STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MILFORD CUNNINGHAM,

Defendant-Appellant.

UNPUBLISHED
December 19, 1997

No. 194296
Recorder's Court
LC No. 95-007786

Before: Holbrook, Jr., P.J. and White and R.J. Danhof,* JJ.

PER CURIAM.

Defendant was convicted by a jury of voluntary manslaughter, MCL 750.321; MSA 28.553, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to a term of ten to fifteen years' imprisonment for the voluntary manslaughter conviction, and a consecutive two year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant argues that he was denied a fair trial because of improper comments and conduct by the trial court. We disagree. A trial judge has wide discretion and power in matters of trial conduct. *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). This power, however, is not unlimited. If the trial court's conduct pierces the veil of judicial impartiality, reversal is required. *Id.* The appropriate test to determine whether the trial court's conduct pierces the veil of judicial impartiality is whether the trial court's comments or conduct "were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." *Id.*, citing *People v Rogers*, 60 Mich App 652, 657; 233 NW2d 8 (1975).

Defendant contends that disparaging and demeaning comments by the trial court towards defense counsel deprived him of a fair trial. It is improper for a trial judge to berate, scold and demean an attorney, so as to hold him in contempt in the eyes of the jury and thereby destroy the balance of impartiality necessary for a fair hearing. *People v Ross*, 181 Mich App 89, 91; 449 NW2d 107 (1989). However, while unfair criticism in front of the jury is always improper, reversal is necessary only when the court's conduct denies the defendant a fair and impartial trial by unduly influencing the

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

jury. *Id.* Upon reviewing the record in this case, we conclude that reversal is not required. While some of the trial court's comments were inappropriate, viewed as a whole and "weighed in the context and the circumstances of a heated trial [they] do not approach the magnitude necessary for reversal on the ground that the trial court pierced the veil of judicial impartiality." *People v Turner*, 41 Mich App 744, 746; 201 NW2d 115 (1972).

Defendant further contends that he was denied a fair trial because of excessive interference by the trial court with defense counsel's cross-examination and argument. In particular, defendant complains that the trial court improperly interrupted defense counsel's opening statement. We disagree. A trial court is permitted to impose reasonable limits on opening statements. MRE 6.414(B). "The purpose of an opening statement is to tell the jury what the advocate proposes to show." *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976) (M.J. Kelly, concurring), affirmed 405 Mich 38; 273 NW2d 471 (1976). Here, defense counsel began arguing the evidence rather than stating the facts that he intended to show. The trial court properly instructed defense counsel to limit his opening statement to a presentation of the facts, rather than engage in argument. Moreover, the record indicates that defense counsel was not precluded from continuing his opening statement, but rather, chose to end his statement because he had finished presenting the facts.

Defendant further complains that he was deprived of a fair trial because the trial court interrupted defense counsel's cross-examination in order to question witnesses itself. A trial court may question witnesses to clarify testimony or elicit additional relevant information, but must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial. *People v* Cheeks, 216 Mich App 470, 480; 549 NW2d 584 (1996). The test for whether a new trial should be ordered is whether the court's questions and comments may well have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case. *Id.* Viewed in context, the record indicates that the trial court was attempting to clarify testimony with its questions. There is no indication that the questions were asked in an intimidating or argumentative fashion, or that the questions demonstrated prejudice, unfairness or partiality. We conclude that the trial court's questions did not pierce the veil of judicial impartiality or deprive defendant of a fair trial. We further conclude that defense counsel's cross-examination was not prejudicially hindered by the trial court's questioning. The record indicates that defense counsel was permitted to engage in vigorous cross-examination of prosecution witnesses.

Next, defendant argues that the trial court unduly restricted his ability to cross-examine witnesses, thereby violating his right to present a defense and to confront the witnesses against him as guaranteed by the Sixth Amendment. We disagree. The scope of cross-examination is within the sound discretion of the trial court, with due regard for a defendant's constitutional rights. *People v Blount*, 189 Mich App 643, 650-651; 473 NW2d 792 (1991); *People v Jackson*, 108 Mich App 346, 348-349; 310 NW2d 238 (1981). Neither the Sixth Amendment's Confrontation Clause nor due process confers on a defendant an unlimited right to cross-examine on any subject. *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). While the Sixth Amendment protects the right to cross-

examine witnesses on relevant evidence, it does not create a right to introduce irrelevant evidence. *Jackson*, *supra* at 349.

Although defendant argues that the trial court refused to allow defense counsel to ask leading questions on cross-examination, the record reflects numerous instances where leading questions were asked. The trial court did require defense counsel to rephrase his questions at times, but the basis for those rulings was that the questions improperly assumed facts without a foundation, see *People v Pollard*, 33 Mich App 114, 118; 189 NW2d 855 (1971), not that the questions were leading. In another instance, the trial court intervened when defense counsel asked a question of a prosecution witness and, without giving the witness the opportunity to answer, asked a second question suggesting the answer to the first. The trial court had a duty to "exercise reasonable control over the mode . . . of interrogating witnesses[.]" MRE 611(a). We are satisfied that the trial court did not abuse its discretion in discharging that duty.

Defendant also argues that he was denied his right to confrontation when the trial court refused to allow defense counsel to engage in recross-examination of three prosecution witnesses. We disagree. A judge "may limit cross-examination with respect to matters not testified to on direct examination." MRE 611(b). The record indicates that the trial court foreclosed recross-examination because no new matter had been raised on redirect examination. On appeal, defendant does not indicate what new subject matters were raised on redirect examination, nor does he identify any relevant questions that he wished to ask on recross-examination that he did not already have the opportunity to ask during cross-examination. Contrary to what defendant asserts, we conclude that the trial court's rulings did not deprive defendant of his right to cross-examine witnesses on all relevant subjects.

Defendant further contends that his right to confrontation was violated when the trial court refused to allow him to call the officer-in-charge as a witness. At trial, defense counsel announced that he wanted to call the officer-in-charge for the purpose of testifying about the investigation, or lack thereof, of the case. The record indicates that the trial court excluded the officer's testimony on the basis that it was cumulative to testimony already presented. Even if it was error to exclude the officer's testimony, we find that the error was harmless. At trial, defense counsel acknowledged that "[the officer's] information, for the most part, comes from other people." Defendant has not identified any material evidence that the officer could have provided. Although defendant asserts that he would have questioned the officer as to why the weapon in question was never analyzed for fingerprints, the probative value, if any, of that line of questioning was minimal, inasmuch as defendant admitted to handling the weapon. Defendant further contends that "the issue of fingerprints could have provided support for [his] accident claim in that it could have shown that no prints were actually found on the trigger or firing mechanism of the gun." However, because the weapon was never analyzed for fingerprints, the officer would not have been able to testify as to whether defendant's fingerprints were on the trigger or firing mechanism. Accordingly, we conclude that any error in excluding the officer-in-charge's testimony was harmless beyond a reasonable doubt. *People v Mack*, 218 Mich App 359, 364; 554 NW2d 324 (1996).

Next, defendant raises several issues pertaining to his sentence. He argues that resentencing is required because the trial court may have been unaware that its sentence exceeded the sentencing

guidelines' recommended minimum sentence range and, in any event, failed to state any reasons for departing from the guidelines. Defendant further contends that his ten to fifteen year sentence for voluntary manslaughter is disproportionate. We disagree with each of these claims.

The sentencing guidelines' recommended minimum sentence range was twenty-four to eighty-four months. The sentencing transcript reflects that, shortly before imposing a sentence of ten to fifteen years' imprisonment, the trial court announced, "I am going to sentence the guidelines." While we agree that this statement is ambiguous, the record reflects that defense counsel expressly mentioned the twenty-four to eighty-four month guidelines' range on the record at sentencing. No other range was discussed. More significantly, a review of the completed sentencing information report reveals that the trial court circled the box for "Guideline Departure." These circumstances sufficiently demonstrate that the trial court was aware that the sentence imposed exceeded the sentencing guidelines' recommended minimum sentence range.

We also disagree with defendant's claim that the trial court failed to state any reasons for departing from the guidelines. When a trial court departs from the sentencing guidelines, it must state on the record at the time of sentencing the reasons for departure. MCR 6.425(D)(1); *People v Fleming*, 428 Mich 408, 426, 428; 410 NW2d 266 (1987). In this case, the trial court discussed the circumstances surrounding the offense, noting that defendant, following an argument in the street, went to his house, obtained a sawed-off shotgun, returned to the scene of the argument, pointed the shotgun at the victim, and then shot the victim, killing him. The trial court thereafter proceeded to impose sentence, stating: "*With that in mind*, I am going to sentence the guidelines." The remark, "With that in mind," reflects that the trial court was looking to the circumstances of the offense as its basis for departure. In *People v Milbourn*, 435 Mich 630, 657; 461 NW2d 1 (1990), our Supreme Court stated that "trial judges may continue to depart from the guidelines when, in their judgment, the recommended range under the guidelines is disproportionate . . . to the seriousness of the crime."

We further conclude that defendant's sentence for manslaughter does not violate the *Milbourn* proportionality standard. The trial court observed that defendant killed a person "when he had it within his power not to do it." Also, the sentencing guidelines as scored for manslaughter do not adequately reflect the circumstances of this offense, namely, that defendant left the scene of an altercation, returned to his house, obtained a gun, returned to the scene, and then shot the victim, who was unarmed. Nor do the guidelines reflect the fact that the firearm used in the offense was a sawed-off shotgun. Departures from the guidelines are appropriate where the guidelines do not adequately account for important factors legitimately considered at sentencing. *Milbourn*, *supra* at 657. Given the facts of this case, defendant's sentence of ten to fifteen years for voluntary manslaughter is proportionate to the seriousness of the circumstances surrounding the offense.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Robert J. Danhof