# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLOS HENRY DAVIS,

Defendant-Appellant.

UNPUBLISHED
November 17, 2005

No. 256495
Wayne Circuit Court
LC No. 04-002055-01

Before: Jansen, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of three counts of assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

Defendant's first issue on appeal is that the trial court's improper comments amounted to judicial misconduct that denied him a fair trial. After review of this unpreserved issue for plain error affecting defendant's substantial rights, we disagree. See *People v Carines*, 460 Mich 750, 763, 773; 597 NW2d 130 (1999).

A defendant in a criminal trial is entitled to a neutral and detached magistrate. *Cain v Dep't of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996). Words or actions of a judge that belittle or demean defense counsel can be found to deny defendant a fair trial. *People v Wigfall*, 160 Mich App 765, 775; 408 NW2d 551 (1987). However, "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Cain*, *supra*. Further, partiality is not established by expressions of impatience, dissatisfaction, annoyance or anger which are within the bounds of what imperfect people would sometimes display. *Id*. The test is whether partiality could have influenced the jury to the detriment of the defendant. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996).

Here, the only specific example of "belittling" set forth by defendant is the trial court's comment that "You're going to pretend I'm a real Judge and move on, aren't you," in response to defense counsel's continued attempt to elicit hearsay. This comment was made after the prosecution had made a hearsay objection to defendant's testimony of what Maurice McKay (Maurice) said to him on a previous occasion. The court sustained the prosecution's objection,

defense counsel attempted to get the same information again, and then the trial court made the aforementioned comment. Taken in its full context, the comment was made to limit testimony to that which was properly admissible, and does not rise to the level of those made in *Wigfall*; thus, reversal is not warranted.

Defendant also argues that the trial court improperly favored the prosecution throughout the trial and specifically alleges that it showed bias by allowing the prosecutor to ask leading questions to Leroy McKay (Leroy). However, defendant never objected to the alleged leading questions at trial, therefore, it was not biased partiality on the part of the trial court to allow the alleged leading questions to be asked. Furthermore, the record clearly establishes that the trial court was impartial throughout the trial. The trial court sustained proper objections made by the prosecutor, and likewise, sustained proper objections made by defense counsel. Moreover, the jury was instructed that if it believed the trial judge had an opinion regarding defendant's guilt or innocence, it should disregard that opinion. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors," thus, any prejudice that may have resulted from the trial judge's acts or comments would be alleviated. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

Next, defendant argues that the trial court abused its discretion by failing to give the requested impeachment and CJI2d 7.23 self-defense instructions. After de novo review of the instructions in their entirety, we disagree. See *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997); *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002).

A trial court must instruct the jury regarding the applicable law. A criminal defendant has a right to a properly instructed jury, and a requested instruction which is supported by the evidence must be given. MCL 768.29; *People v Rodriguez*, 463 Mich 466, 474; 620 NW2d 13 (2000). Error requiring reversal based on the failure to give requested instructions only occurs if the requested instructions were substantially correct, were not substantially covered in the charge given to the jury, and concerned an important point in the trial so that failure to give them seriously impaired the defendant's ability to present a defense. *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995).

Here, the trial court properly refused to give the requested impeachment instruction. Defense counsel asked for the impeachment instruction because he thought that Leroy's trial testimony was inconsistent with his preliminary examination testimony. Defense counsel specifically alleged that Leroy inconsistently testified at trial that he had hit defendant after he was shot. Defense counsel's allegation is incorrect. In Leroy's direct examination trial testimony, he stated that he did not see a gun come out of defendant's pocket but thought that defendant was reaching for a gun so he hit defendant in the face and was subsequently shot by defendant. At the preliminary examination, Leroy testified that he did not know what defendant was reaching for but thought that defendant was reaching for a gun, and thus, hit defendant in the face and then was subsequently shot by defendant. Therefore, the trial court's determination that Leroy's testimony did not support an impeachment instruction was correct. See *Rodriguez*, *supra*.

The trial court also properly refused to give the requested CJI2d 7.23 self-defense instruction. CJI2d 7.23(1) states that "[t]here has been evidence that the [complainant/decedent] may have committed violent acts in the past and that the defendant knew about these acts. You

may consider this evidence when you decide whether the defendant honestly and reasonably feared for [his/her] safety." CJI2d 7.23(1). The evidence provided that Maurice had committed the previous violent act of shooting at defendant's house in 2000, which defendant knew about. However, Maurice was not a "complainant/decedent" in this case. In fact, Maurice had made peace with defendant earlier in the night and was not involved in the altercation that led to defendant's charges. The altercation that led to defendant's charges involved Eric McKay (Eric), Leroy and innocent bystanders. Defendant testified that he had no previous problems or incidents with Leroy or Eric, and that the 2000 shooting incident he testified to only involved Maurice. Therefore, the evidence did not support the requested CJI2d 7.23 self-defense instruction and, thus, the trial judge properly refused to give the requested instruction. See *Rodriguez*, *supra*.

Next, defendant argues that the trial court abused its discretion when it permitted defendant's 1990 larceny conviction to be used to impeach his testimony because the probative value was outweighed by its prejudicial effect. We disagree that the admission constituted an abuse of discretion. See *People v McDaniel*, 256 Mich App 165, 167; 662 NW2d 101 (2003).

The credibility of a witness may be impeached with evidence of a prior conviction if the crime contained an element of dishonesty, false statement, or theft, was punishable by more than one year in prison, and has significant probative value on the issue of credibility. *People v Cross*, 202 Mich App 138, 146; 508 NW2d 144 (1993), quoting MRE 609. If the witness is the defendant in a criminal trial, evidence of a prior conviction may not be used to impeach unless the court also determines that the probative value of the evidence outweighs its prejudicial effect. *Cross*, *supra*. To determine the prejudicial effect, "the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify." *People v Meshell*, 265 Mich App 616, 635; 696 NW2d 754 (2005), quoting MRE 609(b).

We cannot conclude that the trial court abused its discretion when it held that the probative value of the larceny conviction outweighed its prejudicial effect. Although the larceny conviction was only minimally probative of veracity, *Meshell*, *supra* at 636, the conviction was not similar to the charged offenses and had little possible effect on the decisional process with respect to defendant testifying, thus, the use of the conviction had little prejudicial effect. See *id*. at 635-636. We note that the trial court did not go into great detail on the record regarding this evidentiary decision, but it is clear that the court was aware of the pertinent factors and of its discretion regarding the admissibility of the evidence. See *McDaniel*, *supra* at 168. Further, even if the admission was in error, the error was harmless in light of the overwhelming evidence of guilt in the case. See *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992).

Finally, defendant argues that the trial court erred when it denied his motion for a directed verdict because his convictions were insufficiently supported by the evidence. After de novo review, considering the evidence in the light most favorable to the prosecutor, we disagree and conclude that a rational trier of fact could have found the essential elements of the charged crimes proved beyond a reasonable doubt. See *People v Werner*, 254 Mich App 528, 530; 659 NW2d 688 (2002).

The elements of assault with intent to do great bodily harm less than murder are: (1) an assault through an attempt or offer with force and violence to do corporal hurt to another with (2) a specific intent to do great bodily harm less than murder. *People v Lugo*, 214 Mich App 699,

710; 542 NW2d 921 (1995). Here, Leroy, Eric and Hermell Whouie (Whouie) all testified that defendant shot at Leroy and subsequently fired more shots into a crowded bar while "struggling" with Eric. Furthermore, Daniel Ervin Butler (Butler) testified that defendant fit the description of the individual he saw pull out a gun and fire shots into the crowded bar while struggling with another individual. And, Sergeant Daniel Reed (Reed), an expert in firearms identification, testified that the bullets submitted to him from the crime scene were fired from the gun submitted to him, which was found on defendant's person when he was arrested. There was sufficient evidence to support the convictions. But, defendant claims that the record establishes that he acted in self-defense.

Generally, a justified killing in self-defense requires that the defendant honestly and reasonably believe he is in imminent danger of death or great bodily harm and that deadly force is necessary to prevent his death or great bodily harm. *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). "Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v Truong*, 218 Mich App 325, 337; 553 NW2d 692 (1996). Here, the self-defense claim was disproved beyond a reasonable doubt. The evidence included that defendant, a former employee, knew that all patrons in "Francel's II" were patted down for weapons before entry, that defendant was not threatened with deadly violence before he shot at Leroy and subsequently shot randomly into the crowded bar, and that defendant reached for his gun before Leroy punched him. In sum, defendant could not honestly and reasonably believe he was in imminent danger of death or great bodily harm and that deadly force was necessary to prevent his death or great bodily harm. Therefore, the trial court properly denied defendant's motion for a directed verdict.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood