

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 198450

Recorder's Court

DONNELL HOLMES,

LC No. 96-000101

Defendant-Appellant.

Before: Saad, P.J., and O'Connell and Matuzak,* JJ.

MATUZAK, J. (dissenting).

I respectfully dissent. I disagree with the majority's conclusion that the trial judge's interruptions of defense counsel did not deny defendant a fair trial. I would hold that the trial judge's unwarranted interruptions of defense counsel pierced the veil of judicial impartiality and denied defendant a fair trial. I would further conclude that the trial court's instruction regarding the elements of felony-firearm improperly told the jury that an essential element of that crime existed as a matter of law. Accordingly, I would reverse.

I.

Contrary to the majority's conclusion, I do not believe that the trial judge merely "explained how to ask proper questions ... and summarized testimony for defense counsel." During trial, defense counsel attempted to cross-examine the police officer who stopped defendant's automobile regarding his ability to observe defendant fleeing the scene of the robbery. The trial judge repeatedly interrupted defense counsel while she was attempting to question the witness, then ultimately told the jury that the attempted questioning was simply irrelevant. The exchange between the trial judge and defense counsel went as follows:

Q [Defense Counsel]: Okay. Officer Jones – If I may approach the witness, your Honor?

* Circuit judge, sitting on the Court of Appeals by assignment.

The Court: For what purpose, ma'am?

[Defense Counsel]: I would like to hand him this.

The Court: For what purpose, ma'am?

[Defense Counsel]: So he could tell us what corner this shopping center is on.

The Court: It's on the corner of Warren and Conner, he's already testified to that.

[Defense Counsel]: Well, there are four locations at that corner.

The Court: Maybe he can tell us, maybe just ask him.

The Witness: Southwest corner.

Q [Defense counsel, continuing]: The southwest corner.

The Court: Just ask him, ma'am. He can tell you without all that. Thank you.

Q: So when that Buick turned onto East Warren, it made a right out of the shopping center?

A: Yes

Q: Okay. And it's your testimony that you were only about three cars behind it?

A: Yes, approximately.

Q: That Buick did not - - There were no cars between your car - -

The Court: Ma'am, excuse me, ma'am, what is the purpose? He says it turned down, he got in behind it. I mean, what difference does it make how far or whether or not it did six turns or whatever? It doesn't really matter, does it? He says the car turned out and he decided to chase it, so what's the relevance of what we're here to decide?

[Defense Counsel]: Well, I think, your Honor, that he says that it interfered with traffic. Was there any car between him and the Buick?

The Court: What difference does it make, ma'am? He says it doesn't matter what I'm saying, if he's wrong about it interfering, nonetheless, he decided to get after it and he did get after it and subsequently it stopped he says. So I'm saying we could ask a

million questions on whether or not it almost bumped the traffic or didn't bump the traffic. It doesn't matter, does it, because he says I decided to chase it. If it didn't interfere with traffic, I decided to chase it. If it did interfere with traffic, I decided to chase it and the chase began according to him. So the reason, he says that's what drew my attention to it. If he's wrong, it's wrong. But the thing that is important is that he decided to go after it ma'am, that's all. So I just don't want to waste a whole lot of time on whether or not the car was four lengths away or five lengths away or whatever. The car came out he says of the parking lot, he decided to chase it, and off we go into the wild blue east.

[Defense Counsel]: For the record, your Honor, I would object to my not being able to ask - - follow that line of questioning.

The Court: You can, you follow it, ma'am. Go right ahead, follow it. Don't object, just go ahead, follow it. If you really want to get into it, ma'am, go right ahead.

But Ladies and Gentlemen, I want you to know we're not - - this is not a traffic case. We are here to decide whether some time that night there was a robbery and whether or not this man did it. We're not here to decide whether or not they were bad drivers or not or traffic offenses. This is not a traffic case.

All right. You go right ahead, ma'am, and ask all the questions you want along those lines. Go right ahead.

[Defense Counsel]: Thank you, your Honor.

The Court: I don't want you to object to anything I do, but if you feel you must, you must. Go right ahead.

[Defense Counsel]: Thank you, your Honor.

The Court: Your welcome.

Later on, the following exchange took place:

Q [Defense Counsel]: I'm sorry. I'm trying to find out the nature of when you first saw him. Where were you when you first saw him, Mr. Holmes?

A [The Witness]: Well, I saw the subject's face when he turned around and looked at me as I was pursuing - -

The Court: Hold it, ma'am, let him finish. You asked him - - Go on, sir. Let him finish and then you can ask him any - -

[Defense Counsel]: Your Honor - -

The Court: Let him finish, ma'am. Ma'am, just be quiet.

[Defense Counsel]: He's not responding to my question.

The Court: Ma'am, be Q-U-I-E-T till he finishes.

The Witness: Ma'am, you asked me when I first saw 'em.

The Court: Just go ahead, Officer.

Under the guise of retaining control of his courtroom, the trial judge deliberately precluded defense counsel's cross-examination of the arresting officer regarding his ability to observe and identify defendant. The trial judge's remarks belittled the issues defense counsel was attempting to raise regarding the police officer's ability to observe and identify defendant, and effectively instructed the jury that it could ignore those points because they were irrelevant. This interference effectively denied defendant his right to cross-examine the witness. In addition to this more egregious conduct, the trial judge perpetrated numerous additional petty interruptions of trial counsel. As noted by the majority, these comments were frequently condescending or demeaning toward defense counsel, and were made in the jury's presence. The trial judge's biased conduct and interference no doubt unduly influenced the jury and denied defendant his right to a fair trial. *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992).

II.

Moreover, even without the biased commentary and active interference with cross-examination, defendant's felony-firearm convictions should be reversed because the trial judge's instruction regarding that crime effectively instructed the jury that defendant did in fact possess a firearm as defined by the statute. The trial judge gave the following instruction:

And secondly, that at the time the defendant committed or attempted to commit the crime, he knowingly carried or possessed a firearm.

Now, a pistol, Ladies and Gentlemen, without a doubt, is a firearm. That's a firearm. If you believe that was gun, that was the instrumentality, but a pistol of any kind is a firearm. So therefore, you must find that the perpetrator was in possession of a firearm.

This error requires reversal of defendant's felony-firearm convictions. *People v Tice*, 220 Mich App 47, 54; 558 NW2d 245 (1996).

I would reverse.

/s/ Michael J. Matuzak