to conduct a hearing, and issue findings of fact (*see* CPL 65.20[6], [11]), which shall "reflect the causal relationship between the existence of any one or more of the factors set forth in subdivision nine [sic][FN2] of this section or other relevant factors which the court finds are established and the determination that the child witness is vulnerable" (CPL 65.20[12]). The trial court's observations, standing alone, are generally insufficient to support a declaration that the child is a vulnerable witness (*see People v Cintron*, 75 NY2d 249, 265; *People v Costa*, 160 AD2d 889, 890).

CPL 65.20(10) sets forth a list of relevant factors which a court may consider in determining whether a child witness will suffer serious mental or emotional harm if required to testify in court without the use of closed-circuit television. These factors include such considerations as whether the witness "is particularly young" (CPL 65.20[10][b]) and whether the defendant occupied a position of authority over the child (*see* CPL 65.20[10][c]). CPL 65.00(6) defines a person who occupies "a position of authority with respect to a child" as a person who is:

> "a parent, guardian or other person responsible for the custody or care of the child at the relevant time or is any other person who maintains an ongoing personal relationship with such parent, guardian or other person responsible for custody or care, which relationship involves his or her living, or his or her frequent and repeated presence, in the same household or premises as the child."

When article 65 was originally enacted, a declaration of vulnerability required a determination that, "as a result of extraordinary circumstances . . . such child witness will suffer [*4]severe mental or emotional harm if required to testify at a criminal proceeding without the use of live, two-way closed-circuit television" (CPL former 65.10[1]; *see People v Cintron*, 75 NY2d at 254; *People v Henderson*, 156 AD2d 92, 101). However, in 2007, the statutory scheme was amended (*see* L 2007, ch 548) to delete the requirement that there must be "extraordinary circumstances," and to modify the degree of mental or emotional harm which the child would suffer if not permitted to testify via closed-circuit television from "severe" to "serious." The purpose of the 2007 amendment was to liberalize the ability of a

judge to declare a witness vulnerable (*see* Senate Mem in Support, 2007 McKinney's Sessions Laws of NY, pp 2045-2046). Legislative history further reveals that the 2007 amendment was enacted in recognition of the fact that the two-way closed circuit television procedure was integral to protect a child witness's mental and emotional health, and "to maintain that witness's ability to communicate successfully with the finder of fact, thereby ensuring the validity and accuracy of the testimony" (*see* Senate Mem in Support, 2007 McKinney's Sessions Laws of N.Y. at 2045-2046).

A court's determination that a child witness is vulnerable "does not, standing alone, permit the child witness to give televised testimony from the testimonial room in the absence of the defendant" (*People v Cintron*, 75 NY2d at 255). Rather, under the present statutory scheme, once the court has determined that a child witness is vulnerable based upon consideration of the relevant statutory factors, it must next "make a specific finding as to whether placing the defendant and the child witness in the same room during the testimony of the child witness will contribute to the likelihood that the child witness will suffer severe mental or emotional harm" (CPL 65.20[13]). If such a finding is made, the defendant shall remain in the courtroom during the testimony of the child (*see id.*).

In the instant case, the Supreme Court made its initial determination that the child might be a vulnerable witness triggering the need to conduct a hearing on this issue pursuant to CPL 65.20(11) based on the fact that the child could not speak and appeared "terrified" when she was questioned about the crime in the defendant's presence. After the hearing, the Supreme Court concluded that the child was indeed suffering from severe mental or emotional harm based both upon its own observations and the social worker's testimony that the child was afraid to talk about the incident with the defendant in the room (*see People v Watt*, 84 NY2d 948, 952). Although the social worker was not qualified as an expert, the presence of expert testimony is simply a factor to be considered in determining whether a child witness is vulnerable (*see* CPL 65.20[10][l]), not a mandatory requirement (*see People v Cintron*, 75 NY2d at 265; *People v Paramore*, 288 AD2d 53, 54).

Upon our review of the record, we find that the Supreme Court properly declared the child to be a vulnerable witness. Since the child was seven years old at the time of the trial, she was "particularly young" (*People v Lindstadt*, 174 AD2d 696, 697 [nine-year-old witness is particularly young]; *People v Guce*, 164 AD2d 946, 948 [eight-year-old witness is particularly young]). Further, the defendant occupied a position of authority, since he was the

child's great uncle by marriage, the child regarded him as a family member (*see People v Pierce*, 266 AD2d 721), he was responsible for the care of the child at the time the crime occurred, and he had frequent contact with her (*see Matter of Noel O.*, 19 Misc 3d at 432). Thus, two of the factors set forth in CPL 65.20(10) were established by clear and convincing evidence (*see People v Martin*, 294 AD2d 850, 850-851; *People v Pierce*, 266 AD2d 721; *People v Ramos*, 203 AD2d 599). It is also clear from the record that the emotional trauma the child experienced when she attempted to testify in open court about the crime substantially impaired her ability to communicate with the jury. Under all of the circumstances, the Supreme Court's determination that the child was a vulnerable witness is supported by clear and convincing evidence in the record (*see People v Barreto Mejia*, 101 AD3d 1040; *People v Biavaschi*, 265 AD2d 268, 268-269).

Furthermore, the child was properly permitted to testify outside of the physical presence of the defendant. The Supreme Court's observations of the child when she was questioned in the courtroom, and the hearing testimony of the social worker, provided clear and convincing evidence that the cause of the child's severe emotional upset was the defendant's presence in the room (*see People v Paramore*, 288 AD2d at 54). Accordingly, the record supports the requisite specific finding that placing the defendant and the child in the same room during the testimony of the child would contribute to the likelihood that the child would suffer "severe mental or emotional harm" (CPL 65.20[11]).

We reject the defendant's contention that CPL article 65 was unconstitutionally [*5] applied in this case so as to deprive him of his Federal and State constitutional right to confront the witnesses against him. The Court of Appeals has ruled that live, televised testimony does not deprive a defendant of his or her constitutional right to confrontation if it is done for an important public policy reason and reliability is assured by preservation of the confrontation-related rights of "testimony under oath, the opportunity for contemporaneous cross-examination, and the opportunity for the judge, jury, and defendant to view the witness's demeanor as he or she testifies" (*People v Wrotten*, 14 NY3d 33, 39, *cert denied*US, 130 S Ct 2520, citing *Maryland v Craig*, 497 US 836, 851). In *People v Wrotten*, the Court of Appeals noted that Judiciary Law § 2-b(3) authorized a court of record "to devise and make new process and forms of proceeding, necessary to carry into effect the powers and jurisdiction possessed by it," including authorizing two-way televised testimony at a criminal trial, under circumstances where the Legislature has not authorized such testimony by statute, if there were "exceptional circumstances" present (14 NY3d at 40).

In *Maryland v Craig* (497 US 836), the United States Supreme Court considered the constitutionality of a Maryland statute which authorized a child witness in a child abuse case to give one-way televised testimony, whereby the child is visible to those in the courtroom, but those in the courtroom were not visible to the child. The Court determined that, under the Confrontation Clause, a face-to-face confrontation was preferred but not "indispensable" (*id.* at 849). It further ruled that a face-to-face confrontation could be dispensed with upon a showing of necessity, and the showing required by the Maryland statute—that the child will suffer "serious emotional distress such that the child victim cannot reasonably communicate" if he or she were required to testify in the presence of the defendant (former Maryland Cts & Jud Proc Code Ann § 9-102[a][1][ii]; now Maryland Crim Proc Code Ann 11-303[b][1])—satisfied that standard. If the trauma to the child was not the result of the presence of the defendant, face-to-face confrontation with the defendant could not be dispensed with, since, in those circumstances, the child could testify in less intimidating surroundings with the defendant present (*see Maryland v Craig*, 497 US at 856).

In the instant case, those standards were met. The evidence established the likelihood that the child would suffer severe mental or emotional harm if required to testify in the defendant's physical presence as required by the New York statute (CPL 65.20[12]). Moreover, in contrast to *Maryland v Craig*, here, the child testified by way of two-way closed circuit television, so that she could see the defendant during her testimony, and the defendant could see her. This two-way system allowed for face-to-face confrontation between the defendant and the child, thus preserving "the salutary effects of face-to-face confrontation [which] include (1) the giving of testimony under oath; (2) the opportunity for cross-examination; (3) the ability of the fact-finder to observe demeanor evidence; and (4) the reduced risk that a witness will wrongfully implicate an innocent defendant when testifying in his presence" (*United States v Gigante*, 166 F3d 75, 80 [2d Cir], *cert denied* 528 US 1114).

Indeed, federal law permits a child victim to testify in federal criminal prosecutions outside the courtroom by way of two-way closed circuit television if the court finds that the child "is unable to testify in open court in the presence of the defendant," inter alia, because of fear, or "a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying" (18 USC § 3509[b][1][B][i],[ii]). Although "confrontation through a video monitor is not the same as physical face-to-face confrontation" (*United States v Yates*, 438 F3d 1307, 1315 [11th Cir]; *see United States v*

Gigante, 166 F3d at 81), there is no constitutional infirmity if there has been a case-specific finding of necessity in furtherance of an important public policy (*see United States v Yates*, 438 F3d at 1315). That test was satisfied in this case. Further, since the child appeared and was cross-examined by the defendant, the defendant's confrontation rights, as described in *Crawford v Washington* (541 US 36), were not violated (*see People v Whitman*, 205 P 3d 371, 381 [Colo Ct App], *cert denied* _____ US _____, 2008 WL 2581401, 2008 colo LEXIS 704, citing *Crawford v Washington*, 541 US at 59 n 9).

Turning to the other issues raised by the defendant, we conclude that the Supreme Court providently exercised its discretion in denying the defendant's motion pursuant to CPL 200.20(3) to sever certain charges in the indictment (*see People v Martinez*, 69 AD3d 958, 959; *see also People v Lane*, 56 NY2d 1, 10). The charges in the indictment were properly joined pursuant to CPL 200.20(2)(c), since the crimes share common elements and the criminal conduct at the heart of each crime is comparable (*see People v Pierce*, 14 NY3d 564, 574; *People v McAvoy*, 70 AD3d 1467). The defendant's claim that the Supreme Court failed to instruct the jury with respect to its duty to consider the crimes separately is unpreserved for appellate review (*see* CPL 470.05[2]; *[*6]People v Stewart*, 178 AD2d 448, 448) and, in any event, without merit (*see People v Harris*, 29 AD3d 387, 388; *People v Nelson*, 133 AD2d 470, 471).

However, the People correctly concede that the first and second counts of the indictment are multiplicitous, since those counts both allege a course of sexual conduct against a child in the first degree, although there was no interruption in that course of conduct against the child victim at issue (*see People v Moore*, 59 AD3d 809, 810-811; *People v Quinones*, 8 AD3d 589, 590).

The defendant's claims of ineffective assistance of counsel are not properly before this Court, as they involve matter dehors the record.

The defendant's remaining contentions, including those raised in his pro se supplemental brief, are without merit.

Accordingly, the judgment is modified, on the law, by vacating the conviction of course of sexual conduct against a child in the first degree under count two of the indictment, vacating the sentence imposed thereon, and dismissing that count of the indictment; as so modified, the judgment is affirmed.

SKELOS, J.P., HALL, and AUSTIN, JJ., concur.

ORDERED that the judgment is modified, on the law, by vacating the conviction of course of sexual conduct against a child in the first degree under count two of the indictment, vacating the sentence imposed thereon, and dismissing that count of the indictment; as so modified, the judgment is affirmed.

ENTER:

Aprilanne Agostino

Clerk of the Court

Footnotes

Footnote 1:. See Laws of 1985, ch 505, § 5; Laws of 1988, ch 516, § 1; Laws of 1991, ch 455, § 3; Laws of 1996, ch 359, § 1; Laws of 2000, ch 449, § 1; Laws of 2001, ch 273, § 1; Laws of 2002, ch 163, § 1; Laws of 2003, ch 388, § 1; Laws of 2005, ch 577, § 1; Laws of 2007, ch 56, part C, § 21; Laws of 2009, ch 56, part U, § 19; Laws of 2011, ch 57, part A, § 19. The current version expires on September 1, 2015 (Laws of 2013, ch 55, part E, § 18). In 1988, CPL article 65 was made applicable to juvenile delinquency proceedings in Family Court (*see* Family Ct Act § 343.1[4], added by L 1988, ch 331, § 1).

