

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRANCE EFRON WRIGHT,

Defendant-Appellant.

UNPUBLISHED

July 28, 2009

No. 283997

Wayne Circuit Court

LC No. 07-014620-FH

Before: Talbot, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted 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, MCL 750.227b. He was sentenced to concurrent prison terms of 1-1/2 to 4 years for the felonious assault conviction and 1-1/2 to 5 years for the felon in possession conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. Because the trial court expressed skepticism and incredulity of defense witness Devon Windom's testimony through its questioning of Windom, we reverse defendant's convictions and remand for a new trial.

I. Summary of the Facts

Junius Spencer testified that on July 9, 2007, at approximately 10:30 p.m., he walked past a group of men congregating by a dumpster in the parking lot of his apartment complex. According to Spencer, a man whom he later identified as defendant began to follow him. After an exchange of words, defendant waved a gun at Spencer and told him to sit down on a concrete bumper in the parking lot. When Spencer disregarded the demand and turned around, defendant hit him on the side of his face with the gun. Spencer fell to the ground and blacked out for a couple seconds. Defendant then picked Spencer up by the shirt, dragged him over to the crowd, and asked if anyone knew him. One person said, "[H]e straight." Defendant warned Spencer, "[N]ext time I will smoke you." Spencer went back to his apartment and called the police.

Linda Rustin, defendant's alibi witness, testified that she was performing secretarial work for defendant on the night of the assault. Rustin claimed that she and defendant left defendant's office at the apartment complex between 9:00 and 9:30 p.m. and drove directly to her home in Brownstown, which was approximately 45 minutes away. Rustin stated that defendant dropped her off at her home "[p]robably" between 10:00 and 10:30 p.m.

Devon Windom, a defense witness, claimed responsibility for the assault. Windom testified that he hit Spencer in the face with a pipe wrench at the apartment complex on July 9, 2007, at approximately 9:45 p.m. Windom stated that he was working for Affordable Public Plumbing at the time, that defendant was his boss, and that he was using a white van. He was at the apartment complex to return some tools and to turn in his money and receipts. He claimed that while unloading tools from the van, Spencer walked past him and looked at him “kind of strange and mumbling little things under his voice.” Windom stated that as he continued to unload the van, Spencer approached again, “cussing and swearing,” and asked why Windom was following him. Spencer had a stick in his hand and “made a gesture” toward Windom. Windom hit Spencer with a pipe wrench and then left the area.

Windom stated that he first had “little inklings” that defendant had been charged with assaulting Spencer when Investigator Tolbert came to the apartment complex and said that he was looking for defendant about a confrontation that occurred at the complex. After the preliminary examination, Windom contacted defendant’s former attorney, who told him that she would contact someone, but he did not hear anything after that. He explained that he went to a later proceeding and spoke with the prosecutor, who told him she would have someone contact him. He subsequently spoke with Investigator Tolbert.

II. Questioning and Comments by the Trial Court

Defendant argues that the trial court’s questioning of Windom about his delay in reporting his involvement in the assault and the court’s comments about the length of the trial were improper and denied him a fair trial. Defendant did not object to the trial court’s questioning either during the court’s interrogation or at the next available opportunity when the jury was not present, see MRE 614(c), or to the court’s comments. Therefore, this issue is unpreserved and our review is limited to plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Viewed in context, the trial court’s comments referencing the expected length of trial did not improperly suggest that this was an “open-and-shut case,” as in *People v Conyers*, 194 Mich App 395, 405-406; 487 NW2d 787 (1992). These comments simply informed the jurors of the estimated length of the trial based on the number of witnesses the parties intended to call. Further, the trial court’s remarks immediately before jury deliberations did not demonstrate partiality or improperly urge the jury to reach a verdict. Indeed, the court expressly advised the jurors that they should *not* feel pressured to hurry the deliberations.

A trial court may question a witness to clarify testimony or to elicit additional relevant information, MRE 614(b); *Conyers*, *supra* at 404, but its questions should be posed in a neutral manner, *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996); *People v Weathersby*, 204 Mich App 98, 109; 514 NW2d 493 (1994). The court must exercise caution to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial. *Weathersby*, *supra* at 109. It “may not assume the prosecutor’s role with advantages unavailable to the prosecution.” *Id.* The test is whether the trial court’s questions “may well have unjustifiably aroused suspicion in the mind of the jury” [sic] as to a witness’ credibility, . . . and whether partiality quite possibly could have influenced the jury to the detriment of defendant’s case.” *Conyers*, *supra* at 405 (internal quotations and emphasis omitted). See also *People v Ross*, 181 Mich App 89, 91-92; 449 NW2d 107 (1989).

In the present case, the trial court's questioning of Windom began in a neutral manner, but the tenor subsequently changed. Many of the court's questions were phrased in a leading manner and suggested the court's belief that Windom's testimony lacked credibility because he failed to report his attack on Spencer to the police sooner. Examples of the court's questions include:

So did you immediately go to the police and say, hey, wait a minute, you got the wrong guy; I was the one that had the fight?

* * *

You told Mr. Wright?

* * *

You told him?

* * *

But what about telling the police or --

* * *

Well, is there any reason why you didn't just go to the police and say, here, I'm the one that had the fight and I acted in self-defense; it wasn't Wright that did it?

The following colloquy further illustrates the non-neutral tone of the trial court's questions:

THE COURT: So when this happened, though, you didn't report it to anybody? You didn't call the police yourself that night? You didn't report it to the apartment complex?

THE WITNESS: No, uh-uh.

THE COURT: You didn't report it apparently even to Mr. Wright.

THE WITNESS: No.

THE COURT: Or to the woman that worked there.

THE WITNESS: No

The court's questions did not merely ask what Windom did, but conveyed that Windom failed to do what he *would* have done if his account were true.

Windom testified on direct examination that the first time he spoke with anyone about his involvement in the assault was when he spoke with defendant's former attorney at defendant's preliminary examination, and that he later spoke with the prosecutor after a court proceeding.

The prosecutor also asked Windom questions about their conversation. Although Windom's efforts were undisputed by the prosecutor, the trial court asked, "And when you came to court you didn't tell anybody that you were the one that had the fight?" The court's question suggested the court's disbelief in Windom's prior testimony.

Having reviewed the trial court's entire line of questioning, we conclude that the manner in which the court interrogated Windom suggested that the court doubted his credibility and that the court "improperly assumed the role of surrogate prosecutor." *Davis, supra* at 51. The court's questions indicated its skepticism or perceived incredulosity of Windom's testimony, *People v Jackson*, 97 Mich App 660, 664-665; 296 NW2d 135 (1980), and were "thinly veiled expressions of disbelief in [Windom's] testimony which may have unfairly influenced the jury's verdict," *People v Redfern*, 71 Mich App 452, 456; 248 NW2d 582 (1976). The error was plain. *Carines, supra* at 763.

We are also persuaded that the plain error affected defendant's substantial rights and compromised the integrity and fairness of defendant's trial. *Id.* The trial court instructed the jury that its comments, rulings, and questions was not evidence, that the court was not trying to influence the jury's verdict through its comments, and that if the jury thought that the court had an opinion about how to decide the case, it should pay no attention to that opinion. Nevertheless, the case presented a credibility contest between Spencer and defense witnesses Rustin and Windom. Spencer's testimony was plagued with inconsistencies. He wavered several times on whether he saw the white van that was linked to defendant. He told the police that he saw the assailant leave, but then testified at trial that he did not. His testimony regarding whether he recognized other men in the group was confused. Spencer also provided inconsistent descriptions of his assailant. He testified that the assailant was about an inch taller than his height, which was five feet, three inches. However, the police report indicated that Spencer described his assailant as being approximately six feet tall. Defendant is six feet tall; Windom is five feet, five or six inches tall. The defense efforts to show that Windom, not defendant, was the assailant were unduly prejudiced by the trial court's expression of skepticism and incredulity in its questioning of Windom. We agree with defendant that the court's improper questioning affected the outcome of the proceedings. Moreover, the court's evident disbelief of a key defense witness seriously undermined the fairness and integrity of defendant's trial. *Id.* Accordingly, we reverse defendant's convictions and remand for a new trial.

III. Remaining Issues

We briefly address the remaining issues raised by defendant on appeal in the event the issues arise on retrial.

A. Spencer's Lack of a Criminal Record

Defendant argues that the prosecutor improperly elicited testimony that Spencer did not have a criminal record. Plaintiff concedes that the testimony was not admissible to bolster Spencer's credibility. See *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999), overruled in part on other grounds in *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007). Plaintiff, however, contends that the evidence was admissible to attack the credibility of Windom's testimony that Spencer had menaced Windom before he hit Spencer.

The underlying premise of plaintiff's newly advanced theory of admissibility is that Spencer's lack of a criminal record shows that he does not have a violent character. Character evidence is not admissible to prove action in conformity therewith except as provided in MRE 404(a)(1) through (4). None of these subrules are applicable. Thus, plaintiff's alternative theory for the admissibility of this evidence is without merit.

B. Alibi Notice

Defendant also argues that the prosecutor improperly elicited testimony concerning his original notice of alibi, which was filed by defendant's former attorney, and then improperly commented on that evidence in closing argument. Because defendant did not object to the testimony or to the prosecutor's comments at trial, the issue is unpreserved. Accordingly, we review the issue for plain error affecting defendant's substantial rights. *Carines, supra* at 763.

This case is distinguishable from *People v Shannon*, 88 Mich App 138; 276 NW2d 546 (1979), on which defendant relies. In *Shannon*, the defendant filed a notice of alibi and trial was delayed to enable the named alibi witness to be available. However, after the defendant's attorney interviewed the witness, he was not called to testify. The defendant also did not testify. The trial court instructed the jury that the witness identified in the notice of alibi was available and that the defendant had decided not to call him. The prosecutor commented on the defendant's choice not to call the witness and referred to the uncontroverted testimony of the prosecution's witnesses. This Court held that the trial court's instruction and the prosecutor's comment were improper because they allowed the jury to draw an impermissible inference of guilt from the defendant's decision not to present a defense. *Id.* at 143. The Court noted the continuing presumption of innocence and rejected the view that it was permissible to draw an adverse inference because the defendant originally filed a notice of alibi. *Id.* at 144 n 3. The Court distinguished the case from other cases in which the "defendant himself testified or produced witnesses on his behalf." *Id.* at 145.

In this case, unlike in *Shannon*, defendant presented an alibi defense through the testimony of another witness. Because defendant presented an alibi defense, the prosecutor did not infringe on defendant's presumption of innocence or shift the burden of proof by eliciting evidence concerning an earlier notice of alibi that was not consistent with the alibi testimony that was offered. Defendant has not shown plain error. *Carines, supra* at 763.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra