

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEXTER A. DAVIS,

Defendant-Appellant.

UNPUBLISHED

April 23, 1999

No. 207867

Recorder's Court

LC No. 97-000646

Before: Saad, P.J., and Murphy and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for first-degree premeditated murder, MCL 750.316; MSA 28.548, assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The court sentenced defendant to life without parole for the first-degree murder conviction and to life on the assault with intent to commit murder conviction, both of which are to be served consecutively to two years' imprisonment for the felony-firearm conviction. We affirm.

I

Defendant contends that the trial judge's comments, treatment of defense counsel, and evidentiary rulings betrayed his obligation of impartiality and denied defendant his right to a fair trial. We disagree.

Trial courts are duty-bound to control trial proceedings and are granted broad discretion to accomplish this duty. MCL 768.29; MSA 28.1052; *People v Burgess*, 153 Mich App 715, 719; 396 NW2d 814 (1986). There is a presumption of judicial impartiality. *In re Forfeiture of \$1,159,420*, 194 Mich App 134, 151; 486 NW2d 326 (1992). In conducting the trial, the court may not take actions which pierce the veil of judicial impartiality. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). However, a trial court may be deemed to have pierced the veil of judicial impartiality where its conduct or comments unduly influence the jury, depriving the defendant of a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). In reviewing a claim of

trial court bias, portions of the record should not be taken out of context, but rather, the whole record should be reviewed. *Id.*

A

Defendant contends that the trial court pierced the veil of impartiality when it allegedly infringed on his right to present a defense by excluding evidence that other people had a motive to kill the victim. Defendant wanted to introduce evidence that the victim, Cornelius Pannell, was a drug dealer who had been involved in a shoot-out earlier in the day, in order to show that other people had a motive to kill him.

Although defendant has framed this issue as touching on judicial impartiality, it is really an evidentiary issue. Because erroneous rulings rarely, by themselves, establish judicial impartiality, this contention could not support defendant's bias claim even if the ruling were, in fact, erroneous. *Cain v Dep't of Corrections*, 451 Mich 470, 496; 548 NW2d 210 (1996) (quoting *Liteky v United States*, 510 US 540, 555; 114 S Ct 1147; 127 L Ed 2d 474 (1994)). In any event, the ruling was not erroneous.

The decision to admit or exclude evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Warren*, 228 Mich App 336, 341; 578 NW2d 692 (1998). A criminal defendant may introduce evidence of a pertinent trait of character of the crime victim. MRE 404(a)(2). However, the right to present a defense is not an absolute right in that the accused must still comply with procedural and evidentiary rules established to assure fairness and reliability in the verdict. *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984). This includes evidentiary rules on relevance. Generally, relevant evidence is admissible, but evidence which is not relevant is not admissible. MRE 402. "Relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

Here, the trial court did not err when it precluded defendant from introducing evidence regarding Pannell's character. The bare facts that Pannell was a drug dealer and that he had been in a previous violent confrontation do not create an inference that someone other than defendant was the perpetrator. At best, it leads to a speculation that as a drug dealer, Pannell might have had other deadly enemies. Accordingly, the trial court did not abuse its discretion in excluding it.¹ MRE 403.

B

Defendant also contends that the trial court pierced the veil of impartiality when it allegedly restricted defense counsel's cross-examination of prosecution witnesses. We disagree. The scope of cross-examination rests within the sound discretion of the trial court and this Court will not reverse absent a clear showing of abuse. *People v Ross*, 145 Mich App 483, 489; 378 NW2d 517 (1985).

In the present case, the trial court's comments were appropriate and did not prevent defendant from presenting to the jury facts from which bias or lack of credibility of prosecution witnesses might be inferred. *People v Kelly*, 231 Mich App 627, 644; 588 NW2d 480 (1998). The court's comments would not have influenced the jury to the detriment of defendant's case. *People v Cheeks*, 216 Mich App 470; 549 NW2d 584 (1996).

C

Defendant alleges that the trial court pierced the veil of impartiality by quarreling with and ridiculing defense counsel, and interrupting defense counsel's cross-examination of prosecution witnesses. We disagree. Upon review of the record, we find that the trial court's instructions to defense counsel were not argumentative or belittling. The court was simply attempting to control the conduct of the trial by restricting defense counsel's examination of the witnesses to its proper scope, which are those matters in which the witness has personal knowledge. MRE 602. Further, the trial court did not abuse its discretion when it properly limited defense counsel's repetitive questioning on cross-examination. *In re Wardell Jones*, 142 Mich App 207, 212; 369 NW2d 212 (1985). The trial court acted in accordance with its duty to ensure that interrogation was conducive to the ascertainment of truth and not needless or argumentative. MRE 611(a). In sum, defendant's allegations that the trial court pierced its veil of impartiality are not substantiated by the whole record, thus, defendant has failed to overcome the presumption of judicial impartiality.

II

Defendant also raises two unmeritorious claims of prosecutorial misconduct.

A

Defendant argues that the prosecutor impermissibly elicited hearsay testimony from a prosecution eyewitness who testified that his mother was threatened with death if he testified against defendant. This is not actually a prosecutorial misconduct issue, but an evidentiary issue, so we will review it as such. Because defendant failed to object to this testimony at trial, we review only for manifest injustice. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). Here, there was no allegation that defendant made, encouraged, or even approved of the alleged threat. Under these circumstances, there was no miscarriage of justice and we decline to review the issue.

B

Defendant also contends that the prosecutor impermissibly shifted the burden of proof when, in his closing argument, the prosecutor commented on defendant's failure to produce more than one alibi witness. Defendant failed to preserve this issue with a timely objection. When we consider an unpreserved challenge to alleged prosecutorial misconduct, we review only if failure to review would result in a miscarriage of justice. *People v Mitchell*, 223 Mich App 395, 400; 566 NW2d 312 (1997). Here, there has been no miscarriage of justice because the prosecutor is permitted to attack a

defendant's alibi defense by commenting on the weakness of the alibi testimony. *People v Holland*, 179 Mich App 184, 191; 445 NW2d 206 (1989).

III

Defendant claims that the trial court incorrectly instructed the jury as to the concept of reasonable doubt. This argument lacks merit. Because defendant failed to object to the jury instruction in the trial court, appellate review is precluded absent manifest injustice. MCR 2.516(C); *Kelly, supra*, 231 Mich App 645-646. Here, there was no injustice because the instruction correctly informed the jury that reasonable doubt is an honest doubt based on reason. *People v Jackson*, 167 Mich App 388, 391, 392; 421 NW2d 697 (1988). Further, defendant's argument that the trial court erred by failing to read verbatim the applicable jury instruction is without merit because the Michigan Criminal Jury Instructions are not mandatory and their use, modification, or disregard is within the discretion of the trial court. *People v Vaughn*, 447 Mich 217, 235 n 13; 524 NW2d 217 (1994); *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985).

IV

Defendant avers that the cumulative effect of multiple errors denied him a fair trial. Defendant's contention is without merit because only actual errors are aggregated to determine their cumulative effect. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). Here, no such errors were committed.

V

Finally, defendant contends that he was denied a fair trial because no record was made of an allegedly improper communication between a court officer and a juror or of the court's instructions to the jury after the jury reported that it was hung. We disagree. The alleged communication between the juror and court officer occurred after the jury had rendered its verdict and after the jury had been polled by the trial court. Consequently, there was no improper communication between a court officer and a member of the jury during the deliberative process. MCL 768.16; MSA 18.1039. Moreover, an ex parte communication between the jury and a court officer constitutes grounds for reversal only if the contact was, or might have been, prejudicial. *People v Montgomery*, 176 Mich App 501, 503; 440 NW2d 21 (1989). Prejudice is generally found where the communication bears directly on the substance of the jury's deliberations or on the deliberative process. *Id.* Here, there is no indication that this communication—allegedly made *after* the verdict was returned—could have had any effect on the jury's deliberations.

As for the court's response to the "hung jury" message, we find no error because instructions that encourage a jury to continue deliberating are administrative communications carrying no presumption of prejudice, even if given outside the courtroom and the presence of counsel. *People v France*, 436 Mich 138, 142-143; 461 NW2d 621 (1990). Counsel's failure to object after learning of the communication serves as evidence that the administrative instruction

was not prejudicial. *Id.* There is no evidence that defendant was prejudiced by the trial court's instruction to the jury, therefore, defendant was not denied an impartial jury and a fair trial.

Affirmed.

/s/ Henry William Saad

/s/ William B. Murphy

/s/ Peter D. O'Connell

¹ We do not entirely agree with the trial court's ruling that defendant's alibi defense rendered this evidence "totally irrelevant". If defendant actually did have evidence that someone else murdered Pannell, this evidence and the alibi defense would complement each other. However, we will not reverse a trial court if it reached the right result, albeit for the wrong reason. *People v Ortiz (After Second Remand)*, 224 Mich App 468, 477; 569 NW2d 653 (1997).