Footnote 2:. The factors were initially set forth in CPL 65.20(9), but that subsection was renumbered as CPL 65.20(10) (*see* L 2007, ch 548, § 2; *Matter of Noel O.*, 19 Misc 3d 418, 431).

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53 Misc.3d 34
Supreme Court, Appellate Term,
Second Dept., 9 and 10 Judicial Dist.

The PEOPLE of the State of New York, Respondent,
v.
Christine M. TUMMINELLO, Appellant.

April 26, 2016.

Synopsis
Background: Defendant was convicted of assault in third degree, criminal contempt in second degree, and endangering welfare of child, upon jury verdicts in the District Court, Nassau County, Susan T. Kluewer, J. Defendant appealed.

Holdings: The Supreme Court, Appellate Term, held that:

[1] information charging defendant with assault was facially sufficient;

[2] assault conviction was supported by legally sufficient evidence;

[3] information charging defendant with civil contempt was facially sufficient;

[4] information charging defendant with endangering welfare of child was facially sufficient; and

[5] defendant was not denied her right to fair trial.

Affirmed.

West Headnotes (12)

[1] Assault and Battery
Degrees

"Substantial pain" required to constitute "physical injury," in order to support a conviction for assault in the third degree, cannot be defined precisely, but it is more than slight or trivial pain; yet, the pain need not be severe or intense to be substantial. McKinney's Penal Law §§ 10.00(9), 120.00(1).

Cases that cite this headnote

[2] Assault and Battery
Requisites and sufficiency in general

Information charging defendant with assault in third degree was facially sufficient to plead physical injury element of charge; information alleged that defendant's nine-year-old daughter suffered pain and bruising to her head as result of being kicked by defendant, that daughter's condition required medical attention, and that daughter was transported to hospital. McKinney's Penal Law §§ 10.00(9), 120.00(1); McKinney's CPL § 100.15(3), 100.40(1).

Cases that cite this headnote

[3] Assault and Battery
Assault causing, or intended to cause, great bodily harm

Jury's verdict, convicting defendant of assault in third degree, was supported by legally sufficient evidence including daughter's testimony that defendant had intentionally kicked her in head while she was hiding under table, that she sustained very big bruise on top of her head which was swollen from kick, that she was taken to hospital, and that she was prescribed pain medicine that she took next day, registered nurse at daughter's school testified that day after incident she examined defendant's daughter, who was complaining of headaches, and observed bruising on left side of her face and ecchymosis developing under her eyebrow, and daughter's medical records and two photographs depicting her injuries were entered into evidence. McKinney's Penal Law § 120.00(1).

Cases that cite this headnote

[4] Protection of Endangered Persons
Nature or degree of violation;contempt

The essential elements of the crime of criminal contempt in the second degree, based on a violation of an order of protection, are that a lawful order of protection was in effect, that the defendant had knowledge of the order of protection, and that the defendant intentionally disobeyed it. McKinney's Penal Law § 215.50(3).

1 Cases that cite this headnote

[5] **Protection of Endangered Persons**
Pleading, notice, and process

Information charging defendant with criminal contempt in second degree was facially sufficient, in that information's allegations gave rise to inference that defendant had knowledge of order of protection before she violated that order; information alleged that defendant violated valid family court order of protection that was in effect at time of incident, by defendant intentionally kicking her daughter in head, that order was issued by judge, and that defendant was aware of order as it was personally served on her by county sheriff's department. McKinney's Penal Law § 215.50(3).

1 Cases that cite this headnote

[6] **Infants**
Child abuse, neglect, or endangerment

Criminal liability for endangering the welfare of a child is imposed when a defendant engages in conduct knowing it will present a likelihood of harm to a child, in other words, with an awareness of the potential for harm. McKinney's Penal Law §§ 15.05(2), 260.10(1).

Cases that cite this headnote

[7] **Infants**
Child abuse, neglect, endangerment, or cruelty

Information charging defendant with endangering welfare of child was facially sufficient to support charge and factual basis thereof, thereby providing defendant enough notice to prepare defense and avoid retrial for same offense; information alleged that defendant knowingly acted in manner likely to be injurious to physical, mental, or moral welfare of child who was less than 17 years old, by defendant's intentional kicking of her 9-year-old daughter in head during altercation, causing her to suffer pain and bruising to her head. McKinney's Penal Law § 260.10(1).

Cases that cite this headnote

[8] **Criminal Law**
Credibility of Witnesses

In fulfilling its responsibility to conduct an independent review of the weight of the evidence supporting a criminal conviction, the appellate court accords great deference to the factfinder's opportunity to view the witnesses, hear their testimony, and observe their demeanor. McKinney's CPL § 470.15(5).

Cases that cite this headnote

[9] **Criminal Law**
Requisites of fair trial

Trial court's decision to allow crime victim advocate into courtroom during testimony by defendant's daughter and to comfort her while she was outside of courtroom did not deny defendant her right to fair trial on charges of assault, criminal contempt, and endangering welfare of child, since advocate's presence did not have any identifiable impact on trial, and court's decision was not improper exercise of its inherent power and discretion to control trial proceedings. McKinney's Penal Law §§ 120.00(1), 215.50(3), 260.10(1).

Cases that cite this headnote

[10] **Constitutional Law**
Judges

Criminal Law
Order, decorum, and efficiency of proceedings

A judge conducting a criminal trial is empowered to control the proceedings in

whatever manner may be consistent with the demands of decorum and due process. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[11] Criminal Law
Adequacy of Representation

Defense counsel's efforts should not be second-guessed with the clarity of hindsight to determine how the defense might have been more effective. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[12] Criminal Law
Strategy and tactics in general

Mere disagreement with defense counsel's strategies or tactics will not suffice to establish a claim of ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

Attorneys and Law Firms

**355 Kent V. Moston, Legal Aid Society, Hempstead (Jeremy L. Goldberg and Tammy Feman of counsel), for appellant.

**356 Kathleen M. Rice, District Attorney, Mineola (Andrea M. DiGregorio and Monica M.C. Leiter of counsel), for respondent.

PRESENT: MARANO, P.J., IANNACCI and GARGUILO, JJ.

Opinion

Appeal from judgments of the District Court of Nassau County, First District (Susan T. Kluewer, J.), rendered March 26, 2012. The judgments convicted defendant, upon jury verdicts, of assault in the third degree, criminal contempt in the second degree, and endangering the welfare of a child, respectively.

*36 ORDERED that the judgments of conviction are affirmed.

Defendant was charged in separate accusatory instruments with assault in the third degree (Penal Law § 120.00[1]), criminal contempt in the second degree (Penal Law § 215.50[3]), and endangering the welfare of a child (Penal Law § 260.10[1]), respectively. Following a jury trial, defendant was convicted of all charges.

On appeal, defendant contends that all three accusatory instruments were facially insufficient and that the evidence presented at trial was legally insufficient to support her convictions.

*37 [1] [2] [3] Pursuant to Penal Law § 120.00(1), a person is guilty of assault in the third degree when, "[w]ith intent to cause physical injury to another person, he [or she] causes such injury to such person or to a third person." Physical injury is defined as "impairment of physical condition or substantial pain" (Penal Law § 10.00[9]). "[S]ubstantial pain cannot be defined precisely, but ... it is more than slight or trivial pain," yet, the "[p]ain need not ... be severe or intense to be substantial" (*People v. Chiddick*, 8 N.Y.3d 445, 447, 834 N.Y.S.2d 710, 866 N.E.2d 1039 [2007]). Here, the information charging defendant with assault in the third degree alleged that defendant's nine-year-old daughter, suffered pain and bruising to her head as a result of being kicked by defendant, which condition required medical attention, and that the victim had been transported to Franklin Hospital. Allegations of substantial pain, swelling and contusions, caused by a kick, are sufficient to plead the physical injury element of assault in the third degree (*see People v. Henderson*, 92 N.Y.2d 677, 680–681, 685 N.Y.S.2d 409, 708 N.E.2d 165 [1999]). Therefore, this information was sufficient on its face, as it contained nonhearsay factual allegations of an evidentiary nature which established, if true, every element of Penal Law § 120.00(1) and defendant's commission thereof (*see* CPL 100.15[3]; 100.40[1]). As to the legal sufficiency of the evidence presented at trial, when viewing the facts in the light most favorable to the prosecution (*see People v. Contes*, 60 N.Y.2d 620, 467 N.Y.S.2d 349, 454 N.E.2d 932 [1983]), we find that there is a valid line of reasoning and permissible inferences from which a rational trier of fact could have determined that defendant's guilt of assault in the third degree was proved beyond a reasonable doubt (*see People v. Danielson*, 9 N.Y.3d 342, 349, 849 N.Y.S.2d 480, 880 N.E.2d 1 [2007]). The victim testified that defendant had intentionally kicked her in the head while she had been hiding underneath a table. As a result, the

