Circuit Court for Baltimore County
Case No. 03-K-09-002163

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 983

September Term, 2016

EDWARD ALLEN HARRIS

v.

STATE OF MARYLAND

Woodward, C.J.,
Graeff,
Eyler, Deborah S.,*

JJ.

Opinion by Woodward, C.J.

Filed: October 9, 2018

* Eyler, Deborah S., J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, she also participated in the decision and adoption of this opinion.

On March 22, 2009, James Faulcon, the victim, was shot and killed while sitting in his car. After a subsequent investigation, Edward Allen Harris, appellant, was indicted for first degree murder and other related charges pertaining to the death of Faulcon.

From June 7, 2010, to June 10, 2010, a jury trial was held in the Circuit Court for Baltimore County. On the second day of trial, defense counsel made a motion to exclude the testimony of a State's witness, Nathan McCoy, because it was discovered that morning that McCoy was being held at the Spring Grove Hospital Center ("Spring Grove"). Defense counsel requested that McCoy not be permitted to testify because of his lack of competency, but after a *voir dire* of McCoy outside the presence of the jury, the court determined McCoy to be competent to testify. At the conclusion of the trial, the jury convicted appellant of first degree murder, conspiracy to commit first degree murder, and use of a handgun in the commission of a crime of violence.

Appellant was subsequently sentenced to life imprisonment for the charge of first degree murder, a consecutive sentence of life imprisonment for the charge of conspiracy to commit first degree murder, and twenty years' imprisonment for the charge of use of a handgun in the commission of a crime of violence to run consecutively to the conspiracy sentence. Then, almost six years later, appellant requested post-conviction relief in the form of an unopposed motion to permit a belated appeal, which was granted by consent order that same day.

In this appeal, appellant presents the following question for our review, which we have rephrased as follows:[1]

> Did the circuit court err or abuse its discretion in determining the competency of a State's witness and therefore permitting him to testify at trial?

For the reasons discussed below, we conclude that the circuit court did not err or abuse its discretion in determining that McCoy was competent to testify and thus we shall affirm.

DISCUSSION

I. Motion to Supplement the Record

As a preliminary matter, we must first address appellant's pending motion to supplement the record. As will be discussed *infra*, it was not revealed until sometime after trial and upon further investigation by defense counsel that McCoy had been judicially determined to be incompetent to stand trial approximately one month prior to appellant's trial. In his brief on appeal and by a separately filed motion, appellant argues that McCoy's judicial determination of incompetence to stand trial "was the ultimate clear and

[1] Appellant's question presented in his brief reads as follows:

> 1. Did the court abuse its discretion in permitting a State's witness to testify after the parties, and court, learned hours earlier that the witness was being involuntarily held at a mental institution for inpatient treatment?
>   a. Did the court clearly err in finding the witness competent?
>   b. Did the court abuse its discretion in deciding the issue immediately, forcing defense counsel to cross-examine the witness unprepared, without a sufficient factual record?

convincing proof that he was incompetent to testify" and requests this Court to supplement the record with "[a] DVD certified by the court reporter for the Circuit Court for Baltimore City of [McCoy's] May 4 [competency] proceeding[.]" The State responds that appellant's proposed supplement does not fall within the purview of Maryland Rule 8-414, which governs motions to supplement the record. Further, the State argues in its Conditional Motion to Supplement Record that, if this Court is inclined to supplement the record with the DVD, it should also supplement the record with McCoy's testimony at the earlier trial of appellant's co-defendant and the "Court Letter" containing McCoy's psychiatric report provided to the Circuit Court for Baltimore City when that court determined McCoy was incompetent to stand trial.

Maryland Rule 8-414 states in relevant part:

> (a) **Authority of Appellate Court.** On motion or on its own initiative, the appellate court may order that a material error or omission in the record be corrected. *The court ordinarily may not order an addition to the record of new facts, documents, information, or evidence that had not been submitted to the lower court*.

(Bold emphasis in original) (italic emphasis added).

In order for this Court to correct or supplement the record on appeal, the evidence must have been submitted to the Circuit Court for Baltimore County at the time of appellant's trial. Because the DVD evidence was not before that court, we do not have the authority under Maryland Rule 8-414 to make it part of the record on appeal. Similarly, McCoy's testimony at a co-defendant's trial and the "Court Letter" were not before the court, and thus we will not make it part of the record on appeal. We, therefore, deny both appellant's Motion to Supplement Record and the State's Conditional Motion to

Supplement Record and consider only the evidence that was before the court in making its ruling on the competency of the State's witness.

II. Competency of the State's Witness

A. Background

On February 2, 2010, the State informed defense counsel that it intended to call McCoy as a State's witness at appellant's trial. The State sought to call McCoy as a witness to testify to being friends with appellant, going to appellant's house after the murder, seeing appellant with the murder weapon, and being present with appellant when he subsequently disposed of the murder weapon. On the second day of appellant's trial, McCoy was called to testify as a witness for the State. Prior to McCoy taking the stand and outside of the presence of the jury, the parties and the court discussed whether McCoy had any impeachable offenses. The following conversation then occurred:

> [DEFENSE COUNSEL]: Which also leads me into the second problem. See the two individuals with a police shirt on, there is a guy with a black shirt that says "police" and another gentleman with them. Apparently, they are from Spring Grove where [ ] McCoy is. This is news to me they are bringing this guy from Spring Grove. If he is from Spring Grove, obviously, there is something wrong with the guy. I have a right to know why he's in Spring Grove and whether he's capable of being a competent witness.
>
> THE COURT: Anything?
>
> [STATE]: Well, I know why he's in Spring Grove based on my conversation with him. Apparently, he got into a shouting match with a Judge in [Baltimore] City and thr[ew] a chair and the Judge committed him to Spring Grove. That's what he told me. . . .

[DEFENSE COUNSEL]: How long has he been in Spring Grove?

[STATE]: I have no idea. I found out he was in Spring Grove yesterday. So I have no idea.

* * *

THE COURT: What is the defense request with regard to this Spring Grove business?

[DEFENSE COUNSEL]: I think that.

THE COURT: Your suggestion that there was something not disclosed that was required by the discovery rules.

[DEFENSE COUNSEL]: Discovery is ongoing, even if it is as late as yesterday. They can do something.

THE COURT: Right.

[DEFENSE COUNSEL]: I don't know why he's in Spring Grove, I don't know whether it's because of an outburst or because there is a mental disorder. We are entitled to know that in order to cross examine him properly for the defense. And if he is suffering from mental disease or disorder that may disqualify him from testifying, we don't know. [The State] is going on what the person, the inmate, that is. I don't know if that's sufficient here.

[STATE]: We can bring him out if you want and voir dire him. Competency I think is an issue for the Court.

THE COURT: Right. At least initially would that satisfy you if we brought him in outside the presence of the Jury and question him?

[DEFENSE

COUNSEL]: The problem is, Judge, the record and this other question. My only concern is what he thinks is his reason for being in Spring Grove, if you go to Spring Grove and interview all the patients there, why you up hear [sic], they can say, oh, I don't know. They can be suffering from a multitude of things. I don't know whether we can go on that. Without knowing specifically from the hospital or the records of what he is there for, what if anything he's suffering from, puts us in a void in order to see whether he qualifies as a witness and to cross examine him as a witness.

THE COURT: I'm going to start by allowing you to ask him questions outside the presence of the Jury. If you can make some argument that there's been a discovery violation here, go ahead and make it. It doesn't sound to me as though there has been one based on what I have heard so far. But that's the only thing that seems to me is on the table is whether or not you are going to contend the State somehow had an obligation to disclose information that they haven't disclosed.

[DEFENSE COUNSEL]: I take [the State] at [its] word that [it] found out yesterday. Then yesterday he should have said something, maybe we could have gotten something between yesterday and today from the hospital saying what's going on. He found out late, I understand that.

[STATE]: I don't think the hospital can tell us what is going on, Your Honor. HIPAA rules, as they are in confidentiality, I don't think that they have any duty to disclose the nature and course of his treatment to us and as [Defense Counsel] said, I don't think, Judge, as a practical matter from my experience, that we can even subpoena those records. There are restrictions on them.

THE COURT: Well, is your first request for relief that you be permitted to voir dire him outside the Jury,

understanding that may not be the end of your arguments here, but is that your first request?

[DEFENSE COUNSEL]: That would be a beginning.

The circuit court then permitted defense counsel to *voir dire* McCoy on the issue of competency:

[DEFENSE COUNSEL]: [ ] McCoy, is that correct?

[MCCOY]: Yes.

* * *

[DEFENSE COUNSEL]: [ ] McCoy, where are you currently being housed?

[MCCOY]: At Spring Grove State Hospital.

[DEFENSE COUNSEL]: And when did you go to Spring Grove?

[MCCOY]: Last month around I think the 4th or something like that.

[DEFENSE COUNSEL]: The 4th of May?

[MCCOY]: Um-hum. (Indicating nodding head up and down.)

[DEFENSE COUNSEL]: And you have been continuously there since the 4th?

[MCCOY]: Um-hum. (Indicating nodding head up and down.)

[DEFENSE COUNSEL]: What part of the hospital are you being housed in right now?

[MCCOY]: Day Hall C.

* * *

[DEFENSE COUNSEL]: Right now, [ ] McCoy, are the doctors treating you with any medications?

[MCCOY]: Yes.

[DEFENSE COUNSEL]: What kind of medications are you taking?

* * *

[MCCOY]: Trazodone, Spiradol, Risperdal.

* * *

[DEFENSE COUNSEL]: So it's Trazodone, Risperdal and what else?

[MCCOY]: Cogentin, amongst other light medications, but it's like, um, I forgot the name of it. They give it to you like when you act up, like a PRN.

[DEFENSE COUNSEL]: I don't know what a PRN is?

[MCCOY]: It's like they keep you, if you acting up, they keep you stable, I guess.

[DEFENSE COUNSEL]: When we say, acting up, what are you referring to?

[MCCOY]: Yelling, screaming, doing temper tantrums, fighting.

[DEFENSE COUNSEL]: Do you know why the doctors are giving you these medications?

[MCCOY]: Yeah, to help me get better.

[DEFENSE COUNSEL]: And what was wrong with you that made you get better?

[MCCOY]: Schizophrenia, you know.

[DEFENSE COUNSEL]: Do you know why the doctors are giving you these medications?

[MCCOY]: Yeah. To help me get better.

[DEFENSE COUNSEL]: Okay. And what was wrong with you that you need to get better?

[MCCOY]: Schizophrenia, bipolar.

[DEFENSE COUNSEL]: Okay, anything else?

[MCCOY]: That's it. Manic depressive.

[DEFENSE COUNSEL]: And when the doctors said they wanted to give you medicine for schizophrenia, did you have any complaints to the doctor about how you were feeling?

[MCCOY]: What, today?

[DEFENSE COUNSEL]: No, when you first got in there?

[MCCOY]: No.

[DEFENSE COUNSEL]: You thought everything was okay?

[MCCOY]: Yeah.

[DEFENSE

COUNSEL]: Do you have any ideas how long they are going to keep you at Spring Grove?

[MCCOY]: Until next year.

[DEFENSE COUNSEL]: Until next year. You have had opportunities to talk to the doctors about what is going on?

[MCCOY]: Um-hum. (Indicating nodding head up and down.)

[DEFENSE COUNSEL]: Did you ever talk to the doctors about hearing voices?

[MCCOY]: Yes.

[DEFENSE COUNSEL]: Did you ever tell the doctors you were seeing things that weren't there?

[MCCOY]: Yes.

Next, the State and the circuit court questioned McCoy on the issue of competency:

[STATE]: **Now, the medications that you are on today, are those in any way affecting your ability to understand and appreciate the questions you are being asked?**

[MCCOY]: **Um-um. (Indicating nodding head side to side.)**

[STATE]: **Do they [a]ffect your ability to recall events of what happened in the past?**

[MCCOY]: **No.**

[STATE]: **You feel as though you can't [sic] properly communicate experiences that you have had in the past with this Defendant related to this case?**

[MCCOY]: **Um-hum. (Indicating affirmatively.)**

[STATE]: **Are those medications going to affect your ability to do that anyway?**

[MCCOY]: **No.**

[STATE]: I have no further questions.

THE COURT: I have a couple of questions, if you don't mind [ ] McCoy. So you know exactly where you are right now, right, why you are here?

* * *

[MCCOY]: Um-hum. (Indicating nodding head up and down.)

THE COURT: Why is that?

[MCCOY]: Murder was committed and, well, I saw some things and I heard some things.

THE COURT: Somebody brought you in to testify here as a witness.

[MCCOY]: Yes.

THE COURT: How old are you?

[MCCOY]: Now, I'm 31.

THE COURT: Prior to May 4th, were you ever in a hospital before that for any of these conditions we are talking about?

[MCCOY]: Like my schizophrenia and everything?

THE COURT: Right.

[MCCOY]: Yeah.

THE COURT: You have been hospitalized previously; how many times and where?

* * *

[MCCOY]: Maryland like five.

THE COURT: Five hospitalizations? Were you given medications during each of those hospitalizations?

[MCCOY]: Yes.

THE COURT: Those medication[s] keep you calm?

[MCCOY]: Yes.

THE COURT: **Do any of those medications you take affect your ability to remember things?**

[MCCOY]: **No.**

THE COURT: **You feel like you have had a good memory for details and facts right now?**

[MCCOY]: **Yes.**

THE COURT: Where did you go to high school?

[MCCOY]: Frederick Douglas.

THE COURT: Did you graduate?

[MCCOY]: Yeah.

THE COURT: What year did you graduate?

[MCCOY]: ’97.

THE COURT: Where is Douglas located?

[MCCOY]: Mondawmin. I am not familiar with the street name.

THE COURT: That’s close enough. Did you live around Douglas High School?

[MCCOY]: Yes.

THE COURT: Where did you go to elementary?

[MCCOY]: Deerborn Elementary.

THE COURT: **You are not influenced by the medications you are taking or the conditions, is that the case?**

[MCCOY]: **Um-hum. (Indicating nodding head up and down.)**

THE COURT: I don't have any other questions. **Based on those questions, do either of you men have additional questions?**

[DEFENSE COUNSEL]: **No, sir.**

[THE STATE]: No, Your Honor.

(Emphasis added).

Following the *voir dire* of McCoy, the circuit court asked the parties for any argument. Defense counsel stated:

> **Judge, my argument is not so much as to the discovery violation,** but because the information came to the State's Attorney late and it came to me ten minutes before the witness comes in, I have been unable to do anything in reference to preparing for cross examination of this witness. I think enough, even though you have asked questions to try to determine memory, there is enough information here about the medications, the types of medications, the diagnosis that he relates, schizophrenia, bipolar, manic depressive, the fact he suffers from hallucinations and hearing voices gives rise to question[s] whether or not, one, he is competent, but also two, that **I have not had the opportunity to investigate these issues properly through no fault, not done on purpose by the State,** but if there is a conviction in this case and everybody wants [ ] McCoy on the stand, but if there is a conviction in this case, **I believe allowing him to testify within a proper cross examination would be considered a violation of my client's constitutional right to have a defense, to have proper cross examination**

> **confrontation.** It may raise issues later on and I just would rather not try this again.
>
> * * *
>
> I have one issue, whether or not I could get hold of his medical records is not necessarily primary issue, maybe I could, maybe I couldn't. I don't know without trying. But I would have had the opportunity to contact expert witnesses to find out what these medicines are, what they do, what I need, would need to do to prepare for a defense on this witness . . . . The issue is here whether I would have had an opportunity to properly prepare rather than just five minutes of asking him questions. . . .

(Emphasis added).

After hearing argument from both the State and defense counsel, the circuit court ruled:

> THE COURT: I'm going to rule on this issue now. What has been raised before me is a witness in court, and we just conducted examination outside the presence of the Jury for the past 15 or 20 minutes. This witness' name is McCoy, he's a fact witness in this case. He was brought here by folks from Spring Grove Hospital Center. I accept and find as a fact that [ ], the State, didn't know until yesterday at the earliest that this man was being treated at or living at Spring Grove Hospital Center. **Most importantly, I gave everybody ample opportunity to voir dire this witness on the issue of whether or not there is anything that impairs his ability to testify truthfully and accurately, which is the standard set forth in the discovery rule and it's also I believe actually the standard with regard to whether or not the witness is more competent is a more stringent one.**
>
> In any event, **I have had an opportunity to sit here and listen to [ ] McCoy respond to questions with regard to his ability to remember things and**

> **testify truthfully and accurately. I am not persuaded there is anything about his condition or any of his medications that impairs or in any way impinges upon his ability to testify truthfully or accurately.** Under the circumstances, any of those circumstances, you can ask questions about that, but I don't think there's been a discovery violation at all and I don't think there's grounds to postpone the case or continue the case under any circumstances. **I believe that this witness based on my ability to have seen and heard what he said, based on the fact that he testified in the previous case against [ ] Donaldson and that this issue was never raised and I have no recollection of there being any issue as to his ability to testify truthfully or accurately,** then, under all of the circumstances here, I am not persuaded that there was a discovery violation, nor am I persuaded in the interests of justice to continue this case to allow further or other investigation into his medical or psychiatric history under the circumstances.
>
> * * *
>
> [DEFENSE COUNSEL]: **Just for the record, to preserve my record, I take exception to the Court's ruling as to that issue. I was not asking for a postponement or continuance, I am not alleging that the discovery violation was purposeful or intentional. My remedy would have been just not to allow the witness to testify.**

(Emphasis added). McCoy then proceeded to testify.

At some point after trial, appellant discovered that McCoy was not being institutionalized at Spring Grove because he threw a chair in a courtroom. Rather, it was because he had been declared incompetent to stand trial by a judge in the Circuit Court for

Baltimore City on May 4, 2010, approximately one month prior to testifying at appellant's trial.[2]

B. Waiver

On appeal, appellant contends that "[g]iven the extreme circumstances under which the question of McCoy's competency arose and the paucity of information upon which to make a determination, the court abused its discretion in ruling there existed no grounds 'to postpone the case or continue the case under any circumstances.'" Appellant further argues that the court's failure to postpone or continue the case to allow defense counsel to investigate McCoy's medical or psychiatric history was a violation of the Confrontation Clause, because defense counsel was unable to effectively cross-examine McCoy.

Despite claiming that he did not have enough information regarding McCoy's diagnoses or medications, defense counsel opted to request the ultimate relief of excluding McCoy as a witness, instead of requesting a short postponement or continuance, which could have allotted him sufficient time to discover more information about McCoy. We conclude that defense counsel explicitly waived any claim regarding a postponement or continuance when counsel stated: "I was not asking for a postponement or continuance, I am not alleging that the discovery violation was purposeful or intentional. My remedy would have been just not to allow the witness to testify." *See, e.g.*, *Brice v. State*, 225 Md. App. 666, 678 (2015) (explaining that an explicit waiver is when a party fails to object or fails to request a certain action from the court), *cert. denied*, 447 Md. 298 (2016).

[2] Based on the record, it is not clear when this evidence came to light.

Accordingly, we will not address appellant's claims rooted in the circuit court's alleged failure to *sua sponte* postpone or continue appellant's case to allow defense counsel the opportunity to further investigate McCoy.

C. Competency Determination Issue

The issue of competency must be raised as soon as a party knows or should know of the ground for objection. *Andre v. Bodman*, 13 Md. 241, 241 (1859). If "a *substantial question* regarding competency is raised" the court may hold a *voir dire* hearing outside of the presence of the jury. *Perry v. State*, 381 Md. 138, 151 (2004). This Court addressed the issue of witness competency in *Cruz v. State*, 232 Md. App. 108, 112, *cert. denied*, 453 Md. 362 (2017), and set forth the relevant standard of review:

> In *Perry*, 381 Md. at 145, 848 A.2d 631, the Court of Appeals summarized the law relating to decisions regarding the competency of witnesses as follows:
>
> > Md. Rule 5–601 notes that "[e]xcept as otherwise provided by law, every person is competent to be a witness." This rule is derived from Fed.R.Evid. 601, and, like the federal rule, it "places the burden on the opponent of a witness to show that the witness is incompetent." Lynn McLain, *Maryland Rules of Evidence* 103 (2d ed. 2002) (citing *United States v. Odom*, 736 F.2d 104, 112 (4th Cir. 1984)). As stated by Professor McLain, under this rule, almost no one is *per se* incompetent to testify. Lynn McLain, *Maryland Rules of Evidence* 103 (2d ed. 2002).
>
> In determining whether a witness is competent to testify, the trial court, in its discretion, should determine "[1] 'whether an individual witness has sufficient capacity to observe, recollect, and recount pertinent facts' and [2] whether that individual 'demonstrates an understanding of the duty to tell the truth.'" *Id.* (quoting Lynn McLain, *Maryland Rules of Evidence* 103 (2d ed. 2002)).

> A trial court's determination that a witness is competent to testify is a matter within the trial court's discretion, and a decision in that regard will not be disturbed absent an abuse of discretion. *Id.* at 148, 848 A.2d 631. An abuse of discretion will be found only "'where no reasonable person would take the view adopted by the trial court,'" when the court acts "'without reference to any guiding principles or rules[,]'" or when the ruling is "'clearly against the logic and effect of facts and inferences before the court.'" *Md. Bd. of Physicians v. Geier*, 451 Md. 526, 544, 154 A.3d 1211 (2017) (quoting *Gallagher Evelius & Jones, LLP v. Joppa Drive–Thru, Inc.*, 195 Md. App. 583, 597, 7 A.3d 160 (2010)).

Professor Lynn McLain has further elaborated:

> Unless a witness is incompetent because of his status, the trial court determines, in its discretion, whether an individual witness has sufficient capacity to observe, recollect, and recount pertinent facts to be competent to testify. An adult is presumed competent and will be permitted to testify, unless she (1) is shown to be incapable of reliable perception or memory of, or communication of testimony about, the subject of her testimony, or (2) has not demonstrated an understanding of the duty to tell the truth. Such a finding may be reached via Md. Rules 5-401 through 5-403 and 5-603.
>
> Even a person who is, for example, mentally ill, or an abuser of alcohol or drugs, will be found competent, unless the court finds a lack of capacity for reliable perception, memory, or communication.

6 *Maryland Evidence*, § 601:1 (footnotes omitted).

On appeal, appellant contends that the trial court abused its discretion for determining McCoy's competency on an insufficient factual record.[3] The State counters

[3] Appellant also argues, that because McCoy testified in front of the jury to his diagnoses of schizophrenia and bipolar disorder and their effects on him, this "proved clearly and convincingly that his factual observations were impaired and untrustworthy." Appellant asserts that "McCoy's contradictory voir dire and testimony further cast doubt on his ability to appreciate 'the nature and obligation of an oath.'" The State responds that, although McCoy's testimony in front of the jury should not be considered as the ruling was made prior, "any conflict [between McCoy's *voir dire* and his testimony] went to weight, not sufficiency. . . . Thus, any conflicts in the evidence would not render the evidence

that the record was sufficient to make a competency determination and that appellant failed to meet his burden to establish that McCoy was not competent to testify. We agree with the State.

As previously mentioned, "[a] trial court's determination that a witness is competent to testify is a matter within the trial court's discretion, and a decision in that regard will not be disturbed absent an abuse of discretion." *Cruz*, 232 Md. App. at 112. Further, Maryland case law, as articulated by Professor McLain, states that "an adult is presumed competent and has been permitted to testify, *unless he or she has been shown to* be incapable of reliable perception or memory of, or communication of testimony about, the subject of his or her testimony, or has not demonstrated an understanding of the duty to tell the truth." Lynn McLain, 7 *Maryland Rules of Evidence* 108 (3d ed. 2013-14) (bold emphasis omitted (italics emphasis added); *see also Johnston v. Frederick*, 140 Md. 272, 281 (1922) (stating that "[t]he test of incompetency is whether the witness has sufficient understanding to appreciate the nature and obligation of an oath and sufficient capacity to observe and describe correctly the facts in regard to which she is called to testify" (internal quotation marks and citations omitted)).

The Court of Appeals in *Weeks v. State*, 126 Md. 223, 227 (1915), upheld a lower court ruling that permitted an "imbecile" to testify, stating:

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insufficient to support a finding of competence where [appellant] had the burden of presenting 'clear and conclusive' evidence that McCoy was not competent." We agree with the State. McCoy's testimony in front of the jury after the circuit court made its ruling should not be considered in determining whether the trial court erred in making certain findings of fact. We will only review the record up to and at the time of the trial court's ruling regarding its determination of competency.

> The fact that [the witness] was alleged or shown to be an imbecile did not necessarily render her incompetent as a witness. If an imbecile has sufficient understanding to appreciate the nature and obligation of an oath and sufficient capacity to observe and describe correctly the facts in regard to which she is called to testify, there is no reason why her testimony should be excluded.

Put differently, "'[a] witness should not be debarred from testifying on the ground of mental incapacity unless the proof of such disqualification is clear and conclusive.'" *Terry v. O'Neal*, 194 Md. 680, 688 (1950) (quoting *Johnston*, 140 Md. at 274-75).

Based on the record before us, the parties and the court thoroughly examined McCoy to determine whether he had "sufficient capacity to observe, recollect, and recount pertinent facts to be competent to testify." McLain, 7 *Maryland Rules of Evidence* 108. Defense counsel asked McCoy questions pertaining to his institutionalization, including his diagnosis and medications. The State questioned McCoy on (1) whether he understood and appreciated the questions being asked to him in court; (2) whether he could recall past events; and (3) whether the medicines he was prescribed affected his ability to remember events. The court concluded the *voir dire* by asking (1) if McCoy knew where he was; (2) if so, why he was there; (3) his age; (4) the number of times he had been hospitalized in the past; (5) the impact of his medications on his memory; (5) his ability to remember the past; and (6) where he attended high school and elementary school.

McCoy's answers were clear, responsive, and descriptive. He addressed the exact issue that needed to be resolved—whether his medications or conditions affected his memory such that he was not able to observe, recollect, and recount pertinent facts. McCoy was able to explain that he was being hospitalized, his conditions, his medications, distant

facts such as where he attended elementary school and high school, and most importantly, that the medications he was prescribed or conditions he was experiencing did not affect his ability to remember past events or his memory generally. McCoy's answers led the court to rule: "I am not persuaded there is anything about his condition or any of his medications that impairs or in any way impinges upon his ability to testify truthfully or accurately."

Appellant argues, however, that the evidence showed that McCoy did not have the ability to observe or recall material facts because none of the questions asked to him at *voir dire* "probed the veracity of the facts stored in [his] memory[.]" The State responds that it was appellant's "burden to overcome the presumption of competence to testify. . . . [T]he trial court did not bar defense counsel from asking such questions." We agree with the State.

The trial court gave both defense counsel and the State the opportunity to *voir dire* McCoy outside of the presence of the jury. Again, it was the defense's burden to prove that McCoy was not competent to testify, and defense counsel had an unfettered opportunity to ask McCoy questions to "probe the veracity of the facts stored in [his] memory." At the conclusion of *voir dire*, when prompted by the court if he had any additional questions to ask McCoy, defense counsel responded, "No, sir." Defense counsel's failure to ask questions that "probed the veracity of the facts stored in [McCoy's] memory" was not an error committed by the trial court.

Finally, appellant contends that the trial court "clearly erred, as a matter of fact, in declaring McCoy competent to testify. McCoy's mental illnesses and medication rendered him unfit as a witness in a Maryland courtroom." As stated above, the standard of review

for a determination of competency is abuse of discretion, not clearly erroneous as suggested by appellant's argument. *See Cruz*, 232 Md. App. at 112. Because every adult is presumed competent, "the burden [is] on the opponent of the witness to show that the witness is incompetent." *Id.* (internal quotation marks and citation omitted). Here, for the reasons stated above, appellant did not overcome that presumption. We, therefore, hold that the trial court did not err or abuse its discretion in determining that McCoy was competent to testify as a State's witness at appellant's trial.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.