

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MALCOM BACON,

Defendant-Appellant.

UNPUBLISHED
November 6, 2001

No. 226754
Wayne Circuit Court
LC No. 99-008089

Before: Bandstra, C.J., and Doctoroff and White, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for unarmed robbery, MCL 750.530. Defendant was sentenced to four to fifteen years' imprisonment as a fourth habitual offender, MCL 769.12. We affirm.

Defendant first claims that the victim should have been questioned regarding his competency, or an evidentiary hearing should have been held based on his competency. Witnesses are presumed competent to testify at trial. MRE 601; *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). The test of the competency of a witness focuses on whether a witness has the capacity and sense of obligation to testify truthfully and understandably. MRE 601; *People v Breck*, 230 Mich App 450, 457; 584 NW2d 602 (1997). Although a witness may be mentally impaired, this does not preclude the witness from testifying at trial because the weight and credibility of the testimony is a question for the jury. *People v LaPorte*, 103 Mich App 444, 447; 303 NW2d 222 (1981).

Here, the victim had the capacity and sense of obligation to testify truthfully and understandably while testifying at trial. Although it was clear that the victim had a mental disorder, he was able to give lucid, connected testimony regarding the unarmed robbery. The victim understood the questions asked by both the prosecution and the defense, and made direct answers to them. Furthermore, the victim's testimony at trial was consistent with the other two eyewitnesses of the unarmed robbery.

Next, defendant asserts that the victim seemed competent to testify at the preliminary examination, thus the harmful effect of the victim's testimony, due to his incompetence, was not evident until after the victim testified at trial. This argument lacks merit. First, the victim was

competent to testify at the trial proceeding. Second, the victim made similar nonsensical statements during the preliminary examination as he did at the trial proceeding.¹ Third, the prosecution, during pretrial, notified both the judge and defendant that the victim was suffering from dementia. Finally, although defendant expressed concern over the competency of the victim, defendant never made a formal motion for a competency hearing.

Defendant's next argues that the trial court erred in failing to grant defendant's motion for a mistrial. We review a trial court's grant or denial of a motion for a mistrial for an abuse of discretion. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997). A motion for mistrial should be granted only if there is an irregularity that is prejudicial to the defendant's rights and impairs his ability to receive a fair trial. *People v Stewart (On Remand)*, 219 Mich App 38, 43; 555 NW2d 715 (1996).

Because the witness in this case was competent to testify, allowing the testimony was neither prejudicial to defendant's rights, nor did it impair defendant's ability to receive a fair trial. Moreover, the victim's testimony at trial more likely harmed the prosecution than it did defendant. The victim obviously did not recognize defendant while sitting in the courtroom. Additionally, the victim never identified defendant as being one of the perpetrators. Furthermore, there was significant credible testimony from two police officers that corroborated the victim's testimony that two men robbed him, and that he had money stolen from him. Therefore, we find that the victim's testimony did not prejudice defendant, defendant received a fair trial, and the trial court did not abuse its discretion in denying the mistrial.

Defendant's also claims that he was denied his state and federal constitutional right to confront a key witness against him. We disagree. We review this issue for plain error because defendant failed to raise this constitutional challenge in the lower court. *People v Smith*, 243 Mich App 657, 681; 625 NW2d 46 (2000); *Carines, supra* at 763.

A defendant has a constitutional right to confront the witness against him. US Const, Am VI; Const 1963, art 1, § 20. The right to confront one's accusers consists of, among other requirements, the right to subject witnesses to cross-examination. *Maryland v Craig*, 497 US 836, 845-846; 110 S Ct 3157; 111 L Ed 2d 666 (1990); *People v Pesquera*, 244 Mich App 305, 309; 625 NW2d 407 (2001). Consequently, a constitutional right may be violated if the defendant is limited in his ability of cross-examining the witness against him. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). However, the confrontation clause does not guarantee cross-examination in any manner or extent that a defendant may wish, but rather protects a defendant's right to a reasonable opportunity to test the truthfulness of a witness' testimony. *Ho, supra* at 190.

