

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAWRENCE WHITE,

Defendant-Appellant.

UNPUBLISHED

July 1, 1997

No. 182605

Recorder's Court

LC No. 94-003885

Before: Sawyer, P.J., and Marilyn Kelly and D.A. Burress,* JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder and possession of a firearm during the commission of a felony. MCL 750.317; MSA 28.549; MCL 750.227b; MSA 28.424(2). The judge sentenced him to two years' imprisonment for the felony-firearm conviction to be followed by twenty to forty years for the second-degree murder conviction. Defendant appeals as of right. We reverse and remand for a new trial.

Defendant first argues that he was denied a fair trial as a result of judicial misconduct. We agree. Although defendant did not properly preserve this issue for review by objecting to the conduct at trial, we will review the issue to prevent manifest injustice. *People v Weatherford*, 193 Mich App 115, 121; 483 NW2d 924 (1992). Considering the cumulative effect of the challenged judicial comments and conduct, we believe that the trial court's behavior "pierced the veil of judicial impartiality" and thereby denied defendant a fair trial. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

The trial judge prejudiced defendant's presumption of innocence during voir dire when he posed a hypothetical question, modeled on the facts of this case, and encouraged prospective jurors to find defendant guilty based on the hypothetical. Moreover, during voir dire, the judge improperly created sympathy for the victim by comparing the "viable" defendant with the murdered victim, and raised the unfairness of defendant's continued "viability," whereas the victim was dead. See *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988). The judge improperly ridiculed a

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

prospective juror who indicated some bias against the prosecution, asking, “How would you [show your bias]? When you leave here, hiss and boo at [the prosecutor]?”

Additionally, the trial judge referred deferentially to the prosecutor and consulted her in removing prospective jurors for cause, but did not similarly consult defense counsel. He commented spontaneously on defendant’s personal interest in the trial and the effect that it would have on his credibility. Finally, he assisted the prosecutor by framing one of her objections properly and by objecting once on her behalf. The cumulative effect of these actions and remarks created the impression that the judge was biased in favor of the prosecution. This suggestion of partiality denied defendant a fair trial. Even though we are reversing for a new trial, we will briefly address some of the remaining issues.

Defendant failed to preserve the issue of prosecutorial misconduct with an appropriate objection below. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). After reviewing the challenged comments, we find that any error caused by the challenged remarks could have been cured with a timely cautionary instruction and that failure to review would not result in a miscarriage of justice. *Id.* Therefore, we decline to further review this issue.

Defendant argues that the prosecution presented insufficient evidence of the intent needed for second-degree murder and failed to overcome the evidence supporting an imperfect self-defense claim. We disagree.

Witnesses testified that defendant fired five or six shots at the decedent from a distance of only several feet. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could have found that defendant acted with the intent to kill or to cause serious bodily harm, or with willful and wanton disregard for the likelihood that his actions would cause death or serious bodily harm. See *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), modified 441 Mich 1201 (1992); *People v Dykhouse*, 418 Mich 488, 508; 345 NW2d 150 (1984).

Furthermore, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have rejected defendant’s self-defense claim based on (1) the prosecution’s evidence that defendant and the decedent did not appear to be arguing before the shooting; or (2) defendant’s lack of credibility. *Wolfe, supra* at 515. We will not disturb the factfinder’s decisions regarding credibility of witnesses. *Id.* at 514-515.

Because we are remanding for a new trial, we decline to address defendant’s sentencing issues.

Reversed and remanded for a new trial before a different judge. We do not retain jurisdiction.

/s/ Marilyn Kelly