

Order

Michigan Supreme Court
Lansing, Michigan

April 5, 2017

154784

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

BRANDON OSCARLEROY BENSON,
Defendant-Appellant.

SC: 154784
COA: 333084
Wayne CC: 16-001056-FC

Stephen J. Markman,
Chief Justice

Robert P. Young, Jr.
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen,
Justices

On order of the Court, the application for leave to appeal the October 12, 2016 order of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE that part of the Court of Appeals order holding that the investigative subpoena testimony of Bre'Ascia Dixon and Sierra Lattimore was properly admitted under MRE 801, and we REMAND this case to that court for reconsideration of the issue. The Court of Appeals erred in its analysis of MRE 801(d)(1)(A) by considering whether the witnesses were unavailable, rather than whether their prior statements were inconsistent. The unavailability of a witness is relevant for admission under MRE 804, not MRE 801. In all other respects, leave to appeal is DENIED.

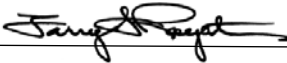
We do not retain jurisdiction.



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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 5, 2017


Clerk

Court of Appeals, State of Michigan

ORDER

People of MI v Brandon Oscarleroy Benson

Docket No. 333084

LC No. 16-001056-01-FC

Michael J. Talbot
Presiding Judge

Cynthia Diane Stephens

Michael J. Riordan
Judges

Pursuant to MCR 7.205(E)(2), the Court orders that the Wayne Circuit Court's May 3, 2016 order is REVERSED. The investigative subpoena testimony of Bre'Ascia Dixon and Sierra Lattimore was admissible for substantive use under MRE 801(d)(1)(A). *People v Malone*, 445 Mich 369, 375-385; 518 NW2d 418 (1994). Both witnesses testified under oath subject to the penalty of perjury and both were unavailable due to their alleged memory loss. See *People v Chavies*, 234 Mich App 274, 282-283; 593 NW2d 655 (1999), overruled on other grounds *People v Williams*, 475 Mich 245, 255; 716 NW2d 208 (2006). Further, defendant's opportunity to cross examine both witnesses at the preliminary examination regarding their prior testimony satisfied the protections of both MRE 801(d)(1)(A) and the Confrontation Clause. See *Malone*, 445 Mich at 384-385 (when a witness testifies at trial, he or she is available for cross-examination regarding his or her prior statements for purposes of MRE 801(d)); see also *People v Stanaway*, 446 Mich 643, 694 n 53; 521 NW2d 557 (1994) ("Where the declarant can be cross-examined about the prior inconsistent statement, there is no Confrontation Clause violation because the literal right to confront the witness has been satisfied."). Defendant's reliance on MRE 804(b)(1) cannot change this. *Chavies*, 234 Mich App at 284, citing *United States v Owens*, 484 US 554, 563-564; 108 S Ct 838; 98 L Ed 2d 951 (1988). Finally, Dixon's prior identification of defendant is likewise admissible under MRE 801(d)(1)(C) and presents no problem under the Confrontation Clause. *Malone*, 445 Mich at 384-385 ("a statement of identification is admissible under MRE 801(d)(1)(C) if a witness is present in court and under oath and is considered subject to cross-examination about his prior position.").

This order is to have immediate effect. MCR 7.215(F)(2). This Court retains no further jurisdiction.

Stephens, J., would grant peremptory reversal on the identification issue only.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

OCT 12 2016

Date

Chief Clerk