STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 8, 2004
v	No. 245211 Wayne Circuit Court
ALI SABRI-JAWID AL-TIMIMI, Defendant-Appellant.	LC No. 01-012337

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of second-degree murder, MCL 750.317. The trial court sentenced him to 15 to 25 years' incarceration. We affirm.

Defendant contends that the trial court erred in admitting the testimony of three witnesses, who testified regarding the statements made by Zamen Al-Kasid[1] at defendant's preliminary examination. At the preliminary examination, Al-Kasid testified that defendant told her he would kill the victim. Defendant does not contest that a complete transcript of the preliminary examination could not be prepared. Moreover, the question of Al-Kasid's unavailability is not at issue in this appeal. Instead, defendant argues that the admission of the three witnesses' testimony violated his constitutional rights under the Confrontation Clause of the Sixth Amendment of the United States Constitution because the testimony constituted an incomplete record of Al-Kasid's statements.

In *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980), abrogated in part by *Crawford v Washington*, ___ US ___; 124 S Ct 1354; ___ L Ed 2d (2004), the United States Supreme Court addressed the interplay between the admission of hearsay evidence and the Confrontation Clause. The Court recognized that it has tried to accommodate the various competing interests at stake. *Id.* at 64. The Court stated:

> The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference

[1] Zamen Al-Kasid was the putative fiancé of the victim, Waheed Alalyawi, whose marriage proposal had been rejected by Al-Kasid's family. Defendant is the husband of Zamen's sister.

for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.

The second aspect operates once a witness is shown to be unavailable. Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that there is no material departure from the reason of the general rule. The principle recently was formulated in *Mancusi* v. *Stubbs* [408 US 204, 213; 92 S Ct 2308; 33 L Ed 2d 293 (1972)]:

> The focus of the Court's concern has been to insure that there are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant, and to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement. It is clear from these statements, and from numerous prior decisions of this Court, that even though the witness be unavailable his prior testimony must bear some of these indicia of reliability.

The Court has applied this indicia of reliability requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the substance of the constitutional protection. This reflects the truism that hearsay rules and the Confrontation Clause are generally designed to protect similar values, and stem from the same roots. It also responds to the need for certainty in the workaday world of conducting criminal trials.

In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate indicia of reliability. [*Roberts, supra* at 65-66 (certain citations and internal quotations omitted).]

In *Crawford, supra* at 1374, the Court stated that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." In other words, there must have been an opportunity for cross-examination. *Id.* Here, it is undisputed that defendant had the opportunity to cross-examine Al-Kasid at the preliminary examination. Therefore, the admission into evidence of Al-Kasid's preliminary examination testimony did not violate defendant's rights under the Confrontation Clause.

Defendant essentially takes issue with the *manner* in which the prosecution presented Al-Kasid's testimony to the jury. In cases such as *Roberts, supra*, and *People v Meredith*, 459 Mich 62; 586 NW2d 538 (1998), the prosecution used transcripts of the preliminary examination

testimony in lieu of the declarant's statements. Here, however, a complete transcript could not be used, because the transcript machinery malfunctioned, and the court reporter died before reconstructing the transcripts from her notes. Therefore, the prosecution was forced to admit into evidence the testimony of those who observed Al-Kasid's preliminary examination testimony; the witnesses consisted of the examining magistrate (who nevertheless was not identified as such) and others. Defendant argues that the witnesses should not have been able to testify because their memories were not complete. Specifically, defendant contends that the witnesses could not testify regarding the substance of Al-Kasid's testimony during cross-examination. Defendant argues that a witness who testifies regarding his or recollection of earlier judicial testimony must be able to offer a complete recollection of the testimony offered on both direct and cross-examination.

Defendant relies on *People v Sligh*, 48 Mich 54; 11 NW 782 (1882), as binding authority in this jurisdiction. In *Sligh*, the Supreme Court ruled that the trial court should not have allowed a trial witness to detail the testimony given at an earlier trial by another witness who had subsequently died. *Id.* at 58. The Court recognized the competing interests associated with "allow[ing] depositions of deceased witnesses," *id.* at 57, and stated that "it is very clear that there must be the utmost precaution taken to place it before the jury as nearly as possible as the witness, if living, would have done." *Id.* at 58.

Any rule gleaned from *Sligh* appears to be countered by the more recent authority cited by plaintiff. Indeed, in *Gloeser v Moore*, 284 Mich 106, 120; 278 NW 781 (1938), our Supreme Court appears to have relaxed any rule that a witness be able to testify with a particular specificity. In *Gloeser*, the defendant, John Moore, testified at an earlier trial that resulted in a "disagreement by the jury." *Id.* at 112. In a second trial, Moore became unavailable to testify, and an attorney who examined Moore at the earlier trial offered to testify regarding the substance of Moore's earlier testimony. *Id.* The Court ruled:

> Under the facts, where Moore was sworn and examined as a witness in a former case, it is probable Neudeck might be competent to testify to what the witness testified in a former case. That proof may be made of the testimony of a witness who is without the jurisdiction of the court, where such witness was sworn and examined on a former trial, is well established. The general rule is stated in 22 C.J. p. 442, that the former evidence of a witness may be established by the testimony of any person who can swear to it from memory. It may be proven by the official stenographer. And the law of this State is in accordance with the general rule, that anyone who has heard the testimony of a witness is competent to testify as to what he said. Plaintiff had the same interest in the testimony of Moore in the former trial as in the present proceeding and the same interest in his examination and cross-examination. This would be sufficient to authorize the stenographer who took the testimony to read the same in evidence upon the trial of the present case. [*Moore, supra* at 120-121 (certain citations omitted).]

Gloeser did not discuss what additional requirements would be necessary for Neudeck to testify at trial, such as whether Neudeck would be able to testify *with detailed specificity* about the direct examination as well as the cross-examination. Accordingly, the *Gloeser* Court implicitly ruled that Neudeck was competent simply to testify with regard to what he observed.

This reasoning is echoed in MRE 602, which provides, in part, 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. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony.

Therefore, just as with *Gloeser*, it is sufficient to allow a witness to testify as long as the witness has personal knowledge of the other witness' testimony. Any failure of a witness to recall the complete detail of another witness' testimony at an earlier proceeding would be relevant to the issue of credibility. Such a credibility issue is for the jury, and not for an appellate court. See, generally, *People v Lemmon*, 456 Mich 625, 637; 476 NW2d 129 (1998).

Moreover, even assuming that a trial court, before admitting the testimony of a witness who is recalling another's testimony, is required to ensure that the witness be able to recall both the direct examination and the cross-examination from the earlier testimony, defendant's argument fails. Indeed, defendant fails to demonstrate that the witnesses at issue lacked knowledge about Al-Kasid's testimony on cross-examination at the preliminary examination. Our review of the witnesses' testimony reveals that these witnesses' recollections were not limited to only the direct examination portion of Al-Kasid's testimony. Moreover, defendant had the opportunity to interview and present any other witnesses that may have been present during Al-Kasid's cross-examination. We reject defendant's argument and conclude that the court properly admitted the testimony of the three witnesses in question.

Defendant also takes issue with the trial court's assessment, during sentencing, of fifteen points for offense variable (OV) 5, for a victim who has suffered serious psychological injury. Defendant contends that the trial court abused its discretion because there were no facts to support this finding. We disagree. The facts adduced at the sentencing hearing reveal that the victim's mother, identified in the lower court record only as Ms. Alalyawi, suffered as a result of the death of her son. Alalyawi testified that her "heart" was "sick" and that she had some blockages in her arteries for four months. Her daughter cared for her, and she was forced into a wheelchair. Alalyawi was frightened as a result of her son's death. Although her heart condition had existed for almost a year, Alalyawi was sure that it had been exacerbated because of her son's death. Alalyawi was clear that her "mental situation is not stable," her eating and sleeping habits had changed, and she was visiting doctors more than she had before her son's death.

MCL 777.35 provides:

> (1) Offense variable 5 is psychological injury to a member of a victim's family. Score offense variable 5 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Serious psychological injury requiring professional treatment occurred to a victim's family..... 15 points
>
> (b) No serious psychological injury requiring professional treatment occurred to a victim's family..... 0 points

> (2) Score 15 points if the serious psychological injury to the victim's family may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.

The trial court believed that Alalyawi's statements, particularly her comment with regard to how her eating and sleeping habits were affected, evidenced psychological injury. We cannot conclude that the trial court abused its discretion in doing so. Our Supreme Court has made the following observation:

> At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. . . . When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes. [*People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003); see also *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).]

Because the trial court's scoring of the variable was within the principled range of outcomes, it was not an abuse of discretion. Defendant's sentence fell within the guidelines range, and we therefore affirm the sentence. MCL 769.34(10); *Babcock, supra* at 261.

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood