

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MONTREAL DARNELL CHRISTIAN-BATES,

Defendant-Appellee.

UNPUBLISHED

March 25, 2008

No. 269919

Ingham Circuit Court

LC No. 05-000749-FC

ON REMAND

Before: Bandstra, P.J., and Zahra and Owens, JJ.

PER CURIAM.

After a jury trial before Ingham Circuit Judge Beverly Nettles-Nickerson, defendant was convicted 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 (“felony-firearm”), MCL 750.227b. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to concurrent terms of 72 to 180 months’ imprisonment for the assault conviction and 45 to 90 months’ imprisonment for the felon in possession conviction, and to a consecutive term of two years’ imprisonment for the felony-firearm conviction.¹ Again, we reverse and remand for a new trial.

Defendant appealed his convictions, alleging prosecutorial misconduct and denial of his right of due process. When this case was initially before us, we determined that the prosecutor did not commit misconduct, but we agreed with defendant’s contention that Judge Nettles-Nickerson’s abrupt termination of his counsel’s closing argument denied him a fair trial. However, our Supreme Court vacated our judgment and remanded the case for reconsideration. *People v Christian-Bates*, 480 Mich 1015; 743 NW2d 65 (2008). It instructed,

On remand, the Court of Appeals shall address whether the trial judge’s admitted error in cutting off defense counsel’s closing argument was harmless, taking into consideration that the defendant admitted shooting at the victim, the

¹ We note that in an unrelated case, defendant pled to one count of armed robbery, MCL 750.529, one count of first-degree home invasion, MCL 750.110a(2), one count of felon in possession of a firearm, MCL 750.224f, and two counts of felony-firearm, MCL 750.227b. Defendant was sentenced to 14 years and 3 months to 30 years’ imprisonment for the armed robbery conviction, 8 to 30 years’ imprisonment for the first-degree home invasion conviction, four to ten years’ imprisonment for the felon in possession conviction, and two years’ imprisonment for each felony-firearm conviction.

only question for the jury was the defendant's intent, and the defendant was convicted of the lesser offense of assault with intent to do great bodily harm. [*Id.*]

Because our initial judgment has been vacated, we again address both issues presented to us during the initial appeal.

First, defendant argues that the prosecutor committed misconduct by eliciting testimony from Officer Brian Rendon concerning whether it is common for witnesses to give varying accounts of events surrounding assaults. Consistent with our original judgment in this case, we disagree with defendant's claim of error. We review questions of prosecutorial misconduct de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

In *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007), this Court stated:

Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial. A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the defendant's guilt or innocence. Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context. [Citations omitted.]

In *Dobek*, this Court also recognized the general rule that precludes a witness from testifying about the credibility of another witness, because this testimony invades the jury's exclusive province of assessing witness credibility. *Id.* at 71.

Rendon's testimony was admissible under MRE 701 because his opinion regarding his experiences with eyewitnesses in his seven-and-a-half years' service as a police officer constituted an opinion rationally based on his perception. Moreover, Rendon did not testify regarding whether any particular witness was credible. Rather, he testified that discrepancies in the testimony of different witnesses are common. This testimony did not invade the jury's province of assessing witness credibility. The jury retained its function of identifying the accurate version of the events, thus preserving its role as the ultimate arbiter of credibility. Accordingly, here, as in *Dobek*, the prosecutor was within the bounds of his authority when he elicited the challenged testimony from Rendon.

Next, defendant argues that the trial court denied him a fair trial by abruptly terminating his counsel's closing argument, effectively disparaging his case. Defendant acknowledges that the trial court had authority to set time limits on closing arguments, see MCR 2.507(F), but maintains that the manner in which the court ended the argument conveyed a tacit message to the jury that the court found defense counsel's argument meritless. Even after considering that defendant admitted shooting at the victim, that the only question for the jury concerned defendant's intent, and that defendant was convicted of the lesser offense of assault with intent to do great bodily harm, we still agree with defendant's contention that Judge Nettles-Nickerson's abrupt termination of his counsel's closing argument denied him a fair trial. We review the trial court's actions for an abuse of discretion. *People v Green*, 34 Mich App 149, 152; 190 NW2d 686 (1971). "The test to be applied when there is an allegation that a trial judge's comments were of such a nature as to unduly influence a jury is for the reviewing court to examine the

record and determine whether the trial court pierced the veil of judicial impartiality.” *People v Sowders*, 164 Mich App 36, 49; 417 NW2d 78 (1987).

Closing arguments in this case began at 2:00 p.m. on December 12, 2005. The prosecutor’s initial closing argument spans 13 transcript pages, which amounted to approximately 20 minutes of argument before the jury.² The first portion of defense counsel’s argument spans 18 pages, which would be less than 30 minutes of argument. At this point, Judge Nettles-Nickerson interrupted him to remind him of the time. Counsel resumed his argument until Judge Nettles-Nickerson stopped him mid-sentence approximately six minutes later:

Defense counsel: If [defendant] had the motive and he really wanted to kill this guy, it would have been a very simple thing to do. This was not about an intent to kill. This was about an intent to beat and put in fear. An intent to beat up is not an intent to do great bodily harm less than murder. When you listen to the definition of what that means, that’s causing serious physical harm, not the kind you’d get in an ordinary fight—

The court: Thank you, counselor.

Defense counsel: —even with a slap with a beer bottle.

The court: Final closing statement.

Defense counsel: Excuse me, Your Honor?

The court: Thank you. Prosecutor, final closing, brief rebuttal.

The record does not indicate that there was an urgent need to hasten closing arguments, and the trial court and parties acknowledged that the court had not informed counsel of any time limits pertaining to closing arguments. After the jury began deliberations, defense counsel moved for a mistrial. During the motion, defense counsel and Judge Nettles-Nickerson had the following exchange:

Defense counsel: The Court, having curtailed my final argument, effectively embarrassed me in front of the jury, diminished my ability to argue my client’s case on his behalf and my theories of defense in this case. Any diminishment of what I do, although it may reflect badly on me, reflects more harmfully on my client and causes the jury, I believe, to believe that this Court holds anything that I argued with very little value. If the Court sets that tone and gives that example to the jury, it certainly sends them a message that the defense has little merit and, therefore, the Defendant should be found guilty. I, therefore, move for a mistrial on that ground. Thank you.

² The record indicates that defense counsel’s entire argument lasted “over 35 minutes.” The closing arguments by both parties, along with the jury instructions, lasted approximately one-and-a-half hours, spanning 58 transcript pages. This results in an estimate that recitation of each transcript page took approximately a minute and a half.

* * *

The court: Thank you. This Court usually does set limits so the Court was mistaken and I do apologize to the defense attorney. . . . I do believe that it was over 35 minutes of final and before the Court had, I hope, gracefully in front of the jury said, it is now time, thank you, but I did give you a little warning to be cognizant of the time.

The trial court then denied defendant's motion for a mistrial.

Although Judge Nettles-Nickerson believed otherwise, we maintain that her interruption of defense counsel's closing argument in mid-sentence was not "graceful." Defense counsel was given no warning before commencing his argument that the trial court would limit the time in which he could give his argument. Further, when Judge Nettles-Nickerson reminded defense counsel of the time during his closing argument, she did not indicate that defense counsel had a set period of time in which to end his closing argument.³ Further, Judge Nettles-Nickerson did not indicate to the jury that she halted defense counsel's closing argument because he had exceeded a particular time limit. Although the trial court has the authority to set time limits on closing arguments, MCR 2.507(F), pursuant to the Code of Judicial Conduct, Canon 3, a trial court judge also has a duty to "avoid interruptions of counsel in their arguments"

On remand, our Supreme Court asks us to address whether Judge Nettles-Nickerson's conduct was harmless. After review, we conclude that the trial court's error was not harmless. Defendant's theory of the case was that his decision to fight the victim and to shoot his handgun merely to scare the victim did not establish either his intent to kill or his intent to commit great bodily harm less than murder. By halting defense counsel's argument in the middle of his explanation that "an intent to beat up is not an intent to do great bodily harm less than murder," without advance warning or a chance to make a concluding remark, Judge Nettles-Nickerson acted in a manner that would lead a reasonable juror to believe that she did not value defense counsel's remarks and argument in support of defendant's acquittal. Conversely, Judge Nettles-Nickerson's interruption of defense counsel at this point in his argument could indicate to a reasonable juror that Judge Nettles-Nickerson disagreed with defense counsel's contention that defendant did not have the intent necessary to commit great bodily harm less than murder. In so doing, Judge Nettles-Nickerson pierced the veil of judicial impartiality and acted in a manner that unfairly favored the prosecution. Accordingly, even after consideration of the factors raised by our Supreme Court in its order, we conclude that the trial court abused its discretion when it interrupted defense counsel's closing argument and, in so doing, denied defendant a fair trial. The error was not harmless, and remand for a new trial is necessary.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Donald S. Owens

³ The trial court merely stated, "Counselor, I'm going to remind you of the time. Thank you."