

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MONTREAL DARNELL CHRISTIAN-BATES,

Defendant-Appellee.

UNPUBLISHED

September 13, 2007

No. 269919

Ingham Circuit Court

LC No. 05-000749-FC

Before: Bandstra, P.J., Zahra and Owens, JJ.

PER CURIAM.

After a jury trial before Ingham Circuit Judge Beverly Nettles-Nickerson, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (“felony-firearm”), MCL 750.227b. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to concurrent terms of 72 to 180 months’ imprisonment for the assault conviction and 45 to 90 months’ imprisonment for the felon in possession conviction, and to a consecutive term of two years’ imprisonment for the felony-firearm conviction. We reverse and remand for a new trial.

Defendant’s convictions arose from an altercation in a Lansing park. During the altercation, defendant fired shots from a handgun, and a bullet hit the victim, Lonnie Glover, in his shoulder. Defendant claimed that he only shot the handgun to frighten Glover, and did not intend to hit him. Glover and other witnesses gave varying accounts of the shooting, generally indicating that defendant shot Glover as Glover ran away.

Defendant first argues that the prosecutor committed misconduct by eliciting testimony from Officer Brian Rendon concerning whether it is generally common for witnesses to give varying accounts of events surrounding assaults. We disagree. We review questions of prosecutorial misconduct de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

In *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007), this Court recently stated:

Given that a prosecutor’s role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was

denied a fair and impartial trial. A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the defendant's guilt or innocence. Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context. [Citations omitted.]

In *Dobek*, this Court also recognized the general rule that precludes a witness from testifying about the credibility of another witness, because this testimony invades the jury's exclusive province of assessing witness credibility. *Id.* at 71.

Rendon's testimony was admissible under MRE 701, because his opinion regarding his experiences with eyewitnesses in his seven-and-a-half years' experience as a police officer constituted an opinion rationally based on his perception. Moreover, Rendon did not testify regarding whether any particular witness was credible. Rather, he testified that discrepancies in the testimony of different witnesses are common. This testimony did not invade the jury's province of asserting witness credibility. The jury retained its function of identifying the accurate version of the events, thus preserving its role as the ultimate arbiter of credibility. Accordingly, here, as in *Dobek*, the prosecutor was within the bounds of his authority when he elicited the challenged testimony from Rendon.

Next, defendant argues that the trial court denied him a fair trial by abruptly terminating his counsel's closing argument, effectively disparaging his case. Defendant acknowledges that the trial court had authority to set time limits on closing arguments, see MCR 2.507(F), but maintains that the manner in which the court ended the argument conveyed a tacit message to the jury that the court found defense counsel's argument meritless. We agree. We review the trial court's actions for an abuse of discretion. *People v Green*, 34 Mich App 149, 152; 190 NW2d 686 (1971). "The test to be applied when there is an allegation that a trial judge's comments were of such a nature as to unduly influence a jury is for the reviewing court to examine the record and determine whether the trial court pierced the veil of judicial impartiality." *People v Sowders*, 164 Mich App 36, 49; 417 NW2d 78 (1987).

Closing arguments in this case began at 2:00 p.m. on December 12, 2005. The prosecutor's initial closing argument spans 13 transcript pages, which amounted to approximately 20 minutes of argument before the jury.¹ The first portion of defense counsel's argument spans 18 pages, which would be less than 30 minutes of argument. At this point, the trial court interrupted him to remind him of the time. Counsel resumed his argument until the court stopped him mid-sentence approximately six minutes later:

Defense counsel: If [defendant] had the motive and he really wanted to kill this guy, it would have been a very simple thing to do. This was not about an intent to kill. This was about an intent to beat and put in fear. An intent to beat up is not

¹ The record indicates that defense counsel's entire argument lasted "over 35 minutes." The closing arguments by both parties, along with the jury instructions, lasted approximately one-and-a-half hours, spanning 58 transcript pages. This results in an estimate that recitation of each transcript page took approximately a minute and a half.

an intent to do great bodily harm less than murder. When you listen to the definition of what that means, that's causing serious physical harm, not the kind you'd get in an ordinary fight—

The court: Thank you, counselor.

Defense counsel: —even with a slap with a beer bottle.

The court: Final closing statement.

Defense counsel: Excuse me, Your Honor?

The court: Thank you. Prosecutor, final closing, brief rebuttal.

The record does not indicate that there was an urgent need to hasten closing arguments, and the trial court and parties acknowledged that the court had not informed counsel of any time limits pertaining to closing arguments. After the jury began deliberations, defense counsel moved for a mistrial. During the motion, defense counsel and the trial court had the following exchange:

Defense counsel: The Court, having curtailed my final argument, effectively embarrassed me in front of the jury, diminished my ability to argue my client's case on his behalf and my theories of defense in this case. Any diminishment of what I do, although it may reflect badly on me, reflects more harmfully on my client and causes the jury, I believe, to believe that this Court holds anything that I argued with very little value. If the Court sets that tone and gives that example to the jury, it certainly sends them a message that the defense has little merit and, therefore, the Defendant should be found guilty. I, therefore, move for a mistrial on that ground. Thank you.

* * *

The court: Thank you. This Court usually does set limits so the Court was mistaken and I do apologize to the defense attorney. . . . I do believe that it was over 35 minutes of final and before the Court had, I hope, gracefully in front of the jury said, it is now time, thank you, but I did give you a little warning to be cognizant of the time.

The trial court then denied defendant's motion for a mistrial.

Although the trial court believed otherwise, its interruption of defense counsel's closing argument in mid-sentence was not "graceful." Defense counsel was given no warning that the trial court would limit the time in which he could give his argument before commencing his argument. Further, when the trial court reminded defense counsel of the time during his closing argument, it did not indicate that defense counsel had a set period of time in which to end his

closing argument.² Further, the trial court did not indicate to the jury that it halted defense counsel's closing argument because he had exceeded a particular time limit. Although the trial court has the authority to set time limits on closing arguments, MCR 2.507(F), pursuant to the Code of Judicial Conduct, Canon 3, a trial court judge also has a duty to "avoid interruptions of counsel in their arguments" By halting defense counsel's closing argument in mid-sentence, without advance warning or a chance to make a concluding remark, the trial court acted in a manner that would lead a reasonable juror to believe that it did not value defense counsel's remarks and argument in support of defendant's acquittal. In so doing, the trial court pierced the veil of judicial impartiality and acted in a manner that unfairly favored the prosecution. Accordingly, the trial court abused its discretion when it interrupted defense counsel's closing argument and, in so doing, it denied defendant a fair trial. Remand for a new trial is necessary.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Brian K. Zahra

/s/ Donald S. Owens

² The trial court merely stated, "Counselor, I'm going to remind you of the time. Thank you."