STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 6, 2009
v	No. 280333 Wayne Circuit Court
RONALD DWIGHT SMITH, Defendant-Appellant.	LC No. 07-006633-01

Before: Fort Hood, P.J., and Wilder and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for assault with a dangerous weapon (felonious assault), MCL 750.82. The trial court sentenced him to imprisonment for 15 months to 4 years. For the reasons set forth in this opinion, we affirm.

I. Facts and Procedural History

Defendant was charged with two counts of felonious assault, MCL 750.82, two counts of aggravated domestic violence, MCL 750.81(2), and one count of armed robbery, MCL 750.529. The charges stemmed from defendant's conduct towards Valerie Campbell. Defendant and Campbell had been in a relationship for approximately 20 years and had two children together. At trial, Campbell testified that on December 8, 2006, defendant hit her in the head and hands with a shoe or a boot because she came home late from work. Campbell also testified that on December 11, 2006, defendant asked her to call her mother to ask if he could borrow her mother's van and that she (Campbell) initially refused to do so, telling defendant that the van was going in to be repaired. According to Campbell, defendant became angry and struck her on the head, eye and left leg several times with the handle of a hammer. Campbell called her mother so that defendant would stop hitting her, and the next day her mother brought the van over for defendant to borrow. Campbell then drove her mother back home and, because defendant had threatened to hit her if she did not get $25 from her mother, asked her mother if she could borrow $25. When Campbell's mother stated that she did not have any money and that the van had gas in the tank, Campbell pleaded with her for $25, and her mother gave her $20, which Campbell gave to defendant when she returned home.

Campbell testified that she told a coworker about defendant's physical abuse of her on December 12, 2006, and showed the coworker some of her injuries. She also stated that she did not seek medical attention for her injuries because she did not have medical insurance and

because defendant said she did not need to go to the doctor. On December 20, 2006, nine days after the assault, Campbell made a report to the Detroit Police Domestic Violence Task Force, and photographs of her injuries were taken. Detroit Police Officer Terry Patterson served a personal protection order (PPO) on defendant for Campbell's protection. According to Officer Patterson, when he served the PPO on defendant, the following exchange occurred:

> He says to me what's this? I told him it was a PPO. He says, you think this is gonna stop me? He says, this bitch is not gonna stop me, I will be back at the house.

The jury found defendant guilty of one count of felonious assault and not guilty of all other charges. At sentencing, Campbell made a lengthy victim's impact statement, describing defendant's abuse of her in detail. While she made her statement, defendant interrupted her and called her a pedophile. The trial court told defendant that it had initially intended to sentence defendant to time served. However, the trial court indicated that defendant's outburst indicated that defendant was likely to re-offend and that he was incapable of controlling himself. The minimum sentencing guidelines range for defendant was 0 to 17 months. Therefore, defendant qualified for the benefit of an intermediate sanction under MCL 769.34(4)(a). The trial court sentenced defendant to 15 months to 4 years' imprisonment.

II. Analysis

A. Voir Dire

Defendant argues that the trial court pierced the veil of judicial impartiality by making certain comments during voir dire and by denying defense counsel the right to finish voir dire on defendant's behalf, while allowing the prosecution to fully conduct its voir dire.

Voir dire occurred on July 18, 2007. After the prosecution had concluded its voir dire of the jurors and while defense counsel was in the process of conducting its own voir dire, Judge James A. Callahan received an important personal phone call and had to leave the bench. An alternate judge replaced him for the remainder of the day and took over the voir dire process. The alternate judge informed the potential jurors that each judge conducted voir dire differently and told them they were witnessing "the most extreme case of metamorphosis." After asking questions of the potential jurors and instructing them on the role they would fill, the alternate judge excused the jury. At that time, defense counsel objected, arguing that her voir dire had been interrupted, while the prosecution had been permitted to finish its voir dire. According to defense counsel, the cessation of her voir dire rendered her unable to ask questions regarding divorce and common law marriage. The alternate judge informed defense counsel that he would not allow questions regarding those topics because they placed factual situations in front of the jurors and asked them to "litigate commitment[.]" However, the alternate judge then brought the jurors back into the courtroom, asked additional questions of the jurors himself and excused four jurors. The prosecution then dismissed one juror with a peremptory challenge, and defense counsel dismissed two.

In order to preserve a claim for appeal, a defendant must object on the same grounds at the trial court level, and the issue must be addressed by the trial court. *People v Bauder*, 269 Mich App 174, 177-178; 712 NW2d 506 (2005). Because defendant did not object at the trial

court level on the grounds that the trial court's statements and actions pierced the veil of judicial impartiality, that issue is not properly preserved for appeal. An unpreserved issue is reviewed for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The defendant must show that a plain error occurred, which affected his substantial rights. *Id.* at 774.

A trial court has broad discretion in matters involving the conduct of trial. *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). However, if the trial court's actions pierce the veil of judicial impartiality, a defendant's conviction should be reversed. *Id.* at 308. A trial court pierces the veil of judicial impartiality when its "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.* at 308, quoting *People v Rogers*, 60 Mich App 652, 657; 233 NW2d 8 (1975). When a trial court engages in excessive interference in the examination of witnesses, makes repeated rebukes and disparaging remarks to defense counsel, and demonstrates marked impatience in the presence of the jury, such conduct can deprive the defendant of a fair trial. *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992). In *Conyers*, the trial court engaged in such conduct, and this Court found that the trial court's actions "displayed an attitude of partisanship," which denied the defendant a fair trial. *Id.*

However, the instant case is distinguishable from *Conyers*. First, defense counsel's voir dire was interrupted because the original trial judge was called away for an emergency, and this was explained to the jury before the alternate judge took over the proceedings. Second, the alternate judge explained to the jury that there would be changes to the way voir dire would be conducted due to differences in the procedures employed by different trial judges. Therefore, because the jury was supplied with a reason for both the interruption and the change in procedures, these facts would not cause a reasonable juror to conclude that the trial court looked unfavorably on defendant's case.

Defendant further argues that the alternate judge made "chilling statements" to defense counsel, which pierced the veil of judicial impartiality. First, when defense counsel stated that she had more peremptory challenges to use after exercising her first, the trial court said:

> Oh, you can do—you can do one at a time or you can do whatever you wish to do. What else do you wish?

Second, when determining whether defense counsel was satisfied with the jury selection, the trial court asked, "What about you, ma'am?" Defense counsel responded that she had no further peremptory challenges. Defendant argues that these statements reveal that the trial court was not impartial. However, remarks made by a trial court during a trial are not sufficient to support a charge of bias, when spoken with impatience or even anger, if they are "within the bounds of what imperfect men and women . . . sometimes display." *Cain v Dep't of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996). Therefore, even if the comments directed at defense counsel in the instant case did evidence a degree of impatience or anger with her continued questioning of its voir dire methods, which we do not believe they did, they are not sufficient to support a finding that the trial court was partial because they were brief and would certainly be within the bounds of what an imperfect person might state in a moment of frustration or anger.

Defendant argues that the alternate judge erred by not allowing defense counsel to conduct voir dire or submit questions for the judge to ask on her behalf. A claim that a trial court improperly limited voir dire is reviewed for an abuse of discretion. *People v Washington*, 468 Mich 667, 674; 664 NW2d 203 (2003). An abuse of discretion has occurred "when the [trial] court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). The Michigan Supreme Court has held that a "trial court has discretion in both the scope and the conduct of voir dire" and that "[a] defendant does not have a right to have counsel conduct the voir dire." *Washington*, *supra* at 674, quoting *People v Tyburski*, 445 Mich 606, 618-619; 518 NW2d 441 (1994). When a trial court conducts voir dire on its own, it abuses its discretion when it does not ask adequate questions regarding potential bias to allow the parties to intelligently exercise their challenges for cause. *Id*.

Defendant cites *Tyburski* for the proposition that a trial court's decision to preclude a defendant from participating in voir dire must be made cautiously. According to defendant, the trial court did not proceed cautiously because it failed to provide him with an opportunity to submit questions for the trial court to ask prospective jurors. The record reveals facts contrary to defendant's assertion in this regard. Our review of the record reveals that defense counsel offered examples of questions that she wished to ask the prospective jurors, but the alternate judge ruled that he would not ask defense counsel's questions because they would put factual situations in front of the jurors and ask them to make decisions. In order to succeed on a challenge to a verdict based on a denial of voir dire, a defendant must show that he was actually prejudiced. *Washington*, *supra* at 675. Defendant has made no argument regarding actual prejudice in this case, and the fact that the jury acquitted him of four of the five charges that he faced is strong evidence that no prejudice existed.

Defendant's argument also belies prior rulings of this Court which have held that a trial court has broad discretion in determining the manner in which voir dire will be conducted. See *People v Daniels*, 192 Mich App 658, 666; 482 NW2d 176 (1992), citing *People v Furman*, 158 Mich App 302, 322, 404 NW2d 246 (1987). In keeping with these mandates, our courts have consistently held that the extent and manner of jury voir dire rests within the sound discretion of the trial court, and the trial court's rulings will not be overturned absent a showing of an abuse of discretion.

In the instant case, the two trial court judges that conducted voir dire questioned the potential jurors at length, and the alternate judge excused four jurors for cause of his own accord. Based on our review of the record, we conclude that defendant and his counsel were afforded ample opportunity to examine the jurors to ensure that the defendant's right to be tried "by a jury free from ethnic, racial or political prejudice . . . or predispositions about the defendant's culpability" was achieved. *Gomez v United States*, 490 US 858, 873; 109 S Ct 2237; 104 L Ed2d 923 (1989) (citations omitted). Therefore, we find no error in the manner in which the trial court conducted voir dire.

B. Sentencing

Citing *People v Uphaus*, 275 Mich App 158, 172; 737 NW2d 519 (2007), overruled *People v Harper*, 479 Mich 599, 603 n 1; 739 NW2d 523 (2007), defendant argues that a trial court is only allowed to depart from the intermediate sanction requirement when the reason for

that departure is "based on facts proven to a jury beyond a reasonable doubt." In *Uphaus*, a panel of this Court held that a sentencing court may depart upwardly from an intermediate sanction only if there is a substantial and compelling reason to do so based on facts proven to a jury beyond a reasonable doubt. *Uphaus*, *supra* at 172. However, in *Harper*, our Supreme Court explicitly overruled *Uphaus*,[1] holding that under Michigan's intermediate sentencing system, the intermediate sanctioning requirements of MCL 769.34(4)(a) do not reflect a statutory maximum sentence. *Harper* at 603. "Rather, the conditional limit on incarceration contained in MCL 769.34(4)(a) is a matter of legislative leniency, giving a defendant the opportunity to be incarcerated for a period that is *less* than that authorized by the jury verdict or the guilty plea, a circumstance that does not implicate *Blakely*." *Id.* at 603-604 (emphasis in original). Therefore, the trial court was not required to rely on factors that had been proven to the jury beyond a reasonable doubt, and defendant's argument in this regard is without merit.

Defendant also contends that the trial court failed to offer substantial and compelling reasons, which were objective and verifiable, on the record to support its departure from the minimum sentencing guidelines range. When reviewing a departure from the minimum sentencing guidelines range, this Court reviews the trial court's factual determinations for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). Whether a factor is objective and verifiable is reviewed de novo. *Id.* at 264. Determinations of whether a factor relied upon by the trial court were substantial and compelling, and the extent of the departure, are reviewed for an abuse of discretion. *Id*. at 264-265. An abuse of discretion has occurred "when the [trial] court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Unger*, *supra* at 217.

The minimum sentencing guidelines range in this case was 0 to 17 months. When the upper limit of a defendant's minimum sentencing guidelines range is 18 months or less, a trial court is required to impose an intermediate sanction, which can include a jail term of 12 months or less. MCL 769.34(4)(a). A trial court may only depart from this range if it offers substantial and compelling reasons for its departure on the record. *Babcock*, *supra* at 255. Substantial and compelling reasons for departure must be "'objective and verifiable'" reasons that "'keenly' or 'irresistibly' grab our attention, and we should recognize them as being 'of considerable worth' in deciding the length of a sentence." *Id.* at 257, quoting *People v Fields*, 448 Mich 58, 62, 67; 528 NW2d 176 (1995). Such substantial and compelling reasons only exist in exceptional cases. *Babcock*, *supra* at 257.

At the sentencing hearing, the trial court informed defendant that it was initially inclined to sentence defendant to time served. However, defendant's conduct during the sentencing hearing impacted the trial court's sentence. When Valerie Campbell was reading her victim's statement to the court, defendant interrupted her, stating: "You're a pedophile . . . . You're a pedophile. You messed with your sister, you messed with our son." The trial court told defendant to be quiet and informed defendant that the victim had the right to express how defendant's behavior had affected her and the couple's children and that defendant had no right to talk at that time.

[1] *Harper*, *supra* at 603 n 1.

A trial court may consider a defendant's actions or behavior in court when imposing a sentence. *People v Eason*, 435 Mich 228, 240; 458 NW2d 17 (1990); *People v Ahumada*, 222 Mich App 612, 617; 564 NW2d 188 (1997). Before imposing defendant's sentence, the trial court referred to defendant's outburst and noted that defendant's "true personality" showed through, telling defendant: "You have brought this upon yourself, this morning, yourself, do you know that?" The trial court noted "the anger, the hatred the vitriol" displayed by defendant while the victim addressed the court. The trial court then concluded that this outburst and defendant's conduct at the sentencing hearing indicated that he was likely to re-offend and was incapable of controlling himself. Based on defendant's conduct at the sentencing hearing and defendant's demonstrated extreme hostility toward the victim, there were objective and verifiable reasons for the trial court to conclude that defendant's lurking anger toward the victim, and the likelihood of re-offending that it creates, constituted a substantial and compelling reason to depart from the minimum sentencing guidelines range.

C. Imposition of Attorney Fees for Court-Appointed Attorney

At sentencing, the trial court ordered defendant to repay $600 in attorney fees and $600 in court costs. Defendant argues that the trial court erred by failing to make a determination on the record regarding his ability to pay court costs and attorney fees as required by *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), reversed *People v Jackson*, __ Mich __ ; __ NW2d __ (Docket No. 135888, July 10, 2009). In *Dunbar*, this Court held that before it can impose a fee upon a defendant for a court-appointed attorney, the trial court must make a determination regarding the defendant's ability to pay such a fee. *Dunbar, supra* at 254-255. In this case, the extent of the trial court's determination regarding defendant's ability to pay is that immediately after ordering defendant to pay $600 in attorney fees, the trial court asked defense counsel: "Was counsel retained or—[?]" Defense counsel interrupted, responding, "I was retained, Judge." The trial court then stated: "You were retained." It appears that the trial court viewed the fact that defendant had retained counsel as evidence that defendant, at the very least, had some ability to pay for retained counsel. Under *Dunbar*, the trial court was not required to make a specific finding on the record regarding defendant's ability to pay because defendant did not object to the reimbursement amount at the time it was ordered. *Id.* at 254. However even without an objection, the trial court was required by *Dunbar* to "provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay." *Id.* at 254-255. In this case, there was no indication that the trial court considered defendant's ability to pay in imposing attorney fees.

However, in *Jackson*, our Supreme Court recently overruled *Dunbar*'s requirement of a presentence ability to pay assessment, instead ruling that a "defendant is not entitled to an ability-to-pay assessment until the imposition of the fee is enforced." *Jackson*, slip op at 20. In overruling *Dunbar*, our Supreme Court reasoned that the relevant United States Supreme Court decisions "do not require a presentence ability-to-pay assessment[,]" that "*Dunbar*'s ability-to-pay rule frustrates the Legislature's legitimate interest in recouping fees for court-appointed attorneys from defendants who eventually gain the ability to pay those fees[,]" and that *Dunbar* conflicts with state statutes (MCL 769.1k and MCL 769.1*l*) which allow the trial court to impose a fee for a court-appointed attorney and operate irrespective of a defendant's ability to pay. *Id.*,

slip op at 11, 14, 17. The Supreme Court further held that "there is a substantive difference between the imposition of a fee and the enforcement of that fee" and that

