

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
August 15, 2017

v

VICKIE ROSE HAMLIN,
Defendant-Appellant.

No. 321352
Ingham Circuit Court
LC No. 13-000924-FH

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

BARBARA ELLEN CARTER,
Defendant-Appellant.

No. 322207
Ingham Circuit Court
LC No. 13-000917-FH

ON REMAND

Before: SAWYER, P.J., and M. J. KELLY and SHAPIRO, JJ.

SHAPIRO, J. (*dissenting*)

I respectfully dissent because in my view when the trial judge questioned defendant Carter at the end of cross-examination, he pierced the veil of judicial impartiality.

“The Sixth Amendment of the United States Constitution and article 1, § 20 of the Michigan Constitution guarantee a defendant the right to a fair and impartial trial,” *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006), which includes a neutral and detached magistrate, *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). “A judge’s conduct pierces [the veil of judicial impartiality] and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge’s conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party.” *People v Stevens*, 498 Mich 162, 164; 869 NW2d 233 (2015).

In evaluating the totality of the circumstances, the reviewing court should inquire into a variety of factors, including the nature of the judicial conduct, the tone and demeanor of the trial judge, the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, the extent to which the judge's conduct was directed at one side more than the other, and the presence of any curative instructions. [*Id.* at 172.]

The inquiry into judicial impropriety is fact-specific and “a single instance of misconduct may be so egregious that it pierces the veil of impartiality,” such as when a trial court’s colloquy with a criminal defendant improperly invades the “province of the jury on the crucial issue which was theirs to decide.” *Id.* at 171-172.

Here, defendant Carter testified on her own behalf. At the end of cross-examination, the trial judge asked Carter the following questions:

Court: Ma’am, [Brown] asked you politely to stop this behavior and leave, was that what you said?

Defendant: I’m sorry?

Court: Didn’t you say she asked you to leave?

Defendant: She asked me if I would detach myself.

Court: Did you do that?

Defendant: No, I did not.

Court: What is the difference between asking you and commanding you? Does someone have to say the word, I command, in order for you to understand the police officer is directing you to do something?

Defendant: Well, I mean—

Court: That’s what you’ve said here.

Defendant: I was just saying it was a question.

Court: It was a question? Did you answer the question?

Defendant: I did answer the question.

Court: What did you say?

Defendant: I said that I wouldn’t detach.

Court. All right. So she asked you politely, and the question was, I guess, you say to leave, and you said you would not do that, and you think that she needed to command further?

Defendant. I politely told her that I was staying.

Court. You think—

Defendant. For reasons.

Court: You think she needed to command you further to leave? What did she need to do beyond asking you politely to leave? I'm just asking because you sit here and told this jury you weren't commanded anything, and I thought maybe you had some distinction I am not aware of.

Defendant: Well, my only point was that it was a question, and I responded to her that I, that morally I could not detach myself because I was there for a purpose. I was, I was there because I believed in what I was doing.

It is with this colloquy in mind that we must consider the *Stevens* factors. The first factor requires us to consider the nature of the judicial intervention. *Stevens*, 498 Mich at 172. Here, the broad nature of the judicial intervention—questioning of a witness by the trial court—is, of course, not itself improper. See MRE 614(b) (permitting judicial questioning of witnesses). Such questioning can “produce fuller and more exact testimony or elicit additional relevant information.” *Stevens*, 498 Mich at 173. However, a judge’s ability to question a witness is not unlimited. *Id.* at 174. The judge’s questioning in this case did not seek clarification of a fact, but exhibited disbelief in defendant Carter’s legal defense, i.e. that the words spoken by the officer were not a command. See *id.* (“It is inappropriate for a judge to exhibit disbelief of a witness, intentionally or unintentionally.”).

Moreover, the force of the judge’s questions was heightened because they were directed to one of the defendants. See *id.* at 175 (“A judge must proceed with particular care when engaging with a criminal defendant.”). The judge’s questioning telegraphed to the jury that he personally disagreed with defendant Carter’s definition of “command.” See *id.* at 174 (holding that a judge should “not permit his own views on disputed issues of fact to become apparent to the jury”). The effect of this questioning was further compounded by the fact that the *only* contested issue with regard to the resisting and obstructing charge was whether defendants failed to obey a lawful command. The court’s questions, ultimately, “did not clarify a confusing point or elicit additional relevant information.” *Id.* at 185. Instead, like the judge in *Stevens*, the judge’s questioning in this case “inappropriately exhibited disbelief of the defendant.” *Id.* Further, the questions undercut the defense theory on the resisting and obstructing charge that no command had been given. The fact that the judge intervened in this matter at the end of defendants’ proofs while questioning one of defendants on an issue that went to the heart of the more serious charge is a further indication that the judge’s questioning was improper. This factor weighs heavily in favor of a finding of judicial partiality.

Next, a reviewing court should consider the judge’s tone and demeanor. *Id.* at 172. Here, Hamlin’s trial counsel indicated that “when the court went over it again and again both in frequency and in the tone, the raising of the voice on the word command overly emphasized that, in essence, [the judge was] telling the jury that a request or a question is a command.” Moreover, “the very words and sequence of questions employed” indicated that the judge

believed defendant Carter's testimony lacked credibility. See *id.* at 186. The judge's statement "I'm just asking you because you sit here and told this jury you weren't commanded anything, and I thought maybe you had some distinction I am not aware of," clearly exhibits not only disbelief of defendant Carter's testimony, it also clearly indicates, as Hamlin's trial counsel pointed out, that the judge believed that a command had actually been given. Accordingly, this factor also weighs in favor of a finding of judicial partiality.

As the reviewing court we must also consider the scope of the conduct in light of the trial's complexity. *Id.* at 172. This was a two-day trial of three defendants before a single jury. The witnesses consisted solely of lay witnesses, including defendants. The testimony of each witness was fully developed by the prosecutor and the defense attorneys. Numerous questions were asked of Brown and defendants as to whether a command was given and a video of the final interaction between Brown and defendants was played for the jury. The judge's questions, although directed to the heart of the resisting and obstructing charge, were unnecessary in light of the straightforward nature of the issues and the extensive questioning that had already occurred. Accordingly, the information presented in this trial did not warrant judicial intervention severely discrediting the defense to the resisting and obstructing charges. This factor weighs in favor of a finding of judicial partiality.

It is also appropriate to consider whether the judge's intervention was directed at one side more than the other. *Id.* at 172. Here, the judge questioned both defense and prosecution witnesses. However, the court's questioning of the prosecution witnesses was brief and served to clarify issues that were not fully developed or to clarify testimony that was apparently not heard clearly by the judge. In contrast, the questioning of defendant Carter challenged her credibility and interjected the court's own opinion that a command had been given. This factor, therefore, weighs in favor of a finding of judicial partiality.

The majority largely recognizes that the judge's questioning was partial, but relies on the curative effect of the standard instruction. The court, in response to the defendants request for a mistrial, stated that it would give the standard jury instruction on judicial questioning. The court, in fact, gave the following instruction:

Questions put to witnesses are not evidence. My questions to witnesses are also not evidence. You should consider these questions only as they give meaning to the answers you receive. The answers of the witnesses supply the evidence, even on my questions.

Now, my comments, rulings, questions, and instructions are not evidence and I have a duty to see that this trial is conducted under the law and to tell you the law that applies to this matter, but when I make a comment or give an instruction I'm not trying to influence your vote or express a personal opinion about the case. If you believe that I have an opinion about how you should decide this matter, pay no attention to that. You're the judges of the facts and you should decide the case from the evidence that you receive.

Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). However, "in some instances judicial conduct may so overstep its bounds

that *no* instruction can erase the appearance of partiality.” *Stevens*, 498 Mich at 177-178. Further, under the totality of the circumstances test set forth in *Stevens*, the presence or absence of a curative instruction is *only* one factor that must “be considered alongside the others.” *Id.* at 190. Accordingly, although the instructions given in this case cut against a finding of judicial bias, in light of the totality of the circumstances, they were insufficient to alleviate the appearance of advocacy and partiality exhibited by the judge when he questioned defendant Carter. Moreover, this instruction is meant to assure that jurors will not *misinterpret* a judge’s neutral rulings and comments as something they are not. In this case, the judge’s comments and questions were *not* neutral; indeed, some jurors may have viewed them as tantamount to a directed verdict against the defendant. If this standard instruction was a magic cure all, *Stevens* would not have been decided as it was.

Accordingly, based on the totality of the circumstances, the judge’s questioning of defendant Carter pierced the veil of judicial partiality and constituted a structural defect for which reversal is required. See *id.* at 178-179.

/s/ Douglas B. Shapiro