

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
April 9, 2013

v

MICHAEL SHAWN BIRMINGHAM,
Defendant-Appellant.

No. 309053
Genesee Circuit Court
LC No. 11-029802-FH

Before: BORRELLO, P.J., and K. F. KELLY and GLEICHER, JJ.

K. F. KELLY, J. (*concurring*).

I agree with the majority's conclusion that defendant was not deprived of his constitutional right to confront the witnesses against him; however, I write separately because I believe that defendant waived the issue for appellate review.

A defendant's constitutional right to confront witnesses against him may be waived through actions by defense counsel. *People v Buie*, 491 Mich 294, 304-306; 817 NW2d 33 (2012). A waiver is the "intentional relinquishment or abandonment of a known right." *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999), quoting *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

Defense counsel failed to object to any of the complained-of testimony and counsel's statements during closing arguments support a finding that the issue was waived. Regarding the confidential informant, counsel argued:

Now, this confidential informant. You don't see this person. This person's not brought to Court obviously. We know nothing of this person. We know nothing of the reliability other than the fact the officers, reliable informant. Well, what the heck does that mean?

What does that mean? It means he's a criminal. The person's a criminal. They've got a case and they're trying to work it off so they give Officers what they claim to be reliable tips. We know nothing of what's going [sic] here.

We don't know if this informant was one of the two people in the red — red truck. We have no idea. No idea. So, take that for what it's worth. This person's not — these informants are not credible at all.

And, the Prosecutor has the right to bring that person in the Court but chose not to.

Regarding Johnson, counsel argued:

We could have objected to that, ladies and gentleman. That was complete hearsay but Michael Birmingham wanted you guys to hear the whole — he's got nothing to hide. He wanted you to hear the whole story of what — what allegedly occurred there.

Based on these statements, I believe that counsel knowingly permitted the alleged constitutional violations. Cf. *People v Fackelman*, 489 Mich 515, 543; 802 NW2d 552 (2011), cert den ___ US ___; 132 S Ct 759; 181 L Ed 2d 483 (2011).

/s/ Kirsten Frank Kelly