STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of TYRONE CURTIS HARBIN,
Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

TYRONE CURTIS HARBIN,

Respondent-Appellant.

UNPUBLISHED
March 31, 2011

No. 296148
Wayne Circuit Court
Family Division
LC No. 08-478887

Before: MURPHY, C.J., and STEPHENS and M.J. KELLY, JJ.

PER CURIAM.

Respondent appeals as of right the dispositional order placing him with the Michigan Department of Human Services following an adjudication by the court finding that respondent had committed assault with intent to do great bodily harm less than murder, MCL 750.84, and escape from a juvenile facility, MCL 750.186a.[1] We affirm.

Respondent argues that the referee's conduct and remarks pierced the veil of judicial impartiality, denying respondent a fair trial and warranting reversal. It is well established that the trial court has a duty to control trial proceedings in the courtroom and that it has wide discretion and power in fulfilling that duty. MCL 768.29; *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). Additionally, a defendant in a criminal trial is entitled to a neutral and detached magistrate. *People v McIntire*, 232 Mich App 71, 104; 591 NW2d 231 (1998), rev'd on other grounds 461 Mich 147 (1999); *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). The court's conduct, however, may not pierce the veil of judicial impartiality. *Conley*, 270 Mich at 307-308. "'If the trial court's conduct pierces the veil of judicial impartiality, a [respondent's] conviction must be reversed.'" *Id.* at 308 (citations

[1] The delinquency petition against respondent also alleged felonious assault, MCL 750.82, however, this charge was dismissed by the court.

omitted). "'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.* (citations and internal quotations omitted). By analogy, the court in a bench trial pierces the veil of judicial impartiality where its conduct indicates bias against or partiality toward a party, thereby denying the respondent a fair and impartial trial.

A trial court is presumed to be fair and impartial. *People v Wade*, 283 Mich App 462, 470; 771 NW2d 447 (2009). A party claiming that the trial court was biased must overcome a heavy presumption of impartiality. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). This Court has stated that "[j]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases do not generally support a challenge for partiality." *McIntire*, 232 Mich App at 104-105. Further, "partiality is not established by expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women sometimes display." *Id.* at 105. Moreover, "[o]pinions formed by a judge on the basis of facts introduced or events occurring during the course of the current proceedings, or of prior proceedings, do not constitute bias or partiality unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Schellenberg v Rochester, Michigan, Lodge No 2225 of the Benevolent & Protective Order of Elks of the United States of America*, 228 Mich App 20, 39; 577 NW2d 163 (1998). A trial court's excessive interference in the examination of witnesses or disparaging remarks directed at defense counsel may demonstrate partisanship that denies a respondent a fair trial. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996).

In the present case, the record reveals that the referee interrupted the direct examination of respondent, interjecting some unprofessional remarks that reflected impatience, annoyance, anger, and some disgust with respondent's testimony and a belief that respondent's testimony was greatly lacking in credibility. Respondent argues that the referee's interruption denied him a fair trial. A trial court does have wide discretion and power in matters of trial conduct. See *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). Here, the referee interrupted respondent's testimony only after respondent confirmed, to a great extent, the victim's testimony and minimally implicated himself as an aider and abettor to the assault.[2] At this point, the referee was satisfied beyond a reasonable doubt that respondent committed the offenses for which he had been charged. The referee also asked respondent's counsel whether he was done before the referee continued and made his findings of fact and conclusions of law, and counsel stated that he had no additional questions. There is no indication that counsel had any other defense witnesses to present. While we do not condone the referee's emotionally-charged comments that reflected poor judicial temperament, we ultimately conclude that the referee did

[2] We note that respondent's testimony itself could support a finding that respondent aided and abetted in the charged crime of assault with intent to do great bodily harm less than murder and that respondent escaped from the facility.

not exceed the parameters of his discretion in regulating trial conduct. MCL 768.29; *People v Taylor*, 252 Mich App 519, 522; 652 NW2d 526 (2002).

With respect to alleged bias and partiality, the referee formed his opinion and made his remarks on the basis of the facts introduced at trial, not on anything that occurred beforehand. His opinion was further fashioned by the nonchalant manner respondent used to describe the bloody beating of the victim. The referee noted that respondent's demeanor during his testimony "show[ed] no empathy, [ ] show[ed] no sensitivity, [and] show[ed] no disgust or shame." The referee's comments appear to be remarks critical or disapproving of, or even hostile to respondent, or expressions of impatience, dissatisfaction, annoyance, and even anger that, in general, are equally ineffective for the purpose of establishing bias or prejudice. *McIntire*, 232 Mich App at 104-105. Further, respondent has failed to show how the referee's comments, made *after* respondent's incriminating and unremorseful testimony, displayed a deep-seated favoritism or antagonism that would make judgment impossible. Accordingly, we conclude that respondent fails to overcome the presumption of impartiality.

Respondent next argues that the referee did not give respondent's counsel an opportunity to present a closing argument and that this conduct denied respondent a fair trial. Pursuant to MCR 2.507(E), "the parties may rest their cases with or without final arguments." Further, a trial court has broad discretion in matters of trial conduct, including limiting arguments of counsel. MCL 768.29; *People v Green*, 34 Mich App 149, 152; 190 NW2d 686 (1971).

In the present case, the referee asked respondent's counsel, "Are we done with this?" Respondent's counsel answered affirmatively and stated that he had no additional questions. The referee then set forth his findings of fact and conclusions of law without first giving the prosecution or respondent's counsel an opportunity to present closing arguments. We cannot conclude that reversal is warranted given that the legal issues presented at trial were not complicated, the trial was relatively short, the testimony was straightforward, and this was a bench trial. Accordingly, assuming error, it was harmless. MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Respondent next argues that he was deprived of the effective assistance of counsel. We disagree. The determination of whether a respondent has been deprived of the effective assistance of counsel presents a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* Because respondent has not established a testimonial record at a *Ginther*[3] hearing, review is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

To prevail on a claim of ineffective assistance of counsel, respondent must show that: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of

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[3] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Mesik*, 285 Mich App 535, 542-543; 775 NW2d 857 (2009). A respondent must satisfy a heavy burden to overcome the presumption that counsel employed sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

First, respondent argues that counsel was ineffective for failing to object to the long narrative form of testimony given by two prosecution witnesses, including the victim, and thus, allowed the witnesses to present inadmissible hearsay evidence, inadmissible statements regarding medical diagnoses, and inadmissible statements concerning what other witnesses and non-witnesses observed. The record reveals that the two witnesses testified vastly in a narrative form, however, nothing in the Michigan rules of evidence preclude testimony because of its narrative form. *People v Wilson*, 119 Mich App 606, 617; 326 NW2d 576 (1982). Further, we can reasonably imagine a potential benefit to respondent in allowing the victim to ramble endlessly without direction or guidance from the prosecutor, giving defense counsel fodder for purposes of cross-examination. Accordingly, respondent has failed to overcome the strong presumption that counsel's failure to object to the narrative form of testimony from the witnesses constituted a sound trial strategy. Even assuming that counsel's performance fell below an objective standard of reasonableness, there is no reasonable probability that, but for counsel's error, the result of the proceedings would have been different. With respect to the argument that inadmissible evidence was introduced through the narrative testimony, there was little risk of unfair prejudice because this was a bench trial, and a judge is presumed to understand the law and decide a case based solely on properly admitted evidence. *See People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001).

Next, respondent argues that counsel was ineffective for failing to sequester a witness during the victim's testimony. The record does not support his claim. The record reveals that, prior to the victim's testimony, the prosecutor asked the other witness to step out into the hall. Accordingly, respondent's argument is without merit.

Respondent also argues that counsel was ineffective for failing to object to the referee's comments. A failure to object can be a serious error that results in prejudice. See, e.g., *People v Kimble*, 470 Mich 305, 314; 684 NW2d 669 (2004). However, respondent has not demonstrated that counsel's failure to object did not constitute sound trial strategy. It is conceivable that respondent's counsel made a strategic decision not to object in order to avoid appearing confrontational. See *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Respondent neither overcomes the strong presumption that counsel's performance was trial strategy nor makes any showing that, but for counsel's failure to object to the referee's comments, the result of the proceedings would have been different.

Respondent next argues that counsel was ineffective for failing to continue his direct examination of respondent following the referee's interruption. Decisions about calling and questioning witnesses are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The extent to which counsel examined respondent was a matter of trial strategy, and this Court will not second guess that strategy with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). During direct examination, respondent confirmed much of the victim's testimony and implicated himself in the bloody beating of the victim. It is conceivable that respondent's counsel discontinued his direct

examination to avoid his client from further incriminating himself. Again, respondent neither overcomes the strong presumption that counsel's performance constituted sound trial strategy nor makes any showing that, but for counsel's failure to continue direct examination of respondent, the result of the proceedings would have been different.

Respondent also claims ineffective assistance because counsel failed to demand an opportunity to make a closing argument. This Court has held that the waiver of closing arguments does not amount to ineffective assistance of counsel. *People v Burns*, 118 Mich App 242, 247-248; 324 NW2d 589 (1982) ("It is not error for defense counsel to waive his final argument"). Thus, counsel's decision not to interject a request to make a closing argument here might be deemed a matter of trial strategy. Regardless, respondent has not established the requisite prejudice. Respondent has not indicated what arguments could have been made by his counsel that would have resulted in a reasonable probability of a different result. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Again, respondent fails to demonstrate that, but for counsel's failure to make a closing argument, the result of the proceedings would have been different.

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Kelly