STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

V

TERRENCE SHEREL VAUGHN,

Defendant-Appellee.

UNPUBLISHED
December 4, 2001

No. 231731
Oakland Circuit Court
LC No. 99-166415-FH

Before: Bandstra, C.J., and Doctoroff and White, JJ.

PER CURIAM.

The prosecution appeals by leave granted from the circuit court's order granting defendant a new trial. We reverse.

Following a jury trial before a visiting drug judge (trial judge), defendant was convicted of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). He was sentenced as an habitual offender, MCL 769.11, to one to forty years in prison. Defendant filed a motion for a new trial and a *Ginther*[1] hearing, arguing that he was denied the effective assistance of counsel and a fair trial because his trial counsel had a conflict of interest. At the hearing on defendant's motion, held before a different visiting judge (second judge), defendant raised additional arguments regarding the ineffective assistance of counsel. At a subsequent hearing, the second judge denied defendant's motion for a new trial, concluding that defendant's trial counsel did not have a conflict of interest and that defendant's other arguments were not properly before the court.

Defendant then filed a motion for rehearing and to allow supplemental argument regarding the grant of a new trial, arguing that the court never ruled on his ineffective assistance of counsel arguments and that he was entitled to a new trial based on prosecutorial and judicial misconduct. After hearing oral arguments and viewing the videotape of the trial, the second judge granted defendant's motion for a new trial based on the body language and comments of the trial judge, stating, "I cannot imagine in my wildest dreams how 12 people sitting there listening to [the trial judge] and watching [the trial judge] could not have been unduly influenced."

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

On appeal, the prosecution first argues that the court erred in granting defendant a new trial on rehearing where the new trial was granted based on issues that defendant did not raise in his original motion for a new trial. We disagree. The construction of court rules is a question of law that this Court reviews de novo on appeal. *People v Levandoski*, 237 Mich App 612, 617; 603 NW2d 831 (1999).

The prosecution argues that defendant did not demonstrate the palpable error required for a rehearing. The issue of judicial misconduct was raised for the first time in defendant's motion for rehearing and supplemental argument for a new trial. In this motion, defendant argued that the court should rehear the issue of defense counsel's ineffectiveness, but that the court should also grant defendant a new trial based on his new arguments of prosecutorial and judicial misconduct. Therefore, although defendant's motion sought a rehearing of the ineffectiveness issue, it was actually also a second motion for a new trial based on new arguments, and defendant did not need to demonstrate "palpable error" with regard to these issues as required by MCR 2.119(F)(3).

Because defendant's motion was for a new trial, rather than rehearing, the issue is whether the court erred in granting defendant a new trial based on arguments that were not raised in defendant's first motion for a new trial. We find that it did not. A motion for a new trial must be filed within forty-two days after the entry of the judgment. MCR 6.431(A)(1). The court rules favor a case being disposed of in the trial court rather than the Court of Appeals. MCR 7.208(B) allows a party to file a motion for a new trial in the trial court, even after it has already filed a brief on appeal in the Court of Appeals. It is preferable to allow parties to file multiple motions for a new trial in order to have the trial courts dispose of the matters, before requiring parties to appeal to this Court.

Unlike MCR 6.502(G), which governs post-appeal motions for relief from judgment, MCR 6.431 contains no language limiting the number of times a party may file a motion for a new trial. Therefore, we find that MCR 6.431 allows for more than one motion for a new trial and the court did not err in allowing defendant to raise new arguments in support of a new trial. Defendant filed his motion for rehearing and to allow supplemental arguments regarding the grant of a new trial within forty-two days of the day his judgment of sentence was entered. Therefore, the court did not err in considering defendant's motion for a new trial based on arguments that were not raised in defendant's original motion for a new trial.

Next, the prosecution argues that the court abused its discretion in granting defendant a new trial based on judicial misconduct. We agree. A trial court may order a new trial on any ground that would support appellate reversal of a conviction or because it believes that the verdict resulted in a miscarriage of justice. MCR 6.431(B); *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). A trial court's grant of a motion for new trial is reviewed for an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). In order to determine whether the trial court abused its discretion, this Court must examine the reasons given for granting a new trial. *Id.* A trial court abuses its discretion if the reasons given by the trial court do not provide a legally recognized basis for relief. *Id.* To justify granting a new trial based on judicial misconduct, it must be established that there was actual prejudice resulting from the alleged misconduct. *Wilkins v Wilkins*, 149 Mich App 779, 787; 386 NW2d 677 (1986).

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). The entire record should be reviewed as a whole to determine whether the trial court was biased. *Id.* A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. *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 the 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; 599 NW2d 102 (1999) (citations omitted).]

Belittling observations aimed at the defense attorney by the trial court are necessarily injurious to the one the attorney represents. *People v Anderson*, 166 Mich App 455, 461-462; 421 NW2d 200 (1988). A trial court destroys the balance of impartiality necessary to a fair hearing when the court berates, scolds, and demeans an attorney, so as to hold the attorney up to contempt in the eyes of the jury. *Id.* at 462. However, unfair criticism of defense counsel in front of the jury, while always improper, only requires reversal when the court's conduct denies the defendant a fair and impartial trial by unduly influencing the jury. *Id.*

In the instant case, defendant alleged three instances of judicial misconduct: (1) the trial judge's comment referring to the evidence of the forfeiture consent judgment as a "bombshell" in front of the jury; (2) the trial judge's disparaging of defense counsel by referring to him only by his last name; and (3) the trial judge's acts of telling defense counsel to "sit down" when he objected and telling both attorneys to "shut up." The second judge found that defendant was entitled to a new trial because of the trial judge's body language and actions in court, including ridiculing defense counsel and "treat[ing] him like a young child, not a practicing attorney."

After review of the record and the videotapes of the trial, we find that the trial judge's conduct did not unduly influence the jury and thereby deprive defendant of a fair and impartial trial. First, the trial judge's "bombshell" comment did not deprive defendant of a fair trial. After the prosecutor objected when defense counsel questioned defendant about whether he and defendant had discussed a possible settlement in the civil forfeiture case, the trial judge stated:

> Well, I got a problem with it, because now we're getting into the attorney/client privilege and what you did or didn't advise him.
>
> * * *
>
> Once that door's open, then I think we got a bombshell, so I'm gonna [sustain the prosecutor's objection].

The trial judge was not commenting on the weight of the evidence of the civil forfeiture action as being a "bombshell," but was commenting on the problems that could arise if defendant testified

regarding evidence that was protected by the attorney-client privilege. Because the trial judge's comment concerned the attorney-client privilege, rather than the weight of the evidence against defendant, we find that this comment did not unduly influence the jury.

Next, the trial judge's referring to defense counsel by his last name did not deprive defendant of a fair trial. The trial judge often referred to defense counsel as Mr. Siegrist and to the prosecutor as Ms. Hand. Therefore, the attorneys for both sides were largely treated equally in this regard, and we find that the jury was not unduly influenced by the trial judge's comments referring to defense counsel by his last name.

Next, the trial judge's comments telling defense counsel to "sit down," did not amount to judicial misconduct. During the prosecutor's closing argument, defense counsel objected to the prosecutor's argument that defendant was pretending to sleep when the police made their raid. This was the fifth time defense counsel had objected during the prosecutor's closing argument. None of his objections had been sustained. After defense counsel's fifth objection, the trial judge stated, "Mr. Siegrist, sit down. Thank you. Go ahead." This statement was the trial judge's way of telling defense counsel that his objection was overruled and may have been a result of the trial judge's annoyance with defense counsel for his interruptions. This Court has held that a trial court's statement telling defense counsel to sit down did not unduly influence the jury. *Anderson, supra* at 461-462. The trial judge's statement did not rise to the level of judicial misconduct or deprive defendant of a fair trial.

Additionally, the trial judge told defense counsel to sit down during the prosecutor's recross-examination of defendant. Defense counsel had objected to the prosecutor's reading from a document and had began telling the jury to disregard the statement. The trial judge told defense counsel, "Mr. Siegrist, sit down. That's not necessarily—that's my job not your job." The trial judge's comment was not prejudicial and was warranted, given defense counsel's attempt to give the jury instructions. It is the trial court's, rather than the attorney's, job to instruct the jury as to the law applicable to the case. MCL 768.29; *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000).

Next, the trial judge's statement telling the attorneys to "shut up" did not display partiality that influenced the jury against defendant. This comment was directed at both lawyers, and therefore, did not unduly influence the jury against defendant.

The second judge granted defendant a new trial because of the trial judge's body language and actions and his statements ridiculing defense counsel in court. However, after viewing the videotapes of the trial, we find that the body language, tone of voice, and actions of the trial judge were not such as would prejudice the jury against defendant. During the course of the trial, there were various other exchanges between defense counsel and the trial judge, but the only instances where the trial judge raised his voice and severely criticized and admonished defense counsel took place outside of the presence of the jury. At one point during the prosecutor's recross-examination of defendant, when the trial judge told defense counsel to sit down and told both attorneys to "shut up," the trial judge's body language and expressions showed that he was annoyed with defense counsel. However, we find that his expressions of annoyance were within the bounds of what imperfect men and women sometimes display. *McIntire, supra* at 104-105. During the other exchanges with defense counsel, the trial judge

maintained a relatively calm demeanor and for the most part avoided any body language or expressions that may have indicated partiality.

Reversed and remanded for reinstatement of defendant's conviction. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Martin M. Doctoroff
/s/ Helene N. White