

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH FIDLER,

Defendant-Appellant.

UNPUBLISHED

November 18, 2008

No. 280811

Wayne Circuit Court

LC No. 07-007639-01

Before: Beckering, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unlawfully driving away an automobile, MCL 750.413. The trial court imposed a sentence of forty to sixty months' imprisonment. Defendant appeals as of right. For the reasons set forth in this opinion, we affirm.

This case arises out of an incident in the City of Detroit in March 2007. According to testimony elicited at trial, the victim stopped his vehicle and opened the door, at which time defendant pulled the victim out of his vehicle and drove off. The victim reported the matter to the police, then afterward spotted defendant and was able to have a picture of him taken, which he brought to the police. A police sergeant recognized defendant from an earlier investigation. The police then approached defendant, who fled in response, but was eventually apprehended.

Defendant was charged with carjacking¹ and unarmed robbery.² The jury found defendant not guilty of those two offenses, but guilty of unlawfully driving away as a lesser included offense of carjacking.

On appeal, appellate counsel argues that the trial court erred in limiting certain cross-examination of the victim. Defendant, in his Standard 4 brief, argues that the trial court erred by

¹ MCL 750.529a.

² MCL 750.530.

denying the jury's request for the transcript of the victim's testimony at the preliminary examination.

I. Limitation on Cross-Examination

When asked on direct examination about items in his car when it was taken, the victim specified his tools and his passport, and then volunteered, "The day before yesterday, someone called, that gentleman told me that my passport, he found in his home." Defense counsel interposed a hearsay objection, which the trial court overruled while advising the prosecuting attorney to move on. On cross-examination, defense counsel attempted to return to the matter of the victim's passport, but the trial court interjected to question the relevance of that line of questioning. Defense counsel offered, "it's relevant . . . that someone else has his passport and not my client and the passport was in the car." But the court admonished defense counsel to move on, because, "[i]t does not answer the question of whether or not your client was the one who took the car and took the passport."

This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002). But cross-examination of adverse witnesses at trial is a party's right, not a privilege left entirely to the discretion of the court. See *People v Hackett*, 421 Mich 338, 347; 365 NW2d 120 (1984). Even so, the court retains the duty and the authority to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." MRE 611(a).

In this case, the trial court's limitation on cross-examination was based on relevance. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. We agree with appellate counsel that, given that this case hinged on the question of defendant's identity as the perpetrator, that someone other than defendant ended up with an item stolen in the course of the crime in question was relevant to the question of defendant's identity as the thief. Further, the cross-examination concerned a matter that originally came out in direct examination, over which the trial court overruled an objection. For these reasons, we hold that the court erred in refusing to allow defense counsel to elicit from the victim some elaboration about having received word that apparently someone other than defendant was in possession of the victim's passport that had been stolen with the vehicle.

The question posed before us then becomes whether the trial court's error constitutes reversible error. We note that a criminal defendant is entitled to a fair trial, not a perfect one. *People v Mosko*, 441 Mich 496, 503; 495 NW2d 534 (1992). "[A] preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), quoting MCL 769.26. See also *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

In this case, we are persuaded by the victim's unequivocal identification of defendant. First, the victim was able to get a good look at defendant at the time of the incident, and then was able to identify defendant and have a picture taken of him, which he took to the police. Based on the strength of this identification it does not affirmatively appear that it is more probable than not that the error was outcome determinative. *Lukity, supra*. Thus, examining the evidence presented as a whole, not allowing cross examination into the issue regarding where the victim's passport ended up, while relevant, does not rise to the level of error requiring reversal. *Carines, supra*.

II. Preliminary Examination Transcript

Shortly after the jury began deliberations, the jury requested the transcript of the preliminary examination, among other things. The court provided the jury with additional instructions, including that the only exhibit admitted into evidence was the photograph of defendant, and that the transcript of the preliminary examination was not an exhibit but something used for limited purpose, in particular to expose prior inconsistent statements.

As the trial court repeatedly admonished the jury, its decision was to be based solely on the evidence. The transcript of the preliminary examination was not admitted into evidence; the trial court properly denied the jury's request to examine it as part of its deliberations.

Affirmed.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis