STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 4, 2001
v	No. 214100 Wayne Circuit Court
EARL R. LYELL, Defendant-Appellant.	Criminal Division LC No. 98-000124

Before: Zahra, P.J., and Hood and McDonald, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit murder, MCL 750.83; MCL 28.278. He was sentenced as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to thirty to sixty years' imprisonment. He appeals as of right. We affirm.

I

Defendant first argues that the trial court committed reversible error when it continued to poll the jury after a juror indicated she did not agree with the announced guilty verdict. We disagree that the court's error in regard to the jury polling requires reversal.

The evidence at trial established that defendant stabbed the victim numerous times outside a bar. Defendant claimed he acted in self-defense after the victim attacked him and tried to commit a robbery. After deliberating for several hours, the jury informed the trial court it had arrived at a verdict. The verdict was announced, finding defendant guilty of assault with intent to commit murder. Defendant's counsel requested that the jury be polled. During the polling, juror number twelve indicated she did not agree with the announced verdict:

THE CLERK: [Juror] was that and is this your verdict?

JUROR NO. 12: No. I'm sorry, Judge.

THE COURT: Don't talk anymore.

Let me just say this to you. May I ask the remaining jurors, was that and is that your verdict?

JUROR NO. 13: Yes.

JUROR NO. 14: Yes.

THE COURT: It is not possible for me to talk to you any further. But I really would ask you to go back and, you know, discuss with each other where you are and what processes you're involved in to see if you can arrive at a verdict. I don't urge anyone to give up their ideas or their thoughts, but I do think it is very important to, you know, talk with each other and to see what it is that you disagree upon. If you would be kind enough to do that, I would be appreciative.

The jury then exited the courtroom and defendant's counsel moved for a mistrial, arguing juror number twelve was placed under overwhelming pressure to convict defendant. The court did not rule on the motion. When the jury returned with the same guilty verdict approximately forty minutes later, the court accepted the verdict.

MCR 6.420(C) provides:

> Poll of jury. Before the jury is discharged, the court on its own initiative may, or on the motion of a party must, have each juror polled in open court as to whether the verdict announced is that juror's verdict. If polling discloses the jurors are not in agreement, the court may (1) discontinue the poll and order the jury to retire for further deliberations, or (2) either (a) with the defendant's consent, or (b) after determining that the jury is deadlocked or that some other manifest injustice exists, declare a mistrial and discharge the jury.[1]

We conclude that the trial court erred in continuing to poll the final two jurors after juror number twelve stated she disagreed with the verdict. *People v Echavarria*, 233 Mich App 356, 362; 592 NW2d 737 (1999). However, we reject the argument that the continued polling and disclosure of the numerical division of the jurors necessitates reversal of defendant's conviction. For an error in the polling process to warrant reversal, the error must have had a coercive affect on the jury.

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[1] The comment to that court rule states, in relevant part:

> Subrule (C) is consistent with the jury polling procedure set forth in MCR 2.512, but is modified to address constitutional concerns applicable in criminal jury trials. See *People v Hall*, 396 Mich 650, 654-655[; 242 NW2d 377] (1976).[1]
>
> The option in subrule (C) permitting the court to "discontinue the poll and order the jury to retire for further deliberations" requires the court to cut off the polling as soon as disagreement is disclosed. The court should not allow the polling to continue because of its potentially coercive effect. Nor, for the same reason, should the court question the jury to determine where the jury stands numerically. See *People v Wilson*, 390 Mich 689[; 213 NW2d 193] (1973).

See *People v Wilson*, 390 Mich 689, 691-692; 213 NW2d 193 (1973) (remanding for a new trial based on coercion found as a result of the trial judge's direct inquiry into the numerical standing of the jury and the judge's statement after being informed the jury was divided eleven to one: "Well, that is not very far from a verdict.") and *People v Booker (After Remand)*, 208 Mich App 163, 169; 527 NW2d 42 (1994) (holding the trial court's inquiry into the nature of a dissenting juror's doubt was impermissibly coercive); see also *Echavarria*, *supra* (holding the trial court erred in questioning a dissenting juror once it discovered the jury disagreed with the verdict by asking: "Now, is there a problem?"). Continuing to poll a jury in a manner that discloses the numerical division amongst jurors is not necessarily coercive. See *People v Bufkin*, 168 Mich App 615, 617; 425 NW2d 201 (1988) and *People v Dietrich*, 87 Mich App 116, 142; 274 NW2d 472 (1978), rev'd on other grounds 412 Mich 904 (1982) (establishing disclosure of numerical divisions does not necessarily constitute prejudicial error); see also comment to MCR 6.420(C) (discussing the "*potentially* coercive effect" of continued polling and questioning regarding numerical division).

Here, the circumstances surrounding the polling did not tend to coerce the jurors to reach a particular verdict. Immediately after juror number twelve stated she did not agree with the verdict, the judge ordered: "Don't talk anymore." The judge then sent the jury back to deliberate on the issues where there was disagreement. The judge clarified: "I don't urge anyone to give up their ideas or their thoughts . . . ." We conclude the judge's comments were not coercive. While the polling of the two remaining jurors disclosed the numerical division of the jury, it is significant that the judge made no comment on the numerical division in the context of the jury's progress in deliberations. Cf. *Wilson*, *supra*. Instead, the judge requested that jurors continue discussions on the disputed issues and urged them not to simply give up their positions. Under these circumstances, the trial court's error in continuing to poll the jury does not require reversal of defendant's conviction.

II

Defendant also argues that the trial judge's conduct during trial deprived him of a fair trial. Defendant claims that the judge expressed partiality and bias when she berated his counsel in front of the jury, perpetually interfered with his counsel's examination of witnesses, and assumed the role of the prosecutor. Several of the specific exchanges cited by defendant occurred in the presence of the jury.[2] Defendant focuses particularly on the judge's conduct of holding his counsel in contempt of court in the presence of the jury.

We review the entire trial record to determine whether the trial court's conduct pierced the veil of judicial impartiality by unduly influencing the jury and, thereby, depriving defendant of a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). A party that challenges a judge based on bias or prejudice bears a heavy burden of overcoming

[2] We note that any comments made outside the presence of the jury could not have operated to deny defendant a fair trial, *People v Mixon*, 170 Mich App 508, 514; 429 NW2d 197 (1988), rev'd in part on other grounds 433 Mich 852 (1989); however, they are relevant to whether the trial court showed partiality.

the presumption of judicial impartiality. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Where a judge forms opinions during the course of a trial on the basis of facts introduced or events that occur during the proceedings, those opinions do not constitute bias or partiality unless there is a deep-seated favoritism or antagonism that makes fair judgment impossible. *Id*. Comments critical or hostile to counsel or the parties do not normally support a finding of bias or partiality. *Id*.

It is the duty of the trial judge to control trial proceedings and to limit the introduction of evidence and argument of counsel to relevant and material matters while considering the need to expeditiously and effectively ascertain the truth of the matters involved. MCL 768.29; MSA 28.1052; *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996). A trial court has wide, but not unlimited, power and discretion over the conduct of a trial. *Paquette, supra*.

> A defendant in a criminal trial is entitled to expect a "neutral and detached magistrate." While 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. The test is whether the judge's questions and comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case. [*People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996) (citations omitted).]

After reviewing the record in its entirety, it is evident there were several moments during trial where the judge became frustrated with defendant's counsel, admonished defendant's counsel for conduct she considered "juvenile" and unprofessional and became involved in the questioning of witnesses. We conclude, however, that the judge acted within her power and discretion to control the trial. The judge's conduct did not demonstrate partiality that influenced the jury's verdict.[3] The judge instructed the jury that its verdict must be based solely on the evidence. The jury was further instructed that the fact defendant's counsel was found in contempt of court must not be considered when reaching a verdict. The judge informed the jury she did not bear any animus toward defendant's counsel and that her contempt ruling was not an indictment of defendant. Juries are presumed to follow their instructions. *People v Mette*, 243 Mich App 318, 330-331; __ NW2d __ (2000). Under these circumstances, we conclude defendant's arguments regarding judicial misconduct lack merit.

III

Defendant also raises several evidentiary issues. First, defendant argues that the trial court erred in refusing to allow him to impeach the victim with a conviction for second-degree

[3] While there were instances below where the judge could have used more tact in dealing with defendant's counsel, we do not believe the judge's conduct approaches the level of conduct previously determined to warrant reversal of a criminal conviction. See *People v Conyers*, 194 Mich App 395; 487 NW2d 787 (1992); *People v Wigfall*, 160 Mich App 765; 408 NW2d 551 (1987); *People v Moore*, 161 Mich App 615; 411 NW2d 797 (1987).

retail fraud. We disagree. The retail fraud conviction, a ninety-three-day misdemeanor, was not admissible pursuant to MRE 609(a)(2), which allows impeachment using a crime of theft if the punishment is in excess of one year. In *People v Parcha*, 227 Mich App 236, 246-247; 575 NW2d 316 (1997), this Court established that some actions prohibited under the second-degree retail fraud statute, MCL 750.356d; MSA 28.588(4), involve dishonesty or false statements as those terms are used in MRE 609(a)(1). In the present case, however, the record does not indicate the specific conduct that resulted in the victim's retail fraud conviction. As such, we cannot say that the victim's conviction resulted from dishonesty or false statements or that the trial court erred in excluding evidence of the conviction under MRE 609(a)(1).

Second, defendant argues that the trial court erred when it refused to allow him to elicit testimony regarding the victim's physical abuse of a girlfriend. Defendant claims that evidence was relevant to his state of mind at the time of the stabbing and was admissible pursuant to MRE 405(b).[4] According to defendant, when he responded to the victim's attack in self-defense, he was in apprehension of harm because he knew the victim had engaged in acts of domestic violence against his girlfriend. The trial court opined that it defied logic that a man would be afraid of another man because the other man beat his girlfriend.

Specific acts of violence by a victim may be elicited to show the defendant was in reasonable apprehension of harm when he acted. *People v Harris*, 458 Mich 310, 319; 583 NW2d 680 (1998). Here, the court allowed witnesses to testify about the victim's general reputation of becoming violent when intoxicated, but precluded testimony regarding the victim's domestic violence. We cannot say that the trial court abused its discretion in determining evidence that the victim beat his girlfriend did not tend to "show that defendant's state of mind was such that he reasonably apprehended danger of serious bodily injury or death at the hands of his victim." *People v Cooper*, 73 Mich App 660, 665; 252 NW2d 564 (1977); see *Harris, supra*. Therefore, we find no error.

Third, defendant argues that the prosecutor improperly impeached a defense witness by eliciting information that the witness had an outstanding warrant for a check drawn with insufficient funds. The prosecutor did not question the witness about a specific instance of conduct or about the conduct underlying the outstanding warrant. Rather, the witness was questioned about the fact that she had a pending warrant. Such testimony was inadmissible under MRE 608. See *Scott v Hurd-Corrigan Moving & Storage Co, Inc*, 103 Mich App 322, 343; 302 NW2d 867 (1981) and *People v Valoppi*, 61 Mich App 470, 475-476; 233 NW2d 41 (1975). Moreover, pending charges may not be used for impeachment purposes under MRE 609. *People v Hall*, 174 Mich App 686, 690-691; 436 NW2d 446 (1989). Thus, it was error to allow the prosecution to impeach the witness based on a pending charges. However, given the substantial evidence establishing defendant's guilt, the trial court's error in this regard was

[4] On appeal, defendant also claims that the evidence was admissible pursuant to MRE 406; however, defendant offers no argument or citation to authority in regard to that claim. "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). We find that defendant has abandoned his claim that the evidence was admissible pursuant to MRE 406 and therefore, we decline to address that issue.

harmless because it is not more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999).

IV

Finally, defendant argues that the trial court erred in sua sponte amending his judgment of sentence. We disagree. Because defendant was on parole at the time of the instant assault, his sentence for this conviction was required to run consecutively to the previous sentence. MCL 768.7a(2); MSA 28.1030(1)(2). "[C]onsecutive sentencing is mandatory when someone commits a crime while on parole." *People v Chavies*, 234 Mich App 274, 280; 593 NW2d 655 (1999). When the trial court entered the judgment of sentence, it failed to indicate that the sentence was to run consecutively to the sentence for the prior offense. When this omission was brought to the attention of the trial judge by the Department of Corrections, an amended judgment was prepared and entered. A judge has authority to correct clerical mistakes in a judgment arising from oversight or omission. MCR 6.435. This may be done by "the court at any time on its own initiative." MCR 6.435(A). Here, because consecutive sentencing was mandatory and the trial court omitted that language from the judgment of sentence, it had the authority to amend the sentence.[5] Therefore, we find no error.

Affirmed.

/s/ Brian K. Zahra
/s/ Gary R. McDonald

[5] This case is distinguishable from *People v Mapp*, 224 Mich App 431; 569 NW2d 523 (1997) and *People v Thomas*, 223 Mich App 9; 566 NW2d 13 (1997) where judgments that reflected concurrent sentences were changed sua sponte to reflect consecutive sentences. Here, the original judgment of sentence did not indicate defendant's sentence was concurrent.