

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

ANDRE CALLOWAY,

Defendant-Appellant.

UNPUBLISHED

October 21, 2003

No. 240834

Wayne Circuit Court

LC No. 01-007953-01

Before: Fitzgerald, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Defendant appeals his bench trial conviction for kidnapping, MCL 750.349, second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(a) (person under thirteen years of age), and assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1). The trial court sentenced defendant to concurrent terms of fifty-one months to fifteen years in prison for the kidnapping and CSC convictions and fifty-one months to ten years in prison for the assault with intent to commit CSC conviction. We affirm.

On June 21, 2001, seventeen-year old defendant, Andre Calloway, and his cousin were playing basketball at the eleven-year-old victim's home.¹ The victim testified that she was on her way to the store when defendant and his cousin grabbed her, dragged her into the basement of a house, and defendant sexually assaulted her. Defendant testified that the victim voluntarily went to the basement and that she initiated the sexual contact.

Victim's Testimony

Defendant first contends that he was denied his right to confront his accuser because the victim refused to be cross-examined. We disagree.

Here, the record reflects that the victim testified openly during the prosecutor's examination, but claimed lack of memory and otherwise expressed reluctance to answer some of defense counsel's questions during cross-examination. After some effort to convince the victim to respond, the trial court stated that the victim appeared to be frightened. It was then discovered

¹ Defendant and his cousin were tried together, but the cousin was acquitted of all charges.

that defendant's mother had previously made hostile comments to the victim and the victim informed the trial court that someone had threatened her. The trial court later noted that spectators at the trial were making faces and comments or noises during the victim's testimony. To control the trial and to facilitate defense counsel's cross-examination, the trial court closed the proceedings. Thereafter, the victim answered defense counsel's questions and answered the questions of co-defendant's counsel. However, defendant's counsel chose not to revisit the issues he previously attempted to explore with the victim and stated, "I'm not going to have anymore questions. She's answered my questions to the extent that she has stated them on the record."

Under these circumstances, we hold that defendant was not denied his right of confrontation. This Court set forth the applicable principles in *People v Chavies*, 234 Mich App 274, 283; 593 NW2d 655 (1999):

Regarding defendant's right of confrontation, the Supreme Court has held that, when witnesses are present at trial and could be cross-examined about their statements -- even though they claim to remember nothing -- the witnesses are "available" for cross-examination within the meaning of the Confrontation Clause. *United States v Owens*, 484 US 554, 559, 108 S Ct 838, 98 L.Ed.2d 951 (1988). "[T]he Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Owens, supra* at 559. "It is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination . . .) the very fact that he has a bad memory." *Owens, supra* at 559 (citation omitted). "The weapons available to impugn the witness' statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee." *Owens, supra* at 560. [Some citations omitted.²]

Defendant was able to confront the victim, she was competent to testify, she was subject to cross-examination, and the trial court, as the finder of fact, had the opportunity to observe the victim's demeanor. *People v Pesquera*, 244 Mich App 305, 309; 625 NW2d 407 (2001). While the victim initially claimed memory problems because she felt intimidated, defense counsel was

² As this Court explained in *People v Watson*, 245 Mich App 572, 584; 629 NW2d 411 (2001):

"The right of confrontation insures that the witness testifies under oath at trial, is available for cross-examination, and allows the jury to observe the demeanor of the witness." *People v Frazier (After Remand)*, 446 Mich 539, 543; 521 NW2d 291 (1994) (Brickley, J). Although a defendant must be given the opportunity for cross-examination, the defendant has no constitutional right to a successful cross-examination. *People v Chavies*, 234 Mich App 274, 283; 593 NW2d 655 (1999). Thus, a defendant's right of confrontation is not denied even if the witness, on cross-examination, claims a lack of memory. *Id.*

able to use her lack of recall and unresponsiveness to contest the credibility of her testimony. Further, were we to find a denial of defendant's right of confrontation, the error, if any, was harmless beyond a reasonable doubt because defense counsel had the opportunity to more fully cross-examine the victim, but chose to end his questioning. *People v Watson*, 245 Mich App 572, 585; 629 NW2d 411 (2001). Again, the record reflects that, after defense counsel's questioning, the victim went on to candidly answer the questions asked by co-defendant's attorney. For these reasons, defendant's claim is without merit.

Limitation on Cross-Examination

Defendant also argues that the trial court denied him his right of confrontation by sustaining the prosecutor's objections to defense counsel's questions to the victim regarding her mother's reaction to the incident.

This Court reviews a trial court's limitation of cross-examination for an abuse of discretion. *People v Hackett*, 421 Mich 338, 347; 365 NW2d 120 (1984). "[V]iolations of the right to adequate cross-examination are subject to a harmless-error analysis." *People v Kelly*, 231 Mich App 627, 644; 588 NW2d 480 (1998). This Court has held that, "[a] limitation on cross-examination that prevents a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation." *Id.* However, "[t]he right of cross-examination is not without limit; neither the Confrontation Clause nor due process confers an unlimited right to admit all relevant evidence or cross-examine on any subject." *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993).

Defense counsel repeatedly asked the victim whether her mother was angry at her or hit her. Three times, the victim denied that her mother hit her, but the trial court repeatedly sustained the prosecutor's objections to questions regarding the mother's alleged anger. The trial court also sustained objections to defense counsel's questions to the victim about her mother's attitude about dating and her going places with boys, though the victim did testify that her mother prohibited dating. While the record reflects that defense counsel was attempting to show that the victim had a motive to fabricate the CSC allegations because her mother would be angry if she voluntarily went to the basement with defendant, the record also suggests that the trial judge excluded the testimony because the court concluded that the mother's reaction after the incident was irrelevant to whether the assault occurred that day. As the prosecutor notes, "[a] decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *People v Gonzalez*, 256 Mich App 212, 217; 663 NW2d 499 (2003). Nonetheless, were we to find the trial court's ruling an abuse of discretion, any error was harmless beyond a reasonable doubt. The victim later testified that her mother *was* angry, but the anger appears to have been directed at the defendants because she then called the police. Defense counsel also had the opportunity to cross-examine the victim's mother about her reaction to the incident. Furthermore, defense counsel called a witness who testified that she saw the victim's mother hitting and cursing at the victim shortly after the incident. Thus, other evidence established defense counsel's theory that the victim's mother was angry at her.

Defendant's Confession

Defendant also asks for a new trial because he claims the trial court should have suppressed his confession as involuntary. Defendant moved to suppress his confession and the trial court held a *Walker*³ hearing before trial. “Whether a defendant’s statement was knowing, intelligent, and voluntary is a question of law that a court must determine under the totality of the circumstances.” *People v Snider*, 239 Mich App 393, 417; 608 NW2d 502 (2000). As this Court recently explained in *People v Shipley*, 256 Mich App 367, 372-373; 662 NW2d 856 (2003):

When reviewing a trial court's determination of the voluntariness of inculpatory statements, this Court must examine the entire record and make an independent determination, but will not disturb the trial court’s factual findings absent clear error. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake was made. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997). However, deference is given to the trial court's assessment of the weight of the evidence and credibility of the witnesses. *Sexton, supra* at 752.

Our Supreme Court set forth the factors to be considered at a suppression hearing in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988):

In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

At the suppression hearing, the interviewing officer, Officer Marvin Jones, testified that the interview began at approximately 2:15 a.m. and finished before 3:00 a.m. Officer Jones further testified that (1) he gave defendant his *Miranda*⁴ rights in writing, (2) defendant read each right out loud, (3) defendant said he understood each right, (4) defendant initialed each right, and (5) defendant signed the notification form. Officer Jones further testified that defendant (1) did not appear to be under the influence of alcohol or drugs, (2) had no complaints of pain, distress or hunger, (3) made no request to use “the facilities,” (4) never said he did not want to talk, and (5) was not hit or struck by police officers. Officer Jones further testified that defendant reported that he completed the ninth grade at Denby High School. Defense counsel stated that defendant had some juvenile contacts with the police and the attorneys also stipulated that a psychological

³ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

⁴ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

evaluation revealed that defendant is in the borderline range of intelligence which is below average, but above mental retardation.

On the basis of the above evidence, the trial court correctly ruled that defendant's confession was voluntary; defendant is not mentally retarded and, while the interview took place late at night, the other factors reveal that defendant made a knowing, intelligent and voluntary waiver.

At trial, and *after* defendant's confession was read into the record, defense counsel again presented evidence regarding defendant's intelligence level and his interview with Officer Jones. Defense counsel's presentation of this evidence was untimely and, had he found additional evidence to support his motion to suppress, he clearly should have moved for a hearing *before* the statement was read at trial. Nonetheless, the additional evidence did not warrant suppression. We find no clear error in the trial court's finding that defendant was fundamentally able to understand his rights. Further, while defendant claimed that Officer Jones physically threatened him during the interview, Officer Jones denied the incident and the trial court clearly believed Officer Jones. Again, we give deference to the trial court's findings regarding weight of the evidence and the credibility of witnesses and we find no error here. See *Shiple*, *supra* at 372-373.⁵

Affirmed.

/s/ Richard Allen Griffin

/s/ Henry William Saad

⁵ We also reject defendant's claim that the failure to electronically record his interrogation violated his constitutional rights. See *People v Fike*, 228 Mich App 178, 183-186; 577 NW2d 903 (1998).