

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT CHARLES NALL,

Defendant-Appellant.

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UNPUBLISHED

August 16, 2005

No. 254123

Wayne Circuit Court

LC No. 03-010609-01

Before: Zahra, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of felonious assault, MCL 750.82, resisting and obstructing a police officer, MCL 750.81d(1), and possession of a firearm during the commission of a felony, MCL 750.227b, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with assault with intent to commit murder, MCL 750.83, assault with intent to do great bodily harm less than murder, MCL 750.84, felonious assault, resisting and obstructing a police officer, and felony-firearm in connection with allegations that he fired shots at officers attempting to execute a search warrant in the lower flat of the building in which he lived. Defendant stepped onto the balcony of his flat, saw a person with a shotgun standing between two vehicles, and fired two shots at the person. The person at whom defendant fired was a police officer. Defendant testified that he fired because he thought that the building was being robbed. The jury acquitted defendant of assault with intent to commit murder and assault with intent to commit great bodily harm less than murder, but convicted him of the remaining charges.

A trial court has wide, albeit not unlimited, discretion and power in the matter of trial conduct. Portions of the record should not be taken out of context in an effort to demonstrate bias or prejudice; rather, the record should be reviewed in its entirety. A trial court's conduct pierces the veil of impartiality where it unduly influences the jury and deprives the defendant of a fair trial. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

Judicial remarks made during the course of a trial that express criticism or disapproval of, or hostility to, counsel do not generally support a challenge for partiality. Partiality is not established by judicial expressions of impatience, annoyance, etc. *People v McIntire*, 232 Mich App 71, 104-105; 591 NW2d 231 (1998), rev'd on other grounds 461 Mich 147 (1999).

A judge may intervene in a case to promote expedition and prevent unnecessary waste of time, but should not do so with undue impatience or in an excessive manner. A judge should avoid a controversial tone when conversing with attorneys. Code of Judicial Conduct, Canon 3(A)(8); *In re Moore*, 464 Mich 98, 132; 626 NW2d 374 (2001).

A judge may question a witness to clarify testimony or elicit additional relevant information, but should exercise caution in doing so and should use restraint to ensure that its questions are not intimidating, argumentative, unfair, or partial. The test is whether the court's questions and comments might have unjustifiably aroused suspicion in the mind of the jury as to a witness's credibility or influenced the jury to the detriment of a party. *People v Davis*, 216 Mich App 47, 49-50; 549 NW2d 1 (1996). See also MRE 614(b).

Defendant argues that he was denied a fair trial because on numerous occasions the trial court belittled defense counsel, made inappropriate comments regarding the length of the trial and unduly circumscribed counsel's ability to question witnesses, and improperly questioned witnesses in a manner that aided the prosecution. We disagree. Defendant failed to object to the remarks by the trial court about which he now complains; therefore, we review this issue for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Sardy*, 216 Mich App 111, 118-119; 549 NW2d 23 (1996). The remarks highlighted by defendant demonstrate that the trial court: requested that defense counsel stand at the lectern or his table when questioning witnesses rather than walking about the courtroom, requested that defense counsel follow trial rules and procedures, requested that defense counsel refrain from making gratuitous comments on witnesses' responses to questions or to the trial court's rulings, requested repeatedly that defense counsel and the prosecutor refrain from addressing comments to one another, encouraged the parties to question witnesses in an expeditious manner so as to keep the proceedings moving at a reasonable pace, and questioned various witnesses. Defendant has improperly taken several comments made by the trial court out of context in an attempt to demonstrate judicial partiality, *Paquette, supra*, and has not established that the trial court's conduct was improper. *McIntire, supra; Moore, supra; Davis, supra*.

The trial court instructed the jury that its comments were not evidence, and that the jury must not assume that it was expressing an opinion as to how the case should be decided. Defendant's assertion that the trial court's comments denied him a fair trial is belied by the fact that the jury acquitted him of the most serious offenses with which he was charged. Defendant has not demonstrated the occurrence of plain error. *Carines, supra*.

Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. Even if somewhat imperfect, instructions do not create error if they fairly present the issues for trial and sufficiently protect the defendant's rights. Error does not result from the omission of an instruction if the charge as a whole covered the substance of the omitted instruction. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). We review a claim of instructional error de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002).

To be lawful self-defense, the evidence must show that: (1) the defendant honestly believed he was in danger; (2) the danger feared was death or serious bodily harm; (3) the action taken appeared at the time to be immediately necessary; and (4) the defendant was not the initial aggressor. *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995). The

threatened harm must be imminent. *People v Riddle*, 467 Mich 116, 129 n 21; 649 NW2d 30 (2002).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.* at 600.

Defendant argues that the trial court erred by failing to instruct the jury that he maintained that he used force to defend others.<sup>1</sup> We disagree. Waiver constitutes the intentional abandonment of a known right, while forfeiture constitutes the failure to timely assert a right. A party who forfeits a right might still obtain appellate review for plain error, but a party who waives a known right cannot seek appellate review of a claimed deprivation of the right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). A party waives review of the propriety of jury instructions when he approves the instructions at trial. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Defense counsel approved the instructions as given by the trial court. By doing so, defendant has waived this issue on appeal. *Id.*

Defense counsel's failure to request an instruction on use of force to defend others did not constitute ineffective assistance. Defendant testified that he was awakened by noise, heard his neighbor yell, and fired two shots when he saw a person with a shotgun standing between two vehicles. No evidence showed that defendant saw his neighbor being attacked or about to be attacked. The evidence did not support the giving of an instruction on defense of others. Counsel did not render ineffective assistance by failing to request such an instruction. Trial counsel is not required to make a meritless request. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Brian K. Zahra  
/s/ Mark J. Cavanagh  
/s/ Donald S. Owens

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<sup>1</sup> CJI2d 7.21 and CJI2d 7.22. The trial court instructed the jury on the use of deadly force in self-defense. CJI2d 7.15.