

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAWRENCE WENDELL STEWART,

Defendant-Appellant.

UNPUBLISHED

April 27, 2010

No. 287286

Ingham Circuit Court

LC No. 07-001591-FH

Before: SAAD, P.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

Following a jury trial, defendant appeals as of right his conviction of Medicaid fraud, MCL 400.607(1). Defendant was sentenced to 60 months' probation and to pay restitution of \$92,085, plus court costs. Because we find that defendant has not overcome the presumption of judicial impartiality, we affirm.

Defendant's conviction arose out of the false Medicaid billings for the surgical extraction of 41 teeth from 12 patients. The prosecutor presented evidence that none of the surgical extractions actually occurred. In response, defendant sought to establish that the Medicaid claims were the result of billing errors and of improper conduct by a disgruntled employee. During the course of the trial, there were several instances of what we charitably characterize as verbal wrangling between the trial judge and defense counsel. Defendant presented motions for mistrial and for disqualification of the trial judge, all of which were denied.

On appeal, defendant contends that the denial of these motions deprived him of a fair trial. We review defendant's preserved constitutional claim to determine whether any constitutional violation occurred. Both the United States and the Michigan Constitutions guarantee a defendant the right to an unbiased and impartial decision maker. US Const, Am XIV; Const 1963, art 1, § 17; *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975). This due process right is violated when a trial judge's conduct unduly influences a jury. *People v Wigfall*, 160 Mich App 765, 774; 408 NW2d 551 (1987). The due process protections require disqualification of a judge only in "the most extreme cases." *In re MKK*, 286 Mich App 546, 566; ___ NW2d ___ (2009), quoting *Cain v Dep't of Corrections*, 451 Mich 470, 498; 548 NW2d 210 (1996). We proceed from a presumption that the trial judge was impartial, and that defendant has the burden of overcoming that presumption. *Coble v Green*, 271 Mich App 382, 390; 722 NW2d 898 (2006).

Defendant has not established a due process violation. Defendant challenges various comments of the trial judge, including the judge's occasional questioning of witnesses. Having reviewed the record, we find nothing that approaches the type of extreme behavior by the trial judge that would require reversal on due process grounds. A trial judge may pose questions to witnesses so long as the tenor of the questions is neutral. MRE 614(b); *People v Davis*, 216 Mich App 47, 50-52; 549 NW2d 1 (1996). Here, the questions posed by the judge were brief and were primarily for clarification or information.

Defendant further argues that the trial judge made inappropriate comments concerning defendant's legal theories during opening statement and closing argument, and improperly directed the jury concerning factual issues. The trial judge made these comments, however, in the course of ruling on matters of law. Defendant does not argue on appeal that the legal rulings were incorrect, nor does defendant challenge the jury instructions on appeal. Rather, defendant claims that the manner in which the judge issued the legal rulings was improper. While some of the judge's comments displayed impatience and even anger toward counsel, the judge's rulings and remarks were within the scope of the judge's duty to control the proceedings. MCL 768.29.

Defendant also claims that the trial court erred by denying his motions for a mistrial. We review the trial court's ruling for abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). A mistrial is necessary only when the trial involves a prejudicial irregularity that impairs a party's ability to receive a fair trial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). We find no prejudicial irregularity in the record. The judge's running commentary to counsel appears to have been designed to preclude repeated attempts to present extraneous or irrelevant information. The comments were thus in keeping with MRE 611(a), which mandates that the trial court "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . avoid needless consumption of time"¹

Last, defendant claims the trial court erred by denying his motions for disqualification. MCR 2.003 governs disqualification of a judge. To preserve a disqualification motion for appeal, the moving party must seek a de novo hearing before the chief judge of the court. *Welch v District Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996). Here, defendant did not request review by the chief judge. Accordingly, this issue is unpreserved and our review is limited to examining the record for plain error affecting defendant's substantial rights. *People v Conley*, 270 Mich App 301, 305; 715 NW2d 377 (2006).

We find no plain error. Although the record contains remarks indicating that the trial judge was exasperated or impatient at times, the judge's impatience does not warrant reversal. As our Supreme Court has noted, a trial judge's critical or hostile remarks toward counsel "ordinarily do not support a bias or partiality challenge." *Cain*, 451 Mich at 497 n 30, quoting *Liteky v United States*, 510 US 540, 555; 114 S Ct 1147; 127 L Ed 2d 474 (1994). Similarly, a

¹ To the extent defendant claims the jury was present when the trial judge expressed astonishment at the outcome of an unrelated trial, the record indicates the jury was not present when the judge made the remark.

judge's "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women . . . sometimes display," do not establish partiality sufficient to require disqualification. *Liteky*, 510 US at 555-556. As the *Liteky* Court noted, "A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune." *Id.* at 556. Accordingly, defendant's appeal of the disqualification motions fails.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray