STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 14, 2004
v	No. 247722 Charlevoix Circuit Court
JOHN JOSEPH SHULICK, Defendant-Appellant.	LC No. 02-073009-FH

Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

PER CURIAM.

I. Overview

A jury convicted defendant John Shulick of assault with intent to do great bodily harm less than murder,[1] assaulting or resisting a police officer causing injury,[2] and possession of a firearm during commission of a felony.[3] The offenses occurred when the county sheriff attempted to serve a court order on Shulick directing him to leave his ex-wife's house. Shulick, who previously said there would "be blood on the walls" if anyone tried to remove him from the house, hit the sheriff in the mouth with a shotgun, knocking out five of his teeth and severing his upper lip. For his respective convictions, the trial court sentenced Shulick to consecutive prison terms of five to ten years, two to four years, and two years. Shulick appeals as of right. We affirm.

II. Basic Facts And Procedural History

A. Shulick's History

By way of background, it is apparent from the record that Shulick had a history of conflict with the Charlevoix County courts and sheriff before the assault at issue in this case took place. Indeed, Shulick's relations both with Judge Pajtas and with Sheriff Lasater play a key part

[1] MCL 750.84.

[2] MCL 750.81d(2).

[3] MCL 750.227b.

in these proceedings: his defense at trial was largely that he legitimately feared the sheriff and acted in self-defense, and he argues on appeal that the judge should have granted a motion to recuse himself.

Shulick was divorced from Barb Shulick on May 15, 2002. The divorce decree gave Barb Shulick possession of the marital house, and ninety days in which to buy Shulick's interest in it for $25,000. After the decree was entered, Barb Shulick repeatedly asked Shulick to leave the house. Not only did Shulick not do so, he told her there would be "blood on the walls" of the house and "stacked bodies" in it if anyone tried to make him leave. Moreover, the Shulicks' daughter had been removed from the home and placed in foster care, partly because of allegations of physical abuse by Shulick, with a stipulation that she could not return home until Shulick left the house. Barb Shulick, therefore, retained an attorney who obtained a court order requiring Shulick to leave.

Judge Pajtas, the same judge who presided over Shulick's criminal trial, presided over the divorce proceeding, which had ended dramatically. Shulick denounced the judge loudly for violating God's law by recognizing the legality of divorce, and thereby placing his family in danger of God's wrath for his unrighteous deeds. He took off his shoes and banged them together, telling Judge Pajtas he was "knocking the dust from his feet" in a gesture of contempt for the court, adding, "Okay?" Judge Pajtas replied that it was "not okay," and that Shulick would either have to leave the court or be held in contempt, in which case he would be jailed for one month. Shulick left and was not held in contempt. However, Shulick was jailed as the result of a later confrontation at the courthouse. He was then placed in a mental institution, at the request of law enforcement authorities. The sheriff had no direct role in the institutionalization, but the under-sheriff did. Shulick was tried for assault over this confrontation but the trial ended in a hung jury.

B. The Assault

Apparently, there was a mutual wariness between the sheriff and Shulick when time came to serve the court order requiring Shulick to leave the marital home, especially given his comments about "blood on the walls" and "stacked bodies." This order specifically stated that it could be served by the sheriff or by the state police. Barb Shulick's lawyer gave the order to the sheriff, and asked him to see that it was served. The sheriff assured the lawyer that he would *personally* see to it that the order was served.

The sheriff later testified he had never refused to make service for anyone who asked him to do it. Indeed, he testified, he would be violating the law if he refused, and could face sanctions. He said that he never expected his deputies to do anything he was unwilling to do himself, and so took personal responsibility for the more difficult service situations. According to the sheriff, he had faced a number of difficult service scenarios but none, he said, had ever degenerated into violence. The sheriff stated that he had always been able, through persuasion, to convince persons to accept service of process and that he expected the same result with Shulick. When asked why he did not simply give the order to the state police to serve, the sheriff replied that the fact that the order mentioned service by the sheriff before service by the state police indicated to him that the sheriff was to make the primary attempt to serve, with reliance on the state police only if he were unsuccessful.

Shulick, however, insisted that he was leery of the sheriff because of his history with the sheriff's office, and was not prepared to accept service from the sheriff. When he would see sheriff's deputies approaching, he said, he did not know if they were there to serve process, or to arrest him, or worse. He believed the sheriff's office was hostile to him.

Apparently, there were a number of unsuccessful attempts to serve Shulick with the order and other legal papers. Shulick claimed he placed numerous phone calls to the sheriff concerning service, and that the sheriff never returned the calls. The sheriff, however, denied this, adding that he always responds personally to each message he gets, and that he is one of the few sheriffs in Michigan who has his home phone number listed in the telephone directory, something he does to make access to him easy.

The sheriff testified that he and his deputies met to discuss serving the order. Barb Shulick faxed permission for the sheriff and deputies to enter her home, where Shulick still lived, to make service. The sheriff deliberately did not tell Shulick about the plan to serve him for fear that Shulick would avoid service.

According to the testimony at trial, the sheriff, the under-sheriff, and two deputies drove in marked police cars to Barb Shulick's residence a little before dawn on September 23, 2002. All were wearing uniforms and badges. The sheriff gave instructions that if Shulick left the premises voluntarily, to allow him to do so, but if he did not, to arrest him. The sheriff and the under-sheriff entered the house together, the sheriff in the lead, while the deputies waited outside. Just before they did so, a man who had been watching them went inside and turned off all the lights. Barb Shulick testified that this person was their son who had been watching outside, and reported the arrival of the sheriff to Shulick. Shulick then spoke of "the cops" and "the pigs" being there, ran upstairs, and told Barb Shulick and their son to say he was not there. Barb Shulick said she was not going to lie and the son told Shulick, "Mom says she's not going to lie."

The sheriff testified that he carried a flashlight, and had a side arm in his holster, but no weapon drawn. The under-sheriff, several steps behind, carried the order to be served, but also had no weapon drawn. By pre-arrangement, Barb Shulick had left the front door ajar. The sheriff and under-sheriff made no unusual noise or loud noise as they entered the house. The sheriff quietly asked Barb Shulick where Shulick was, and she either very quietly replied, or mouthed words, while pointing upstairs.

According to the sheriff, he began to walk up the stairs, carrying only a flashlight. The area was dim, but it was possible to see; it was about half an hour before dawn and, though a number of lights in the house were non-functional, a very bright light was on in the kitchen. The sheriff testified that Shulick was near the top of the stairs, pointing a sawed-off 12-gauge shotgun at the sheriff. The sheriff said that Shulick shouted loudly a couple of times for him to drop the flashlight. The sheriff responded, "John, I just have some papers for you." Quite suddenly, according to the sheriff, Shulick shoved the gun into his face and he fell to the bottom of the stairs in a pool of blood. The under-sheriff radioed the other two deputies for help. The two deputies came in, and gave assistance until an emergency vehicle took the sheriff to the hospital.

The account given by Shulick and his son was radically different. Shulick testified that he had driven through the small hours of the morning from his parents' home in Lansing, and

had arrived at about 6 a.m. After spending a little time with his ex-wife and speaking briefly with his son, he went upstairs and fell asleep. According to Shulick, he kept two bandoliers and a loaded shotgun under the bed. Shulick testified that he was awakened by the sound of a loud commotion. He said that he had no idea who was there, but it sounded like "an army" was breaking into the house. Shulick got up, thinking the home was being invaded, grabbing the shotgun and putting the two bandoliers around his torso. Someone began to come up the stairs, carrying a bright flashlight, which was shining in his face and making it impossible for him to see. Shulick said that he told the person to drop the light. When the person did not drop the light, a struggle ensued over Shulick's shotgun. According to Shulick, the intruder grabbed the barrel and slipped and fell and the barrel hit him in the mouth. At this point, Shulick heard someone radio, "Officer shot! Officer down!" Shulick testified that at this point he realized for the first time that the person he had struggled with, thinking him an intruder, was actually a police officer. Fearful of the consequences, Shulick ran out of the house. He hid first in a swamp and then in a neighbor's boat, and at the neighbor's urging, turned himself in. However, by stipulation, the surrender was not to the sheriff's department, whom Shulick feared, but the state police, whom he trusted.

The son's testimony largely corroborated Shulick's account. The neighbor on whose boat Shulick hid testified in detail about his encounter with Shulick and the discussions leading to the surrender, and described Shulick as a hard-working, reliable, honest, and peaceful person.

C. The Sheriff's Injuries

The sheriff was taken to the hospital, examined, and treated. His upper lip was dangling loose from his face, and had to be surgically re-attached. According to the sheriff, he has lost sensation in his lip, and this gives him continuing difficulties in speaking, eating, and kissing his loved ones, he testified. The sheriff said his upper and lower jaws were fractured, and that he has had hours of reconstructive dental surgery. The doctor who examined the sheriff after his injuries opined that the injuries were consistent with having a shotgun rammed in his face, or possibly being punched with a clenched fist, but were not consistent with an accidental fall down the stairs. The reason was that "the injury was limited to a very small area of his mouth," whereas with a fall, the area of injuries would have been more widespread. The jaw was not broken, the doctor reported on cross-examination, but three teeth were knocked out. No teeth, however, were broken. The doctor testified that he has seen people who have had teeth knocked out by a fall.

D. The Trial

The trial lasted five days, excluding jury deliberations. The prosecutor's closing argument focused largely on things Shulick's counsel had said in his opening statement that the evidence would show, which the prosecutor said that it did not. The jury deliberated less than two hours before finding Shulick guilty as charged on all three counts. The trial court sentenced Shulick in excess of the guidelines.

III. Disqualification

A. Standard Of Review

Shulick argues that he did not receive a fair trial because the trial judge did not disqualify himself due to prejudice or bias in accordance with MCR 2.003. We review a trial court's factual findings with respect to a motion for disqualification for clear error, and review the application of the law to the facts de novo.[4]

B. MCR 2.003(B)(1)

MCR 2.003(B)(1) calls for disqualification of a judge when, inter alia, "[t]he judge is personally biased or prejudiced . . . against a party." To require recusal of a judge due to alleged personal bias or prejudice, (1) there must be *actual* bias that is *personal* in nature on the part of the judge, and (2) the bias must be extrajudicial in origin, i.e., derived from matters outside what the judge has learned in the case.[5] Rulings of a judge almost never create the basis for a finding of bias.[6] Moreover, the judge's opinions derived from an earlier case involving the party require disqualification only if they "display a deep-seated favoritism or antagonism that would make fair judgment impossible."[7] "[T]he party who challenges a judge on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality."[8]

C. Overcoming The Presumption

In our view, Shulick has not overcome this strong presumption. He has presented only evidence that *he* had a bias against the trial *judge*, not that the *judge* was biased against *him*. The case is, therefore, governed by *Crampton v Dep't of State.*[9] *Crampton* provides for disqualification of a judge if the judge has either (1) "been the target of personal abuse or criticism from the party before him"[10] that, although it need not have arisen from circumstances where the judge initiated the conflict, have gotten the judge "embroiled in a running, bitter controversy,"[11] or (2) "become enmeshed in (other) matters"[12] involving the party seeking

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[4] *Cain v Dep't of Corrections*, 451 Mich 470, 503; 548 NW2d 210 (1996); *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999).

[5] *Cain, supra* at 495-496.

[6] *Id*. at 496.

[7] *Id.*, quoting *Liteky v United States*, 510 US 540, 555; 114 S Ct 1147; 127 L Ed 2d 474 (1994).

[8] *Id.* at 497.

[9] *Crampton v Dep't of State*, 395 Mich 347; 235 NW2d 352 (1975).

[10] *Id*. at 351, quoting *Withrow v Larkin*, 421 US 35, 47 n 15; 95 S Ct 1456; 43 L Ed 2d 712 (1975).

[11] *Id*. at 352 (quoting *Mayberry v Pennsylvania*, 400 US 455, 465; 91 S Ct 499; 27 L Ed 2d 532 (1971).

[12] *Id*. at 351 (quoting *Johnson v Mississippi*, 403 US 212, 215; 91 S Ct 1778; 29 L Ed 2d 423 (1971).

disqualification, so that "experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."[13]

We conclude that Shulick has not met this standard for disqualification, for two reasons. First, the record indicates that the judge never became "embroiled" or "enmeshed" in a controversy with Shulick. Rather, the judge was the object of a diatribe by Shulick, to which the judge never responded inappropriately, and thus never became enmeshed in a controversy of any kind. Rather, his conduct toward Shulick was, at all times, marked by scrupulous fairness. Second, the evidence of Shulick's guilt, and the general indicia of fairness in his trial, were so strong that he cannot establish the "miscarriage of justice" required for reversal.[14]

IV. Prosecutorial Misconduct

A. Standard Of Review

Shulick argues that the prosecutor engaged in misconduct requiring a new trial. We review allegations of prosecutorial misconduct on a case-by-case basis to determine, from an examination of the challenged comments in context, whether the defendant was denied a fair and impartial trial.[15] Here, because the claim of error was not preserved, reversal is appropriate only upon a showing of plain error affecting substantial rights, such that either "the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings."[16]

B. The Prosecutor's Comments

We find that the prosecutor did not comment on the Shulick's failure to present evidence in any way that contradicted the court's instructions that the burden of proof rested entirely on the prosecution and that Shulick was not required to present any evidence at all. Rather, the prosecutor simply compared what Shulick claimed the evidence would show, and what the evidence actually showed. To do so is entirely proper.[17] We conclude that there was no prosecutorial misconduct.

V. Sentencing

A. Standard Of Review

Shulick argues that the trial court's upward departure from the sentencing guidelines mandates resentencing. When reviewing departures from the statutory sentencing guidelines, we

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[13] *Id.*, quoting *Withrow*, *supra*.

[14] *People v Lukity*, 460 Mich 484, 493; 596 NW2d 607 (1999).

[15] *People v Rice (On Remand)*, 235 Mich App 429, 434-435; 597 NW2d 843 (1999).

[16] *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

[17] *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999).

review whether a factor exists for clear error, whether a factor is objective and verifiable de novo, and whether a reason is substantial and compelling for an abuse of discretion.[18] An abuse of discretion has a unique meaning in the sentencing context. The *Babcock* Court stated that "the appropriate standard of review must be one that is more deferential than de novo, but less deferential than the *Spalding*[19] abuse of discretion standard."[20] A reviewing court must also determine "whether taking into account an allegedly substantial and compelling reason would contribute to a more proportionate criminal sentence than is available within the guidelines range."[21]

B. The Trial Court's Articulation Of Its Reasons

We find that the trial court clearly articulated two substantial and compelling reasons for the departure, either of which would, in itself, justify the sentencing departure. The trial court correctly found that the extent of the injuries to the sheriff, which were not considered by the guidelines, justified an upward departure. Although injury was, as Shulick says, scored by the guidelines, the extent of the injuries suffered was not. For example, a sprained or broken arm would have resulted in scoring points. The sheriff sustained permanent grievous injuries that affect the quality of his life. The severity and extent of the sheriff's injuries were not taken into account by the guidelines and justified the upward departure.

The trial court also correctly found that there was objective evidence for Shulick's failure to accept responsibility for his own actions, as demonstrated by his actions and his words in repeatedly blaming his conduct on anyone but himself – on the judge, the sheriff, his ex-wife, the judicial system itself – and his willingness to act contemptuously, and indeed violently, toward public servants carrying out the law, whenever the legal system did not produce the results he wanted. Consideration of these factors made for a more proportionate sentence than would have been possible had they not been considered and so we conclude that there was no clear error in the upward departure.[22]

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Henry William Saad

[18] *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003).

[19] *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

[20] *Id*. at 269.

[21] *Id.* at 264.

[22] *Id*.