

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH RACHAR WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

March 18, 2008

No. 275982

Wayne Circuit Court

LC No. 06-007582-01

Before: Murray, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for second-degree criminal sexual conduct, MCL 750.520c(1)(b), for which defendant was sentenced to 1½ to 15 years' imprisonment. We affirm.

Defendant first contends that the trial court's non-standard, sua sponte jury instruction, which reminded the jury that its function was limited to deciding the facts based solely on the evidence and that it should not be distracted by arguments of counsel that imply additional duties, left the jury with the impression that defense counsel was attempting to divert the jury's attention from performing its duty and, thus, denied defendant a fair trial. We disagree.

Challenges to jury instructions are reviewed on appeal de novo. *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003). However, this Court reviews a trial court's determination that an instruction was applicable under the facts of the case for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). The jury instructions are reviewed in their entirety and as a whole to determine whether error, warranting reversal, occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Pursuant to MCL 769.26, review of a defendant's challenge to the trial court's decision to deliver the jury instruction is limited:

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

As a general rule, jurors are presumed to have followed their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 221 (1998). Where a correct and incorrect jury instruction is given, this Court presumes that the jury followed the incorrect instruction. *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995).

A trial court is also obligated to control trial proceedings, and has wide latitude to exercise its discretion in performing that obligation. *People v Conley*, 270 Mich App 301, 305; 715 NW2d 377 (2006). However, in controlling the proceedings, a trial court may not pierce the veil of judicial impartiality. *Id.* at 307. “The appropriate test to determine whether the trial court’s comments or conduct pierced the veil of judicial impartiality is whether the trial court’s conduct or comments ‘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.’” *Id.* quoting *People v Rogers*, 60 Mich App 652, 657; 233 NW2d 8 (1975).

Defendant does not contend that the cautionary instruction was substantially erroneous. Instead, defendant asserts that the jury likely concluded that the trial court’s cautionary instruction was addressed to defense counsel’s closing argument and not the prosecution’s closing argument, thereby piercing the veil of judicial impartiality.

However, rather than transmitting a message to the jury that it was partial to the prosecution’s theory of the case, the trial court, in cautioning the jury, quite properly responded to what it perceived as improper argument by defense counsel. Indeed, that portion of defense counsel’s closing argument that the trial court addressed could have improperly imported to the jury that defendant could receive life in prison if he was convicted. The trial court had a duty to clarify; in as neutral terms as possible, that such an argument should be disregarded. The trial court also minimized any potential prejudicial effect on defendant by not pointing out to the jury that it was defense counsel’s argument that made the instruction necessary. Accordingly, we hold that the trial court did not abuse its discretion in controlling the proceedings by cautioning the jury regarding closing arguments, and it does not affirmatively appear that the error complained of resulted in a miscarriage of justice.¹

Defendant next argues that reversal is warranted where the trial court did not rule on an evidentiary objection but, instead, scolded defense counsel, and allowed the prosecutor to proceed with an allegedly improper line of questioning. Again, we disagree.

¹ Defendant invites this Court to speculate that the trial court’s response to defense counsel’s closing argument somehow persuaded at least one juror to convict him of second-degree criminal sexual conduct. However, jurors are presumed to have followed their instructions, *Graves, supra* at 486, and the trial court specifically instructed the jury that:

My comments, rulings, instructions, and if I asked questions are not evidence. And when I am doing so I am not expressing a personal opinion about the facts of the case. If you think I have one ignore it, because you should decide this case from the evidence, not what you think someone else is thinking.

Here, the testimony leading up to and including the prosecutor's question to the complainant, as well as the objection and trial court response, was as follows:

Q: (The assistant prosecutor): Okay.

And where were you living when you were nine years old?

A: (The victim): On 3000 Colbert.

Q: Is that in the City of Detroit?

A: Yes.

Q: Was that a house or apartment?

A: A two-family flat.

Q: And who lived at that address with you?

A: My mother and my grandparents stayed upstairs.

Q: Okay. But in your flat your mother lived with you?

A: Yes.

Q: And then eventually the defendant moved in with you?

A: Yes.

Q: Now you said you were nine years old when he first moved in?

A: Yes, I was.

Q: Okay. Can you tell us the first time you remember something happening between you and your father?

MR. PAIGE (defense counsel): Your Honor, Objection to

– *no objection*. Assume the facts not in evidence, for one thing. That's the objection, *so that it's noted for the record*.

THE COURT: All right.

Q: Okay, go ahead. When was the first time?

A. MR. PAIGE: Your Honor, you have to rule on an objection.

THE COURT: Mr. Paige, you don't have to tell me how to handle

the Court. Excuse me. I know how to handle the Court. I know what my job is. I don't take direction from attorneys. You withdrew your objection; and now you're saying what, you're reinstating it?

MR. PAIGE: Yes, reinstating. Assuming fact not in evidence.

THE COURT: Thank you. *Be more particular.* Thank you. Sit down.

MR. PAIGE: Thank you.

Instead of elaborating on assertions of error based on the evidentiary issue itself, defendant focuses on the trial court's perceived denigration of defense counsel, arguing that the trial court's admonition pierced the veil of judicial impartiality.

As stated above, a trial court is under a duty to control trial proceedings, and has discretion in performing that obligation, but must not pierce the veil of judicial impartiality. *Conley, supra* at 305, 307. Although a trial judge generally has a duty to address an objection, "the ground of an objection . . . if not readily apparent, 'should be stated with perspicuity and particularity, in order that it may be understood by the court.'" *Tibitoski by Tibitoski v Macomb Disposal Service, Inc.*, 136 Mich App 259, 263-264; 356 NW2d 15 (1984) quoting *Case v Klute*, 283 Mich 581, 585; 278 NW2d 721 (1938). Here, the record was unclear regarding whether defendant was maintaining an objection, and the trial judge's comments reflect its impression that it was withdrawn. Once defense counsel cleared up that confusion, the trial court informed defense counsel to be more precise in the objection, which did not occur. We therefore conclude that the questioned comments were not denigrating to defense counsel and did not pierce the veil of judicial impartiality. *Conley, supra* at 305, 307.

Affirmed.

/s/ Christopher M. Murray
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood