STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 19, 2000
v	No. 216367 Wayne Circuit Court
ANDRE L. GREEN, a/k/a SYLVESTER GREEN, Defendant-Appellant.	Criminal Division LC No. 98-007990

Before: Bandstra, C.J., and Wilder and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. He was acquitted of first-degree criminal sexual conduct, and the trial court directed a verdict on an additional charge of assault with intent to rob while armed. Defendant appeals as of right. We affirm, but remand for correction of the judgment of sentence.

On appeal, defendant contends that the trial court's conduct requires reversal of his conviction and a new trial. We disagree. "A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct." *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). "Portions of the record should not be taken out of context in order to show trial court bias against defendant; rather the record should be reviewed as a whole." *Id.*

> A defendant in a criminal trial is entitled to a neutral and detached magistrate. The test is whether partiality could have influenced the jury to the detriment of the defendant's case. Judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases do not generally support a challenge for partiality. Moreover, partiality is not established by expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women sometimes display. [*People v McIntire*, 232 Mich App 71, 104-105; 591 NW2d 231 (1998), rev'd on other grounds, 461 Mich 147 (1999) (citations omitted).]

A defendant is not denied a fair trial when a trial court questions witnesses if the questions are posed in a neutral manner and the trial court's comments and questions neither add to nor distort the evidence. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). However, "[w]hile a

trial court may question witnesses to clarify testimony or elicit additional relevant information, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair or partial." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). In *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992), this Court held that "excessive interference in the examination of witnesses, repeated rebukes and disparaging remarks directed at defendant's counsel, and marked impatience *in the presence* of the jury displayed an attitude of partisanship, which resulted in the denial of a fair trial." (Emphasis added.)

Defendant first argues that the trial court belittled defense counsel throughout the trial, which gave the jury the impression that the judge sided with the prosecution. After reviewing the record as a whole, we disagree. The most egregious exchanges between defense counsel and the trial court, which evidenced hostility especially on the part of defense counsel, occurred outside the presence of the jury. Moreover, the challenged judicial remarks that were made in the presence of the jury were not extensive and were entirely appropriate under the circumstances. The two incidents wherein the trial court chided defendant's counsel in front of the jury were the result of defense counsel's own unprofessional conduct in turning his back on the judge while the judge was speaking, talking to the prosecutor while the judge was speaking, and continuing to argue after the judge ruled. The trial court's expressions of dissatisfaction were within appropriate bounds. *McIntire, supra*. Further, after these expressions of dissatisfaction, the trial court was respectful and neutral toward defendant's counsel. The judge's conduct in addressing defendant's counsel did not demonstrate partiality that could have influenced the jury to the detriment of defendant's case. *Id.*

Defendant next argues that the trial court disparaged or interfered with defense counsel's attempts to question or discredit prosecution witnesses. Defendant cites four examples to support his claim.

First, defendant argues that the trial court's decision to allow the victim to remain in the courtroom after testifying disparaged and interfered with defendant's attempts to question or discredit her. The record does not support this claim. Defendant had ample opportunity to cross-examine the victim. In fact, the trial court allowed defense counsel to recross-examine the victim twice after his initial cross-examination. Further, although the victim was apparently out of the courtroom before her testimony, there was no sequestration order in place and it does not appear that defendant ever requested one. When the trial court asked if there were further questions of the witness, defendant did not indicate that he might want to recall her. He simply said nothing until after the court informed the victim that she could remain in the courtroom. Then defendant argued that he may reach a stipulation with the prosecutor, which might lead to additional questions for the victim. Defendant did not subsequently attempt to recall the victim, nor was he prohibited from doing so. The sequestration of witnesses is discretionary. *In the Matter of Jackson*, 199 Mich App 22, 29; 501 NW2d 182 (1993). Here, there was no abuse of discretion when the trial court refused to sequester the victim after she had already been subject to extensive cross-examination and where there was no sequestration order. More importantly, defendant never attempted to recall the victim; thus, it is disingenuous for him to argue that the trial court's decision improperly interfered with his ability to question the victim.

Second, defendant argues that the trial court improperly refused to allow him to recross-examine a police officer about whether people who smoke crack cocaine can burn themselves while doing so. Trial courts have wide discretion to determine the scope of cross-examination. *People v Lucas*, 188 Mich App 554, 572; 470 NW2d 460 (1991). "The exercise of that discretion is not subject to review unless a clear abuse is shown." *Id.*; MRE 611. Reasons to limit cross-examination include concerns about harassment, prejudice, confusion of the issues, or interrogation that is repetitive or only marginally relevant. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). In this case, defendant was given sufficient opportunity to question Richardson and explore the facts of the case. On recross-examination, defense counsel decided to pursue a line of general questioning about crack cocaine users and whether they can burn themselves when smoking crack cocaine. Counsel tried to convince the trial court that cross-examination on this general line of questioning was necessary because of the prosecutor's redirect-examination. It was not. The issue whether cocaine users can burn themselves while smoking crack cocaine was not injected into the trial on redirect-examination. Under the circumstances in this case, where the questioning was not specific to the case, it concerned a newly raised subject not covered by the prosecutor on redirect, and it was only marginally relevant, the trial court did not abuse its discretion in limiting the recross-examination. The trial court's decision did not disparage the defendant or improperly interfere with his case. Defendant was able to and did, in fact, argue that the victim probably could have burned herself when she was smoking crack cocaine.

Third, defendant argues that the trial court improperly interrupted defense counsel's cross-examination of another police officer to explain to the jury that "working," in the context used, indicated prostitution. The trial court's interruption of defense counsel's cross-examination did not disparage defendant or interfere with his ability to discredit any witnesses. The trial court's interruption, made to clarify an issue for the jury, was not intimidating, argumentative, prejudicial, unfair or partial. *Cheeks*, *supra*.

Fourth, defendant complains that the trial court improperly interrupted the prosecutor during his redirect-examination of the same police officer. Defense counsel elicited from the victim on cross-examination that she went to the preliminary examination on her own. Defense counsel later elicited from the officer that he drove the victim to the preliminary examination. This was a strong point for defendant, who was relying on the victim's lack of credibility as his defense. After defense counsel elicited the inconsistent testimony from the officer, the prosecutor tried to rehabilitate the victim. The prosecutor asked the officer whether it was unusual for the police to transport witnesses to court and under what circumstances it would be done. The trial court interrupted the questioning, finding that it was moving too far afield of the issues in the case. The trial court pointed out that there was a discrepancy in the testimony of the victim and the officer and that the jury should decide what, if anything, this meant. The trial court had the right to limit questioning to avoid needless consumption of time and "make the interrogation and presentation effective for the ascertainment of truth." MRE 611(a). The trial court's limitation was directed at the prosecutor, was related to marginally relevant evidence only, and was not designed to and did not disparage the defense. Defense counsel fully explored this issue and obtained the testimony he needed to attack the victim's credibility during closing argument. The trial court's limit on the prosecutor's inquiry was therefore appropriate.

In sum, the trial court's participation in the trial was not excessive or partial, and it did not disparage defendant's case or his attempts to discredit the prosecution's witnesses. Further, we disagree that the trial court's conduct toward defendant and his counsel, when considered in relation to the trial court's polite treatment of the victim, demonstrates that the trial court was biased against defendant. Defendant points to one instance where the trial court interacted politely with the victim. The victim was having difficulty testifying that defendant had burned her pubic hair and the trial court attempted to make her feel at ease. The trial court's statement to the victim did not bolster the credibility of the victim. Nothing the trial court said lent credence to the victim's testimony or suggested to the jury that the trial court believed the victim was credible. Defendant's argument that the trial court was overly friendly and appreciative to prosecution witnesses while antagonizing defense counsel at every turn is simply not supported by the record in this case. The particular facts of this case demonstrate that, while there were some expressions of dissatisfaction directed at defense counsel in front of the jury, the trial was not tainted by excessive interference in the examination of witnesses, repeated rebukes and disparaging remarks, or marked impatience in the presence of the jury. *Conyers, supra.*

Finally, defendant raises two instructional errors on appeal. Defendant phrases the instructional errors in terms of judicial misconduct. His argument with regard to the alleged instructional errors is lacking. Defendant states only that the instructional errors *likely* affected the outcome of trial, that the trial court's examples of specific intent *may have unfairly influenced* the jury, and that the trial court invaded the province of the jury when it indicated that the touching of fire to skin is a violent touching. Defendant offers no authority to support his positions and fails to explain how the alleged errors prejudiced his case. Where a party fails to provide supporting authority, this Court may consider the issue abandoned. *People v Piotrowski,* 211 Mich App 527, 530; 536 NW2d 293 (1995). In addition, an appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *People v Kelly,* 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Nevertheless, we note that a trial court may use examples to clarify the meaning of complex legal terms. *People v Edwards,* 206 Mich App 694, 696-697; 522 NW2d 727 (1994). See also *Jennings v Southwood (After Remand),* 224 Mich App 15, 22-23; 568 NW2d 125 (1997), vacated in part on other grounds 457 Mich 884 (1998). When using examples, the trial court must clearly indicate that the examples are only examples and that guilt or innocence must be determined by following the instructions as a whole. *Edwards, supra.* Moreover, a trial court's examples of intent should not relate too strongly to the facts of the case because there is a risk of implicitly instructing the jury that the intent element has been established as a matter of law. *People v Cooper,* 236 Mich App 643, 650 n 2; 601 NW2d 409 (1999). Here, defendant does not argue that the examples were misleading, inaccurate or caused confusion. In addition, the trial court told the jury that they were examples or analogies, and the examples were not closely related to the facts of the case. We find that the use of examples was appropriate. Further, even if the use of examples was error, reversal is not warranted. Defendant does not argue that, without the use of examples, the result of the trial more probably than not would have been different. *People v Lukity,* 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Defendant also contends that the trial court clearly invaded the province of the jury by indicating that placing fire on skin constitutes a violent touching. The allegedly improper

instruction related to the crime of felonious assault. As argued by defendant, it appears that the trial court did direct the jury that one of the elements of felonious assault was met. However, defendant was not convicted of felonious assault. He was convicted of assault with intent to do great bodily harm. The instruction for assault with intent to do great bodily harm was properly given to the jury and defendant does not argue that the trial court directed the jury to find that any element of that crime was legally established. "[A] defendant has no room to complain when he is acquitted of a charge that is improperly submitted to a jury, as long as the defendant is actually convicted of a charge that was properly submitted to the jury." *People v Graves*, 458 Mich 476, 486-487; 581 NW2d 229 (1998). Here, even if there was error in the trial court's giving of the felonious assault instruction, the error was harmless in light of the fact that the jury did not convict defendant of felonious assault. Thus, the trial court's instruction that burning flesh with a torch is a violent touching does not require reversal. More significantly, we note that defendant's theory of the case was not affected by the trial court's improper instruction. Defendant argued that the victim was not credible and that she had probably burned herself while smoking crack cocaine with a torch. Defendant denied burning her. There was no issue about whether burning flesh is or is not a violent touching. Thus, any error did not more probably than not affect the outcome of the case. *Lukity, supra*.

We note that defendant's judgment of sentence does not reflect defendant's habitual offender sentence, under MCL 769.11; MSA 28.1083, as stated on the record. Therefore, we remand only for entry of a corrected judgment of sentence.

Affirmed and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Kurtis T. Wilder
/s/ Jeffrey G. Collins