

Finley v. State, No. 02-21-00112-CR (Tex. App.-Ft. Worth, Nov. 3, 2022)
Attorneys. William R. Biggs (appellate and trial)

Issue & Answer. Is it a violation of a defendant's right to confrontation when the trial court permits a witness to testify with a face covering during a pandemic, absent a showing of necessity? **Yes.**

Facts. The court previously reversed the defendant's conviction and maintains its previous judgment but substitutes the instant opinion.

The defendant's trial took place in late July 2021 when masks were voluntary for anyone in the courtroom. The complaining witness was the sole eyewitness to the alleged assault. The court allowed the complaining witness to wear a surgical mask over her nose and mouth. The defendant objected under the Sixth Amendment and articulated his concern that the jury would not be able to evaluate the complaining witness's facial expressions and demeanor. The State argued against the defendant's request by characterizing it as an attempt to "harass and annoy the victim." The closest thing to a showing of necessity was the State's articulation on behalf of the complaining witness that she felt more comfortable to testify in such a manner.

Analysis. The panel previously held that the State did not show the requisite necessity for the trial court to dispense with face-to-face confrontation and permit the complaining witness to wear a face covering during cross-examination. On the same day the panel issued its opinion, the trial court supplemented the Appellate record with a transcript of a non-evidentiary abatement hearing held a month before the court issued its opinion. These findings included the trial court's opinion that its adopted health and safety measures adequately protected courtroom participants and thus masks were optional. "We are given no explanation as to why T.G. herself needed protection of a mask when others did not. At no point in these proceedings-not at any pretrial hearing, at trial, on appeal, or upon abatement of the appeal-has any evidence been adduced to explain why T.G. needed this special protection." The analysis from *Maryland v. Craig* remains determinative even in a pandemic: there must be an evidence-based finding that the departure from face-to-face confrontation is necessary to protect the well-being of the particular witness. The Supreme Court Emergency Orders do not and did not disturb this Constitutional rule.

Comment. This is a thoughtful opinion.