

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 19, 2012

v

ANDRE LAMONT FRANKLIN,

Defendant-Appellant.

No. 300371
Wayne Circuit Court
LC No. 08-019415-FC

Before: JANSEN, P.J., and WILDER and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals by right his bench-trial convictions of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to 250 months to 50 years in prison for the second-degree murder conviction, and a consecutive term of two years in prison for the felony-firearm conviction. We affirm.

Defendant was convicted of murdering Marcellus White, who died from multiple gunshot wounds, the most severe being a gunshot wound to the head. Christine Grochowicz, who identified herself as defendant's girlfriend, was the prosecution's principal witness at trial. Grochowicz testified that she was with defendant when defendant shot White. Grochowicz and defendant knew White from an area soup kitchen. Defendant denied shooting White. Defendant also denied that Grochowicz was his girlfriend and claimed that she had threatened to falsely accuse him of a crime if he broke up with her.

At trial, Grochowicz identified two letters that were addressed to her in care of the soup kitchen that she and defendant attended. Grochowicz testified that she recognized the writing in the letters as defendant's handwriting. In the letters, defendant expressed his love for Grochowicz, but did not directly admit his involvement in the charged crime. During defendant's testimony, the prosecutor offered a third letter that was also addressed to Grochowicz from defendant, in which defendant similarly expressed his love for Grochowicz. Defendant denied writing any of the letters. The trial court decided to call a handwriting expert to examine the letters and compare them with samples of defendant's known handwriting. After an adjournment, the trial court called Detective Jan Johnson, a handwriting analyst with the Michigan State Police. Defense counsel did not object. Detective Johnson opined that one of the letters was written by defendant, and that defendant "may have" written the other two letters.

The trial court ultimately found that Grochowicz was a credible witness and that defendant was not. The court stated that Johnson’s expert testimony had helped it to determine that defendant’s trial testimony was not credible. Although defendant had been charged with first-degree premeditated murder, MCL 750.316(1)(a), the court found that there was insufficient evidence of premeditation and deliberation. However, the court convicted defendant of the lesser offense of second-degree murder, in addition to felony-firearm.

On appeal, defendant argues that it was improper for the trial court to call the handwriting expert at trial. Defendant contends that the court improperly assumed the role of the prosecutor by doing so. As defendant concedes, he did not object when the trial court stated its intention to call the handwriting expert or when the expert witness was actually called to testify. Therefore, this issue is unpreserved. MRE 614(c); *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996). We review unpreserved claims for plain error affecting the defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

“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). A trial court has wide discretion and power in matters of trial conduct. *Id.* The court’s power includes the authority to call witnesses on its own, and to “interrogate witnesses, whether called by itself or by a party.” MRE 614(a) and (b). Thus, the trial court had the authority to call Detective Johnson as a witness in this case and to question Detective Johnson at trial.

Defendant relies on authority recognizing that a trial court’s conduct at trial may not “pierce the veil of judicial impartiality.” *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). Such claims of judicial misconduct are reviewed ““to determine whether the trial court’s comments or conduct . . . “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.””” *Conley*, 270 Mich App at 308, quoting *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988), in turn quoting *People v Rogers*, 60 Mich App 652, 657; 233 NW2d 8 (1975). These concerns were not present in this case, however, because defendant was tried before the court, not a jury.

Nonetheless, a criminal defendant is still entitled to be tried before a “neutral and detached magistrate.” *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). A defendant claiming judicial bias must overcome a heavy presumption of judicial impartiality. *People v Jackson*, ___ Mich App ___; ___ NW2d ___ (2011). Generally, to prevail on a claim of judicial bias, a showing of actual bias is necessary, although there may be situations in which the appearance of impropriety is so strong as to rise to the level of a due process violation. *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 597, 599; 640 NW2d 321 (2001); *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999).

Here, the mere fact that the trial court called a handwriting expert—conduct that was authorized by MRE 614(a)—does not demonstrate that the court was biased or partial. Defendant correctly observes that a trial court ““may not assume the prosecutor’s role with advantages unavailable to the prosecution.”” *Davis*, 216 Mich App at 51, quoting *People v Weathersby*, 204 Mich App 98, 109; 514 NW2d 493 (1994). However, the trial court did not improperly assume the prosecutor’s role in this case. The court explained that its purpose in

calling the handwriting expert was to help it resolve conflicting testimony concerning the origin of the letters—i.e., to either lend credence to Grochowicz’s testimony that the letters were written in defendant’s handwriting, or to lend credence to defendant’s testimony that he did not write the letters. The expert’s testimony could have potentially favored either defendant or the prosecution. Further, the trial court allowed both parties to provide input on the selection of an expert and, after the expert was called, all parties were permitted to cross-examine the expert. Although defendant emphasizes that the expert’s testimony ultimately influenced the trial court’s determination of witness credibility, the mere fact that the expert’s testimony was damaging to defendant’s case does not establish that the court improperly assumed the role of a surrogate prosecutor. *Davis*, 216 Mich App at 51.

Defendant principally relies on *Wallace v Bell*, 387 F Supp 2d 728 (ED Mich, 2005), which involved habeas review of a defendant’s state court conviction. In that case, the petitioner was convicted of criminal sexual conduct against a 13-year-old boy. A forensic serologist from the Detroit Police Department testified for the prosecution that a semen stain on the victim’s underwear matched the petitioner’s DNA. *Id.* at 733. After the prosecution rested, the trial court called the serologist’s supervisor in the police crime laboratory. The trial court questioned the supervisor regarding “the history and development of the forensic science division, its expertise in DNA testing, and the cost of its DNA testing equipment.” *Id.* The court elicited that the forensic examiners “know what [they’re] doing,” and are “good at it.” *Id.* This Court determined that the trial court crossed the line of judicial impartiality by asking the supervisor questions that could only be interpreted as bolstering the prosecution’s evidence, but concluded that the trial court’s improper conduct was harmless because the defendant did not contest the presence of his semen on the victim’s clothing, and instead contended that he had a nocturnal emission while sleeping beside the victim. The federal court held that the trial judge’s conduct violated the petitioner’s constitutional right to an impartial tribunal, and that the violation of judicial impartiality was a “structural error that can never be found to be harmless.” *Id.* at 737-738. Accordingly, the federal court conditionally granted the petition for habeas relief. *Id.* at 740.

The present case is clearly distinguishable from *Wallace*. Most significantly, defendant in this case was not tried before a jury, so there was no risk that the court’s conduct might unduly influence a jury against defendant. Further, the trial court’s choice of a witness in *Wallace* was the supervisor of the prosecution’s serology expert, who plainly had an interest in promoting the reliability of the expert’s testimony. In this case, the trial court called an independent handwriting expert and sought input from both sides on the selection of the expert. Defense counsel did not express any concern that the expert selected might be biased in favor of the prosecution. In addition, unlike in *Wallace*, the testimony of the handwriting expert in this case had the potential of favoring either party, and defendant does not claim that the expert was questioned in a partial manner. Notably, the handwriting expert was not giving an opinion on anyone else’s testimony or reliability. Instead, she conducted an independent analysis of the handwriting samples she was given, and it was the expert, not the trial court, who established the protocols for the analysis. For these reasons, defendant has failed to establish that the trial court’s decision to call or question the handwriting expert was plain error.

Defendant also argues that trial counsel was ineffective for not objecting to the trial court’s decision to call a handwriting expert. But because MRE 614(a) expressly permitted the

court to call the expert, and the record does not support defendant's claim that the court was biased or partial, defendant has not demonstrated that there was any basis for an objection. Because any objection would have been futile, defendant's claim of ineffective assistance of counsel cannot succeed. *People v Unger*, 278 Mich App 210, 256; 749 NW2d 272 (2008); *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Affirmed.

/s/ Kathleen Jansen
/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly