

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL RONALD KORTE,

Defendant-Appellant.

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UNPUBLISHED

February 8, 2005

No. 249660

Kent Circuit Court

LC No. 02012121-FH

Before: Griffin, P.J., and Neff and Borrello, JJ.

PER CURIAM.

A jury convicted defendant of obtaining money (more than \$1,000 but less than \$20,000) by false pretenses, MCL 750.218(4)(a), and of attempting to obtain money (more than \$1,000 but less than \$20,000) by false pretenses, MCL 750.218(4)(a) and 750.92. The trial court originally sentenced defendant to concurrent terms of six months' incarceration and ordered defendant to pay \$2,000 in court costs, \$60 to the crime victims' rights fund, \$60 for DNA testing, and \$3,066 in restitution. Thereafter, the trial court learned that it had improperly imposed costs on defendant without statutory authority. In an attempt to remedy the lack of statutory authority for the imposition of court costs, the trial court resentenced defendant. On resentencing, the trial court again sentenced defendant to concurrent terms of six months' incarceration. However, the trial court also sentenced defendant to probation for one month because the probation statute, MCL 771.3, expressly authorizes the payment of costs as a condition of probation. In addition, on resentencing, the trial court ordered defendant to pay \$2,000 in court costs, \$60 in state costs, \$60 to the crime victims' rights fund, and \$3,066 in restitution. Defendant appeals as of right. We affirm, but remand for vacation of the second judgment of sentence and reinstatement of the original judgment of sentence without the \$2,000 in court costs.

On appeal, defendant raises several jury instruction issues. We review claims of instructional error de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *Id.* Even if somewhat imperfect, instructions do not warrant reversal if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* With regard to unpreserved claims of instructional error, we review such claims for plain error that affected substantial rights. *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001).

Defendant raises numerous instructional errors. First, defendant argues that the trial court erred in defining for the jury the term "reimbursement" when defendant specifically requested

that the court not define the term. Next, defendant argues that the trial court erred in instructing the jury on the rules of contract interpretation without informing the jury that those rules were only relevant to the fourth element (detrimental reliance) of count I. Lastly, defendant contends that the trial court committed reversible error by failing to instruct the jury that whether defendant's good faith defense was valid depended on defendant's subjective state of mind and not on objective criteria. However, contrary to defendant's argument on appeal, the trial court specifically explained to the jury that it needed to know what the Grand Rapid's Police Department's college tuition reimbursement policy meant to determine whether the prosecutor had proven detrimental reliance. Furthermore, the trial court specifically instructed the jury: "[g]ood faith is a subjective standard; it's not an objective standard." After carefully reviewing the trial court's instructions, we conclude that they were not improper. While not always perfect, the instructions fairly presented the issues to be tried and sufficiently protected defendant's rights.

Defendant next argues that the trial court's instructions on the good faith or claim of right defense warrants reversal of his convictions because the instruction shifted the burden of proof to defendant to prove that he had an honest, good faith belief that he was entitled to reimbursement and therefore lacked intent. Although defendant raised this issue in a post-trial motion for new trial, defendant did not object at trial to the good faith instruction on the ground that it improperly shifted the burden of proof. He has therefore failed to preserve this issue for appellate review. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Therefore, our review of this issue is for plain error affecting defendant's substantial rights. *Aldrich, supra* at 124-125.

Our review of the trial court's instructions reveals that the trial court's instructions regarding the burden of proving good faith were not perfect. The trial court could have, and should have been more specific in explaining the burden of proof regarding the good faith defense. The prosecutor, not defendant, had the burden of proving that defendant lacked an honest good faith belief that he was entitled to the money. CJI2d 7.5(4). While the trial court did not explicitly articulate that the prosecutor bore this burden, the trial court correctly instructed the jury that the prosecutor had the burden of proof and that one of the elements of obtaining money by false pretenses is the intent to defraud or deceive.

As we observed above, even imperfect jury instructions do not warrant reversal if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Kurr, supra* at 327. Our review of the record reveals that the jury instructions did sufficiently protect defendant's rights. *Id.* We reject defendant's suggestion that the jury instructions shifted the burden of proof to defendant to show that he lacked the requisite intent. The trial court's instructions never stated that defendant had the burden of proving that he lacked intent or that he had a good faith defense. On the contrary, the trial court instructed the jury that the prosecutor had the burden of proof. We find that the trial court's instructions, while not perfect, adequately conveyed the concept of the burden of proof, fairly presented the issues to be tried, and sufficiently protected defendant's rights. Therefore, we conclude that there was no plain error in this case.

Defendant next argues that the trial court abused its discretion when it excluded from evidence the testimony of defendant's expert, labor lawyer Timothy Ryan, regarding the meaning of terms used in the union contract. We review a trial court's decision regarding the

admissibility of expert testimony for an abuse of discretion. *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003). MRE 702, which governs the admissibility of expert testimony, provides that where specialized knowledge will assist the fact finder in understanding the evidence or determining a fact in issue, an expert witness may offer expert testimony, provided, among other factors, that “the testimony is based on sufficient facts or data.”

Defendant contends that Ryan was a necessary witness who would have assisted the jury in understanding the meaning of the term “existing practice” found in Article 43, the Educational Reimbursement section, of the union contract. That section provides, in part, that “[t]he existing practice with respect to reimbursement of tuition for officers who successfully complete courses approved by Management for academic credit shall continue for the life of this Agreement . . . .” According to defendant, Ryan, a labor lawyer with seventeen years of experience, would have helped the jury understand that the term “existing practice” is one often used by parties to a contract when they do not wish to decide what the existing practice is but would like to finalize the contract without agreeing on what the practice is. Defendant further argues that Ryan could show that, because such terms often suggest an ambiguity in the contract, the term “reimbursement” used in the above contract may be an ambiguous term susceptible to more than one interpretation. Further, because defendant’s theory at trial was that defendant honestly believed he was entitled to keep the scholarship money he received, evidence tending to show that the contract was ambiguous would support defendant’s assertion that his belief that he was entitled to keep the scholarship money was an honest one.

At the pretrial motion hearing on this issue, attorney Ryan testified that because he did not participate in the negotiations of the contract at issue, he did not know what the parties to the contract intended when they agreed to use the term “existing practice” in the Educational Reimbursement section of the contract. Ryan acknowledged that any testimony about what the parties were thinking would have been speculation. In light of Ryan’s testimony at the motion hearing on this issue, we conclude that his testimony would not have been helpful to the jury to understand the evidence or determine a fact in issue. Moreover, Ryan’s testimony would not have been “based on sufficient facts or data” as required by MRE 702.

Furthermore, although defendant contends that Ryan could have testified that nothing in the contract language precluded the reimbursement of scholarship money received, such testimony would have been cumulative in light of other testimony presented at trial. Police Captain Rex Marks testified that, before June 2002, there was no policy or other directive regarding tuition reimbursement applying to uniformed officers that contained the term “scholarship.” Similarly, Lieutenant Paul Warwick testified that there are no written policies that indicate that an officer could not claim a scholarship earned through academic achievement. MRE 403 permits a trial court to exclude relevant evidence that is cumulative. We therefore conclude that the trial court did not abuse its discretion in precluding Ryan from testifying because the testimony was not helpful to the jury or “based on sufficient facts or data” under MRE 702 and was cumulative and therefore properly excluded under MRE 403.

Defendant next argues that the trial court questioned certain prosecution witnesses in a biased manner, thereby “piercing the veil of judicial impartiality.” A trial court may question witnesses to clarify testimony or elicit additional relevant information. MRE 614(b); *People v Sterling*, 154 Mich App 223, 228; 397 NW2d 182 (1986). “However, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative,

prejudicial, unfair, or partial.” *People v Conyers*, 194 Mich App 395, 405; 487 NW2d 787 (1992). The test is whether a “judge’s questions and comments ‘may well have unjustifiably aroused suspicion in the mind of the jury’ as to a witness’ credibility, . . . and whether partiality ‘quite possibly could have influenced the jury to the detriment of defendant’s case.’” *Sterling*, *supra* at 228, quoting *People v Redfern*, 71 Mich App 452, 457; 248 NW2d 582 (1976).

According to defendant, the trial court’s questions of the witnesses revealed the trial court’s bias against defendant and gave the appearance that the trial court was partial to the prosecution. Defendant further asserts that the negative impact of the trial court’s improper questioning was magnified when the trial court denied defendant’s request to re-cross examine the witnesses following the trial court’s questioning of the witnesses. After reviewing the trial court’s questioning of Jan Emrich, Captain Rex Marks, Marlene Watson, and George Childers, we reject defendant’s contention that the trial court’s questioning of the witnesses was improper. The questions the trial court asked the witnesses were proper to clarify testimony or to elicit additional relevant information. *Sterling*, *supra* at 228; MRE 614(b). Moreover, our review of the trial court’s questions of the witnesses reveals that they were not intimidating, argumentative, prejudicial, unfair or partial. We disagree with defendant’s characterization of the nature of the trial court’s questioning and conclude that there is no possibility that the trial court’s questions could have influenced the jury to the detriment of defendant’s case.

In addition, to the extent that defendant claims that the trial court’s reaction and remarks to defense counsel in response to a hearsay objection made by defense counsel showed the trial court was biased against defendant, we disagree. “[T]he party who challenges a judge on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality.” *Cain v Dep’t of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). Ordinarily, judicial remarks during trial that are critical, disapproving, or hostile to counsel do not support a finding of bias or partiality. *Id.* at 497 n 30, quoting *Liteky v United States*, 510 US 540, 555-556; 114 S Ct 1147; 127 L Ed 2d 474 (1994). Furthermore, expressions of impatience, dissatisfaction, annoyance, and anger on the part of the trial court do not establish bias or partiality. *Id.*

We disagree with defendant’s characterization of the trial court’s response to defense counsel regarding the hearsay objection. The trial court’s response was not brusque, did not exhibit partiality toward the prosecution, and did not belittle defense counsel. However, even if the trial court’s comments toward defendant expressed impatience, annoyance, or anger, such comments would not establish bias or impartiality. *Id.* Moreover, before trial, the trial court instructed the jury that when he ruled on a party’s objection, he would necessarily have to rule in favor of one party and against the other but that the jury should not assume that the prevailing lawyer was right or better than the other lawyer and that “there’s no inherent criticism in siding with one lawyer or the other in the first place.” Juries are presumed to follow the trial court’s instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). After carefully reviewing the trial court’s questions of the witnesses and response to defense counsel’s hearsay objection, we reject defendant’s contention that trial court demonstrated bias and partiality in favor of the prosecution and against defendant that could have influenced the jury to the detriment of defendant’s case. Defendant has failed overcome the presumption of judicial impartiality.

Defendant next argues that the trial court erred in declining to reduce or offset the amount of his restitution by \$2,407. Grand Rapids City Commission Policy 600-04 provides that an

employee who leaves city employment for any reason while participating in the tuition reimbursement program shall forfeit all rights to reimbursement for tuition for any course that he is taking at the time he leaves city employment. According to defendant, the trial court should have reduced or offset his restitution by \$2,407 for the cost of two courses that he completed at Thomas M. Cooley Law School and was not reimbursed for before he was suspended and placed on administrative leave. We review the trial court's order of restitution for an abuse of discretion. *People v Guajardo*, 213 Mich App 198, 201-202; 539 NW2d 570 (1995).

The presentence investigation report (PSIR) recommended restitution of \$3,066. The court was entitled to rely on the amount recommended in the PSIR because that amount "is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information." *People v Gahan*, 456 Mich 264, 276-277 n 17; 571 NW2d 503 (1997), quoting *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997). The Crime Victim's Rights Act affords a defendant an evidentiary hearing when the amount of restitution is contested. *Id.* at 275-276. While defendant objected to the restitution amount, he did not request an evidentiary hearing. "[I]t is incumbent on the defendant to make a proper objection and request an evidentiary hearing. Absent such objection, the court is not required to order, sua sponte, an evidentiary proceeding to determine the proper amount of restitution due." *Id.* at 276 n 17. Because defendant failed to request an evidentiary hearing, the trial court was entitled to rely on the amount recommended in the PSIR. *Id.* The trial court did not abuse its discretion in ordering defendant to pay restitution in the amount of \$3,066.

