STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee	UNPUBLISHED August 22, 2000
v	No. 214036 Kent Circuit Court
FREDRICK LEWIS SCOTT, Defendant-Appellant.	LC No. 98-001395-FH

Before: Zahra, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of felonious assault, MCL 750.82; MSA 28.277. Defendant was sentenced as an habitual fourth offender, MCL 769.12; MSA 28.1084, to three to fifteen years' imprisonment. We affirm.

Defendant was originally charged with three counts of felonious assault stemming from a fight at an apartment in Grand Rapids. The prosecution alleged that defendant assaulted Jessie McGruder, II, during a fight, cutting his arm with a broken bottle and threatening him with a knife. The prosecution also alleged that defendant assaulted Rikki Willoughby with an unbroken bottle. The defense's theory was intoxication and accident, and that there was no evidence to support that defendant possessed a knife during the incident.

McGruder testified at trial that he and defendant got into an argument at the apartment in question, and that he and his then-girlfriend, Laura Robar, left the apartment but later returned because Robar had left her purse, at which time the fight broke out. Several witnesses testified that during the fight, McGruder beat defendant, that defendant had been drinking, and that at some point McGruder, Willoughby and Robar went into a bedroom and shut the door to keep defendant out. Several witnesses testified that defendant got his arm through the door and was swinging a broken bottle, and McGruder was cut. The jury found defendant guilty of assaulting McGruder with a bottle, and acquitted defendant on the counts of assaulting McGruder with a knife and assaulting Willoughby.

Defendant argues that error requiring reversal occurred through the introduction of irrelevant and highly prejudicial opinion testimony of two police officers, where the trial court made no effort to

control the nature and extent of the testimony, and did not strike the testimony or caution the jury regarding its use.

We review a trial court's determination whether to admit evidence for abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "[A] witness is prohibited from opining on the issue of . . . the criminal responsibility of an accused, or his guilt or innocence." *Koenig v South Haven*, 221 Mich App 711, 725-726; 562 NW2d 509 (1997), *rev'd on other grounds* 460 Mich 667 (1999), quoting *People v Drossart*, 99 Mich App 66, 79-80; 297 NW2d 863 (1980). "The reason for this rule is that where a jury is as capable as anyone else of reaching a conclusion on certain facts, it is error to permit a witness to give his own opinion or interpretation of the facts because it invades the province of the jury." *Koenig*, *supra* at 726. It is generally improper for a witness to comment on or opine on the credibility of another witness, since credibility determinations are for the trier of fact. *People v Smith*, 158 Mich App 220, 230-231; 405 NW2d 156 (1987).

We review preserved nonconstitutional error by assessing the record in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error. *Lukity*, *supra* at 495-496. Preservation of instructional error is required by both court rule and statute. *People v Carines*, 460 Mich 750, 767; 597 NW2d 130 (1999). The failure of a court to instruct on any point of law shall not be ground for setting aside a jury verdict unless the defendant requested such an instruction. *Id.*, citing MCL 768.29; MSA 28.1052; see also MCR 2.516(C).[1]

Officer Clare testified that on the day in question she received a police dispatch regarding two men fighting. She testified that one of the radio calls indicated that one of the men was armed with a knife. Defense counsel immediately thereafter requested a cautionary instruction, and the court instructed the jury that it was not to consider the contents of the dispatch statements as evidence of any point which would be a dispute in the case. Officer Clare later testified:

> Q Okay. You entered the front door and you observed what, please?
>
> A We observed Mr. Scott being held in a bear hug type fashion by a shorter gentleman, and they seemed to be wrestling around quite a bit. Based on the

[1] MCR 2.516(C) provides that

> A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations), stating specifically the matter to which the party objects and the grounds for the objection. Opportunity must be given to make the objection out of the hearing of the jury.

description that we had been given through our dispatch, *we noted Scott to be probably the one that had the knife.*

The three of us ordered him to the ground face down and the other two officers that were with me secured him in handcuffs while I went to where the screams were to see if there was anybody else that was possibly in an assaultive behavior at that point.

Defendant also challenges testimony of Officer Clare highlighted below:

Q. Can you tell us, Officer Clare, what happens then after your interview of the individuals in the northwest bedroom?

A. At that time, after obtaining the statements that I did, *I realized that we had a felonious assault and that the gentleman that we had handcuffed face down that was matching the description was the one that had, by statements obtained, taken a broken bottle top and had cut Mr. McGruder's arm.*

MR. GRACE: Your Honor, I object to this. Unless she observed these acts, she should not be testifying to this.

THE COURT: I suppose that is probably true. I think I will sustain the objection and the Officer can tell us what she did by way of making an arrest. We will leave it to the other witnesses to tell us what people did with what implements.

MR. GRACE: Thank you.

Q You interviewed the witnesses and you drew certain conclusions about the nature of the criminology that had occurred at this location?

A Yeah. Based on the statements that we had, we arrested Mr. Scott on a felonious assault charge.

Q Okay. And did you then conduct further examination of physical evidence at the location?

A Yes. Just outside of the bathroom door there was probably three- to four-inch top piece of a beer bottle, it had a label and a cap still on it, had a very sharp edge.

Through investigation, we believe that that was what was used for the initial cutting. I picked it up off the floor so that no one . . . would step on it or harm it as physical evidence . . . .

The trial court sustained defendant's objection to Officer Clare's statement that a felonious assault had occurred and that defendant had committed it. Defendant did not object to her later

statement regarding the beer bottle, or to her testimony that defendant was probably the one who had the knife.

We conclude that reversal is not required because it was clear to the jury that Officer Clare was testifying regarding her assumptions made at the time of the events at issue, drawn from limited information, and was not testifying to personal knowledge pertaining to the alleged assault. Because the context was clear and no special expertise was claimed, we are confident that the jury gave the testimony little weight on the question of defendant's guilt, and that the testimony did not affect the outcome of the trial. *Lukity, supra* at 495-496.

Defendant next challenges Detective Kooistra's testimony pertaining to his post-incident interview of Laura Robar. At trial, Robar testified that defendant was merely trying to pull his arm back out of the door and did not swing the bottle at the victim. Robar acknowledged that she had told Detective Kooistra that defendant was attempting to slash Willoughby but was blocked when McGruder put up his arm to block the slash, but testified that she told Kooistra that story because she was instructed to by someone else. Detective Kooistra testified in pertinent part:

> Q Was there any indication from Ms. Robar at the time that she spoke with you that she was not speaking with you of her own volition?
>
> A My understanding was that she was relating to me exactly what had occurred and as she saw it.
>
> Q Any indication to you that this was not as represented by her?
>
> A No, there was no –
>
> [DEFENSE COUNSEL]: Objection as to the leading question once again, your Honor.
>
> THE COURT: Yeah, I suppose it probably is leading. I will sustain the objection.

Defendant argues that Kooistra's testimony was inadmissible opinion testimony, and that the error was compounded by the prosecution's arguing in closing and closing rebuttal that Robar was not credible and noting that her testimony conflicted with a statement she made to the police. Because defendant did not object below on the same ground as asserted on appeal, this claim is not preserved. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). We note, however, that the trial court sustained defendant's objection on other grounds to part of the challenged testimony, and the prosecutor's statements in closing were not improper.

Because defendant did not request curative instructions, the trial court was not obligated to provide them. *People v Griffin*, 235 Mich App 27, 37; 597 NW2d 176 (1999). In any event, the trial court instructed the jury that it was to decide the facts of the case, that defendant was presumed innocent, that it was to determine whether the prosecution had proven every element beyond a

reasonable doubt, that it was not to consider excluded or stricken testimony, and that it was to judge police testimony by the same standards used to evaluate the testimony of other

witnesses. Defendant did not object to the instructions as given, and we conclude that the jury was properly instructed and understood its role as the sole judge of the facts and the credibility of all witnesses.

Affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Joel P. Hoekstra