

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM BURT,

Defendant-Appellant.

UNPUBLISHED

December 10, 1999

No. 208836

Detroit Recorder's Court

LC No. 96-007051

Before: Gribbs, P.J., and Murphy and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of second-degree murder, MCL 750.317; MSA 28.549, possession of less than twenty-five grams of heroin, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The court sentenced defendant to thirty-five to fifty years' imprisonment for the murder conviction, thirty-two to forty-eight months' imprisonment for the possession conviction, and two years' imprisonment for the felony-firearm conviction. We affirm the convictions, but vacate the sentence imposed for second-degree murder, and remand for resentencing on the conviction for second-degree murder.

Defendant's convictions arose out of an altercation on a Detroit street corner. A verbal argument regarding whether defendant could sell drugs from that location devolved into a physical altercation. Ultimately defendant fired two shots, killing the victim, Randy Tabaka. Defendant testified that he acted in self-defense.

I

At trial, defendant was represented by an attorney who in a recent proceeding had been cited for contempt by the trial judge. Defendant claims that in his case the trial judge demonstrated a clear bias against defense counsel, hobbling his capacity to represent defendant, berating him in front of the jury, and invading the role of the prosecutor to such an extent that defendant was denied a fair trial. We disagree.

A defendant's claim that he was denied a fair trial by the conduct of the judge is "to be reviewed in its entirety to determine whether an atmosphere of prejudice has crept in which may have deprived the appellant of a fair trial." *People v Anderson*, 166 Mich App 455, 462; 421 NW2d 200 (1988), quoting *People v McIntosh*, 62 Mich App 422, 438-439; 234 NW2d 157 (1975). A trial court pierces the veil of judicial impartiality if its conduct or comments unduly influence the jury so as to deny the defendant a fair and impartial trial. *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). The test is whether the judge's questions or comments "may well have" unjustifiably aroused suspicion in the mind of the jury regarding the credibility of a witness, or whether partiality could have influenced the jury to the detriment of the defendant's case. *People v Ross*, 181 Mich App 89, 91-92; 449 NW2d 107 (1989). Unfair criticism of defense counsel in front of the jury is always improper, but reversal is only necessary if the court's conduct denied a defendant a fair and impartial trial. *People v Wigfall*, 160 Mich App 765, 774; 408 NW2d 551 (1987).

Defendant directs this Court's attention to various exchanges between his attorney and the court that he alleges demonstrate bias. Defendant claims that the court's attitude became clear when, in granting adjournment on the second trial date, the court expressed doubt over a brief, unsigned note from a physician offered as an excuse for the delay. The court expressed concern for defendant, who was lodged in jail, and noted that the case was nearly a year old and had been delayed before. The court's advice to defendant that he consider obtaining other counsel appears justified in light of the circumstances, and in any event could not have affected the jury, since the jury was not present to observe any partiality possibly implied by the court's comments.

Defendant also alleges that the court manifested bias by treating his attorney and the prosecutor differently. In particular, defendant focuses on the voir dire, during which the court "criticized" defense counsel for using hypothetical questions, after previously permitting hypothetical questions posed by the prosecutor. However, in one cited instance, the court permitted the question when defense counsel explained its relevance. In another instance, the court properly steered counsel away from posing a hypothetical question using facts not yet in evidence. In a third instance, when defense counsel used a hypothetical question that failed to elicit the response he sought, the court properly interposed to prevent waste of time and confusion. At another point during voir dire, the court interrupted defense counsel's questions to a juror regarding her moral beliefs. At no point during these exchanges was the court rude to defense counsel in the presence of the jury. After the jury was excused, any harshness was a reasonably measured response to defense counsel's insistence on being allowed to ask questions in his own way. The court's conduct during voir dire did not deny defendant a fair trial.

Defendant contends that the court's "misconduct" extended into the trial, during which the court interrupted defense counsel's opening statement because it was argumentative. Nothing in the exchange constituted judicial misconduct. At other points during testimony, the court interrupted various questions by defense counsel that called for speculation, assumed facts not in evidence, and were repetitive. Lastly, the court interrupted defense counsel before he had used all his time for closing argument. Immediately upon discovering the error, the court allowed him to continue. However frustrating and difficult these exchanges and others like it may have been for the participants, they do not constitute misconduct on the part of the court that rises to the level necessary to overcome the presumption that a

judge is impartial. See *Cain v Michigan Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). The court's responses were reasonably measured, focused on enforcing the rules of evidence, and unlikely to unduly influence the jury to the detriment of defendant. See *Ross, supra* at 91. We conclude that the court was merely exerting control over the proceedings in order to limit confusion and prevent time wasting as required by MCR 6.414(A) and MCL 768.29; MSA 28.1052.

The record as a whole does not demonstrate bias on the part of the trial judge that would require reversal. The court's remarks were directed toward controlling the conduct of the trial, and did not create a likelihood that the jury was influenced to arrive at its verdict by any partiality on the part of the court. Nor did the individual rulings invade the role of the prosecutor so as to create an appearance of partiality. Defendant was not denied a fair trial.

II

Next, defendant claims that his due process right to a conviction beyond a reasonable doubt was violated by the court's inclusion of the phrase, "moral certainty," in the jury instruction defining the burden of proof. Defense counsel failed to object to the jury instruction, and indeed, expressed satisfaction with it. Therefore, defendant failed to preserve this issue for appeal. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Absent objection, alleged errors in jury instructions are deemed waived unless a miscarriage of justice results. *People v Bonham*, 182 Mich App 130, 134; 451 NW2d 530 (1989). We find no miscarriage of justice.

The court clearly instructed the jury on the burden of proof and the presumption of innocence. The United States Supreme Court has noted that while the Constitution requires that a jury be instructed that guilt must be found beyond a reasonable doubt, the Constitution does not mandate a particular expression of the standard. *Victor v Nebraska*, 511 US 1, 5; 114 S Ct 1239; 127 L Ed 2d 583 (1994). The context in which the court placed the "moral certainty" language lent it sufficient meaning to protect the rights of defendant. The court told the jurors to consider the proof sufficient if it was such that they would be willing to rely on in their most important affairs, but cautioned them that the proofs must eliminate any doubt based on reason or arising out of the evidence, and that any real doubt must inure to the benefit of defendant. Considering the instruction in its entirety, we have no doubt that the jury understood the burden placed on the prosecutor and the meaning of reasonable doubt. See *People v Hubbard*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

III

Next, regarding his thirty-five- to fifty-year sentence for the second-degree murder conviction, defendant contends that by departing from the sentencing guidelines' recommended minimum range of 120 to 300 months, the trial court abused its discretion by imposing a disproportionate sentence.

A sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990); *People v Paquette*, 214 Mich App 336, 345; 543 NW2d 342 (1995). A departure from the recommended range in the absence of factors not adequately reflected in the guidelines should alert the appellate court to the

possibility that the sentencing court violated the principle of proportionality. *Milbourn, supra* at 660. The sentencing court's inquiry should include consideration of (1) where on the range the sentence should fall if it is to be within the guidelines; (2) what unique facts exist that are not already adequately reflected in the guidelines, and whether they justify any departure; and (3) if there is to be a departure, what should be its magnitude and what is its justification. See *People v Harris*, 190 Mich App 652, 668-669; 476 NW2d 767 (1991).

Placing on the record the reason for this ten-year departure, the court stated that it inferred from defendant's testimony and defense counsel's arguments that defendant believed it was acceptable or justifiable to take the life of another in order to preserve one's drug turf. We find this to be an inaccurate and strained interpretation of the case presented by the defense. Defendant's claim of self-defense was essentially premised on an argument that the right to self-defense should not be lost because of the nature of the area in which this incident occurred nor because of the nature of the activity defendant may have been engaged in at the time he claims to have felt threatened. Defendant's testimony concerning the shooting clearly, if unsuccessfully, alleged that he fired the gun because he was scared for his safety. Contrary to the court's interpretation, this testimony cannot be read as indicating an attitude on the part of defendant that it was his right to defend himself in any fashion while selling drugs.

Because the court's misunderstanding formed the basis for the upward departure from the sentencing guidelines, and no other reason was presented for the departure, we conclude that this sentence in excess of the guidelines was an abuse of discretion. Accordingly, we remand this matter for resentencing on the second-degree murder conviction. Our decision to remand renders moot defendant's final claim, that his sentence for the second-degree murder conviction violates the "two thirds" rule of *People v Tanner*, 387 Mich 683, 688; 199 NW2d 202 (1972).

Defendant's convictions are affirmed, the sentence for the second-degree murder conviction is vacated, and we remand for resentencing on this conviction. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ William B. Murphy
/s/ Richard Allen Griffin