

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON L. CLEMENTS,

Defendant-Appellant.

UNPUBLISHED
October 11, 1996

No. 187974
LC No. 94-20283-FH

Before: Doctoroff, C.J., and Hood and Bandstra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of felonious assault, MCL 750.82; MSA 28.277. He was sentenced to 365 days in jail, but was granted early release on November 30, 1995. He appeals as of right. We affirm.

On August 6, 1994, Clyde Smith, an off-duty police officer, was driving a motorcycle en route to visit a friend. Initially, defendant, who was driving a pick-up truck, forced Smith onto the shoulder of the road. Smith then followed defendant in order to obtain his license plate number. Defendant made a U-turn and came toward Smith in his lane of traffic. Smith was forced into a ditch. After emerging from the ditch, he tried to catch defendant to retrieve the license plate number. Again, defendant made a U-turn and came toward him. Smith turned into a driveway to avoid being hit by defendant. Smith continued to follow defendant to obtain the license plate number. He claimed that defendant was traveling at seventy-five to eighty miles per hour, when defendant applied his brakes in an attempt to force Smith to rear end the truck. After another incident of following the truck and the truck turning and coming very close to the motorcycle, Smith obtained the license plate number.

The police traced the license plate to defendant and went to his home. Defendant admitted to the police that "he was acting like an idiot, and . . . he did in fact swerve at the guy on the motorcycle" twice. At trial, defendant testified that he passed Smith that night and Smith started chasing him. Defendant said that he was not sure if Smith was angry or drunk or why he started chasing him. Defendant claimed that he was afraid of Smith and swerved at him "to make him back off more or less."

Defendant first argues that the trial court pierced the veil of judicial impartiality. We disagree. Defendant did not object to the trial court's conduct at trial. In the absence of objection, this Court may review the matter if manifest injustice results from the failure to review. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct. *Id.* Portions of the record should not be taken out of context in order to show trial court bias against defendant; rather the record should be reviewed as a whole. *Id.* A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. *Id.* If the trial court's conduct pierces the veil of impartiality, the defendant's conviction must be reversed. *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988).

Defendant cites ten instances where the court commented on the proceedings. We have considered each of defendant's contentions and conclude that the trial court's conduct and comments were not of such a nature as to unduly influence the jury and deprive him of a fair trial.

Next, defendant argues that the trial court prejudiced his defense by improperly questioning the investigating officer regarding a threatening telephone call that defendant alleged he received. Defendant also claims that he was prejudiced by the trial court's questioning of Smith regarding whether defendant had committed a felony. Defendant claims that the questions undermined his credibility. Again, because defendant failed to object to the trial court's conduct at trial, we will review the matter for manifest injustice. *Paquette, supra.*

A trial court may question a witness in order to clarify testimony or elicit additional relevant information. *People v Weathersby*, 204 Mich App 98, 109; 514 NW2d 493 (1994); MRE 614 (b). However, the court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial. *Weathersby, supra.* The judge's questions and comments should not arouse unjustifiable suspicion in the minds of the jurors as to a witness' credibility or indicate partiality against the defendant. *People v Conyers*, 194 Mich App 395, 405; 487 NW2d 787 (1992). A trial court may not assume the prosecutor's role with advantages unavailable to the prosecution. *Weathersby, supra.* The court's questioning of a witness is subject to a harmless error analysis. *Id.*, 110.

After a thorough review of the record, we are not convinced that the trial court's questions constituted manifest injustice or denied defendant of a fair trial. The trial court's questions did not arouse unjustifiable suspicion in the minds of the jurors as to defendant's credibility. Furthermore, contrary to defendant's claim, the court's questions did not insinuate that the court found defendant's testimony lacking in credibility. Moreover, the trial court's questions neither added to nor distorted the evidence. *People v Davis*, 216 Mich App 47, 51-52; 549 NW2d 1 (1996).

Defendant also claims that the trial court erred in admitting certain portions of Smith's testimony because they were speculative. Defendant relies on Smith's testimony that he believed defendant

deliberately tried to run him off the road and that, had he not taken evasive actions, defendant's truck would have struck him. The decision to admit evidence is within the trial court's discretion. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995).

We find that defendant's argument is without merit. Any witness is qualified to testify as to his or her physical observations and opinions formed as a result of them. MRE 701; *People v Grisham*, 125 Mich App 280, 286; 335 NW2d 680 (1983). MRE 701 provides that a lay witness may give opinion testimony if the opinion is rationally based on the perception of the witness and is helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. In this case, Smith's statements were descriptive of his perception and observations. Moreover, defendant admitted that he swerved at Smith twice. We therefore conclude that the trial court did not abuse its discretion by allowing the testimony.

Next, defendant argues that, under MCR 2.516(B)(5)(c), the trial court erred in providing the jury with written jury instructions on the elements of felonious assault over defendant's objection, because the jury did not request such instructions and defendant did not agree to such instructions. Defendant further argues that the trial court should have also given a written instruction on self-defense. He claims that the submission of only the elements of felonious assault prejudicially reinforced those elements in the jurors' minds.

Jury instructions are to be read as a whole rather than extracted piecemeal to determine whether an error has occurred. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). Even if somewhat imperfect, there is no error requiring reversal if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* While we agree with defendant that the trial court improperly submitted partial written instructions to the jury, we also conclude that the error was harmless. MCR 2.516(B) provides, in relevant part:

(5) Either on the request of a party or on the court's own motion, the court may provide the jury with

(a) a full set of written instructions,

(b) a full set of electronically recorded instructions, or

(c) a partial set of written or recorded instructions if the parties agree that a partial set may be provided and agree on the portions to be provided.

However, a trial court's erroneous use of partial written instructions to the jury without the defendant's consent may be found to be harmless error when the defendant was not denied a fair trial, the error was not so offensive to the maintenance of a sound judicial process that it could never be considered harmless, the instructions were given in apparent good faith and were accurate, the court's actions were not adverse to the judicial process, and the error was harmless beyond a reasonable doubt. *People v Riley*, 156 Mich App 396, 402-403; 401 NW2d 875 (1986), overruled in part on

unrelated grounds *People v Lane*, 453 Mich 132; ___ NW2d ___ (1996); *People v Robinson*, 386 Mich 551, 563; 194 NW2d 709 (1972).

In this case, defendant was not denied a fair trial. The trial court's erroneous use of partial written instructions was not so offensive to the maintenance of a sound judicial process that it could never be considered harmless. There is nothing in the record to support that the partial written instructions were not given in apparent good faith and they were not, nor does defendant contend that they were, inaccurate. Furthermore, the court's actions were not adverse to the judicial process, but, rather, the court attempted to carry out its responsibility in the manner it considered most effective. Finally, we conclude that the error was harmless beyond a reasonable doubt. Defendant admitted that he swerved at Smith. Smith testified that defendant attempted to hit him with a pick-up truck several times. On the basis of the evidence presented, there was more than sufficient evidence on which the jury could have based the verdict.

Finally, defendant argues that his sentence, which was an upward departure from the guidelines, was disproportionate. Because defendant has already been released, this issue is moot. *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995). Although this issue is technically moot because defendant is no longer in jail, we will, nevertheless, review the merits of the issue.

This Court reviews a sentencing court's decision under an abuse of discretion standard. *People v McCrady*, 213 Mich App 474, 483; 540 NW2d 718 (1995). A sentencing court abuses its discretion when it violates the principle of proportionality. *Id.*; *People v Milbourn*, 435 Mich 630, 634-636, 654; 461 NW2d 1 (1990). A sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *Milbourn, supra*, pp 635-636. The test of proportionality is not whether the sentence departs from or adheres to the recommended range, but whether the sentence reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995); *People v Granderson*, 212 Mich App 673, 680; 538 NW2d 471 (1995). Departures are appropriate where the guidelines do not adequately account for factors that legitimately can be considered at sentencing. *People v Watkins*, 209 Mich App 1, 6; 530 NW2d 111 (1995). Where a defendant's actions are so egregious that standard guidelines scoring methods simply fail to reflect their severity, an upward departure from the guidelines range may be warranted. *Houston, supra*.

In this case, the recommended guidelines were zero to six months. Defendant's sentence of 365 days with consideration of release after nine months was an upward departure from the guidelines. The trial court gave three reasons for its upward departure: (1) the facts at trial revealed at least three life threatening acts, (2) a "2000 lb. motor vehicle was used as the weapon," and (3) defendant's prior reckless driving conviction was not part of the guidelines calculation. We conclude that, under the circumstances, defendant's sentence was proportionate to the seriousness of the offense and the offender, and the departure was not an abuse of discretion.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Harold Hood

/s/ Richard A. Bandstra