> trial courts should not entertain defendants' ability-to-pay-based challenges to the imposition of fees until enforcement of that imposition has begun. Even *Dunbar* recognized that these pre-enforcement challenges would be premature. Nonetheless, once enforcement of the fee imposition has begun, and a defendant has made a timely objection based on his claimed inability to pay, the trial courts should evaluate the defendant's ability to pay. The operative question for any such evaluation will be whether a defendant is indigent and unable to pay *at that time* or whether forced payment would work a manifest hardship on the defendant *at that time*. [*Id.*, slip op at 18, 20-21 (emphasis in original; footnotes omitted).]

Generally, judicial decisions are to be given complete retroactive effect. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 205; 747 NW2d 811 (2008); *JW Hobbs Corp v Dep't of Treasury*, 268 Mich App 38, 45; 706 NW2d 460 (2005). However, prospective application can be appropriate if injustice might result from full retroactivity. *McDonald*, *supra* at 205. No injustice will result from retroactive application of *Jackson* for two reasons. First, as the Supreme Court stated in *Jackson*, there is no constitutional right to a presentence ability-to-pay assessment. *Jackson*, slip op at 14-15. Second, there has not yet been an attempt to enforce the order imposing attorney fees upon defendant.[2] Once such enforcement is undertaken, and defendant makes a timely objection based on his claimed inability to pay,[3] defendant will be entitled to an evaluation by the trial court to determine whether he "is indigent and unable to pay *at that time* or whether forced payment would work a manifest hardship on the defendant *at that*

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[2] Although defendant claims that "the trial court has required the MDOC to collect these monies of $600 in court costs and $600 in attorney fees from [defendant's] prisoner account[,]" defendant does not claim that any monies have actually been withdrawn from his prisoner account to pay for his attorney. Thus, at least as of the time the parties' briefs were submitted to this Court, it does not appear that there had been any attempt to enforce the order imposing attorney fees upon defendant.

We also observe that the record contains an "Interim Order for Contribution Toward Payment of Attorney Fees" which is dated April 2, 2007. The order directs defendant to pay $250 toward his attorney fees and states that "[t]he final amount owed for attorney fees may be increased at the completion of this case." The order further states that "[a]ll fines, costs and fees not paid within 56 days of your final order are subject to a 20% late penalty on any outstanding balance. Continued failure to pay shall result in the use of any and all collection methods as permitted by law." In his brief on appeal, defendant does not argue that he made any payments pursuant to this interim order. Furthermore, he did not seek a $250 reduction in attorney fees when the trial court imposed $600 in attorney fees at sentencing. In any event, it does not appear that this interim order, including its penalties, was enforced as defendant does not refer to the order in his brief on appeal.

[3] The fact that defendant failed to object to the imposition of costs and attorney fees at sentencing is of no import under *Jackson*. Under *Jackson*, the trigger for the trial court to evaluate a defendant's ability to pay is when enforcement of the fee imposition has begun and a defendant has made a timely objection based on inability to pay. *Jackson*, slip op at 21.

time." *Id.*, slip op at 21 (emphasis in original). Because no injustice will result from retroactive application of *Jackson*, the general rule giving judicial decisions complete retroactive effect applies.

Defendant argues that he is entitled to a determination regarding his ability to pay the $600 in court costs imposed by the trial court. In support of his argument, he cites two unpublished orders of this Court which, relying on *Dunbar*, remanded for a determination of a defendant's ability to pay *both* court costs and attorney fees. As noted above, however, *Dunbar* was reversed by the Supreme Court in *Jackson*. Furthermore, even if *Dunbar* was still good law, its holding did not extend to the imposition of court costs; rather, *Dunbar* was limited to the imposition of court-appointed attorney fees, and the opinion was grounded in an indigent defendant's fundamental right to counsel. Unlike the imposition of court-appointed attorney fees, the imposition of court costs does not implicate any fundamental rights.

III. Holding

For all of the reasons stated above, we affirm defendant's conviction and sentence.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello