

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 22, 2012

v

MARCUS GERALD ONESKI,

Defendant-Appellant.

No. 303690
Chippewa Circuit Court
LC No. 09-000235-FH

Before: MARKEY, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

Following a jury trial, defendant Marcus Gerald Oneski was convicted of operating while intoxicated, third offense, MCL 257.625(1), (9). The trial court sentenced defendant to serve 180 days in jail and 18 months' probation. Defendant appeals as of right, and we affirm.

After leaving a wedding reception in the early morning hours of July 12, 2009, defendant and Nicole Wilds¹ were involved in a single vehicle accident. The truck rolled approximately one and a half times and came to rest on the driver's side of the vehicle. Defendant was pinned under the driver's side door with his legs inside the car underneath the steering wheel and the rest of his body outside through the broken window. Wilds was not injured. At the scene, Wilds told Michigan State Police Department Trooper Daniel Bergsma that defendant had been driving. Defendant, however, told the trooper that Wilds was driving the vehicle. According to Trooper Bergsma, when he confronted defendant with Wilds's statement that he was the driver, defendant "said that she was lying." Trooper Bergsma noted that defendant showed signs of alcohol intoxication. A blood draw taken at a hospital showed that defendant had a blood alcohol level of 0.176.

¹ Wilds was defendant's girlfriend at the time of the accident and his fiancée at the time of the trial.

At trial, Wilds and defendant testified that it was Wilds who was driving the vehicle. Wilds said that she was lying when she told Trooper Bergsma that defendant was driving, explaining that she was scared to admit she was driving because she thought she had killed defendant. Trooper Bergsma testified that he had Wilds get into the driver's seat of the truck after it was flipped upright, Wilds's feet were six to eight inches from the pedals, and she was not able to touch the pedals when she pulled herself forward. Wilds testified that, after the accident, she "had pushed the seat back to get out from the steering wheel and the seat." An EMT who responded to numerous accidents assumed defendant was the driver "due to his location."

The prosecution attempted to discredit Wilds on the basis that she had not come forward as the driver of the vehicle until the preliminary examination:

Q. At that time period[, between the accident and the preliminary examination,] Mr. Oneski was charged with operating while intoxicated. In those months, August, September, October, all of November, did you ever even get in contact with the Michigan State Police and tell them you lied at the scene?

A. Have I? No.

Q. In those months between the time of the accident and the time of the preliminary examination did you contact them and tell them you didn't tell the truth?

A. No, I didn't know that was the thing to do. I actually thought that Bergsma, that he would come to me.

At the conclusion of her trial testimony, the trial court asked Wilds the following questions concerning the delay in her coming forward as the driver of the vehicle:

The court: I am not clear on one thing. I take it you were having some relationship with Mr. Oneski. How long did that continue or is it still continuing?

Witness: It is still continuing.

The court: But when [the prosecutor] asked you about Mr. Oneski being charged with drunk driving, you knew that? I mean, wouldn't you feel that you should come forward and say you were driving if you were in a relationship and he was being charged with drunk driving?

Witness: Yes, I did.

The court: Say, hey, that is not right. I am the one. Would you wait six months for someone to come ask you? I mean I just ask that for the sake of the jury. They are trying to figure what your motivation was under this set of circumstances.

Witness: Right. At the time I was caring for Marcus and I was working and all I could think about was taking care of him. So I thought that obviously the cop, Trooper Bergsma—Wiersma—if I am not saying that right excuse me, but I was carrying [sic] for him like full time, 24-hour care and actually we were in the hospital for like a month in Traverse City so there wasn't—I kind of waited for him to get to me and I thought because he was in critical condition that the cop would maybe observe that and come to me because I didn't have time.

The court: I just wanted to clarify that.

On appeal, defendant argues that the trial judge violated defendant's right to a fair trial when he questioned Wilds in the above manner. We disagree. Defendant did not object during trial to the trial court's questioning of Wilds; therefore, we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, defendant must demonstrate a clear and obvious error that affected the outcome of the lower court proceedings. *Id.* at 763. Furthermore, reversal is only warranted when the error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.* at 763-764.

Under MRE 614(b), a trial "court may interrogate witnesses, whether called by itself or by a party." The court may question witnesses in order to clarify testimony or elicit additional relevant information, *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992), but its actions cannot pierce the veil of judicial impartiality, *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). "[T]he trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial." *Conyers*, 194 Mich App at 405. "A trial judge has discretion to question witnesses to shed light on something unclear in the testimony but must not allow his views on disputed issues of fact to become apparent to the jury." *People v Pawelczak*, 125 Mich App 231, 236; 336 NW2d 453 (1983). The test to determine whether a new trial is warranted is whether the judge's questions and comments may have unjustifiably aroused suspicion in the mind of the jury as to a witness's credibility and whether partiality could possibly have influenced the jury to the detriment of the defendant's case. *Conyers*, 194 Mich App at 405. "It is . . . the content of the questions and their possible impact on the jury which is crucial to an appellate review." *People v Smith*, 64 Mich App 263, 267; 235 NW2d 754 (1975).

While the appropriateness of the trial court's questioning of Wilds is a close call, we conclude that it was improper. Before the court questioned Wilds, she testified that she did not come forward to the police between the time of the accident and the preliminary examination because she "didn't know that was the thing to do" and "actually thought that [Trooper] Bergsma . . . would come to [her]." This testimony was clear. Wilds provided an explanation for her inaction. There was no need for clarification. In questioning Wilds, the trial court did not simply seek clarification of Wilds's earlier testimony. Instead, the court essentially "connected the dots" in Wilds's testimony and provided the jury with a reason to find her testimony incredible. More specifically, the court identified and emphasized the problematic nature of Wilds's testimony: the fact that she provided the police information against her boyfriend's criminal interest and then did not object to the charges brought against him by explaining to the

police that the information she provided was false as she insists. The trial court's identification and emphasis on this problem with Wilds's testimony could have been taken by the jury as an expression by the judge of a belief that Wilds was not credible. Thus, the court's "questions and comments may have unjustifiably aroused suspicion in the mind of the jury as to [Wilds's] credibility." See *Conyers*, 194 Mich App at 405.

The prosecution argues that the trial court's questioning was appropriate because it gave Wilds an opportunity to address this problem with her testimony and to provide a believable, reasonable answer that was favorable to defendant. We do not agree. To the extent that the court gave Wilds an opportunity to provide an answer favorable to defendant, it provided Wilds with an equal opportunity to testify unfavorably for defendant—Wilds could have provided an answer that was not believable or testified in a manner indicative of dishonesty. The prosecution further argues that Wilds did indeed provide an "extremely plausible" explanation in response to the court's questioning, and, therefore, there is no error. However, as discussed above, "[i]t is . . . the content of the questions and their possible impact on the jury which is crucial to an appellate review." *Smith*, 64 Mich App at 267 (emphasis added). Moreover, "issues of witness credibility are matters for the jury and not this Court." *People v Railer*, 288 Mich App 213, 219; 792 NW2d 776 (2010). Therefore, we will not speculate as to the jury's view of Wilds's response when evaluating the propriety of the trial court's questioning.

Notwithstanding the impropriety of the trial court's questioning, we conclude that a new trial is not warranted. Where a trial court inappropriately questions a witness, "a proper cautionary instruction may serve to alleviate any prejudice to the defendant." *People v Clemons*, 91 Mich App 68, 72; 282 NW2d 838 (1979). In this case, the trial court provided the following instruction to the jury:

My comments, rulings, questions, and instructions are also not evidence. . . . [W]hen I make a comment or give an instruction, I am 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 case, you must pay no attention to that opinion. You are the judges of the facts and you should decide this case based on the evidence.

Jurors are presumed to follow the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Defendant has not established error affecting the outcome of the lower court proceedings. *Carines*, 460 Mich at 763. Moreover, we are not convinced that a forfeited error resulted in the conviction of an actually innocent defendant. See *id.* While this case largely rested on witness credibility, the physical evidence in this case, i.e., the location of defendant's body immediately after the accident, the position of the driver's seat, and the belief of the EMT with nine years of experience that defendant had been driving the vehicle due to his location, supported the conclusion that defendant was driving the vehicle. Finally, we cannot conclude that the fairness, integrity, or public reputation of the judicial proceedings was seriously affected. See *id.* at 763-764. As discussed above, the judge instructed the jury not to pay attention to what it may have believed was his personal opinion. And, review of the entire trial transcript reveals that the trial judge did not engage in excessive interference in the examination of witnesses or display an attitude of partisanship throughout the trial. Notably, the trial court also intervened when Wilds, after repeatedly testifying at trial that she was the driver

of the vehicle, testified that she was buckled into the passenger seat of the vehicle after it came to rest. The court sought clarification at that time, which gave Wilds an opportunity to clarify that she meant to say she was in the driver's seat. Accordingly, defendant has not established plain error warranting a new trial.

Affirmed.

/s/ Jane E. Markey
/s/ Jane M. Beckering
/s/ Michael J. Kelly