Defendant first alleges that he was denied his right to confront witnesses because the victim testified at trial that two men robbed him, but it appeared at the preliminary examination that only one person had robbed him. Defendant claims that this consequently ruined his proposed defense that only one person robbed the victim and that defendant did not participate in

¹ Specifically, at the preliminary examination, the witness stated "my name is Jesus." At trial, he stated "Jesus is number one" and "I'm the one that raised the dead."

the crime, and that that this may have been the determining factor in convicting him. However, when we review the record from both the preliminary examination and the trial, there is no evidence suggesting that only one person attacked the victim. Furthermore, defendant had an adequate opportunity to cross-examine the victim in front of the jury concerning any inconsistencies between the preliminary examination and trial testimony. Moreover, the judge, jury, and defendant were able to view the demeanor of the victim as he testified. Therefore, we hold that defendant was not limited in his ability to cross-examine the victim.

Additionally, defendant asserts that had he known of the victim's dementia prior to trial, then defendant would have attacked his credibility by retaining an expert witness to discredit the victim. This assertion lacks merit because it is clear that the prosecution notified defendant before trial that the victim was suffering from dementia. Further, although defendant questioned the competency of the victim, defendant never moved for a competency hearing, nor did he assert that the victim's testimony violated his right to confrontation.

Defendant also asserts in his brief on appeal that the trial court erred in failing to give the jury a cautionary instruction on the definition of dementia. This argument was not raised in defendant's statement of the questions presented, and consequently, review is inappropriate. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Even if we were to overlook defendant's failure to properly present this issue, we would note that defendant failed to request a cautionary instruction. A party must object to the giving of, or the failure to give, an instruction on the record before the jury retires to consider the verdict. MCR 2.516(C). Thus, this assertion of a failure to give a jury instruction on "severe dementia" is unpreserved and will be reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (2001).

Here, the failure to instruct the jury on dementia did not result in a plain error. The victim was competent to testify. The victim testified that he was robbed of the money he had in his pocket. Moreover, two witnesses gave testimony that corroborated the victim's testimony. Even if plain error occurred, reversal is not warranted because it did not affect the fairness of the trial or result in the conviction of an innocent person. *Carines, supra* at 763.

Defendant's final assertion of error is that the trial judge interfered with defendant's constitutional right to defend himself by excluding lay opinion evidence. We review a trial court's decision to exclude evidence for an abuse of discretion. *People v Brownridge*, 459 Mich 456, 460; 591 NW2d 26 (1999). The admissibility of lay witness testimony is governed by MRE 701. "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." MRE 701.

The lay witness' proposed testimony, that the officers could not see the robbery from where they stood, was not rationally based on his own perceptions. The witness was not at the robbery scene at the operative time. Although the witness was allowed to testify regarding where he was standing during his investigation of the matter, and what he could rationally perceive from that vantage point, he was not allowed to speculate on what the officers could see the day of the robbery. Therefore, defendant was not prevented from presenting a defense

because the trial court's decision merely prohibited opinion testimony by a lay witness regarding an ultimate issue, whether the officers observed defendant rob the victim.

In addition, one officer testified that when he witnessed the robbery, he was parked on Gilbert Street about three or four car lengths south of Michigan. On cross-examination, he testified that his distance was about three car lengths, and he was facing north in front of the alley. Further, the other officer that witnessed the robbery, testified she was parked on Cicotte Street, facing the wrong way, behind the sidewalk. Consequently, these descriptions were too vague for a lay witness to testify that he was standing in the exact same position as the officers were during the robbery. Therefore, we find that the trial court's decision to limit the expert's testimony was not an abuse of discretion.

Affirmed.

/s/ Richard A. Bandstra
/s/ Martin M. Doctoroff
/s/ Helene N. White