224 A.3d 1268
Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee
v.
Patrick TIGHE, Appellant

No. 57 MAP 2018
|
Argued: May 14, 2019
|
Decided: February 19, 2020

Synopsis
Background: Defendant, who was pro se, was convicted in the Court of Common Pleas, Lackawanna County, Criminal Division, No. CP–35–CR–0001297–2012, Margaret Moyle, J., of rape and other sex offenses against child victim. Defendant appealed. The Superior Court, No. 266 MDA 2017, Bowes, J., 184 A.3d 560, affirmed in part, vacated in part, and remanded. Defendant appealed.

[Holding:] The Supreme Court, No. 57 MAP 2018, Dougherty, J., held that defendant forfeited his right to personally cross-examine victim by violating bail condition prohibiting contact with her.

Affirmed.

Saylor, Chief Justice, and Todd and Mundy, JJ., filed concurring opinions.

Wecht, J., filed a concurring and dissenting opinion.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection.

West Headnotes (5)

[1] **Criminal Law** Theory and Grounds of Decision in Lower Court

Under the "right-for-any-reason doctrine," Supreme Court can affirm if the lower tribunal's decision was correct for any other reason supported by the record. (Per Dougherty, J., with two judges concurring and four judges concurring in result.)

[2] **Criminal Law** In general; right to appear pro se

The right to self-representation is not absolute. (Per Dougherty, J., with two judges concurring and four judges concurring in result.) U.S. Const. Amend. 6; Pa. Const. art. 1, § 9.

[3] **Criminal Law** Delay or misuse of waiver or right of self-representation

A defendant's misbehavior affecting the right to self-representation is not restricted to the courtroom, and the relevant rules of procedure and substantive law are not limited to those occurring only in the trial itself. (Per Dougherty, J., with two judges concurring and four judges concurring in result.) U.S. Const. Amend. 6; Pa. Const. art. 1, § 9.

[4] **Criminal Law** Delay or misuse of waiver or right of self-representation

Threatening or intimidating a potential trial witness is serious and obstructionist misconduct, which if properly shown was committed by a pro se defendant, can properly result in the complete or partial forfeiture of his or her pro se

status. (Per Dougherty, J., with two judges concurring and four judges concurring in result.)
U.S. Const. Amend. 6; Pa. Const. art. 1, § 9.

[5] **Criminal Law** Delay or misuse of waiver or right of self-representation

Pro se defendant forfeited his right to personally cross-examine child victim, rather than having standby counsel do so with defendant's own questions, by deliberately contacting victim months before trial, in violation of bail condition prohibiting contact with victim, and imploring her not to pursue his prosecution for sex offenses. (Per Dougherty, J., with two judges concurring and four judges concurring in result.)
U.S. Const. Amend. 6; Pa. Const. art. 1, § 9.

Appeal from the Order of Superior Court at No. 266 MDA 2017 dated April 12, 2018, Vacating the Judgment of Sentence dated January 13, 2016 of the Lackawanna County, Court of Common Pleas, Criminal Division, at No. CP-35-CR-0001297-2012 and Remanding for resentencing. Bisignani Moyle, Margaret A., Judge.

Attorneys and Law Firms

Mark J. Powell, Esq., for Appellee.

Terrence J. McDonald, Esq., for Appellant.

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

OPINION ANNOUNCING JUDGMENT OF THE COURT

JUSTICE DOUGHERTY

***1269** In this discretionary appeal, we examine whether the trial court improperly limited appellant's right to self-representation in violation of the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution when, during appellant's jury trial for sexual offenses committed against a minor female, the court prohibited appellant, who was proceeding *pro se*, from personally conducting cross-examination of the victim-witness, and instead required stand-by counsel to cross-examine the witness using questions prepared by appellant. We determine there was no constitutional violation and affirm the order of the Superior Court.

On the night of May 29, 2012, appellant, then 58 years old, sexually assaulted a minor female victim, J.E., then 15 years old, by placing his penis in her mouth and vagina. The following day, J.E. told her older sister what had happened. J.E.'s sister called the police who transported J.E. to the Children's Advocacy Center for medical examination and a rape kit. The examination showed redness, abrasions and exfoliations of J.E.'s internal and external genitalia consistent with trauma. Testing of the contents of the rape kit resulted in a forensic and statistical finding that appellant's and J.E.'s DNA were present on a pubic hair combed from J.E.'s vaginal area. Police conducted a consensual phone intercept between J.E. and appellant, in which appellant made incriminating statements. Police arrested appellant and charged him with rape, involuntary deviate sexual intercourse, indecent assault of a person less than 16 years old, unlawful contact with a minor, and statutory sexual assault.[1]

Prior to trial, in February 2013, appellant informed the court he wished to proceed *pro se*.[2] The court conducted a *Faretta* colloquy, determined appellant knowingly and voluntarily relinquished his right to counsel, granted the request to proceed *pro se* and appointed stand-by counsel, attorney Christopher Osborne. *See* *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (Sixth Amendment right to counsel implicitly includes right to self-representation); Pa.R.Crim.P. 121(A)(2) (setting forth minimum inquiry necessary to determine defendant's choice to proceed *pro se* is knowing, voluntary and intelligent); Pa.R.Crim.P. 121(D)

("When the defendant's waiver of counsel is accepted, ***1270** standby counsel may be appointed for the defendant.").[3]

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

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

J.E. then testified on direct-examination that on May 20, 2013, she noticed numerous unanswered calls to her phone from a number she did not recognize, so she called the number back and asked, "[W]ho's this[?]" *Id.* at 42. A voice replied, "you know who this is[,]" among other things, and J.E. recognized the voice as appellant's. *Id.* She testified, "[Appellant] said, 'Come on. Why [are] you doing this to me? I didn't hurt you. Please don't put me in jail for life. We can make it right baby[;]" to which she replied, "Yes you did hurt me[,]" and hung up. *Id.* Appellant called back several more times and each time J.E. answered and quickly hung up. She also testified she had been frightened, in part because she did not know appellant had been released and she believed he might be looking for her.[5] Stand-by counsel cross-examined J.E., asking her questions prepared by appellant. At the conclusion of the hearing, the trial court revoked appellant's bail.

On June 17, 2013, the court conducted a pre-trial hearing wherein, among other ***1271** things, the court addressed appellant's "request ... [for] a ruling on who is going to conduct cross examination" at trial. N.T. 6/17/13 at 12. The Commonwealth took the position appellant's willful misconduct in violating the conditions of bail should "be construed as a forfeiture" of appellant's right to question J.E. personally at trial. *Id.* at 13. The Commonwealth specifically argued:

> [Appellant] willfully violated those rules. They were fairly clear, I think, don't contact the victim. He disregarded them. ...
>
> Now we have from past behavior that whether or not there is an order in place, whether or not there is [a] parameter set up by the court in terms of what is or is not relevant questioning, the manner of questioning, the depth of questioning, the subject matter of questioning, I don't know that anyone can guarantee that [appellant] would follow that because he's demonstrated his willful disregard for a prior order of court.
>
> So [we] would simply supplement with what was submitted some time ago with the fact that overlaying that is the question of whether or not [appellant] now forfeits his right because of his own behavior.

Id. at 14-15.

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

> And that phone call that was supposedly made, there was no threats, there was no, like, threats, I'm going to kill you, nothing like this, like I'm going to come and get you if you [ ] testify. There [were] no threats. It was asked, Why are you going to put me in prison for the rest of my life? I never hurt

> you. ...The rules are the rules, and I feel that to have standby counsel cross-examine the victim like that would be very prejudicial to the jury, definitely send a thing to the jury to show a sign to the jury that, like, how could I be representing myself the whole trial but not there. It's almost like saying I'm guilty[.]

Id. at 15-16.

The court deferred ruling on the issue pending its review of pertinent case law.[6] A final pre-trial conference was held on July 3, 2013.[7] At that time, the trial court ruled appellant would not be permitted to cross-examine J.E. personally at trial.[8] The ***1272** court stated its "number one" reason for the ruling was appellant's "violation of the bail condition of no contact." N.T. 7/3/13 at 9. The court added its ruling also took into account "the age of the victim" and appellant's "position of trust with the minor child." *Id.* at 9-10. Appellant strenuously objected, repeatedly arguing he has a "right to confrontation" under "Crawford versus Washington." *Id.* at 13, 14, 19. Appellant asserted, among many other things, "The prosecution showed no offering of proof that the alleged victim has emotional trauma" or "that I am a threat to this witness." *Id.* at 14, 19. The Commonwealth replied that it could supplement the record, if the court wished, and presented an offer of proof of evidence from a treating psychologist who would testify to the negative emotional impact appellant's personal cross-examination would have on J.E. *Id.* at 20-21. The court replied, "[T]hat's your decision. If you want the opportunity to supplement the record with that testimony, I will grant you the opportunity to do that." *Id.* at 20. Ultimately, the Commonwealth did not supplement the record with additional evidence.

On the first day of trial, the court again conducted a *Faretta* colloquy and determined appellant's decision to represent himself was knowing, voluntary and intelligent. Thereafter, appellant strenuously objected to the court's prior ruling that standby counsel would conduct cross-examination of J.E. The court replied, "I understand you're making a record, but it has been decided, sir. Your Sixth Amendment right to represent yourself is not absolute." N.T. 7/8/13 at 19. The court stated it had engaged in a balancing test "between your right to represent yourself and protecting any potential witnesses from potential harm." *Id.* In response to appellant's continued argument against the court's ruling, the court responded:

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

Id. at 20-21.

The court noted "[t]hose facts" coupled with other factors such as J.E.'s age and appellant's occupying a "position of trust" with her, were the "reasons that I made the ruling that I did and we are not going to discuss it any further." *Id.* at 21-22.[9] At the outset of trial, the court instructed the jury appellant was representing himself, that he had standby counsel who, as a procedural matter, may take a more active role at some point in the proceedings, but the jury was to take no negative inference against appellant in that event. During ***1273** trial, stand-by counsel cross-examined J.E., using questions provided by appellant. Appellant called J.E. as a witness during his defense case, and stand-by counsel conducted the direct examination, again using questions prepared by appellant. Appellant conducted all other aspects of his defense and testified in his own defense. At the conclusion of the three-day trial, the jury convicted appellant of all charges and the court sentenced him to 20 to 40 years' imprisonment. Appellant filed a counseled post-sentence

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

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

The Superior Court affirmed in relevant part.[11] The panel first observed that, although appellant had "explicitly distance[d] himself" from any analysis focused on the Sixth Amendment right of confrontation, the trial court relied on case law from other jurisdictions drawing parallels between that right and the Sixth Amendment right to self-representation. *Tighe*, 184 A.3d at 566. The panel noted the right to self-representation is implicit in the Sixth Amendment, citing *Faretta*, while the right to confrontation is explicit therein, citing U.S. CONST. AMEND. VI, and began its analysis by reviewing case law pertaining to the right of confrontation. *Id.* at 566-67.[12] The panel considered ***1274** *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), where the High Court held a "State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *Tighe*, 184 A.3d. at 567, *quoting* *Craig*, 497 U.S. at 853, 110 S.Ct. 3157.[13] The Superior Court explained the Maryland statute at issue in *Craig* permitted the testimony of a child abuse victim to be presented to the jury via one-way closed circuit television, but only if the trial judge made a finding that testifying in the courtroom, in the presence of the alleged abuser, would "result in the child suffering serious emotional distress such that the child cannot reasonably communicate." *Id.*, *quoting* *Craig*, 497 U.S. at 841, 110 S.Ct. 3157. The panel observed the *Craig* Court declined to specify the minimum showing of emotional trauma required to outweigh the confrontation right but held the Maryland statute's requirement of serious emotional distress such that the child cannot reasonably communicate passed constitutional muster. *Id.* at n.3

The panel then observed the trial court in the present matter "extensively relied on *Fields v. Murray*, 49 F.3d 1024 (4th Cir. 1995) (*en banc*)[, *cert. denied*, 516 U.S. 884, 116 S.Ct. 224, 133 L.Ed.2d 154 (1995)]," a decision wherein the United States Court of Appeals for the Fourth Circuit held "[i]f a defendant's Confrontation Clause right can be limited in the manner provided in *Craig*, we have little doubt that a defendant's self-representation right can be similarly limited." *Id.* at 568, *quoting* *Fields*, 49 F.3d at 1035. The panel disagreed with appellant's fundamental assertion that the right of self-representation is an absolute right that can never be curtailed. *Id.* at 569, *citing* *McKaskle v. Wiggins*, 465 U.S. 168, 176-77, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (*Faretta* indicates no absolute bar on stand-by counsel's participation even without express consent of *pro se* defendant). The panel stated, "Instead, the question is whether the principles announced in *Craig*, which permitted a procedure that limited the Confrontation Clause rights due to the countervailing interests of the victim when the procedure otherwise preserved the reliability of the cross-examination, should be adopted in this Commonwealth as a permissible restriction on the right of self-representation." *Id.* Ultimately, the panel concluded the answer to that question "is yes." *Id.* The panel stated it was "persuaded by the analysis set forth in *Fields* that, if the constitutional right of confrontation can be limited on the basis of emotional trauma to the victim, then it follows that the same State interest serves to justify the

[self-representation] restriction at issue." *Id.* at 571.[14] Accordingly, the panel ***1275** determined appellant's right to self-representation was not violated and the trial court committed no error in restricting that right under the present circumstances. As noted, the panel did not discuss forfeiture as a potential alternative basis for denying appellant the right to personally cross-examine J.E.

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

> (1) In an issue of first impression, after a knowing, voluntary and intelligent *Faretta* colloquy where the trial court approves the right of self-representation during a criminal trial, whether the trial court can thereafter limit or deny the guaranteed right to self-representation by forcing standby counsel to participate during the trial for reasons other than waiver or forfeiture of that right?
>
> (2) Whether the Superior Court disregarded the limits set for standby counsel by Pennsylvania Rule of Criminal Procedure 121(D) and legal precedent reached in *Commonwealth v. Spotz*, 616 Pa. 164, 47 A.3d 63 (2012), by authorizing standby counsel to participate during trial before jury over the objections of the accused and absent waiver or forfeiture of the accused's right to self-representation?
>
> (3) Whether it was sufficiently established that the minor victim would suffer emotional trauma making her unable to reasonably communicate if questioned by the accused during trial thereby making it necessary to deny and/or limit the right to self-representation?

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

The arguments appellant sets forth in support of his first and third issues overlap; accordingly, and because our determination of these two issues is dispositive, we will present and address them together. Appellant now concedes the right to self-representation is not absolute, but can be waived or forfeited. Appellant's Brief at 12. Appellant acknowledges a trial judge may terminate self-representation where a *pro se* defendant "deliberately engages in serious and obstructionist misconduct." *Id.* at 13, *quoting* *Faretta*, 422 U.S. at 834 n.46, 95 S.Ct. 2525. Appellant recognizes "the right to self-representation is 'only to the extent that [a defendant] is able and willing to abide by the rules of procedure and courtroom protocol.' " *Id.*, *quoting* *McKaskle*, 465 U.S. at 173, 104 S.Ct. 944. Despite the fact the Commonwealth explicitly framed its request to restrict appellant's cross-examination of J.E. at trial based on an alleged forfeiture of his right to self-representation due to his willful violation of a no-contact-with-the-victim bail condition, appellant argues "[t]here is no suggestion" he forfeited his right by his actions and maintains "[t]he court did not find [him] disrespectful or disruptive, nor was it implied or indicated in the record." *Id.* at 14.[15]

***1276** Appellant asserts the Commonwealth's motion "to limit or deny [appellant's] right to self-representation[,]" was based primarily on a concern J.E. would "suffer emotional trauma" as a result of being questioned by appellant. *Id.* at 15. Appellant further argues the trial court did not address this concern until it issued its Rule 1925(a) opinion stating it "was persuaded J.E. would suffer 'emotional trauma' if she was subject to cross examination by [appellant]." *Id.* at 18, *quoting* Trial Ct. Op., 7/28/16 at 29. Complaining there was no hearing or evidence presented that J.E. would actually suffer emotional trauma or be unable to testify accurately as a result of being questioned by appellant, he asserts "[t]he trial court clearly confused the right to confront one's accuser with the right to self-representation and while the right to confrontation may have been maintained, the right to self-representation was not." *Id.*

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

in his presence.' " *Id.* at 24 n.13, *quoting* *Fields*, 49 F.3d at 1036.[16]

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

***1277** Moreover, appellant observes this Court has repeatedly held, with respect to the face-to-face confrontation right formerly set forth in Article I, Section 9 of the Pennsylvania Constitution,[17] society's interest in protecting victims of sexual abuse does not prevail over an accused's constitutional right to confrontation. *Id.* at 27-33, *citing* *Commonwealth v. Ludwig*, 527 Pa. 472, 594 A.2d 281 (1991) (use of closed circuit television to transmit testimony of witness violated Article I, Section 9 of Pennsylvania Constitution's face-to-face confrontation right guarantee); *Commonwealth v. Lohman*, 527 Pa. 492, 594 A.2d 291 (1991) (same; companion case to *Ludwig*); *Commonwealth v. Louden*, 536 Pa. 180, 638 A.2d 953 (1994) (Legislature's enactment of statutes intended to provide protection to child witnesses, while perhaps laudable, violates Pennsylvania's Constitution which specifically, clearly and unambiguously guarantees to an accused the right to face-to-face confrontation with his accuser). Appellant suggests the express right to self-representation contained in Article I, Section 9 similarly cannot give way to society's interest in protecting victims of sexual abuse.

Amicus Curiae, Defender Association of Philadelphia ("DAP"), has filed a brief on behalf of appellant, stating it "is mindful that this Court can affirm a trial court order if correct for any reason. Therefore Amicus will examine whether the facts as found by the trial court justify a forfeiture even though the trial court itself never made the requisite finding of forfeiture." Amicus Brief at 18. DAP argues that "[b]oth *Faretta* and *McKaskle* contemplate forfeiture by conduct that occurs during the trial itself, and that disrupts the orderly processes of that trial." *Id.* at 16, *citing* *McKaskle*, 465 U.S. at 173, 104 S.Ct. 944 (*Faretta* recognizes that "an accused has a Sixth Amendment right to conduct his own defense, provided only that he knowingly and intelligently forgoes his right to counsel and that he is able and willing to abide by rules of procedure and courtroom protocol."). DAP further contends, even a "liberal extension of what might constitute a forfeiture under *Faretta*/*McKaskle* would contemplate out-of-court or pretrial conduct only to the extent that it strongly portends future courtroom disruption of orderly trial processes." *Id.* at 16, *quoting* *United States v. Smith*, 830 F.3d 803, 810 (8th Cir. 2016) ("[p]retrial activity is relevant [to continued *pro se* status] only if it affords a strong indication that the defendant ... will disrupt the proceedings in the courtroom.") (construing *Faretta*) (additional citations omitted).

DAP insists appellant comported himself in a wholly appropriate manner during all pre-trial and trial proceedings, that the trial court never suggested his courtroom conduct disrupted courtroom processes, and a "review of the record discloses no instances of such disruption." *Id.* at 17. "Nor does the trial court suggest that any out-of-court or pretrial activity by appellant constitutes a strong indication — or indeed any indication at all — that appellant would inappropriately disrupt orderly trial processes during cross-examination of the complainant at trial." *Id.* With specific reference to the trial court's partial reliance on appellant's violation of the no-contact bail condition as a reason to deny him the right to personally cross-examine J.E., DAP asserts the behavior could not constitute a forfeiture because it did not occur during trial or portend future disruption of orderly trial processes. DAP ***1278** concludes, "appellant did not forfeit by conduct any component of his right to self-representation." *Id.*

The Commonwealth responds that appellant and DAP are "incorrect" to the extent they suggest the Commonwealth supports forfeiture as a basis for denying appellant the right to personally cross-examine J.E. Commonwealth's Brief at 15 n.2. "Rather, the Commonwealth's position is that the right can be 'narrowly limited' as the Superior Court concluded." *Id.* In support of that position, the

Commonwealth argues the United States Supreme Court's decisions in *Faretta* and *McKaskle* recognize the Sixth Amendment right to self-representation is not absolute, and the Superior Court here properly found a parallel between the Sixth Amendment right of confrontation under *Craig* and *Fields* and the Sixth Amendment right to self-representation.[18]

The parties agree the current appeal presents questions of law for which this Court's standard of review is *de novo* and scope of review is plenary. *Commonwealth v. Brown*, 646 Pa. 396, 185 A.3d 316, 324 (2018). We turn first to appellant's reliance on *Ludwig*, *Lohman*, and *Louden*, to support his argument based solely on an interpretation of Article I, Section 9 of the Pennsylvania Constitution, which provides as follows:

§ 9. Rights of accused in criminal prosecutions.

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

PA. CONST. art. I, § 9.

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

> The amendment [to Article I, Section 9 of the Pennsylvania Constitution] removed the [prior] right of an accused person to confront the witnesses against him or her "face-to-face." *See Bergdoll v. Commonwealth of Pennsylvania*, 858 A.2d 185, 190-91, 201-02 (Pa. Cmwlth. 2004) (*en banc*), *affirmed*, 583 Pa. 44, 874 A.2d 1148 (2005) (*per curiam*). Thus, the text of the Pennsylvania Constitution guaranteeing accused persons the right to confront the witnesses against them was made identical to the text of the Confrontation Clause in the Sixth Amendment to the United States Constitution. Specifically, the accused has the right "to be confronted with the witnesses against him." In *Bergdoll*, the Commonwealth Court rejected a challenge to the 2003 amendment, and this Court affirmed. As the Commonwealth ***1279** Court explained, the amendment was proposed after we had ruled that laws permitting children to testify outside the physical presence of the accused, *e.g.*, by closed circuit television, violated the Pennsylvania Constitution because such laws denied the accused the right to confront witnesses against him or her "face-to-face." *Bergdoll, supra* at 190. By removing the "face-to-face" language from the Pennsylvania Constitution and making the confrontation clauses of the Pennsylvania Constitution and the Sixth Amendment identical, the amendment was designed to permit the enactment of laws or the adoption of rules that would permit child victims or witnesses to testify in criminal proceedings outside the physical presence of the accused. *Id.* at 190-91.

Commonwealth v. Williams, 624 Pa. 183, 84 A.3d 680, 682 n.2 (2014).

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

[1]We now address the parameters of that right and the corresponding Sixth Amendment right in the resolution of appellant's primary contention of trial and Superior Court error centered on an alleged misreading or misapplication of *Craig*. Given the Superior Court's correct observation there was no evidence presented to the trial court indicating J.E. would be traumatized if questioned by appellant directly, we are hesitant to determine

whether the permissible limitation on the confrontation right as it applies to child victims of sexual abuse, *see* *Craig*, has a parallel paradigm applicable to the self-representation right. In *Craig*, "[t]he expert testimony ... suggested that each child would have some or considerable difficulty in testifying in Craig's presence." *Craig*, 497 U.S. at 842, 110 S.Ct. 3157. The High Court explained, "if the State makes an adequate showing of necessity," a special procedure that permits a child witness to testify against a defendant "in the absence of face-to-face confrontation with the defendant" can be justified. *Id.* at 855, 110 S.Ct. 3157. The Court noted "[t]he requisite finding of necessity" requires the trial court to "hear evidence" regarding whether the special procedure is necessary to "protect the welfare of the particular child[,]" and "[t]he trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant." *Id.* at 855-56, 110 S.Ct. 3157. If there is a parallel between limitations of the confrontation and self-representation rights guaranteed by the Sixth Amendment and Article I, Section 9 of the Pennsylvania Constitution, relevant evidence would presumably be required to justify those limitations in any given case. Accordingly, this case is a poor vehicle to decide the matter, as there simply was no evidentiary showing with respect to J.E.'s emotional response to direct questioning by appellant. Nevertheless, this Court can affirm if the lower tribunal's decision was correct for any other reason supported by ***1280** the record. *In re A.J.R.-H.*, 647 Pa. 256, 188 A.3d 1157, 1175-76 (2018) ("[R]ight-for-any-reason" doctrine "allows an appellate court to affirm the trial court's decision on any basis that is supported by the record."). In our view, as will be explained below, appellant forfeited his constitutional right to personally cross-examine J.E. by his willful misconduct in violating the no-contact bail condition.[19]

[2] [3]A defendant's right to act as his own counsel has long been recognized under the law. As noted above, it is implicit in the Sixth Amendment to the United States Constitution and explicit in Article I, Section 9 of the Pennsylvania Constitution. "The right to self-representation, however, is not absolute." *Commonwealth v. Brooks*, 628 Pa. 524, 104 A.3d 466, 474 (2014). In *Faretta*, the High Court recognized that a defendant may forfeit his right to self-representation. *Faretta*, 422 U.S. at 834 n.46, 95 S.Ct. 2525 (trial court "may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct[;] ... self-representation is not a license to abuse the dignity of the courtroom" or to fail to "comply with relevant rules of procedural and substantive law"). The California Supreme Court, for example, has held *Faretta* does not limit the "serious and obstructionist misconduct" potentially supporting a finding of forfeiture, to behavior occurring in the courtroom. *See, e.g.*, *People v. Carson*, 35 Cal.4th 1, 23 Cal.Rptr.3d 482, 104 P.3d 837, 840 (2005), *citing* *Faretta*, 422 U.S. at 834 n.46, 95 S.Ct. 2525. We find this approach persuasive. Although trial may be the central event in a criminal prosecution, we recognize it is the culmination of many weeks or months of preparation and related proceedings, not all of which take place in the courtroom; accordingly, misbehavior affecting the right to self-representation is not restricted to the courtroom and the "relevant rules of procedure and substantive law" are not limited to those occurring only in the trial itself. *Id.* at 841, 95 S.Ct. 2525, *quoting* *Faretta*, 422 U.S. at 834 n.46, 95 S.Ct. 2525. Ultimately, it is the effect and not the location of the misconduct and its impact on the core integrity of the trial that will determine whether forfeiture is warranted. *Id.*

[4]One form of serious and obstructionist misconduct is "witness intimidation, which by its very nature compromises the fact[-]finding process and constitutes a quintessential 'subversion of the core concept of a trial.' " *Id.*, *quoting* *United States v. Dougherty*, 473 F.2d 1113, 1125 (D.C. Cir. 1972). We agree with the California Supreme Court that threatening or intimidating a potential trial witness subverts the core concept of a fair trial and we find that such behavior is serious and obstructionist misconduct under *Faretta*, which if properly shown was committed by a *pro se* defendant, can properly result in the complete or partial forfeiture of his or her *pro se* status.[20]

***1281** [5]Here, some three months after the court granted appellant's request to represent himself, he was released on bail and as a condition thereof, was ordered to have no contact with the victim. However, appellant called J.E. repeatedly. When she hung up on him, he called again and again. J.E. testified she was "scared" and "shocked" by the calls. N.T. 6/4/13 at 47. Appellant admits he violated the no-contact condition, but has insisted, in response to the Commonwealth's position the violation amounted to a forfeiture of his right to personally cross-examine J.E., that he never threatened J.E when he contacted her.

Nevertheless, appellant does not dispute that he beseeched J.E. not to put him in jail for the rest of his life and insisted to her he did not hurt her.[21] Whether or not appellant's improper communications with J.E. might be described as including a "threat," the record would clearly support a finding his purpose was to manipulate J.E. in an attempt to influence her participation in the criminal proceedings against him to his benefit. Moreover, J.E. testified she "felt like [she] was in danger" after being contacted by appellant. *Id*. at 47. Thus, even if appellant merely attempted to manipulate J.E., which we conclude would itself be enough to subvert or obstruct the truth-determining process, J.E. clearly felt threatened and/or intimidated thereby. Accordingly, we hold the trial court's ruling prohibiting appellant from himself cross-examining J.E. but requiring standby counsel to do so, using appellant's own questions, was proper under the facts of this case, which included appellant's deliberate violation of a no-contact order with the Commonwealth's chief witness in an attempt to influence the outcome of the criminal proceedings against him. Appellant's serious and obstructionist misconduct compromised the core truth-determining function of a trial, and he thus forfeited his right to personally cross-examine J.E.[22,23] We find no constitutional ***1282** violation and thus affirm the decision of the Superior Court.

Order affirmed.

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

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

Justice Wecht files a concurring and dissenting opinion.

CONCURRING OPINION

CHIEF JUSTICE SAYLOR

While it is certainly plausible that the victim would have suffered emotional trauma from having to answer questions personally posed to her by Appellant at trial, I find substantial weight to Appellant's argument that the record is insufficient to support that conclusion. *See, e.g.*, Brief for Appellant at 16. If the Commonwealth sought to restrict, on that basis, Appellant's rights under *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed.2d 562 (1975), the Commonwealth bore the burden to create an adequate record, ***1283** which it failed to do. *See* Opinion Announcing the Judgment of the Court (OAJC), at 1271–72 (reciting that the Commonwealth elected not to supplement the record with evidence that would tend to show the "negative emotional impact [A]ppellant's personal cross-examination would have" on the victim); *see also id.* at 1279–80. Were this the sole basis for the dispositions in the trial and intermediate courts, I would be inclined to reverse.

As spelled out more fully by the lead Justices, however, the Commonwealth chose to rely on a forfeiture rationale. *See id.* at 1270–71 & n.6. Moreover, in its pretrial ruling the trial court largely adopted that rationale by focusing on Appellant's misconduct in disobeying the relevant provision of the bail order, rather than future harm to the complaining witness. *See* N.T., July 8, 2013, at 21-22.[1]

Despite the prominent role of a forfeiture dynamic in the decisions under review, Appellant framed the issues presented in this appeal to specifically exclude any consideration of a possible misconduct-based limited forfeiture of his self-representational rights. *See Commonwealth v. Tighe*, — Pa. —, —, 195 A.3d 850, 851 (2018) (*per curiam*). In this circumstance, I ultimately agree with Justice Wecht that the Court should not undertake, of its own accord, to proceed beyond the issues presented for review. *See* Pa.R.A.P. 1115(a)(3); *Commonwealth v. Metz*, 534 Pa. 341, 347 n.4, 633 A.2d 125, 127 n.4 (1993).

CONCURRING OPINION

JUSTICE TODD

I concur in the result. On the merits of the allocatur question not ultimately reached by the Court, I agree with

Justice Mundy, as stated in her concurring opinion, that the trial court did not abuse its discretion in concluding that the instant record, under the current state of the law, was sufficient to demonstrate that the victim would have been emotionally traumatized by Appellant's cross-examination so as to justify the trial court's decision to order standby counsel to perform that examination and thereby momentarily supplant Appellant's desire to represent himself, as a permissible restriction on the right of self-representation.

CONCURRING OPINION

JUSTICE MUNDY

I concur in the result. Additionally, I agree with the expressions of Chief Justice ***1284** Saylor and Justice Wecht in their separate opinions, and would not affirm on the basis of forfeiture under the right-for-any-reason doctrine. Relative to the issues accepted for review, whose merits have not been reached, I note the opinion announcing the judgment of the court and the responsive opinions implicitly accept that establishing a record of a witness' emotional trauma requires expert testimony before restrictions may be placed on a self-represented defendant's cross-examination, and because such record is absent conclude we should not address the issue. Until this Court definitively extends *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) to limiting self-representation, and sets forth a test for determining what evidence the Commonwealth must demonstrate to preclude the defendant from being entitled to personally cross-examine the victim, such conclusions are premature.

The lower court in this matter held, as matter of first impression, that the principles announced in *Craig*, "which permitted a procedure that limited the Confrontation Clause rights [of a *pro se* defendant] due to the countervailing interests of the victim when the procedure otherwise preserved the reliability of the cross-examination[,]" was "a permissible restriction on the right of self-representation." *Commonwealth v. Tighe*, 184 A.3d 560 (Pa. Super. 2018). In so doing, the court addressed Appellant's concern that his right to self-representation cannot be limited, but did not opine on the degree of emotional trauma that must be demonstrated to warrant limiting that right.[1] Nevertheless, Appellant has asked this Court to determine "whether it was sufficiently established that the minor victim would suffer emotional trauma making her unable to reasonably communicate if questioned by the accused during trial making it necessary to deny and/or limit the right to self-representation?" *Commonwealth v. Tighe*, —— Pa. ——, 195 A.3d 850 (2018) (*per curiam*). Appellant's premature leap to the sufficiency of the victim's emotional trauma, in the absence of a clear test, has resulted in today's splintered decision.

As a final note, assuming emotional trauma must be established, I believe the instant record supports such a finding. One of the conditions of Appellant's bail was to have no contact with J.E. J.E. testified at the bail hearing that she was unaware Appellant had been released on bail until she received a phone call from him where he pleaded with her "Come on. Why [are] you doing this to me? I didn't hurt you. Please don't put me in jail for life. We can make it right baby[.]" N.T., 6/4/13, at 42. She further testified, "I was scared. I was shocked. I didn't know what to think because I wasn't notified that he was out. I felt like I was scared he would find me. I didn't know if he was already trying to find me. So that's when I told my foster mom and contacted the police ... I felt like I was in danger." *Id.* at 47. Without an established test to guide it, the trial court exercised its discretion to balance the victim's right to be free from being questioned by Appellant, and Appellant's right to self-representation. It may have been prudent to hold a subsequent hearing, but in the absence of a clear directive, it is inappropriate to fault the trial court's handling of the matter. For these reasons, I concur in the result.

***1285** CONCURRING AND DISSENTING OPINION

JUSTICE WECHT

I agree with the Plurality's judgment, as reflected in the Opinion Announcing the Judgment of the Court ("OAJC"), that the issues as to which we granted review—which concern the tension between protecting a criminal defendant's right to represent himself and avoiding where possible the imposition of excessive trauma upon a child witness—should not be resolved here. But for much the same reason, I disagree with the Plurality's suggestion that we should decide this case by adopting *sua sponte* a novel principle of law that the parties did not pursue and the lower courts did not address.

As the learned Plurality relates, these issues hinge upon the Supreme Court's decision in *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), and the Court of Appeals' decision in *Fields v. Murray*, 49 F.3d 1024 (4th Cir. 1995). *Craig* held that the state may limit a defendant's Confrontation Clause right by arranging for a child victim witness to give testimony remotely, rather than in court in the presence of the defendant, but only upon a case-specific determination that in-court testimony will cause trauma to the witness that exceeds the ordinary emotional difficulty of facing one's assailant. *See* *Craig*, 497 U.S. at 857, 110 S.Ct. 3157. In *Fields*, the Court of Appeals extended this limiting principle from the context of the Confrontation Clause to the right to self-representation, reasoning generally that, because each was rooted in the Sixth Amendment, they could be subject to similar limitations. *See* *Fields*, 49 F.3d at 1035.[1]

As set forth above, these holdings hinged upon a case-specific examination of the traumatic effect upon the witness of being confronted or examined by the defendant. In this case, we cannot answer these questions because, not only does the record lack any fact-finding on this particular point,[2] but the Commonwealth expressly waived the opportunity the trial court afforded it to produce evidence relevant to that inquiry.[3]

Rather than stop there, however, the Plurality instead relies upon the right-for-any-reason doctrine to hold that Patrick Tighe forfeited his right to represent himself when he contacted the victim months before trial and implored her not to pursue his prosecution.[4] Notably, the parties expressly have eschewed forfeiture as a basis for decision. Two of the three questions upon which we granted review expressly frame the issue as *excluding* waiver or forfeiture, and the third issue implicates the emotional trauma test that the Plurality correctly determines we should not address on the present record. *See* ***1286** *Commonwealth v. Tighe*, —— Pa. ——, 195 A.3d 850 (2018) (*per curiam*) (respectively qualifying the first and second questions "for reasons other than waiver or forfeiture of [the right to self-representation]," and "absent waiver or forfeiture of the accused's right to self-representation").[5] Accordingly, throughout their briefing here, as in the Superior Court, the parties do not address the subject of forfeiture by conduct of the right to self-representation.[6]

The right-for-any-reason doctrine may be applied only under limited circumstances. We have explained:

> Where a court makes a correct ruling, order, decision, judgment or decree, but assigns an erroneous reason for its action, an appellate court will affirm the action of the court below and assign the proper reason therefor. This approach however is only appropriate where the correct basis for the ruling, order, decision, judgment or decree is clear upon the record.... Where disputed facts must be resolved appellate courts should refrain from assuming the role of a fact-finder in an attempt to sustain the action of the court below.

Bearoff v. Bearoff Bros., Inc., 458 Pa. 494, 327 A.2d 72, 76 (1974) (cleaned up).

The legal basis of the Plurality's "any reason" is not found in Pennsylvania law. Instead, the Plurality relies upon the California Supreme Court's decision in *People v. Carson*, 35 Cal.4th 1, 23 Cal.Rptr.3d 482, 104 P.3d 837 (2005), which it cites for the proposition that acts other than in-court disruptions may warrant forfeiture of the right to counsel, a principle that this Court has not previously endorsed. *See* OAJC at 1280. However, in relying upon *Carson* for the mere proposition that conduct warranting forfeiture of the right to counsel need not happen during trial or inside the courtroom, which may well be sound, the OAJC entirely

disregards the numerous caveats the *Carson* court identified as relevant to a forfeiture inquiry.

The *Carson* court explained that "[t]ermination of the right of self-representation is a severe sanction and must not be imposed lightly. Nonetheless, ... trial courts should be given sufficient discretion when confronted with behavior—whether occurring in court or out of court—that threatens to compromise the court's ability to conduct a fair trial." *Carson*, 23 Cal.Rptr.3d 482, 104 P.3d at 839. But the court cautioned that "[n]ot every obstructive act will be so flagrant and inconsistent with the integrity and fairness of the trial that immediate termination is appropriate." *Id.*, 23 Cal.Rptr.3d 482, 104 P.3d at 841-42.

***1287** Accordingly, the California court emphasized, before finding forfeiture of the right to self-representation, the trial court must specifically examine whether the defendant's conduct has given the court good cause to believe that the defendant will disrupt the proceedings or compromise the integrity of the trial itself:

> It is incumbent on the trial court to document its decision to terminate self-representation with some evidence reasonably supporting a finding that the defendant's obstructive [out-of-court] behavior seriously threatens the core integrity of the trial.... To this end, the court may need to hold a hearing or may want to solicit the parties' respective arguments with written points and authorities and any evidentiary support on which they may seek to rely....
>
> Such a record should answer several important questions. Most critically, a reviewing court will need to know the precise misconduct on which the trial court based the decision to terminate. The court should also explain how the misconduct threatened to impair the core integrity of the trial. Did the court also rely on antecedent misconduct and, if so, what and why? Did any of the misconduct occur while the defendant was represented by counsel? If so, what is the relation to the defendant's self-representation? Additionally, was the defendant warned such misconduct might forfeit his *Faretta* rights?[7] Were other sanctions available? If so, why were they inadequate? In most cases, no one consideration will be dispositive; rather, the totality of the circumstances should inform the court's exercise of its discretion.

Id., 23 Cal.Rptr.3d 482, 104 P.3d at 842-43 (cleaned up). The record before us informs these questions only glancingly, if at all, and only to the extent we choose to make our own factual determinations where the trial court did not. In fact, the trial court's findings of fact are no more responsive to *Carson*'s numerous concerns than they are to the questions as to which we granted review.[8]

In *Carson*, the defendant received evidence from an investigator to which he was not entitled, including, *inter alia*, contact information for the prosecution's witnesses. ***1288** *Id.*, 23 Cal.Rptr.3d 482, 104 P.3d at 843. This breach was especially troubling because the defendant had a history of multiple attempts to suborn perjury, fabricate an alibi, and intimidate a prosecution witness. *Id.* The trial court held a hearing, reviewed the investigative materials upon their retrieval from the defendant's cell, and made certain findings of fact. But the trial court had made no express assessment relative to the numerous factors that the California Supreme Court deemed critical in determining whether to impose the "severe" sanction of forfeiture. Rather than summarily denying the defendant's right to self-representation based upon its own interpretation of the record, the California Supreme Court remanded the case for further fact-finding on these questions. *Id.*, 23 Cal.Rptr.3d 482, 104 P.3d at 844.

Carson had an indisputably lengthier history of misconduct implicating the integrity of trial than Tighe's behavior in this case. Unlike Carson's, Tighe's misconduct was isolated to a single incident. Carson repeatedly had attempted to influence others to compromise the truth-determining process. I do not intend to minimize the impropriety of Tighe's violation of the no-contact order, nor am I naïve about his intention to discourage the victim from moving forward with this prosecution. However, even taking the victim's own testimony at face value, I cannot agree with the Plurality's characterization of Tighe's communication with the victim as sufficient without more to justify infringing his constitutional right to self-representation when the trial court itself declined to do so.

Even assuming that any degree of witness intimidation in advance of trial may furnish a sufficient basis for forfeiture of the right to self-representation, here the trial court did not clearly find that this was the effect of Tighe's contacts with his alleged victim, nor did the court even suggest that it anticipated disruptive trial behavior or

other in-court conduct likely to compromise the integrity of the trial, *Carson*'s overriding concern. Tighe was not warned that his behavior could result in forfeiture of his right to represent himself. Upon learning of the violation, even though Tighe had already confirmed his desire to proceed *pro se*, the trial court elected to impose an alternative sanction upon Tighe in revoking his bail, returning him to jail, and resetting bail at $750,000, a sanction designed to ameliorate the victim's stated fear for her personal safety prompted by the call.[9] After Tighe's isolated, albeit serious violation of the no-contact order and the trial court's decision to sanction him by revoking his bond, Tighe made no further effort to contact the victim, impede her testimony, or otherwise interfere with the proceedings. To the contrary, no one claims that Tighe ever again behaved in any way inconsistent with due decorum or the rules of court or in a manner that otherwise threatened to compromise the integrity of the truth-determining process. Thus, even under the *Carson* approach, the record lacks a sufficient basis to support forfeiture, and, at a minimum, the trial court should have the opportunity to conduct fact-finding tailored to that specific inquiry in the first instance.

***1289** The California rule does not strike me as unsound, applied with the care for the important constitutional right that the *Carson* court's circumspection embodied. Other courts also have embraced a similarly cautious approach to the forfeiture by conduct of a defendant's right to represent himself, holding that there must be some nexus between the disruptive conduct and the likelihood of disrupting the trial proceedings. *See* *Faretta v. California*, 422 U.S. 806, 834 n.46, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) ("[T]he trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct."); *United States v. Smith*, 830 F.3d 803, 810 (8th Cir. 2016) (quoting *United States v. Flewitt*, 874 F.2d 669, 674 (9th Cir. 1989)) ("A defendant granted *pro se* status may ... be required to comply with pretrial orders, but pretrial activity is relevant to continued *pro se* status *only if it affords a strong indication that the defendant will disrupt the proceedings in the courtroom*." (cleaned up; emphasis added)). In *Smith*, the Court of Appeals expressed the view that, even faced with a disruptive defendant, the best judicial response is to impose "lesser sanctions" than forfeiture. *Id.*[10]

This Court, too, has suggested that a defendant who behaves disruptively should receive a warning that he risks forfeiting his right to represent himself and should be granted a subsequent opportunity to behave appropriately:

> All defendants, even those who may display the potential to be disruptive, have the right to self-representation. In such instances, however, it is advisable that stand-by counsel be appointed.... [I]n such circumstances ... [t]he court should explain to the defendant the standards of conduct he will be expected to observe. If the defendant misbehaves, he should be warned that he will be removed from the court, his right to represent himself will be considered waived, and the trial will continue in his absence with standby counsel conducting the defense. *If the defendant again misbehaves, these measures should be taken.*

Commonwealth v. Abu-Jamal, 553 Pa. 485, 720 A.2d 79, 109 (1998) (cleaned up; emphasis added). But no such opportunity was granted Tighe, and such restraint is nowhere to be found in the Plurality's expansive application of the *Carson* rubric.

Even where a rule of *settled* Pennsylvania law furnishes a right-for-any-reason ground for disposition, this Court should be cautious in applying it, especially when doing so in the context of discretionary review diverts us from the questions we intended to review. We should be more reluctant still to do so when the legal principle relied upon has not yet been endorsed in the relevant form by this Court, the parties offer no advocacy concerning that principle, the record reveals limited and contested factual support for its application, and the trial court's fact-finding is devoid of factual predicates critical to the novel principle's application. *See* ***1290** *In re A.J.R.-H.*, 188 A.3d at 1176 ("[The right-for-any-reason doctrine] may not be used to affirm a decision when the appellate court must weigh evidence and engage in fact

finding or make credibility determinations to reach a legal conclusion."); *cf.* *Mitchell v. Wisconsin*, —— U.S. ——, 139 S. Ct. 2525, 2551, 204 L.Ed.2d 1040 (2019) (Gorsuch, J., dissenting) ("While I do not doubt that the Court may affirm for any reason supported by the record, the application of the exigent circumstances doctrine in this area poses complex and difficult questions that neither the parties nor the courts below discussed.").

The Plurality's *sua sponte* adoption of a foreign jurisdiction's reasoning in a case that involved facts and circumstances far more pertinent to the risk of disruptive conduct than those presented in this case—and yet still declined to find forfeiture absent fact-finding directly addressing the risk of disruptive behavior or a compromised proceeding presented by the defendant's self-representation—reflects an extraordinary and imprudent employment of the right-for-any-reason doctrine. In merely precluding Tighe from cross-examining one witness, the trial court signaled that its specific concern was not disruption or other conduct imperiling the integrity of the proceedings, but rather the risk of trauma to the witness. *See* Tr. Ct. Op. at 28-30.[11]

The distinction between approaching the question as one involving threats to the integrity of the trial and concerns for the infliction of extraordinary trauma on the victim is not trivial, it is defining. In this regard, the remedies applied in each case reveal the distinction: In none of the forfeiture authorities cited by the Plurality, nor in any I have consulted, did the court order a forfeiture remedy limited to a particular witness. Rather, where a defendant comports himself (in or out of court) in a fashion that raises questions about his ability to adhere to courtroom rules and play his part in an orderly proceeding, the remedy is either exclusion or the categorical denial of the right to self-representation in favor of the retention or appointment of counsel to carry on the defendant's defense. Conversely, witness-specific limitations appear to have arisen only in cases like *Craig* and *Fields*, where the issue revolves around how sharing a courtroom with the defendant or enduring the defendant's cross-examination will affect a witness. Thus, that the trial court repeatedly alluded to its obligation to balance Tighe's right to self-representation with countervailing concerns for the traumatic effect of Tighe's personal cross-examination on the victim makes abundantly clear that the court framed the issue as a *Craig*/*Fields* question, not one implicating forfeiture.

To demonstrate otherwise, the Plurality relies heavily on the Commonwealth's characterizations of its objections rather than the trial court's own contemporaneous and *post hoc* explanations of its reasoning. This undermines the Plurality's effort to find anything in the trial court's own commentary and stated reasoning that supports the findings of fact necessary to find forfeiture. *Compare* OAJC at 1270 (quoting Notes of Testimony ("N.T."), 6/4/2013, at 37-38) (Commonwealth: "[W]hen we talk about self-representation, ***1291** the question of forfeiture always arises.") *with* N.T., 6/4/2013, at 39 (The court: "I find that in denying your right to cross-examine the complaining witnesses [for purposes of the bail revocation hearing] it is important to this [c]ourt that I balance the competing interest[s] here[:] your right to self-representation and the right of the state to protect the complaining witness from emotional harm.").

In the most vivid example of this approach, the Plurality avers:

> As the record plainly shows, the trial court prohibited [Tighe] from personally cross-examining the victim at trial in response to the Commonwealth's motion alleging appellant had forfeited the right to do so by his own pre-trial behavior.... [T]he court **twice** determined that issue in favor of the Commonwealth—on June 4, 2013, the court granted the Commonwealth's forfeiture motion for purposes of the bail revocation hearing, and on July 3, 2013, the trial court granted the Commonwealth's forfeiture motion for purposes of trial based upon the same pre-trial behavior.

OAJC at 1271–72 n.8 (emphasis in original). But that the trial court twice granted the Commonwealth's motion does not mean it did so for any one among several reasons ventured by the Commonwealth in advocating for the ruling.

To the contrary, in support of its June 4, 2013 decision to bar cross-examination of the victim in the bail revocation proceeding, the trial court cited concerns for witness

trauma. *See* N.T., 6/4/2013, at 39 ("I find that in denying your right to cross-examine the complaining witness here today there is no prejudice to you because of the nature of the proceedings, the nature of the alleged violation, and it is important to this [c]ourt that I balance the competing interest[s] here[:] your right to self-representation and the right of the state to protect the complaining witness from emotional harm."). And in ruling upon the cross-examination issue for purposes of trial a month later, the trial court once again cited concerns for trauma, not disruption or the integrity of the proceedings:

> [F]or a number of reasons, I'm going to deny your request, sir, that you be allowed to cross examine [the victim]. And in particular, the court is concerned because there was a violation of the bail condition of no contact. That is something that does concern me, number one. Number two, the age of the victim. And number three, it is alleged by the Commonwealth that because you were a friend of her parents, you stood in a position of trust with the minor child. So for those reasons, sir, in balancing your right to represent yourself pursuant to the Sixth Amendment of the constitution and also balancing the rights of the victim in this Case to not be subject to emotional harm or trauma during the proceedings, I'm going to deny your request that you cross[-]examine [the victim] ....

N.T., 7/3/2013, at 9-10. The trial court again reduced its reasoning to concerns for witness trauma in its Pa.R.A.P. 1925(a) opinion, a context allowing for more careful reflection and articulation than extemporaneous commentary in open court, which serves as the trial court's final word on the matter. *See* Tr. Ct. Op. at 30 ("In conclusion, this [c]ourt finds that denying [Tighe] the right to personally cross-examine [the victim] was necessary to protect her from additional and unnecessary 'emotional trauma.' ").

Similarly unavailing is the Plurality's reliance upon the Commonwealth's Memorandum of Law on the subject, filed the day before the July 3, 2013 hearing, to establish that the court accepted forfeiture as a basis for restricting Tighe from cross-examining ***1292** the witness at trial. The Plurality posits that, "[i]mplicit in the court's statement [on July 8, 2013, which alluded to the no-contact violation, the victim's age, and Tighe's "position of trust" relative to the victim,] is that its ruling decided the Commonwealth's forfeiture motion alleging appellant had forfeited his right to cross-examine the victim at trial by his willful pre-trial misconduct." *See* OAJC at 1272 n.9 (citing Commonwealth's Memorandum of Law, 7/2/2013, at 13-14). However, the Plurality overlooks that forfeiture, as such, was the third of three bases upon which the Commonwealth sought to preclude Tighe's cross-examination; the first two depended upon the victim-trauma approach derived from *Craig* and *Fields*. Thus, even to call the Commonwealth's motion a "forfeiture motion" is question-begging. And the inference that the trial court relied upon this third theory rather than the *Craig*/*Fields* victim-trauma approach is serially belied by the trial court's own accounts of its reasoning for granting the Commonwealth's motion.

Notably, the Plurality eschews the very same caution that underlies its decision not to analyze the questions as to which we granted review. In that connection, the Plurality specifically observes that "this case is a poor vehicle to decide the [questions presented], as there simply was no evidentiary showing with respect to [victim's] emotional response to direct questioning by appellant." *Id.* at 1279. But if the record does not suffice to sustain that determination, despite the trial court's frequent invocation of that concern, then certainly it does not speak specifically to the risk that Tighe would disrupt or otherwise threaten the integrity of the trial by cross-examining the victim, which the trial court never addressed in those terms. If anything, the victim's testimony that she felt threatened by Tighe's imprecations better supports the prospect of excess trauma than it does the concern that Tighe would not conduct himself appropriately at trial.

The liberties the Plurality takes in this case illustrate why the right-for-any-reason doctrine has far more utility in resolving a direct appeal as of right than it does in an appeal by allowance. Where a court cannot decline entirely to decide a given appeal, and it perceives a clear legal basis for upholding the lower court's judgment based upon undisputed findings of record, it is better to

affirm on that basis than to protract the matter by reversing and remanding for the trial court to apply the correct analysis to reach the same result.

As a Court of last resort, however, our review typically is discretionary, and we may decline to review a case entirely, or dismiss a case as improvidently granted, if we determine that the questions we granted allowance of appeal to resolve are moot or otherwise not well-suited to facilitate our principal function of advancing the law. Indeed, the Court's decision not to review the issues as to which we granted review in this case embodies this principle, and amounts to such a dismissal. When we dismiss a case as improvidently granted, we leave the lower court's ruling undisturbed without any endorsement of that court's reasoning, an outcome much the same for practical purposes as affirming on an alternative basis.[12] In this way, we ***1293** can defer deciding an issue prematurely, rather than resolving the case on an analytic basis as to which the lower courts, the parties, and other interested individuals or entities have had no notice or opportunity to advocate. The concern for judicial efficiency that animates the right-for-any-reason doctrine is of limited relevance to a court of last resort exercising discretionary jurisdiction; nothing is more efficient, nor more judicious, than dismissing an appeal as improvidently granted when it becomes clear that it would be imprudent to decide it on the record and advocacy presented.

That we specify the questions as to which we grant review is not a mere courtesy. It ensures transparency, informing the parties and the greater legal community of what this Court intends to decide, granting all interested citizens—and especially the parties—the opportunity to proceed in full awareness of what is at stake, which is nothing less than the advancement of Pennsylvania law.[13] The Plurality's employment of the right-for-any-reason doctrine disserves these goals by introducing a new common-law rule to Pennsylvania, derived from a reading of non-binding foreign case law more expansive than the issuing court, itself, suggested, despite the parties' disclamation of any interest in litigating for or against that rule of law, and without trial court fact-finding made with an eye toward that rule's factual predicates.[14]

I agree with the Plurality that the record betrays an important void relative to the questions we set out to answer. But precisely for that reason, I would dismiss this case as improvidently granted. Accordingly, I respectfully disagree with the Plurality's election to affirm the lower court's decision on an alternative basis.

All Citations

224 A.3d 1268

Footnotes

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

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

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

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

5 Specifically, when asked on direct examination how she felt upon receiving the calls and hearing appellant's voice, J.E. testified, "I was scared. I was shocked. I didn't know what to think because I wasn't notified that he was out. I felt like I was scared he would find me. I didn't know if he was already trying to find me. So that's when I told my

foster mom and contacted the police ... [because] I felt like I was in danger." N.T. 6/4/13 at 47.

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

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

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

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

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

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

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

[13] The *Craig* Court held: "[W]here necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation." *Maryland v. Craig*, 497 U.S. at 857, 110 S.Ct. 3157.

[14] The panel also noted "whether the Commonwealth sufficiently established as a matter of degree that J.E. would suffer emotional trauma as contemplated by *Craig* is not before us," because appellant's position on appeal was

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

15 Justice Wecht asserts, "the parties do not address the subject of forfeiture by conduct of the right to self-representation." Op. at 1286 (Wecht, J. concurring and dissenting). However, appellant's brief devotes several pages to this precise issue. *See* Appellant's Brief at 12-14.

16 The *Fields* court continued: "Further, the right denied here, that of cross-examining witnesses personally, lacks the fundamental importance of the right denied in *Craig*, that of confronting adverse witnesses face-to-face. As a result, we do not believe it was essential in this case that psychological evidence of the probable emotional harm to each of the [child victims] be presented in order for the trial court to find that denying Fields personal cross examination was necessary to protect them." *Fields*, 49 F.3d at 1036-37 (footnote omitted). We note, whatever the import of the *Fields* court's rationale distancing itself from the High Court's decision in *Craig*, it is clear Fields was represented by counsel and his "right to self-representation was not violated[,]" in part because "Fields failed to invoke his right to self-representation clearly and unequivocally." *Id.* at 1034.

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

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

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

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

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

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

[23] Justice Wecht takes issue with our reliance on *People v. Carson*, 35 Cal.4th 1, 23 Cal.Rptr.3d 482, 104 P.3d 837 (2005), and asserts the record in this matter is insufficient to support a finding of forfeiture under *Carson* in our application of the right-for-any-reason doctrine. Op. at 1286–87 (Wecht, J. concurring and dissenting). To be sure, *Carson* instructs the record in these matters should answer several important questions; "[m]ost critically a reviewing court will need to know the precise misconduct on which the trial court based the decision to terminate." *Id.,* 23 Cal.Rptr.3d 482, 104 P.3d at 842. *Carson* additionally suggests that, for purposes of appellate review in a case involving out-of-court misconduct, a trial court should preserve a chronology of events because "it is incumbent on the trial court to document its decision to terminate self-representation with some evidence reasonably supporting a finding that the defendant's obstructive behavior seriously threatens the core integrity of the trial." *Id.* Justice Wecht opines "[t]he record before us informs these questions only glancingly, if at all, and only to the extent we choose to make our own factual determinations where the trial court did not." Op. at 1287 (Wecht, J. concurring and dissenting). Notwithstanding Justice Wecht's interpretation of the record, it is clear the trial court repeatedly found that appellant's behavior in contacting the victim in violation of a court order justified partial forfeiture. Indeed, the court made that ruling in open court twice, once on June 4, 2013 with respect to appellant's cross-examining the witness at the bail revocation hearing, and again on July 3, 2013, with respect to his cross-examining the witness at trial. On both occasions, the court explained the rationale for its ruling, and in both instances, the court's ruling was made in response to the Commonwealth's motions requesting partial forfeiture. Justice Wecht nevertheless suggests we should not consider forfeiture as a basis on which to resolve this appeal because we accepted petitioner's phrasing of the issues as asking whether the decisions below were correct **absent** waiver or forfeiture. Although we accepted the questions as phrased by appellant — which included his self-serving representations that he neither waived nor forfeited his right — we are not obligated to accept those representations as true, particularly when they are not supported by the record or when, as here, a party's argument diverges from his own issue statement. In the present appeal, appellant concedes the right to represent himself is not absolute, but he argues he did not, by his conduct, forfeit the right. DAP, on behalf of appellant, agrees and devotes an entire section of its brief to that precise issue. Our review of the record shows, as Chief Justice Saylor saliently acknowledges in concurrence, the "forfeiture dynamic" played a "prominent role" in this case. Op. at 1283 (Saylor, C.J. concurring). The record is replete with references to potential partial forfeiture. The trial court clearly expressed to appellant, "[y]our Sixth Amendment right to represent yourself is not absolute[,]" and explained the grounds for its ruling "hinged largely" upon appellant's behavior. N.T. 7/8/13 at 19. While the tribunals below also considered potential emotional trauma to the victim-witness if personally questioned by appellant, the foundation of the trial court's restriction was always primarily based on appellant's out-of-court misconduct and flouting of a court order mandating he have no contact with the victim. Not only does the record properly support our consideration of partial forfeiture as an alternative basis to resolve the issue raised, our determination of partial forfeiture is supported by the evidence of record. The trial court clearly documented its decision to partially terminate self-representation with evidence reasonably supporting a finding that appellant's obstructive behavior threatened the integrity of the trial, and the court properly held hearings and solicited the parties' respective arguments with respect thereto. *See* *Carson*, 23 Cal.Rptr.3d 482, 104 P.3d at 842. At these hearings, appellant represented himself, and in the face of the Commonwealth's forfeiture motions, argued his self-representation right was absolute, maintaining he did not threaten the victim in any event. The court disagreed. We hold the totality of the circumstances warranted the court's exercise of its discretion to partially limit appellant's self-representation right due to his out-of-court behavior. *See* *id.*, 23 Cal.Rptr.3d 482, 104 P.3d at 843. Finally, because our decision in this matter to affirm on other grounds criticizes the Superior Court's rationale, *see supra* at

1278, n.18, our decision does not have the same practical effect as would a dismissal of the appeal as improvidently granted, as Justice Wecht suggests. *See* Op. at 1292–93 (Wecht, J. concurring and dissenting).

1 As discussed by the lead Justices, *see, e.g.*, OAJC, *op*. at 1273–74 & n.13, 1279–80, *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157, 111 L.Ed.2d 666 (1990), addressed permissible limitations on the separate Sixth Amendment right to confront adverse witnesses. The Court upheld a Maryland statute which allowed a minor victim of sexual abuse to testify at trial via one-way closed-circuit television, thus curtailing the face-to-face element of the confrontation right. Such limitation was considered constitutionally permissible where (a) it was necessary to further an important public interest, and (b) the reliability of the testimony was otherwise assured. *See id.* at 850-57, 110 S. Ct. at 3166-70.

Whether the right of self-representation can be restricted on similar grounds has not been considered by this Court, but at least one federal appellate court has relied on *Craig* in circumstances similar to those of the present case. *See Fields v. Murray*, 49 F.3d 1024, 1034-35 (4th Cir. 1995) (*en banc*); *cf. State v. Estabrook*, 68 Wash.App. 309, 842 P.2d 1001, 1006 (1993) (approving a trial judge's decision to ask the victim-witness any questions posed by the *pro se* defendant, and stating that, under *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944, 79 L.Ed.2d 122 (1984), a criminal defendant's right to act *pro se* is satisfied where (a) he preserves control over the case he elects to present to the jury, and (b) the jury's perception that the defendant is representing himself is not obviated).

1 The court noted in a footnote, "[w]hether the Commonwealth sufficiently established as a matter of degree that J.E. would suffer emotional trauma as contemplated by *Craig* is not before us, as Appellant avers that his right to act as counsel precludes any limitation upon his right to represent himself, regardless of any trauma to the witness." *Tighe* 184 A.3d at 571, n.8.

1 In *Fields*, the analogy it drew between the permissibility of limiting the right of confrontation and limiting the right of self-representation comprised an alternative basis for decision. Separately and dispositively, it affirmed the lower court's determination that the defendant had failed successfully to invoke his right to self-representation in the first instance. *Fields*, 49 F.3d at 1034.

2 *See* OAJC at 1279 ("If there is a parallel between limitations of the confrontation and self-representation rights guaranteed by the Sixth Amendment and Article I, Section 9 of the Pennsylvania Constitution, relevant evidence would presumably be required to justify those limitations .... Accordingly, this case is a poor vehicle to decide the matter, as there simply was no evidentiary showing with respect to [victim's] emotional response to direct questioning by appellant.").

3 *See* OAJC at 1271–72.

4 *See* OAJC at 1279–82.

5 The Plurality reproduces the questions in full. *See* OAJC at 1274–76.

6 The Plurality's assertion that Tighe himself dedicates three pages of his brief to forfeiture clearly mischaracterizes the collective thrust of that passage. *See* OAJC at 1275–76 n.15 (citing Brief for Tighe at 12-14) ("[A]ppellant's brief devotes several pages to this precise issue [*i.e.*, forfeiture]."). In point of fact, Tighe mentions forfeiture only in reciting the broad principles and limitations governing self-representation generally, and concludes the very passage in question:

There is no suggestion that [Tighe] waived or forfeited his right to self-representation after it was granted. The

> court did not find [Tighe] disrespectful or disruptive, nor was it implied or indicated in the record. The record shows [that Tighe] exercised proper decorum in questioning witnesses and in addressing the court.

Brief for Tighe at 14 (footnote omitted). Thus, Tighe did not invite this Court's *sua sponte* treatment of forfeiture in resolving his appeal. Moreover, the Commonwealth only refers to forfeiture once, in a footnote distancing itself from that principle. *See* Brief for the Commonwealth at 15 n.2 ("Appellant's and Amicus'[s] suggestions that the Commonwealth is claiming that Appellant 'forfeited' his right to represent himself is incorrect. Rather, the Commonwealth's position is that the right can be 'narrowly limited' as the Superior Court concluded.").

7 *See* *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (holding that a defendant has a constitutional right to represent himself when he voluntarily chooses to do so, and that a state may not force a lawyer upon him).

8 The California Supreme Court in *Carson* recommended a totality-of-the-circumstances analysis involving eight discrete factual considerations. While the Plurality faults me for observing that the record is not responsive to these factors, in purporting to follow the *Carson* approach, the Plurality identifies only "the precise misconduct on which the trial court based the decision to terminate" self-representation—Tighe's violation of the no-contact order. From that undisputed misconduct the Plurality infers that the trial court necessarily deemed Tighe's right to cross-examine the victim forfeit based upon the fact that the Commonwealth suggested forfeiture as grounds for precluding Tighe's cross-examination and the trial court granted the Commonwealth's requested relief. *See* OAJC at 1281–82 n.23. This inference is unwarranted given that the Commonwealth ventured several independent bases for such a result, including theories not rooted in forfeiture, and that the trial court *never* expressly embraced forfeiture as its guiding theory, a problem I discuss at length below. More importantly, though, the Plurality omits even to mention let alone consider seven of *Carson*'s eight defining factual and prudential considerations—among them "how the misconduct threatened to impair the core integrity of the trial," "was the defendant warned such misconduct might forfeit his" right to self-representation, "[w]ere other sanctions available," and, if so, "why were they inadequate." *Id.*

9 Because the Plurality necessarily predicates its entire forfeiture analysis on the victim's comments at this proceeding, it is worth noting that she related only her contemporaneous response to the call, spoke only in the past tense, and she was neither asked nor commented upon how that call might bear upon her testimony at trial. *See* Notes of Testimony, 6/4/2013, at 47 ("I was scared. I was shocked. I didn't know what to think because I wasn't notified that [Tighe] was out [on bail]. I felt like I was scared he would find me. I didn't know if he was already trying to find me. ... I felt like I was in danger.").

10 In *Faretta*, the Supreme Court incorporated by reference its decision in *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), which concerned not the right to self-representation, but rather a defendant's Sixth Amendment right to be present during his trial. In *Allen*, noting that "courts must indulge every reasonable presumption against the loss of constitutional rights," the Court held that a defendant can forfeit his right to be present if, "after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Allen*, 397 U.S. at 343, 90 S.Ct. 1057.

11 In this regard, the trial court cited Tighe's violation of the no-contact order, victim's testimony that his phone call "scared" and "shocked" her because she had not been aware of Tighe's release on bail, her contemporaneous fear that she was in danger, and Tighe's "position of trust as a friend of the family." Tr. Ct. Op. at 29-30. None of these findings suggest that the trial court considered whether they indicated a likelihood that Tighe's cross-examination of the victim would disrupt the trial proceedings months later, or that the trial court even viewed the record through

that lens.

12 Respectfully, the Plurality's suggestion that its statement of disapproval in a footnoted *dictum* will be treated by the lower courts as precedential, or even persuasive, is neither required as a matter of law nor assured in practice. *See* OAJC at 1281–82 n.23 ("O]ur decision does not have the same practical effect as would a dismissal of the appeal as improvidently granted ...."); *see also id.* at 1280 n.19 (noting disapproval of Superior Court's reasoning). Neither this Court nor the lower courts are bound by our commentary when it is "not crucial to our determination." *In re L.J.*, 622 Pa. 126, 79 A.3d 1073, 1081 (2013); *Maloney v. Valley Med. Facilities*, 603 Pa. 399, 984 A.2d 478, 490 (2009) (quoting *N'Western Nat'l Ins. Co. v. Maggio*, 976 F.2d 320, 323 (7th Cir. 1992)) ("No court ... is obliged to treat a dictum of another court ... as binding precedent."). The Plurality's conclusory footnote clearly comprises *dicta* because it pertains to a legal question that has no ultimate bearing upon its analysis. *Cf. Commonwealth v. Romero*, 646 Pa. 47, 183 A.3d 364, 400 n.18 (2018) (plurality) ("Of course, *dicta* often present risks of unforeseen complications and unintended consequences, which is why reliance upon them to resolve those same complications can be difficult to justify, if not ill-advised.").

13 For this reason, the Plurality's casual dismissal of the terms employed by Tighe in seeking this Court's review, which this Court adopted rather than reworded, is troubling. *See* OAJC at 1282 n.23 ("Although we accepted the questions as phrased by appellant—which included his self-serving representations that he neither waived nor forfeited his right—we are not obligated to accept those representations as true...."). It is well within this Court's discretion to reword questions when necessary to cleanse them of misleading or tendentious assertions. Moreover, for all the foregoing reasons, the representations that the Plurality suggests are not true in fact accurately describes the proceedings below.

14 By declining to incorporate limiting principles like those that carefully circumscribed the *Carson* court's ruling, the Plurality opens the door to courts in future cases deeming defendants' important right to self-representation forfeit for individual out-of-court incidents that do not necessarily satisfy the limiting factors enumerated in *Carson* or comport with the caution we applied in the related Confrontation Clause context in *Abu-Jamal*, *supra*. The potential for unintended consequences is precisely why we hesitate to declare new rules without the benefit of focused advocacy highlighting the benefits and risks of a given rule.

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