victim sustained a very big bruise on the top of her head, which was swollen from the kick, and she was taken to Franklin Hospital where she was prescribed medicine for the pain, which she took the following day. The victim's medical records were entered into evidence, as were two photographs depicting her injuries. Additionally, a registered nurse at the victim's school testified that the day **357 after the subject incident she examined the victim, who had come to her complaining of headaches, and observed bruising on the left side of the victim's face and ecchymosis developing under the victim's eyebrow.

[4] [5] Pursuant to Penal Law § 215.50(3), a person is guilty of criminal contempt in the second degree when she engages in *38 the conduct of " [i]ntentional disobedience or resistance to the lawful process or other mandate of a court." The essential elements of the crime of criminal contempt in the second degree, as charged herein, are that a lawful order of protection was in effect, that the defendant had knowledge of the order of protection, and that the defendant intentionally disobeyed it (*see Matter of McCormick v. Axelrod*, 59 N.Y.2d 574, 583, 466 N.Y.S.2d 279, 453 N.E.2d 508 [1983]). Here, the instrument charging defendant with criminal contempt in the second degree alleged that, on February 24, 2010, defendant had violated a valid Nassau County Family Court order of protection that had been in effect at the time by intentionally kicking her daughter in the head. Additionally, it alleged that the order of protection had been issued on February 2, 2010 by Judge Frank D. Dikranis and that defendant was aware of the order, which had been personally served upon her by the Nassau County Sheriff's Department on February 2, 2010. As a result, there were allegations from which it could be inferred that defendant had knowledge of the order of protection before she violated it (*see People v. Inserra*, 4 N.Y.3d 30, 33, 790 N.Y.S.2d 72, 823 N.E.2d 437 [2004]; *People v. McCowan*, 85 N.Y.2d 985, 987, 629 N.Y.S.2d 163, 652 N.E.2d 909 [1995]). Although, as defendant argues, there was a discrepancy between the instrument and a supporting deposition as to the date that defendant was actually served with the order of protection, it is uncontroverted that she was aware of its existence at the time that the violation occurred, on February 24, 2010. Thus, the discrepancy did not impact upon the jurisdictional underpinnings of the prosecution (*see People v. Gonzalez*, 184 Misc.2d 262, 708 N.Y.S.2d 564 [App.Term, 1st Dept.2000]). Consequently, we find that this accusatory instrument was sufficient on its face. We further find that the evidence presented at trial was legally sufficient to establish defendant's guilt of criminal contempt in the second degree.

