

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WINSTON LUSTER,

Defendant-Appellant.

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UNPUBLISHED

May 20, 2014

No. 314624

Wayne Circuit Court

LC No. 12-009375-FC

Before: CAVANAGH, P.J., and OWENS and M.J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, being a felon in possession of a firearm (felon-in-possession), MCL 750.224f, and carrying a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent terms of 6 to 20 years' imprisonment for each of the assault with intent to do great bodily harm less than murder convictions, 6 to 10 years' imprisonment for the felon-in-possession conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that the trial judge abused his discretion when he asked a question of a defense witness, thus improperly bolstering the prosecution's theory of the case and demonstrating judicial bias for the prosecution. We disagree. We review this unpreserved claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). Defendant must show that the plain error prejudiced him, i.e., that it affected the outcome of the proceedings. *Id.* at 763.

A criminal defendant is entitled to a neutral and detached trial judge. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996) (citation omitted). However, because a trial judge is presumed to be impartial, defendant bears a heavy burden of overcoming the presumption of impartiality. *People v Wade*, 283 Mich App 462, 470; 771 NW2d 447 (2009). “[A] trial judge has wide discretion and power in matters of trial conduct,” but it is not unlimited. *People v Jackson*, 292 Mich App 583, 598; 808 NW2d 541 (2011) (quotation marks and citations omitted). “While a trial court may question witnesses to clarify testimony or elicit additional relevant information, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial.” *Cheeks*, 216 Mich App at 480. “The appropriate test to determine whether the trial court's comments or

conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments 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." *Jackson*, 292 Mich App at 598 (quotation marks and citations omitted).

Defendant contends that the trial judge demonstrated partiality toward the prosecution when he asked a follow-up question of defendant's nephew, in light of a question from the jury, regarding the color of the vehicle driven by defendant. The trial judge stated:

*The Court:* Mr. Garland, these additional questions have been asked of you by members of the jury. What kind of car does . . . Winston Luster normally drive in? What color is it and what kind is it?

*The Witness* [Mr. Garland, defendant's nephew]: It's an Expedition.

*The Court:* What color is it?

*The Witness:* It's like beige, brownish like.

*The Court:* Gold?

*The Witness:* Yeah, something like that.

The testimony of three prior witnesses regarding the make, model, and color of defendant's vehicle was unclear. Particularly, one witness testified that defendant's vehicle was brown and gold, but then clarified that it was gold. It appears from the record that the questions from the jury regarding defendant's vehicle were posed in light of the prior witnesses' testimony, and sought clarification of that testimony from the perspective of defendant's nephew. The make, model, and color of the vehicle were relevant to the issues of the identity of the shooter and whether defendant was at the scene of the crime, and the jury's questions were intended to clarify those issues. There is no indication that the trial judge's question, "Gold?," was intended to do anything other than provide clarity for the jury, and the question properly elicited relevant information. *Cheeks*, 216 Mich App at 480. Accordingly, we find that the trial judge's question did not unduly influence the jury as to deprive defendant of a fair trial. *Jackson*, 292 Mich App at 598.

Defendant next argues the prosecution improperly appealed to the jury's sympathy for the complainant when it encouraged them to put themselves in her place during its closing argument. Defendant argues that this argument improperly sought to inflame the jury's passions, prejudices, and sympathies, and encouraged them to convict on that basis. We disagree. Because defendant failed to contemporaneously object to the alleged error or request a curative instruction, our review of his claims of prosecutorial misconduct is limited to ascertaining whether there was plain error that affected his substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *Id.* "Prosecutorial comments must be read as a whole and evaluated in the light of defense arguments and the relationship they bear to the evidence admitted at trial." *Id.* at 135. "A prosecutor may not appeal to the jury to sympathize with the victim. Nor may a prosecutor

urge the jury to convict as part of its civic duty or on the basis of its prejudices.” *People v Unger (On Remand)*, 278 Mich App 210, 237; 749 NW2d 272 (2008) (citation omitted). However, a prosecutor may “argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief.” *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

Defendant takes issue with the following statement made during the prosecutor’s rebuttal argument: “And if someone shot in your house, I would assume you want the person who shot in it, not someone else. You would want the person that shot in it, especially when your child is standing there next to you.” Defendant argues that this statement encouraged the jury to convict defendant based on its sympathy for a mother and son. However, a fair reading of the prosecutor’s remarks evaluated in the context in which they were made reveals that the focus of the argument was that the testimony of complainant and her son, identifying defendant as the shooter, was credible and should be believed. Further, the trial court instructed the jury at the conclusion of the trial that the attorneys’ arguments were not evidence, and jurors are presumed to follow the court’s instructions. See *Unger*, 278 Mich App at 237. Finally, even if the prosecutor’s remarks were improper, defendant failed to seek a timely curative instruction, which could have alleviated any prejudicial effect. See *id.* Thus, defendant has failed to show plain error affecting his substantial rights, and accordingly, we cannot conclude that he was denied a fair trial.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Donald S. Owens  
/s/ Michael J. Kelly