Defendant next argues that the trial court erred in ordering defendant to pay costs when there was no statutory authority to justify imposing costs and in resentencing defendant to a one-month term of probation in addition to defendant's original sentence in order to provide statutory authority for imposing \$2,000 in costs under MCL 771.3. According to defendant, the trial court erred when it originally ordered defendant to pay \$2,000 in costs because there was no statutory authority for the imposition of costs, and the proper remedy for the partially invalid sentence was for the trial court to vacate the portion of the original judgment of sentence imposing costs rather than to resentence defendant. We agree. The appropriateness of the imposition of costs as part of a sentence is a question of law that we review de novo. *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

The trial court first sentenced defendant on June 2, 2003. Part of defendant's sentence included the payment of \$2,000 in costs. However, the trial court later became aware that it had improperly imposed costs because there was no statutory basis for costs, and a trial court may only require a convicted felon to pay costs when such requirement is expressly authorized by statute. *People v Slocum*, 213 Mich App 239, 242; 539 NW2d 572 (1995). Thereafter, on February 2, 2004, the trial court resentenced defendant. On resentencing, the trial court sentenced defendant to probation for one month because the probation statute, MCL 771.3, expressly authorizes the payment of costs as a condition of probation.

We hold that the trial court erred in resentencing defendant. A trial court has the authority to resentence a defendant only when the previously imposed sentence is invalid. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997); see also MCR 6.429(A) ("The court may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as provided by law."). A sentence is invalid when it is based on inaccurate information, if it is beyond statutory limits, when it is based upon constitutionally impermissible

grounds, improper assumptions of guilt, a misconception of the law, or when it conforms to local sentencing policy rather than individualized facts. *Miles, supra* at 96. The trial court's statements on the record indicate that the trial court, in originally imposing costs at sentencing, was unaware that costs could only be imposed if there was a statute expressly authorizing imposition of costs. Therefore, the portion of the sentence imposing costs was based on a misconception of the law and was invalid. "Where a court imposes a sentence that is partially invalid, the Legislature has provided that the sentence is not to be 'wholly reversed and annulled,' but rather is to be set aside only 'in respect to the unlawful excess.'" *People v Thomas*, 447 Mich 390, 393; 523 NW2d 215 (1994), quoting MCL 769.24.

With the exception of the \$2,000 in court costs, the original sentence imposed by the trial court was valid. Therefore, under *Thomas*, the trial court should have set aside the \$2,000 in court costs and let the remainder of the original sentence stand rather than resentence defendant. It was improper for the trial court to resentence defendant to probation to provide a statutory basis for imposing court costs. We therefore remand to the trial court for vacation of the second judgment of sentence and reinstatement of the original judgment of sentence without the \$2,000 in court costs. Because the payment of \$60 to the crime victims' rights fund is authorized by MCL 780.905(1) and was ordered in the original judgment of sentence, defendant remains responsible for that payment. If there is a statutory basis for the \$60 DNA testing fee, then the trial court properly assessed that fee and defendant also remains responsible for that payment.

Defendant finally argues that the cumulative effect of numerous errors deprived him of a fair trial. We disagree. The cumulative effect of several minor errors may warrant reversal where the individual errors would not. *Ackerman, supra* at 454. However, in this case, the only error is the trial court's imposition of costs. Because there is only one individual error, there are no errors that can aggregate to deny defendant a fair trial. *Id.*

We affirm defendant's convictions and remand this case for vacation of the second judgment of sentence and reinstatement of the original judgment of sentence without the \$2,000 in court costs. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Janet T. Neff

/s/ Stephen L. Borrello