STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARY ANN WEBBER,

Defendant-Appellant.

UNPUBLISHED
March 20, 1998

No. 197560
Monroe Circuit Court
LC No. 95-027228 FH

Before: McDonald, P.J., and O'Connell and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of burning a dwelling house, MCL 750.72; MSA 28.267. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12; MSA 28.1084, to an enhanced term of eight to twenty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant was convicted of burning an apartment building. At trial, a child witness testified that he observed defendant start the fire in apartment number four. The child also testified that he observed the landlord come out of apartment number four before the fire. Defendant's theory was that the landlord set the fire.

Defendant first raises some evidentiary issues. Specifically, defendant argues that the trial court erred in excluding testimony that would have rebutted the landlord's claim that he was at the apartment building near the time of the fire for the purpose of picking up litter, and that he kept the apartment building grounds in good condition. The trial court excluded this evidence on the ground that it was not relevant to a fact in issue. We agree. Whether the landlord, contrary to his claim, did not keep the grounds in good condition did not have any tendency to make it more probable that he started the fire. MRE 401. Moreover, as a general rule, a witness may not be contradicted regarding collateral, irrelevant, or immaterial matters. *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995). Finally, we note that defense counsel did elicit some testimony from a witness indicating that the landlord did not keep the apartment building in good condition. Accordingly, any further testimony on this point would have been cumulative. MRE 403. Thus, we conclude that the trial court did not abuse its

discretion in excluding this evidence. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

Defendant also claims that the trial court erred in excluding testimony indicating that she took care of the premises. The trial court likewise excluded this evidence on the ground that it was not relevant to a fact in issue. Again, we agree and find that the trial court did not abuse its discretion in excluding this evidence. *Id*.

Next, defendant raises issues of prosecutorial misconduct. Specifically, defendant contends that the prosecutor erroneously elicited testimony from the investigating police officer that allegedly vouched for the credibility of the child witness and defendant's guilt. However, defendant failed to object to the testimony of the investigating officer. Appellate review of alleged prosecutorial misconduct is foreclosed where the defendant fails to object or request a curative instruction unless a curative instruction could not have eliminated the prejudice to the defendant or manifest injustice will result from our failure to review the issue. *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995). Our review of the record in this case reveals that the prosecutor's disputed questions to the investigating officer could be viewed as a proper response to a door opened by defense counsel during counsel's questioning of the officer. See *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996); *People v Allen*, 201 Mich App 98, 103; 505 NW2d 869 (1993). Moreover, even assuming error, a curative instruction could have eliminated any prejudice arising from the disputed questions. Accordingly, we find no manifest injustice and decline to further review this issue. *Paquette, supra*.

Defendant also contends that the prosecutor erroneously elicited testimony from the state's arson expert that likewise allegedly vouched for the credibility of the child witness and defendant's guilt. Defendant preserved this issue by a timely objection. However, we find no error. The prosecutor posed a hypothetical question to arson expert for the purpose of eliciting the expert's opinion. A witness who is qualified as an expert may state an opinion on the basis of a hypothetical question. MRE 703; *People v Dobben*, 440 Mich 679, 695; 488 NW2d 726 (1992). The opinion given by the arson expert did not concern the credibility of the child witness or vouch for defendant's guilt, but rather concerned whether the cause of the fire was accidental or incendiary. We thus conclude that the prosecutor's questions did not deny defendant a fair and impartial trial. *Allen, supra* at 104.

Next, defendant argues that the trial court improperly commented on the credibility of the child witness. In the absence of an objection, as here, this Court may review this issue only if manifest injustice would result from the failure to review. *Paquette, supra* at 340. A trial court pierces the veil of judicial impartiality when its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. *Id*. After reviewing the record in this case, we conclude that the trial court's comments, taken in context, were an observation concerning the requirements for the admission of testimony from a witness under the age of ten. *Lansing v Hartsuff*, 213 Mich App 338, 350; 539 NW2d 781 (1995). As such, the comments by the trial judge did not unduly influence the jury to the extent that it deprived defendant of a fair and impartial trial. *Id*.

Finally, defendant argues that the trial court abused its discretion when it found the child witness competent to testify. We disagree. Generally, every person is competent to be a witness "[u]nless the

court finds after questioning a person that the person does not have sufficient

physical or mental capacity or sense of obligation to testify truthfully and understandably." MRE 601. The testimony of a witness under ten years of age is governed by MCL 600.2163; MSA 27A.2163, which requires the trial court to ascertain to its satisfaction whether the child has "sufficient intelligence and sense of obligation to tell the truth to be safely admitted to testify." A trial court's decision allowing a child witness to testify will not be reversed absent an abuse of discretion. *People v Jehnsen*, 183 Mich App 305, 308; 454 NW2d 250 (1990).

In this case, the trial court determined that the child was competent following questioning designed to determine whether he had the capacity to testify truthfully and whether he understood the obligation to testify truthfully. Under these circumstances, the trial court did not abuse its discretion in allowing the child to testify. *Id*.

Affirmed.

/s/ Gary R. McDonald
/s/ Peter D. O'Connell
/s/ Michael R. Smolenski