[6] [7] Pursuant to Penal Law § 260.10(1), a person is guilty of endangering the welfare of a child when, among other things, "she knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old." Criminal liability for endangering the welfare of a child is imposed when a defendant engages in conduct knowing it will present a likelihood of harm to a child, i.e., with an awareness of the potential for harm (*see People v. Hitchcock*, 98 N.Y.2d 586, 590–591, 750 N.Y.S.2d 580, 780 N.E.2d 181 [2002]; *People v. Johnson*, 95 N.Y.2d 368, 372, 718 N.Y.S.2d 1, 740 N.E.2d 1075 [2000]; *see also* Penal Law § 15.05[2]). Here, the information charging defendant with endangering the welfare of a child alleged that she *39 "did knowingly act in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old when during an altercation defendant intentionally kick[ed] the victim, her 9-year-old daughter, in the head, causing the victim to suffer pain and bruising to her head." Thus, giving the information a fair and not overly restrictive or technical reading (*see* **358 *People v. Casey*, 95 N.Y.2d 354, 360, 717 N.Y.S.2d 88, 740 N.E.2d 233 [2000]), we find that it sufficiently alleged the charge and the factual basis thereof, thereby providing defendant enough notice to prepare a defense and avoid retrial for the same offense (*see People v. Konieczny*, 2 N.Y.3d 569, 575, 780 N.Y.S.2d 546, 813 N.E.2d 626 [2004]; *see also People v. Best*, 31 Misc.3d 141[A], 2011 N.Y. Slip Op. 50826[U], 2011 WL 1797619 [App.Term, 2d Dept., 9th & 10th Jud.Dists.2011]; *People v. Vonancken*, 27 Misc.3d 132[A], 2010 N.Y. Slip Op. 50695[U], 2010 WL 1629630 [App.Term, 2d Dept., 9th & 10th Jud.Dists.2010]). We further find that the evidence presented at trial was legally sufficient to establish defendant's guilt of endangering the welfare of a child.

[8] Defendant also contends on appeal that the verdicts were against the weight of the evidence. In fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15[5]; *Danielson*, 9 N.Y.3d 342, 849 N.Y.S.2d 480, 880 N.E.2d 1), we accord great deference to the factfinder's opportunity to view the witnesses, hear their testimony, and observe their demeanor (*see People v. Lane*, 7 N.Y.3d 888, 890, 826 N.Y.S.2d 599, 860 N.E.2d 61 [2006]; *People v. Bleakley*,

69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672 [1987]). Upon a review of the record, we find that the jury's verdicts were supported by ample credible evidence (*see People v. Romero*, 7 N.Y.3d 633, 826 N.Y.S.2d 163, 859 N.E.2d 902 [2006]; *People v. Mateo*, 2 N.Y.3d 383, 410, 779 N.Y.S.2d 399, 811 N.E.2d 1053 [2004]; *Bleakley*, 69 N.Y.2d at 495, 515 N.Y.S.2d 761, 508 N.E.2d 672).

[9] Defendant further contends on appeal that her right to a fair trial was denied when the court allowed a crime victim advocate to comfort both of her children during their respective testimonies. A review of the record reveals that, while testifying, the victim became distraught and needed to take a break. However, after taking that break, she was able to complete her testimony, including cross-examination. Nevertheless, before her younger brother was called to testify, the prosecutor informed the court that a crime victim advocate, employed by the District Attorney's Office, had been seated in the courtroom during the victim's testimony. Defense counsel objected to the advocate's presence, and the prosecutor responded by stating that the advocate was not coaching the witness and had never met the victim before that day. The court instructed the *40 prosecutor that the advocate was not permitted to coach the witness and that defense counsel would be permitted to voir dire the victim about the advocate. During this voir dire, which took place in the jury's presence, the victim denied being familiar with the advocate, indicating that she had never spoken to the advocate before the trial and noting that, when they did speak briefly in the courthouse, they did not discuss the case whatsoever. Furthermore, the victim testified that she did not know why the advocate was present, that the advocate did not provide her with any assistance in any way, that the advocate did not gesture to her, and that she did not look at the advocate while testifying. Before the victim's brother testified, the prosecutor informed the court that the advocate was in the hallway, but would not enter the courtroom, and was available to comfort him should that become necessary. At the beginning of the victim's brother's direct examination, he became distraught and a recess was taken. After rejecting several suggestions made by the prosecutor, **359 the court indicated that the advocate should speak with the victim's brother to try to calm him down, and neither party objected. The court made it very clear to the advocate that she was not to discuss any testimony with him. Upon his return to the witness stand, the court noted, with the jury present, that it would allow the advocate to sit in the courtroom, and again neither party objected.

[10] "New York courts have long held that a judge conducting a public trial is empowered to control the proceedings in whatever manner may be consistent with the demands of decorum and due process" (*People v. Tohom*, 109 A.D.3d 253, 267, 969 N.Y.S.2d 123 [2013]; *see also People v. Sorge*, 301 N.Y. 198, 202, 93 N.E.2d 637 [1950] [trial courts possess "wide latitude and ... broad discretion ... to administer a trial effectively"]). Defendant's contention pertaining to the crime victim advocate's comforting of the victim's brother is unpreserved for appellate review since, after the court indicated that it would allow him to speak with the advocate, upon the stipulation that they would not discuss his testimony, defense counsel did not register an objection. Nor did defense counsel object when the court told the jury that it would allow the advocate to sit in the courtroom while the victim's brother testified. Further, with regard to the victim's testimony, defendant has made no showing that the advocate's presence had any "identifiable impact on the proceeding" (*Tohom*, 109 A.D.3d at 267, 969 N.Y.S.2d 123). Thus, in addition to the statutory *41 basis afforded by Executive Law § 642–a, the District Court's decision to allow the advocate into the courtroom during the victim's testimony, and to comfort her while she was outside of the courtroom, was not an improper exercise of its inherent power and discretion to control the trial proceedings (*see Tohom*, 109 A.D.3d at 267, 969 N.Y.S.2d 123 [affirming a defendant's conviction where the trial court permitted a child witness to testify in the presence of a therapeutic "comfort dog" used to provide emotional support]; *see generally Sexton v. State*, 529 So.2d 1041, 1044–1045 [Ala.Ct.Crim.App.1988] [affirming a defendant's conviction even though the prosecutor sat with the five-year-old victim as she testified, and explaining that the "trial judge was in the best position to determine what, if any, probable effect this action would have on the jury"]; *People v. Adams*, 19 Cal.App.4th 412, 437, 23 Cal.Rptr.2d 512 [1993] ["(t)he presence of a support person at the stand does not necessarily rob an accused of dignity or brand him or her with an unmistakable mark of guilt"]; *Gonzalez v. State*, 310 Ga.App. 348, 714 S.E.2d 13 [2011] [trial court did not abuse its discretion by allowing a "victim-witness advocate" employed by the District Attorney's Office to sit with the 14–year–old victim while she testified]).

Defendant's contention that the People violated their disclosure obligations under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) by failing to disclose that they had allegedly induced defendant's two children to testify against her by telling them that, if they did so, defendant would not go to jail, relies on factual assertions outside the record and, thus, cannot be reviewed on direct appeal (*see People v. Valdes*, 66 A.D.3d 925, 886 N.Y.S.2d 623 [2009]; *People v. Reyes*, 60 A.D.3d 873, 875 N.Y.S.2d 229 [2009]; *People v. Purdie*, 50 A.D.3d 1065, 856 N.Y.S.2d 223 [2008]; *People v. Williams*, 43 A.D.3d 729, 841 N.Y.S.2d 447 [2007]).

[11] [12] To the extent that defendant's claims of ineffective assistance of counsel **360 are predicated on matters dehors the record, we cannot review them. With regard to defendant's claim of her counsel's general failure to make proper objections, "counsel's efforts should not be second-guessed with the clarity of hindsight to determine how the defense might have been more effective" (*People v. Benevento*, 91 N.Y.2d 708, 712, 674 N.Y.S.2d 629, 697 N.E.2d 584 [1998]), and mere disagreement with strategies or tactics will not suffice to establish a claim of ineffective assistance of counsel (*see People v. Benn*, 68 N.Y.2d 941, 942, 510 N.Y.S.2d 81, 502 N.E.2d 996 [1986]). With regard to the remainder of defendant's ineffective assistance claims which can be reviewed on direct appeal, we find that defendant has failed to *42 demonstrate that she was deprived of the effective assistance of counsel under either the federal standard (*Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 [1984]) or the New York State standard (*Benevento*, 91 N.Y.2d 708, 674 N.Y.S.2d 629, 697 N.E.2d 584; *People v. Baldi*, 54 N.Y.2d 137, 444 N.Y.S.2d 893, 429 N.E.2d 400 [1981]).

We have considered defendant's remaining contentions and find them to be without merit.

Accordingly, the judgments of conviction are affirmed.

All Citations

53 Misc.3d 34, 39 N.Y.S.3d 354, 2016 N.Y. Slip Op. 26145

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