

Court of Appeals, State of Michigan

ORDER

People of MI v James Connelly Dixon III

Docket No. 316341

LC No. 12-011921 FH

Joel P. Hoekstra
Presiding Judge

Kurtis T. Wilder

Karen M. Fort Hood
Judges

The Court orders that the September 11, 2014 opinion is hereby AMENDED. The opinion contained the following clerical error: On page 4, the fifth line from the top, the number for footnote 2 shall be deleted, and footnote 3 on the third line of the last paragraph shall be amended to be footnote 2.

In all other respects, the September 11, 2014 opinion remains unchanged.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

SEP 26 2014

Date


Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
September 11, 2014

v

JAMES CONNELLY DIXON III,
Defendant-Appellant.

No. 316341
Wayne Circuit Court
LC No. 12-011921-FH

Before: HOEKSTRA, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of felonious assault, MCL 750.82, possession of firearm during the commission of a felony (“felony-firearm”), MCL 750.227b, and domestic violence, MCL 750.81(2), following a jury trial. Defendant was sentenced to two years in prison for the felony-firearm conviction and 58 days, time-served, for the other convictions.¹ We affirm, but remand to the trial court for a ministerial correction of the judgment of sentence.

I

This case arises out of an encounter between defendant and complainant, his step-father, on December 9, 2012. Complainant testified that, on that day, complainant was sitting at his desk when defendant appeared in the room with a shotgun in one hand and a hunting rope in the other. Complainant recalled that defendant, who appeared calm, but inebriated, tossed the rope to complainant and said, “I want you to do me a favor and tie yourself up.” Complainant further recalled that defendant announced that he was going to take complainant’s car, but complainant said, “Well, Jim, it’s not gonna happen, and I’m not gonna tie myself up. You can’t take my car. You’ll never make it to where you want to go.”

¹ Although not raised by either party, we note that defendant’s judgment of sentence incorrectly provides that he was convicted following a plea, as opposed to a jury trial. We also note that, at the sentencing hearing, the trial court ordered 30 days of probation, which is not reflected in the judgment of sentence. We therefore remand to the trial court for a ministerial correction of the judgment of sentence.

Complainant testified that, after deciding to call the police to let them handle the situation, defendant suddenly “snapped,” grew “terribly agitated and crazy looking,” and shoved complainant violently as complainant tried to get out of his chair. Complainant testified that defendant then shouldered the pump shotgun and aimed it at complainant’s face, saying, “I’m gonna kill you.” Complainant recalled struggling to wrestle the gun away from defendant, and during the struggle, hitting defendant in the head twice with the gun, knocking him to the floor, and ultimately subduing him. Complainant testified that he went to the garage, unloaded the weapon, and called 911.

At trial, defendant testified differently about the encounter. He claimed that he was going to the garage to clean his shotgun when complainant exited the office and “caught [defendant] off-guard.” Defendant testified that complainant grabbed the shotgun, shoved defendant into the wall, and struck him in the face with the shotgun. Defendant further testified that he left the house because complainant took the gun and defendant was unsure whether complainant planned to hit him again. Defendant denied pointing the gun at complainant, pushing him, or telling him to tie himself up.

The jury convicted defendant as charged.

II

Defendant argues that the trial court’s questioning of him was improper because it assumed the prosecutor’s role, telegraphed to the jury that the trial court found defendant’s testimony incredible, and undermined the fairness of the trial. We disagree.

“Generally, an issue is not properly preserved unless a party raises the issue before the trial court and the trial court addresses and decides the issue.” *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011). Defendant did not raise an objection in the trial court based on judicial bias. Therefore, this issue has not been preserved for review, *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011). Unpreserved claims are reviewed for plain error affecting the defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). A plain error affected a defendant’s substantial rights if the error affected the outcome of the proceedings. *People v Vaughn*, 491 Mich 642, 665; 821 NW2d 288 (2012).

“A defendant in a criminal trial is entitled to expect a neutral and detached magistrate.” *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). “[A] trial judge is presumed to be impartial, and the party asserting partiality has the heavy burden of overcoming that presumption.” *People v Wade*, 283 Mich App 462, 470; 771 NW2d 447 (2009). In general, this Court applies the following analysis to determine whether a trial court’s comments or conduct deprived the defendant of a fair trial:

Michigan case law provides that a trial judge has wide discretion and power in matters of trial conduct. This power, however, is not unlimited. If the trial court’s conduct pierces the veil of judicial impartiality, a defendant’s conviction must be reversed. 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 (quotations and citations omitted); see also *People v Conyers*, 194 Mich App 395, 405; 487 NW2d 787 (1992) (“The test is whether the judge’s questions and comments may well have unjustifiably aroused suspicion in the mind of the jury’ as to a witness’ credibility, . . . and whether partiality quite possibly could have influenced the jury to the detriment of defendant’s case.”).]

A trial court may question witnesses to clarify testimony. *Cheeks*, 216 Mich App at 480. Judicial rulings are not valid grounds for alleging bias “unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible.” *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999).

The challenged questioning took place after defendant testified, on direct examination, “I was out in the woods. And I came—was comin’ back to the house, since I knew [the police] were there.” As defendant’s attorney started to ask, “[h]ow did—,” the trial court interposed:

THE COURT: How did you know they were there?

DEFENDANT: Well, I heard the police sirens, ma’am.

THE COURT: Why did you leave?

DEFENDANT: Because I was struck in the face with a gun.

THE COURT: And you didn’t want them to help you?

DEFENDANT: Well, I didn’t know what [complainant]—if he was gonna’ hit me more, or not.

THE COURT: In front of the police?

DEFENDANT: Well, nobody was there when I left.

THE COURT: But you heard the sirens.

DEFENDANT: I heard sirens.

THE COURT: So, you know that they were on their way.

DEFENDANT: Yes, ma’am.

THE COURT: And you left.

DEFENDANT: I left.

THE COURT: Go ahead.

Defense counsel did not object to this colloquy.

A complete review of the record indicates that the trial court's short series of questions about defendant's actions after leaving complainant's house were asked immediately following his description of that sequence of events, sought clarification of defendant's perspective, and did not evidence deep-seated favoritism or antagonism. *Wells*, 238 Mich App at 391. The tenor of the trial court's questions was even and fair, and the questions were not posed in such a way as to suggest judicial skepticism, as distinct from the line of questioning in the authority relied on by defendant in his brief, *People v Ross*, 181 Mich App 89, 92; 449 NW2d 107 (1989), and an unpublished opinion of this Court.² The record shows that, consistently throughout the trial, the trial court paid copious attention to the examination of the witnesses and, during occasions when it perceived particular testimony needed clarification, actively engaged the witnesses. *Cheeks*, 216 Mich App at 480.

Taken in the context of the entire record, the court's questioning did not unduly influence the jury to defendant's detriment. *Jackson*, 292 Mich App at 598; *Conyers*, 194 Mich App at 405. There is no indication that the judge's comments may have unjustifiably aroused suspicion in the mind of the jury concerning defendant's credibility. Cf *Conyers*, 194 Mich App at 404 (judge's "excessive interference in the examination of witnesses, repeated rebukes and disparaging remarks directed at defendant's counsel, and marked impatience in the presence of the jury displayed an attitude of partisanship, which resulted in the denial of a fair trial.") Accordingly, defendant has not surmounted the heavy burden of overcoming the presumption of judicial impartiality. *Wade*, 283 Mich App at 470.

In addition, the record shows that the trial court issued cautionary instructions to the jury both before and after the trial. In advance of the presentation of any evidence, the court said that "[m]y responsibility as the Judge in this trial is to make sure that the trial is run fairly," and that "[n]othing I say is meant to reflect my own opinion about the facts of this case." Later in its pretrial instructions, the trial court stated, "I may ask some of the witnesses questions, myself. These questions are not meant to reflect my opinion about the evidence. If I ask questions, my only reason would be to . . . ask about things that may not have been fully explored." At the close of the proofs and following the lawyers' closing arguments, the trial court even more directly instructed the jury that "my questions to the witnesses, are also not evidence," and that "when I make a comment . . . I am not trying to influence your vote or express a personal opinion about the case." Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, any prejudicial effect of the trial court's questioning of defendant was cured by these instructions.

III

Finally, defendant argues that defense counsel's failure to object to the trial court's questioning of him constituted ineffective assistance of counsel. Defendant failed to preserve his claim by moving in the trial court for a new trial or a *Ginther*³ hearing, *People v Payne*, 285

³ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973),

³ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973),

Mich App 181, 188; 774 NW2d 714 (2009), or by filing a proper motion to remand with this Court pursuant to MCR 7.211(C)(1). “Unpreserved issues concerning ineffective assistance of counsel are reviewed for errors apparent on the record.” *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). Whether a defendant received ineffective assistance of counsel presents a mixed question of constitution law, reviewed do novo, and fact, reviewed for clear error. *Id.*

Even if defendant’s unpreserved ineffective assistance of counsel argument had been properly developed, it would not constitute grounds for reversal or a new trial. Because the trial court properly questioned defendant, his defense counsel was not ineffective in failing to object to the inquiry. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). “Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.” *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). In addition, any prejudice was cured by the trial court’s instructions to the jury. *Graves*, 458 Mich at 486.

Affirmed, but remanded to the trial court for a ministerial correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood