STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 15, 2009
v	No. 281273 Bay Circuit Court
ROGER WILLIAM BADOUR, Defendant-Appellant.	LC No. 06-010892-FC

Before: Murray, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to commit armed robbery, MCL 750.529 and MCL 750.157a, and armed robbery, MCL 750.529. Defendant was sentenced to concurrent terms of 10 to 20 years for each crime. Defendant appeals as of right, and we affirm.

Defendant raises two arguments on appeal. First, defendant argues that he was deprived of his Sixth Amendment right to confront witnesses when the trial court ruled that he was not permitted to inquire into the details of a *Cobbs*[1] hearing. Thomas Fitzek, defendant's accomplice testified against defendant pursuant to a plea deal with the prosecution. Prior to Fitzek's acceptance of his plea deal, a *Cobbs* hearing was held. The court ruled that cross-examination about the *Cobbs* hearing would "create an issue . . . that is more prejudicial than probative" and would "mislead the jury."

The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees criminal defendants a right to confront witnesses who testify against them. US Const, Amend VI. The touchstone of a defendant's right to confront witnesses is the right to cross-examine them. *People v Holliday*, 144 Mich App 560, 567; 376 NW2d 154 (1985). However, this right is not absolute. *People v Bushard*, 444 Mich 384, 391; 508 NW2d 745 (1993). "'[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent the defense might wish.'"

[1] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

Bushard, *supra* at 391 (Boyle, J.), quoting *Delaware v Fensterer*, 474 US 15, 20; 106 S Ct 292; 88 L Ed 2d 15 (1985) (emphasis in the original).

Cobbs provides that "[a]t the request of a party, . . . a judge may state *on the record* the length of sentence that, on the basis of the information then available to the judge, appears to be appropriate for the charged offense." *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993) (emphasis in original). This "preliminary evaluation of the case does not bind the judge's sentencing discretion." *Id.* Knowledge of the possible sentence one might receive could be an incentive to accept a plea agreement being offered by a prosecutor, if for no reason other than because it would confirm information passed on by the prosecutor. Assuming that Fitzek was motivated, in part, to accept plaintiff's plea offer because of information learned at the *Cobbs* hearing, this evidence would be probative of Fitzek's credibility.

The court's ruling was based on the conclusion that the probative value of the evidence would be "substantially outweighed by the danger of unfair prejudice . . . or misleading the jury," and was thus excludable under MRE 403. In light of the court's allowing defendant to ask Fitzek about the charge that was dismissed as a result of his plea and the potential penalty it carried, it does not seem that the probative value of the excluded evidence was substantially outweighed by the danger of unfair prejudice. However, it was within the range of principled outcomes, *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003), for the court to rule that there was a substantial danger that the jury would be misled by such an examination. As the court noted, if the sentencing ramifications of the *Cobbs* hearing were put before the jury, the jury would also have to be told how a *Cobbs* hearing works and that the plea agreement was not contingent upon Fitzek receiving the preliminary sentencing evaluation set forth in the hearing. This would likely divert the jury's attention from trying to understand and determine the facts in issue to trying to comprehend a procedural device that has no relevance to those facts.[2] Accordingly, the court did not abuse its discretion in excluding examination on the details of the *Cobbs* hearing.

Defendant's second argument on appeal is that the trial court abused its discretion when it allowed the prosecution, over his objection, to introduce demonstrative evidence created days before the start of trial. Defendant's argument is two-fold. First, defendant argues that the trial court impermissibly held that the complained of demonstrative evidence was admissible and not subject to rules of discovery. This argument is without merit. Contrary to defendant's argument, the record reveals that the trial court properly considered whether the prosecution had violated the rules of discovery. Furthermore, the prosecution provided defendant with the complained of evidence as soon as it was available to it, which is all that was required. MCR 6.201(H).

Defendant also argues that the trial court abused its discretion when it held the demonstrative evidence was admissible contrary to the rules of evidence. We disagree. "Demonstrative evidence is admissible if it will aid the fact-finder in reaching a decision on a material issue to the case." *People v Unger*, 278 Mich App 210, 247; 749 NW2d 272 (2008). Here, defendant does not deny that the complained of evidence would aid the fact-finder in

[2] Defendant was given a full opportunity to cross-examine Fitzek about the details of his plea agreement and the sentencing ramifications of the dismissed charge.

reaching a decision on a material issue of this case. Nor does defendant deny the relevancy of the evidence to a material issue in this case. Thus, the evidence was admissible. Nevertheless, defendant argues that the evidence is inadmissible because it undermines one of the strongest arguments of his defense. However, only evidence that is unfairly prejudicial is inadmissible. MRE 403. Evidence is not unfairly prejudicial merely because it is damaging to a party's case. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). Defendant has failed to prove how the evidence is unfairly prejudicial to his case.

Affirmed.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Alton T. Davis