STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENTAL JUDAN MOSS,

Defendant-Appellant.

UNPUBLISHED
July 17, 2008

No. 278535
Wayne Circuit Court
LC No. 07-004496-01

Before: Saad, P.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant was convicted at a bench trial of two counts of armed robbery, MCL 750.529, but was acquitted of carjacking, MCL 750.529a. Defendant was sentenced to concurrent prison terms of 51 months to 16 years. Defendant appeals as of right. We affirm. This case has been decided without oral argument under MCR 7.214(E).

Defendant first argues the trial judge denied him a fair trial and due process "by not observing the presumption of innocence." While this issue is somewhat awkwardly phrased by defendant, it can only reasonably be considered as amounting to a claim of error requiring reversal based on inappropriate remarks by the trial judge that evinced improper bias against defendant and for the prosecution. Because this issue is unpreserved, review is for plain error that affected defendant's substantial rights. *People v McCuller*, 479 Mich 672, 681; 739 NW2d 563 (2007). Further, because this case involves a bench trial, "concern over the effect of the judge's comments and conduct did not exist," but a trial judge's comments and conduct during a bench trial "can indicate a possible bias." *In re Forfeiture of $1,159,420*, 194 Mich App 134, 153; 486 NW2d 326 (1992). However, there is "a heavy presumption of judicial impartiality." *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999).

Defendant asserts that remarks by the trial judge during defense counsel's opening statement indicated a "dubious attitude." While the trial judge's references to Howard Woodard "just" being with defendant the next day and to this being a "case of coincidence" in the course of defense counsel's opening statement might raise concern as to whether he was prematurely discounting the defense theory, it is not plain that this is the import of those remarks. Rather, it is reasonably conceivable that the trial judge wanted to be sure for purposes of his role as the fact-finder at the bench trial that he accurately understood the defense theory as to where defendant was at the relevant times and why he was there. Further, even if the trial court's remarks are taken as reflecting skepticism about the defense theory, "[w]here a judge forms

opinions during the course of the trial process on the basis of facts introduced or events that occur during the proceedings, such opinions do not constitute bias or partiality unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible." *Wells*, *supra* at 391. It is not plain that any initial skepticism the trial judge had about the defense theory was so great that he was tainted by a deep-seated favoritism or antagonism that rendered fair judgment impossible, particularly in light of the fact he ultimately acquitted defendant of the carjacking charge.

Defendant next asserts his trial testimony was continually interrupted by questions from the trial judge "which contain the mocking tone of cross-examination." Defendant's first example occurred after he testified, "I don't really drive because, you know what I'm saying, I ain't got no license," the trial court asked him, "Don't really drive means that sometimes you do?," to which defendant replied, "Because I used to." A trial court may question a witness to clarify testimony. *People v Weathersby*, 204 Mich App 98, 109; 514 NW2d 493 (1994). Defendant's testimony that he did not "really drive" was vague because it could reasonably be taken either as he did not drive at all or as meaning that he did not commonly drive. Accordingly, it was not plainly inappropriate for the trial court to inquire whether defendant meant he sometimes drove in an effort to clarify his testimony.

Defendant also refers to the trial judge as having "interrupted" when he testified about his pastor helping him lead a law-abiding life. However, defendant provides only selective portions of the record. Apart from the full context, the trial judge's reference to defendant testifying to the effect that religion changed his life might appear as a sarcastic remark. But in context, the trial judge's initial observation that he thought he understood what defendant was saying seems to be a reasonable, and even helpful, matter to point out to defense counsel who expressed concern the judge did not know what defendant was saying. It is also not plain the trial judge's synopsis of defendant's testimony that he had a prior shoplifting charge in Oakland County, that religion changed his life, and that defendant's minister helped get him a job reflected bias or antagonism toward defendant. Rather, the trial judge could have intended this substantially accurate summary of defendant's testimony as illustrating that he understood defendant despite defendant's repeated use of the phrase "you know what I'm saying," which apparently concerned defense counsel that it may have distracted or confused the judge.

Without providing further detail, defendant claims the trial court continually interrupted his "direct testimony with cross-examination which demonstrates the presumption of innocence was not being applied" and then refers to certain pages of the trial transcript, which actually transcribed part of the redirect examination by defense counsel. This argument, with such a vague reference to five pages of trial transcript, is so amorphous and lacking in detail that we view it as being abandoned based on inadequate argument. See *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004) ("An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue."). Regardless, in the referenced questioning, the trial court essentially questioned defendant about discrepancies between his trial testimony and his statements or alleged statements to Sergeant Joseph Turner, Jr., including why defendant admittedly told the sergeant he was at home when he claimed in his trial testimony that he was actually at church. A trial judge has more discretion in questioning witnesses at a bench trial than during a jury trial. *In re Forfeiture of $1,159,420*, *supra* at 153. Given that the trial judge was the fact-finder at the bench trial and as such was fundamentally concerned with

ascertaining the truth as to whether defendant was a perpetrator in the incident, it seems reasonable for the judge to have pointedly questioned defendant about these matters in an effort to assess his credibility. It is not plain that this questioning involved impropriety or bias.

Defendant also indicates that certain questions the trial judge asked of Pastor Rico Johnson were inappropriate. First, we conclude there was no plain error in the trial judge asking Johnson about whether the uniform he believed defendant was wearing during the church service was a Wendy's uniform because Johnson's testimony on that point may have seemed unclear. Further, given a trial judge's greater discretion in questioning witnesses at a bench trial, *In re Forfeiture of $1,159,420*, *supra* at 153, there was no plain error in the trial judge asking questions to clarify that Johnson did not have personal knowledge that a driver took defendant to his grandmother's residence after the church service and to expressly ascertain that Johnson did not have personal knowledge of defendant's whereabouts at the time of the robbery incident.

Defendant asserts the trial judge showed "unjustified impatience" with defense counsel during two brief exchanges related to the possible failure of defense counsel to provide a witness list. However, given that there is no indication of the trial judge imposing any sanction on the defense in this regard and that comments critical of counsel are ordinarily not supportive of finding bias, *Wells*, *supra* at 391, we conclude that these remarks do not support a finding of bias.

Defendant claims the trial judge "interjected" during the cross-examination of Kenneth Moss that defendant "never goes to church in that suit, no." However, defendant's insinuation that the trial judge simply interjected that comment is misleading. During the prosecutor's cross-examination of Kenneth, she asked him if defendant wore his Wendy's uniform when he went to church, to which Kenneth replied, "Not that I can remember. I don't think he went to church—he don't never go to church in that, so no." At that point defense counsel interjected, "I'm sorry?" In reply to this apparent indication that defense counsel did not hear or understand the testimony, the trial court stated, "He never goes to church in that suit, no." Thus, rather than simply interjecting a remark, the judge merely responded to defense counsel's unusual interjection during the prosecutor's cross-examination of a witness with an accurate statement about the testimony of the witness. This does not plainly reflect any bias by the trial judge.

Defendant also claims that comments by the trial judge regarding certain members of his family not being allowed in the courtroom "revealed [the judge's] attitude towards the defense." The trial judge stated the family members were not being permitted in the courtroom "[b]ecause of court security concerns brought to the court's attention by the deputies." Defense counsel then referred to defendant's father waiting to hear from her because he wanted to know if he could be there, and the trial judge replied, "Well, if you don't go out, obviously he can't be. All right." This does not plainly reflect bias by the trial judge to overcome the presumption of judicial impartiality. Rather, it could reasonably be understood as merely expressing that the trial judge did not believe it was necessary to delay the proceedings for defense counsel to leave

the courtroom to tell defendant's father he would not be allowed in the courtroom when that should have quickly become apparent to him if defense counsel did not leave the courtroom.[1]

Keith Moss, defendant's brother, testified he was with defendant on the night of the incident from around 9:15 or 9:30 p.m. after defendant arrived home from church. Keith indicated that defendant had his Wendy's uniform on at the time. The trial judge asked Keith, "So he must have gone from work right to church then, right?" Defendant includes this as an example of the trial judge engaging in "prosecution-styled cross examination." That question may not have been necessary or appropriate because it was essentially the role of the trial judge, as fact-finder, to draw conclusions from witness testimony. Nevertheless, it is not plain that this question, which amounts to noting an obvious inference from Keith's testimony, i.e., that defendant apparently went from work to church without changing clothes, is reflective of bias. Rather, the question merely amount to a neutral articulation of the import of Keith's testimony.

Defendant also indicates it was inappropriate cross-examination for the trial judge to ask Keith with regard to checking on his grandmother's apartment: "And you thought you would go over there because your older brothers wouldn't be able to take care of it?" In context, in testifying as to where he was on the night of December 22, 2006, Keith referred to going to a location "because my grandma, she's very sick, so I constantly take care of her." The trial judge then observed, "Your grandma wasn't even there." Keith then said she was not there at the time but she had called him and asked him to check on her apartment, which led to the trial judge's questions related to Keith's brothers already being there. In light of a trial judge's greater discretion in questioning witnesses at a bench trial, *In re Forfeiture of $1,159,420, supra*, at 153, it is not plain that this questioning, which appeared to be directed at understanding Keith's testimony expressing that he was going to a location because his grandmother was sick even though she was not at that location, was reflective of bias.

Defendant argues that, in questioning Patricia Green, the trial judge demonstrated "his lack of respect for the defense and his reliance on the earlier plea of Howard Woodard." The tenor of the trial judge's questions may have reflected skepticism as to Green's claim she was unaware of the stolen car being in her garage. However, as noted above, "[w]here a judge forms opinions during the course of the trial process on the basis of facts introduced or events that occur during the proceedings, such opinions do not constitute bias or partiality unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible." *Wells, supra* at 391. It was reasonable that the trial judge found it odd or untruthful for Green to claim she was unaware of the presence of a vehicle in her own garage. Accordingly, this impression based on her testimony was not indicative of bias. Further, the trial judge's rather extensive questioning of Green, rather than showing lack of respect for the defense, might have been an attempt to ascertain whether there was a plausible explanation for her claimed lack of knowledge that would address the trial judge's skepticism. Such questioning was not plainly inappropriate given a trial judge's greater discretion to question witnesses at a bench trial. *In re Forfeiture of $1,159,420, supra* at 153. With regard to the trial judge's reference to Howard

[1] Defendant has not raised an issue on appeal challenging the substance of the trial judge's decision to exclude certain members of his family from the courtroom.

Woodard's guilty plea, even assuming that consideration of that plea was improper, an improper view of the law clearly is not necessarily indicative of bias. Moreover, there is no basis from which to conclude that the trial judge's consideration of Woodard's guilty plea affected defendant's substantial rights. *McCuller, supra* at 681. Whether Woodard was involved in the robbery at issue was not central to the defense. Defendant presented his own testimony and that of other witnesses in support of an alibi defense. Thus, the critical issue at trial was whether defendant was involved in the robbery, not whether Woodard was.

Defendant also faults the trial judge for attempting to block a permissible question from defense counsel to Green asking if she had any discussion with anyone regarding the Pontiac. Defense counsel asked Green if she had any direct information as to how the G-6 Pontiac got in her garage, and Green replied, "No, it's just hearsay." The trial judge initially interjected that it "would be hearsay" when defense counsel asked Green if she had any discussion with other people, but, after defense counsel noted she was only asking Green if she had discussion and was "not asking what the person said," the trial judge ultimately allowed Green to answer the question if she "had any discussions with someone regarding the car," to which Green replied yes. "A trial court has broad discretion in regard to controlling trial proceedings." *People v Taylor*, 252 Mich App 519, 522; 652 NW2d 526 (2002). Accordingly, it is not plain error for the trial judge to initially restrict defense counsel's question, which seemed directed at eliciting inadmissible hearsay testimony, reflected bias, particularly as the trial judge ultimately allowed the question after defense counsel made clear she was not seeking to elicit hearsay.

Defendant refers to the conflict between the trial judge and the defense reaching a "zenith" with regard to warnings by the trial judge to defense witness Gabriel Woodard. Without specifying what was wrong with the warnings, defendant concludes that they "went far beyond any legal duties and again betrayed a bias against the defense." Citing to several pages of trial transcript, defendant asserts the trial judge "attempted to dissuade [Gabriel] Woodard from testifying, accused [defense counsel] of an ethics violation and filed an Attorney Grievance Commission complaint against her." Notably, despite the trial court's warnings, Gabriel Woodard did testify to a version of events in which he and two other men—and not defendant—were responsible for the robbery incident, including taking a white Pontiac to the location where it was found by the police. While the trial judge effectively informed Gabriel Woodard that he did not have to testify and that any incriminating testimony he provided could be used against him, this was not improper or reflect bias against defendant. Rather, the trial judge acted appropriately in warning Gabriel Woodard about his right against self-incrimination. See *People v Clark*, 172 Mich App 407, 416; 432 NW2d 726 (1988) (referring to a trial court "reminding the witness of her privilege against self-incrimination" as "a legitimate warning"). The trial judge also referred to defense counsel having talked to Gabriel as an ethics violation and stated that he "may be responsible for turning [that violation] into the Attorney Grievance Commission."[2] Gabriel Woodard was clearly in custody and represented by counsel with regard to some type of criminal charges at the time of his contact with defendant's counsel. The trial judge was

[2] Contrary to defendant's description, it is not clear the trial judge actually filed a complaint against defense counsel with the Attorney Grievance Commission; rather, the judge only stated he might have to do so.

presumably referring to MRPC 4.2, which generally precludes a lawyer representing a client from communicating with a party about a matter related to that representation where the party is represented by another lawyer in the matter. Given that defendant's counsel's communication with Gabriel Woodard reasonably raised concern as to a possible violation of MRPC 4.2 and that comments critical of counsel are ordinarily not supportive of finding bias, *Wells, supra* at 391, it is not plain that the trial judge's remarks indicating that he believed an ethics violation may have occurred reflected bias against defendant.

Defendant also faults the trial judge for certain seemingly sarcastic questions and a remark during Gabriel Woodard's testimony. While this may have been inappropriate, it merely reflected that the trial judge did not find Gabriel Woodard's testimony to be credible. Because opinions formed during the course of the trial process on the basis of facts introduced generally do not constitute bias, *Wells, supra* at 391, these questionable episodes do not plainly establish that the trial judge was biased against defendant.

In view of a trial court's greater discretion to question witnesses at a bench trial, *In re Forfeiture of $1,159,420, supra* at 153, there was no plain error in the trial judge's questioning of Kenzetta Moss. The questions were aimed at assessing the credibility of her testimony about defendant and other family members being together and eating a pizza when the robbery was alleged to have occurred. Specifically, it was proper for the trial judge to question the reasonableness of her claim that such a large number of people shared but a single pizza.

Defendant also argues that it was improper for the trial judge to question Moss about her claim of not knowing that defendant had a prior shoplifting conviction. In this regard, Moss was effectively attempting to offer positive character testimony about defendant by describing him as "always going to church or working." The trial judge's questions, even if slightly sarcastic in tone, reflected his belief that Moss was not sufficiently familiar with all aspects of defendant's life to opine on his character. Because opinions formed during the course of the trial process on the basis of facts introduced generally do not constitute bias, *Wells, supra* at 391, it is not plain that these questions reflected bias against defendant.

Finally, as to defendant's argument related to the trial judge's alleged bias, he faults the judge for referring to matters not in evidence, specifically to Gabriel Woodard and two other men being codefendants in a separate carjacking case and to other pending charges against Gabriel Woodard. While these references may have been inappropriate, it is not plain that they reflected bias against defendant or were relevant to the trial judge's ultimate verdict in the case.

Defendant also argues there was insufficient evidence to support his convictions because (1) the victim was initially equivocal in identifying defendant as one of the assailants, (2) the alibi evidence presented by defendant, and (3) the evidence that Gabriel Woodard and two other men were actually guilty of the offense. However, "[t]he credibility of identification testimony is a question for the trier of fact that we do not resolve anew." *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Further, in determining whether sufficient evidence was presented to support a conviction, the evidence is viewed in a light most favorable to the prosecution. *Id*. Thus, the victim's trial testimony identifying defendant with "no doubt" as the man who pulled the gun on him during the incident was sufficient to support a determination that defendant was one of the assailants.

Affirmed.

/s/ Henry William Saad
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello