STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 15, 2011
v	No. 294195 Saginaw Circuit Court
LOUIS BARRY CURRIN, Defendant-Appellant.	LC No. 07-029211-FC

Before: HOEKSTRA, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84, and the trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to a prison term of nine to 18 years. Defendant appeals as of right. We affirm.

Defendant's first argument concerns the trial court's conduct. Although defendant frames his argument in terms of judicial bias, in actuality he is arguing that certain questions and actions by the trial judge unfairly influenced the jury and thereby deprived him of a fair trial. We disagree.

Defendant moved for a mistrial as a result of the trial court's conduct during trial. "We review a trial court's denial of a motion for a mistrial for an abuse of discretion." *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997).

Pursuant to MRE 614(b), the trial court may question witnesses in order to clarify testimony or elicit additional relevant information, *People v Conyers*, 194 Mich App 395, 404-405; 487 NW2d 787 (1992), but its actions cannot pierce the veil of judicial impartiality. *People v Davis*, 216 Mich App 47, 50; 546 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 well have unjustifiably aroused suspicion in the mind of the jury as to a witness's credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case. *Conyers*, 194 Mich App at 405.

Defendant first points to the following exchange, which occurred following defense counsel's redirect examination of defendant:

> THE COURT: I have just a couple of questions. When this little guy started to get off on you, or reach for the knife, why didn't you just leave and—or when the owner came out and say this guy's 's [sic] going nuts on me or whatever, say—why didn't you do that?
>
> THE WITNESS: Well, when Shannon came around there, all he did was say stop it, and I couldn't stop it because the guy was still sticking me, sticking at me. But when he did stop, I quit.
>
> THE COURT: When's the first time you ever said anything to Detective Grigg about him calling you that name and coming at you with the knife and that, when—today?
>
> THE WITNESS: Yes.
>
> THE COURT: Okay. I don't have anything further…

Defendant asserts that the trial court's first question suggested that the trial court believed that defendant should have fled the scene when one of the store workers pulled a knife. Defendant claims this undermined his self-defense claim and "suggest[ed] that the court did not believe [defendant's] claim that the complainant started the fight." Defendant asserts that the trial court's second question "challenge[d] [defendant's] version of events" and "communicated its belief that [defendant] made up the story for purposes of trial."

Although this exchange might have cast doubt on the credibility of defendant's testimony and his defense, that was a result of his answers, not the result of an improper question. These questions were limited in scope, material to the issues, and did not communicate to the jury any opinion that the trial judge may have had regarding these matters. Moreover, defendant testified that he did in fact start the fight. He said that he grabbed the store worker by his collar with both hands after Neville insulted him. The trial court's questioning produced fuller testimony and clarified what defendant told the investigating officer. As such, these questions did not unjustifiably arouse suspicion in the mind of the jury as to a witness's credibility or influence the jury to the detriment of the defendant's case. *Conyers*, 194 Mich App at 405.

Defendant next claims that the trial court "expressed fear or distrust" of defendant when it moved a knife away from the witness stand during defendant's testimony on direct examination. Defendant appears to argue that the trial court should have granted his motion for a mistrial because the trial court's action unduly influenced the jury.

A criminal defendant is entitled to a fair trial, not a perfect one. *People v Mosko*, 441 Mich 496, 503; 495 NW2d 534 (1992). A criminal defendant generally has the right to appear before the jury as a dignified, free, and innocent man. *People v Payne*, 285 Mich App 181, 187; 774 NW2d 714 (2009).

The record shows that defendant received a fair trial. First, this unusual situation was created by defense counsel, who apparently placed the knife near the witness stand during defendant's testimony. Second, although the incident was unfortunate, the trial court explained that its only concern was safety. A trial court has discretion to take the steps necessary to prevent injury to persons in the courtroom. *Payne*, 285 Mich App at 186. Given defendant's rather extensive criminal history dating back to 1975, the trial court was clearly justified in regard to its safety concerns.

Moreover, defendant cannot show he was prejudiced as a result of the trial court's questioning or the knife incident. The trial court instructed the jury that its comments, rulings, questions, and instructions are not evidence, and that a person accused of a crime is presumed innocent. The trial court also instructed, "If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion." "[J]urors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Under the circumstances, the trial court did not abuse its discretion denying defendant's motion for a mistrial. *Messenger*, 221 Mich App at 175.

Defendant next argues he was denied his right to a speedy trial. However, defendant waived his right to a speedy trial at the November 14, 2007, hearing on his motion for an adjournment. Based on the questioning from the trial court during that hearing, it is clear that defendant specifically considered and intentionally waived this right. *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). As such, we decline to review this issue.

Defendant next argues that his trial counsel provided ineffective assistance when he (1) failed to raise a claim of violation of defendant's right to a speedy trial, and (2) failed to seek a jury instruction on the necessarily lesser-included offense of simple assault. We disagree.

The determination as to whether there has been a deprivation of the effective assistance of counsel is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The factual findings are reviewed for clear error, and the matters of law are reviewed de novo. *Id*. The ultimate decision whether counsel rendered ineffective assistance is also reviewed de novo. *Id*.

To establish ineffective assistance of counsel, defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and a defendant claiming ineffective assistance is required to overcome a strong presumption that sound trial strategy motivated defense counsel's conduct. *LeBlanc*, 465 Mich at 578.

Defendant's claim that trial counsel was ineffective for failing to assert a violation of his right to a speedy trial is without merit because, as noted, he waived his right on the record to a speedy trial. Trial counsel is not ineffective for failing to advocate a meritless position. *Mack*, 265 Mich App at 130. Counsel's failure to argue a meritless position clearly falls within prevailing professional norms.

Further, defense counsel might have elected not to request an instruction on the lesser included offense as a matter of trial strategy. This Court will not second-guess counsel on matters of strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Despite defendant's contention that the instruction could only have helped him, it may have been defense counsel's strategy to forego an instruction on a charge that defendant's testimony clearly supported. Thus, if the jury believed defendant's testimony that he did not have a weapon and only responded more aggressively in self defense when the store worker reached for a weapon, it would be left with no choice but to acquit defendant of assault with intent to do great bodily harm less than murder. However, had the jury been instructed on simple assault, even if the jury believed defendant's testimony that he did not have a weapon and only responded more aggressively in self defense, it could have convicted him of simple assault based on his testimony that he grabbed the store worker by the collar when worker made him angry.

Moreover, in light of the evidence of defendant's guilt, the outcome would not have been different even if defense counsel had requested the instruction. Accordingly, defendant was not denied effective assistance of counsel.

Defendant's final argument is that the trial court erred in scoring ten points for offense variable (OV) 9. We disagree.

Defendant preserved this issue by challenging the scoring of OV 9 at the sentencing hearing. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). "A sentencing court has discretion in determining the number of points to be scored [when calculating the sentencing guidelines], provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Thus, this Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009).

A score of ten points for OV 9 is appropriate if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death…" MCL 777.39(1)(c). The statute defines "victim" as "each person who was placed in danger of physical injury or loss of life or property..." MCL 777.39(2)(a).

Defendant clearly placed the store worker in danger of physical injury. The issue is whether defendant placed a second store worker in danger of physical injury. Defendant argues that he should not be charged with putting a second store worker in danger of physical injury because he attempted to distance himself from the second store worker, but that the second store worker chased *him*. However, defendant's argument completely ignores defendant's behavior *before* he was chased by the second store worker.

The second store worker testified that he was working in the service area, pulling out vehicles, when he heard "some ruckus." The worker came "around the corner" and saw the first worker curled up into a ball with defendant on top of him. The second worker saw defendant strike the first worker 10 to 15 times, and heard the worker repeatedly yelling, "he's got a gun … he's got a gun."

The second worker indicated that he "started yelling and making a bunch of noise, screaming … [defendant] stood up, and he turned around and he came at me." Defendant ran toward the second worker, who then fled the store to get away from defendant. As the second worker was running, defendant continued to yell, "Come here, come here, come here." The second worker ran out of the building and called 911 as defendant chased him down the street through a parking lot. At some point, defendant gave up the chase and left the scene. The second worker then followed defendant to keep sight of him until the police arrived.

The second store worker's testimony adequately supports the trial court's finding that two victims were placed in danger of physical injury. *Steele*, 283 Mich App at 490. The second worker was placed in danger of physical injury when defendant chased him in a threatening manner after assaulting the first worker. The trial court did not err in assigning ten points for OV 9. *Steele*, 283 Mich App at 490.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering