

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTIN VARGAS, JR.,

Defendant-Appellant.

UNPUBLISHED

April 24, 2008

No. 277416

Wayne Circuit Court

LC No. 06-011459-01

Before: Kelly, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felonious assault, MCL 750.82, 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 to five years' probation for the felonious assault and felon in possession of a firearm convictions, and two years in prison for the felony-firearm conviction. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that he is entitled to a new trial because the trial court made improper remarks during jury selection. Defendant asserts that the trial court stated that defendant would not testify because he was "taking" the Fifth Amendment and thereby choosing not to incriminate himself. The trial court denied defendant's motion for a mistrial based on this matter. We reject defendant's arguments.

We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005). We review jury instructions de novo "in their entirety to determine if there was any error, and even 'if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights.'" *People v Osantowski*, 274 Mich App 593, 611; 736 NW2d 289 (2007), quoting *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003).

"No person may be deprived of life, liberty, or property without due process of law." US Const, Am V; Const 1963, art 1, § 17; *People v McGee*, 258 Mich App 683, 699; 672 NW2d 191 (2003). Due process requires a fair trial before an unbiased judge. *Bracy v Gramley*, 520 US 899, 904-905; 117 S Ct 1793; 138 L Ed 2d 97 (1997); *Cain v Dep't of Corrections*, 451 Mich 470, 499; 548 NW2d 210 (1996). A criminal defendant is entitled to a fair and impartial trial. US Const, Am VI; Const 1963, art 1, § 20; *People v Conley*, 270 Mich App 301, 307; 715 NW2d

377 (2006). The purpose of voir dire is to “elicit sufficient information from prospective jurors to enable the trial court and counsel to determine who should be disqualified from service on the basis of an inability to render decisions impartially.” *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996). In accomplishing this task, the trial court is afforded “considerable discretion in both the scope and conduct of voir dire.” *Id.* (quotation marks and citation omitted); MCR 6.412(C). A trial court’s discretion regarding the conduct of trial is not unlimited; rather, if its conduct “pierces the veil of judicial impartiality,” the defendant’s conviction must be reversed. *Conley, supra* at 307-308. In determining whether the challenged conduct pierced the veil of impartiality, the appropriate test to apply is “whether the trial court’s conduct or comments were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial.” *Id.* at 308 (quotation marks and citation omitted).

During jury voir dire, the trial court stated that the prosecution bore the burden of proof and “the defendant doesn’t have to do a darn thing.” The trial court explained that defendant did not have to prove anything or call any witnesses because he “had no burden, which means the defendant may not even testify, which is his right, which we call, right against self-incrimination.” The trial court asked if the prospective jurors had “heard of taking the Fifth” and explained that it was the right not to incriminate oneself. The trial court asked if any of the prospective jurors would like to hear from defendant, and some raised their hands. The trial court explained that defendant was presumed innocent and admonished the prospective jurors that they were required to take the evidence as it was presented and defendant had no obligation to present any witnesses. After a conference off the record, the trial court expanded, stating that it did not know whether defendant would testify, but he was not required to do so. The trial court stated that a defendant might not want to testify for many reasons, including being nervous, having never testified before, or his attorney’s advice that it was not necessary because “the case is overwhelmingly a not guilty.” The trial court then stated, “I wouldn’t want you to think that someone doesn’t testify just because they have a Fifth Amendment Right. But that is a Fifth Amendment Right not to testify and no one is required to testify. And that certainly is the law.” After the jury was impaneled, defendant moved for a mistrial, which the trial court denied.

Contrary to defendant’s argument, the trial court never indicated that defendant would not be testifying; rather, it stated three times that it did not know whether he would be testifying. The trial court properly stated that a defendant’s right to not testify arises from the constitutional right against self-incrimination provided by the Fifth Amendment. See *People v Wyngaard*, 462 Mich 659, 671-672; 614 NW2d 143 (2000). The trial court provided several valid reasons why a defendant might not want to testify, other than a desire not to incriminate himself. Further, during its final instructions to the jury, the trial court stated, “Every defendant has the absolute right not to testify. When you decide this case, you must not consider the fact that the defendant did not testify. It must not affect your verdict in any way.” Although the trial court’s remarks during voir dire were unnecessarily expansive, they did not improperly suggest that, if defendant opted not to testify, this decision was based on a desire not to incriminate himself. Therefore, we are not convinced that these remarks were of such a nature that they unduly influenced the jury and thereby deprived defendant of his right to a fair and impartial trial. *Conley, supra* at 308. It follows that the trial court did not abuse its discretion by denying defendant’s motion for a mistrial.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Donald S. Owens

/s/ Bill Schuette