

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARIOUS DAVIS,

Defendant-Appellant.

UNPUBLISHED

October 23, 2008

No. 279871

Wayne Circuit Court

LC No. 06-012172-01

Before: O’Connell, P.J., and Smolenski and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of two counts of felonious assault, MCL 750.82, and one count each of maliciously using a telecommunications service, MCL 750.540e, and possession of a firearm during commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to concurrent terms of two years’ probation for the assault convictions and for maliciously using a telecommunications service, all to be served consecutively to a two-year term of imprisonment for the felony-firearm conviction. We affirm, and decide this appeal without oral argument pursuant to MCR 7.214(E).

Theresa Davis, defendant’s wife, testified at trial that on August 10, 2006, she and defendant shared a Detroit residence with Davis’s mother and three children. Davis recounted that on that date, after she and defendant had a dispute concerning his suspicion that she had been unfaithful, defendant gathered his clothing, placed it in a car, and drove away. Davis averred that shortly thereafter, defendant used a cellular phone to call her several times and threaten her. Davis recounted that during one call, defendant urged her to come outside, and that she went out on the front porch, accompanied by her mother and the children. Davis and her mother similarly recalled at trial that after defendant had stopped his car in front of the residence, he produced a black handgun, pointed it at them, and announced that he intended to kill “both of you all bitches.”

Defendant contends that the trial court improperly admitted the testimony of a six-year-old witness, his daughter, who had difficulty understanding the difference between the truth and lies. The determination of a witness’s competency rests within the discretion of the trial court. *People v Breck*, 230 Mich App 450, 457; 584 NW2d 602 (1998). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of principled and reasonable outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Because defendant did not object to the admission of his daughter’s testimony in the trial court, we limit our review

to whether the admission of her testimony constituted plain error that affected defendant's substantial rights. *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007).¹

Michigan courts presume that all witnesses are competent to testify. *People v Watson*, 245 Mich App 572, 583; 629 NW2d 411 (2001). Under MRE 601, a trial court may question a witness to determine whether she is competent "to testify truthfully and understandably." "The test of competency is . . . whether the witness has the capacity and sense of obligation to testify truthfully and understandably." *Watson*, *supra* at 583.

The trial court's probing examination of the minor child revealed that she plainly understood the difference between a true statement and a false statement. Near the end of the trial court's preliminary questioning, the child responded affirmatively to the court's specific inquiry whether she would truthfully answer the questions posed by the prosecutor and defense counsel. Although defendant emphasizes that, when first asked if she knew the difference between telling the truth and telling a lie, the child had responded, "No," the record clearly reflects that after additional questioning, the trial court found that the child simply had not understood the word "difference." This Court defers to a trial court's credibility determinations, "especially where the demeanor of the witnesses is important." *People v Cipriano*, 431 Mich 315, 339; 429 NW2d 781 (1988) (internal quotation omitted).

In summary, the trial court's finding that defendant's six-year-old daughter was competent to testify at trial fell well within the range of principled and reasonable outcomes of this evidentiary question.

Defendant additionally maintains that the child's testimony does not qualify as trustworthy because she made inconsistent statements regarding the model of the car that he drove. But once a trial court examines a child witness and finds her competent to testify, "a later showing of the child's inability to testify truthfully reflects on credibility, not competency." *Watson*, *supra* at 583 (internal quotation omitted).

Even assuming that the trial court plainly erred in admitting the child's testimony, any error was harmless. Because the substance of the child's testimony was cumulative to that of Davis, Davis's mother, and a third eyewitness to defendant's assaults, the admission of the child's testimony did not affect the outcome of the trial or defendant's substantial rights. *Watson*, *supra* at 585.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Elizabeth L. Gleicher

¹ Although defense counsel arguably has affirmatively waived appellate review of this claim, we nonetheless briefly address the merits of defendant's complaint.