

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS M. SMITH,

Defendant-Appellant.

UNPUBLISHED

February 18, 2000

No. 209519

Recorder's Court

LC No. 97-002929

Before: O'Connell, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendant appeals by right from his jury-trial convictions for first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), and assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. Defendant was sentenced as an habitual offender to four to thirty years' imprisonment. MCL 769.10, MSA 28.1082. We reverse and remand for a new trial.

Defendant argues that he was denied a fair trial because the trial judge did not display impartiality. Specifically, defendant contends that the trial judge disparaged defense counsel, interfered with defense counsel's argument and questioning of witnesses, and assumed a prosecutorial role by bolstering the victim's testimony. Because defendant failed to object to the challenged conduct, this issue is not preserved and our review is limited to plain error.¹ *People v Carines*, 460 Mich 750, 752-753; 597 NW2d 130 (1999). To avoid forfeiture under the plain-error rule, defendant must demonstrate plain error that was outcome determinative. *Id.* at 763. Moreover, reversal is not justified unless the error resulted in the conviction of an actually innocent defendant, or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763-764. We conclude that the trial judge's conduct during the testimony of the victim constituted outcome-determinative plain error that seriously affected the fairness of the trial.

A trial judge may question witnesses in order to clarify testimony or elicit additional relevant information. MRE 614(b); *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992). However, the judge's questions must not be intimidating, argumentative, prejudicial, unfair, or partial. *Id.* at 405. Also, the judge must not invade the role of the prosecutor. *People v Sterling*, 154 Mich App 223, 228; 397 NW2d 182 (1986). The test is whether the judge's questions and comments may

have unjustifiably aroused suspicion in the jury's mind about a witness's credibility or whether the judge's partiality may have possibly influenced the jury to the detriment of the defendant's case. *Conyers, supra* at 405; *Sterling, supra* at 228.

Defendant cites numerous examples of the trial judge's conduct that were allegedly improper. However, many of these examples would not constitute a denial of the right to a fair trial, and we decline to address them. Instead, under the plain-error rule, we address only the instances of the judge's conduct that seriously affected the fairness of the trial.

The central issue at trial was the victim's identification of defendant as her attacker. The trial judge improperly bolstered the victim's testimony regarding this identification. For example, the victim initially testified that her attacker was not wearing a jacket, but then stated that she described his jacket to the police. When defense counsel pointed out that the victim initially denied that her attacker was wearing a jacket, the judge stated, "No, she didn't. She said he had some kind of jacket on. That's what she sort of gestured. The lady is 79 years of age and testifying in a manner which is consistent with the way she talked." These comments improperly bolstered the victim's testimony and demonstrated partiality toward the victim.

Additionally, the trial judge demonstrated a degree of deference to the victim that exceeded common courtesy and might have improperly influenced the jury to regard her testimony as credible. At the close of direct examination, the following exchange took place:

The Court: You all right? You don't need a glass of water or anything?

The Witness: No thanks.

The Court: If you do, you just let me know.

The Witness: Thank you, I will.

The Court: Okay. Seventy-nine, you say you're 79?

The Witness: Well, I'm 79, 1918, February the 8th. This coming February the 8th I'll be 80 years old.

The Court: Okay.

The Witness: God give me power.

The Court: He will. We should get a little of yours.

These comments by the trial judge inappropriately conveyed partiality toward the elderly victim and quite possibly influenced the jury's assessment of her credibility.

Moreover, during cross-examination, the judge demonstrated overt impatience with defense counsel's questioning. Such a marked impatience in the presence of the jury evinces an attitude of

partisanship that has no place in a trial. *Conyers, supra* at 404. Also, during cross-examination, defense counsel was attempting to impeach the victim's identification of defendant by suggesting that she did not have a long time to look at her attacker. Although the victim initially stated that her attacker was there about fifteen minutes, she conceded that the attack could not have lasted that long. Over defense objection, the trial judge then interrupted and informed the jury that the duration of the attack was not relevant. Although the judge clarified that this information was irrelevant only on the issue of whether the crime took place, his comment effectively undermined defense counsel's attempt to emphasize the importance of the duration of the attack on the issue of identification.

Perhaps the most egregious example of the judge's conduct occurred during the victim's testimony about her lineup identification of defendant. The victim stated that she picked defendant out of the lineup "before I even got the turn to go out in there." As she was trying to explain her answer further, the trial judge interrupted and gave the jury a description of the physical layout of the lineup room at the police station. He concluded his description by characterizing the victim's testimony and questioning her in a leading manner as follows:

The Court: But it's her testimony that as you came out of that door you didn't even get in front of 'em, in front of all of 'em, is that right, ma'am? You didn't have to get in front and look at all of—

The Witness: Oh, yeah, I had to go in there and look at all of them. But when I go, I saw him before I even got into where I identify 'em.

The Court: So you saw him, you saw him behind the glass?

The Witness: Right, yeah.

The Court: He was standing there with others?

The Witness: Right.

The Court: And so you recognized him right off? (emphasis added)

The judge's final question smacks of partisanship. Although the victim's testimony was less than clear, the judge's questions did more than attempt to clarify her testimony for the jury. The judge attempted to characterize her testimony and lead her to testify in such a way as to convey to the jury that she immediately recognized defendant as her attacker. This bolstering of the victim's identification of defendant quite probably affected the jury's assessment of her identification testimony. The judge's conduct "may well have been interpreted as the court's seal of credibility on the complainant's testimony." *Sterling, supra* at 230. The identification of defendant was the key issue in this case, and the judge improperly elicited testimony prejudicial to defendant. This constitutes prejudicial, unfair, and partial questioning. *Conyers, supra* at 405.

These examples demonstrate that the judge's conduct was inexcusable and resulted in a denial of defendant's right to a fair trial before an impartial judge. The right to an impartial judge is so

important that it defies harmless-error analysis. *People v Minor*, 213 Mich App 682, 687; 541 NW2d 576 (1995). We therefore reverse defendant's convictions and remand for a new trial before a different judge.

Defendant also argues that a new trial is required due to an erroneous jury instruction, the judge's refusal to give the jury a transcript of testimony, and prosecutorial misconduct. However, defendant failed to object in each instance. Defendant has accordingly forfeited these issues under the plain-error rule, and we find no basis for granting relief on these issues.

Reversed and remanded for a new trial before a different judge.

/s/ Peter D. O'Connell

/s/ William B. Murphy

/s/ Kathleen Jansen

¹ We note that defendant did object to one of the judge's comments during the victim's testimony. However, since the comment would merit review absent objection, for purposes of clarity we will review the judge's conduct during the victim's testimony as a whole under the plain-error rule.