STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ROBERT ADAMS,

Defendant-Appellant.

UNPUBLISHED
July 24, 1998

No. 199150
Shiawassee Circuit Court
LC No. 95-007432 FC

Before: Bandstra, P.J., and Griffin and Young, Jr., JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree retail fraud, MCL 750.356c; MSA 28.588(3). Defendant pleaded guilty to being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. The trial court sentenced defendant to 54 to 180 months in prison. He now appeals as of right. We affirm.

Defendant's conviction arises from a theft of beer from a party store. Defendant drove a friend, David Benoit, to the party store, waited for him, and then after Benoit stole two twenty-four packs of beer, defendant drove him to a friend's apartment. Defendant testified at trial that when he drove Benoit to the store, he did not know that Benoit was planning to steal beer or did he know when Benoit emerged from the store with the beer that he had stolen it. His defense was that he was merely present and not an accomplice to the crime.

However, Benoit testified at trial that he had told defendant he planned to steal the beer from the party store. Then, on cross-examination by defense counsel, Benoit testified that defendant drove away from the scene of the theft more slowly than Benoit would have liked, given that he was being chased by the owners of the party store. When defense counsel attempted to elicit from Benoit his opinion as to why defendant drove away from the scene of the crime more slowly than one would expect someone fleeing a crime scene to drive, the prosecutor objected and the court sustained the objection.

Defendant argues on appeal that when the court sustained the prosecutor's objection, it denied him his right of confrontation under the Sixth Amendment to the United States Constitution and the Michigan Constitution. We disagree.

While the right of cross-examination is secured by the Confrontation Clause of the U.S. Constitution, the Confrontation Clause does not confer 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). The proper scope of cross-examination is within the sound discretion of the trial court, which must exercise that discretion with due regard for the defendant's constitutional rights. *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992); *People v Blunt*, 189 Mich App 643, 650-651; 473 NW2d 792 (1991). Likewise, the decision whether to admit or exclude evidence is within the trial court's discretion and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

Defendant argues that Benoit's opinion concerning the speed at which defendant drove should have been admitted under MRE 701. MRE 701 permits opinion testimony by a lay witness if it is rationally based on the perception of the witness and is helpful to a clear understanding of a fact in issue. *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994). Defendant argues that Benoit's statement is admissible under MRE 701 because *a thief* could rationally infer that the reason defendant, his alleged accomplice in the theft, was not attempting a quick getaway, was that he did not realize a theft had taken place. As such, Benoit's testimony would have been helpful to the trier of fact.

However, MRE 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." While Benoit's perception that defendant was driving slowly was rationally based on personal knowledge and could be characterized as helpful to a clear understanding of a fact in issue, Benoit had no personal knowledge of what defendant was thinking. Benoit's inference that defendant did not know a theft had occurred is no more valid than any inference the jury could draw from the testimony concerning defendant's driving speed. Thus, Benoit's opinion testimony would not be helpful to a clear understanding of a fact in issue as required under MRE 701, and the trial court did not abuse its discretion in excluding it. Moreover, because defendant was allowed to elicit on cross-examination Benoit's testimony that defendant drove away from the scene slowly, we find that defendant was not denied his right of confrontation.

Finally, even if the trial court did err in limiting the scope of defendant's cross-examination, given the overwhelming evidence of defendant's guilt in this case, any error was harmless beyond a reasonable doubt. See *People v Jones*, 209 Mich App 212, 216; 530 NW2d 128 (1995).

Affirmed.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ Robert P. Young, Jr.