

20-7735

Supreme Court, U.S.
FILED

JAN 04 2021

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DeAndre Harris — PETITIONER
(Your Name)

vs.

Michigan — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Michigan Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DeAndre Harris
(Your Name)

1727 W. Bluewater Hwy
(Address)

Ionia, MI 48846
(City, State, Zip Code)

N/A
(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

- I. Did the trial court's ~~testimony~~ questioning of multiple witnesses that essentially advocated for and strengthen the prosecution's case pierce the veil of judicial impartiality, demonstrate the trial court's partiality toward the prosecution and improperly influence the jury by creating an appearance of advocacy and partiality against Petitioner? In the alternative, was defense counsel ineffective for failing to object to the trial court's questioning of Mr. Tisdale and Ms. Brunson?
- II. Did the trial court reversibly err when it admitted highly prejudicial and irrelevant evidence regarding an alleged threat to Ms. Brunson by Petitioner following the shooting incident with Mr. Tisdale?

STATE OF NEW YORK

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OTHER

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the Michigan Court of Appeals court appears at Appendix B to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was Oct. 27th, 2020.
A copy of that decision appears at Appendix A.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution ~~guarantee~~ guarantee a criminal defendant the right to a fair jury and the right to the effective assistance of counsel. US Const. Ams. VI, XIV; Const. 1963, art. 1, § 20

Statement of the Case

A jury convicted Petitioner in the Wayne County Circuit Court, the Honorable Giana Denise Lillard presiding, of assault with intent to do great bodily harm less than murder, felon in possession of a firearm and felony firearm. (TT 6/4/18 8-9). The trial court repeatedly injected itself into the trial through its questioning of prosecution witnesses that essentially strengthened the prosecutor's case and improperly bolstered the credibility of a vital prosecution witness. The trial court further admitted irrelevant and highly prejudicial evidence of alleged threats made by Petitioner to his ex-girlfriend.

The trial court sentenced Petitioner as a fourth habitual offender to terms of 12 to 30 years for GBH, 1 to 5 years for possession of a firearm by a felon, and 2 years for felony firearm with the sentence for felony firearm to be served consecutively to the sentences for both GBH and possession of a firearm by a felon and the sentences for GBH and possession of a firearm by a felon to be served concurrently with one another. (Sent 6/20/18 37-38)

In the beginning of October of 2017, Troy Tisdale was living with Taisha Brunson. (TT 5/31/18 157). Mr. Tisdale and Ms. Brunson have three children together. (TT 5/31/18 5, 157). Petitioner and Ms. Brunson has previously been romantically involved and were still in communication at that time. (TT 5/31/18 5, 159). The relationship between the two of them was rocky. (TT 6/1/18 46). Petitioner and M. Brunson lived together previously for a period of eight months before Mr. Tisdale moved in with Ms. Brunson. (TT 6/1/18 44).

On October 6, 2017, Mr. Tisdale was selling movies and CDs outside of the Grand Crew liquor store in Detroit. (TT 5/31/18 4-5). At some point Petitioner arrived in a car with two other individuals. (TT 5/31/18 8-9). A female was driving the car, and Petitioner and another male exited the car, while the driver stayed in the vehicle. (TT 5/31/18 8-10). Mr. Tisdale later found out that the male with Petitioner was his brother. (TT 5/31/18 9). Petitioner's brother was wearing a gray sweat suit and Petitioner was wearing a burgundy hoodie. (TT 5/31/18 10).

According to Mr. Tisdale, when Petitioner and his brother started walking towards the store, Petitioner called Mr. Tisdale a "bitch ass nigger" on his way in. (TT 5/31/18 10). Petitioner and his brother were in the store for about five minutes; when they exited the store, according to Mr. Tisdale, Petitioner started "hurting threats" at him. (TT 5/31/18 12, 18). The situation escalated when according to Mr. Tisdale, Petitioner came closer and threw a glass beer bottle at him. (TT 5/31/18 19-20). The bottle did not hit Mr. Tisdale. (TT 5/31/18 20). However, Mr. Tisdale testified that he swung at Petitioner and grabbed him after Petitioner approached him with another bottle. (TT 5/31/18 20). During

this tussle, Petitioner's brother tried to hit Mr. Tisdale because he was "over Deandre." At one point, Mr. Tisdale picked up a knife off the ground. (TT 5/31/18 21). He later threw the knife down and grabbed a stick he had in his car. (TT 5/31/18 22-23).

While still struggling with Petitioner, Mr. Tisdale saw Petitioner's brother walking toward them with a gun. (TT 5/31/18 24). Petitioner's brother shot at Mr. Tisdale but he was able to duck the first shot and was not hit by it. (TT 5/31/18 25). Following the shot, Mr. Tisdale tried to grab Petitioner's brother's arm to get the gun and a struggle ensued between the two. (TT 5/31/18 25-26). Then while Petitioner's brother was trying to shove the gun to hit him, Mr. Tisdale heard two more shots. (TT 5/31/19 26). During the struggle, the gun eventually fell out of Mr. Harris' brother's hand and Mr. Tisdale testified that he heard Petitioner's brother tell Petitioner, "pick up the gun, pick up the clip, hurry up and shoot this motherfucker." (TT 5/31/18 26). Mr. Tisdale did not see what Petitioner did after that. (TT 5/31/18 27). Mr. Tisdale was ultimately shot in the shoulder. (TT 5/31/18 27).

However, he testified that Petitioner never fired a shot at him. (TT 5/31/18 63). Mr. Tisdale also testified about a previous incident between he and Petitioner that occurred one or two weeks prior. (TT 5/31/18 13). According to Mr. Tisdale, Petitioner had approached him at the Grand Crew liquor store and started talking about "beeing" pulled a knife on him. (TT 5/31/18 16). According to Mr. Tisdale, he then pulled out his stick from his car and Petitioner left. (TT 5/31/18 17).

Larshone Brown testified was working at Grand Crew liquor store on the evening of October 5, 2017. (TT 5/31/18 103). He testified that he heard the guy in the burgundy hoodie say "I was gonna kill him" in reference to Mr. Tisdale as he was walking out of the store. (TT 5/31/18 97, 103-105).

The October 6, 2017 incident at Grand Crew liquor store was partially captured by surveillance cameras at the store as well as by a cell phone video made by Orlando Simpson. (TT 5/29/18 184-185; TT 5/30/18 6-7).

Mr. Simpson testified that he was talking to Mr. Tisdale about buying a flash drive when two males came up to them who he thought "was about to rob us or something." (TT 5/29/18 181). He stepped back and went to sit in his truck. (TT 5/29/18 181). While sitting in his truck, he observed the two males start wrestling with Mr. Tisdale. (TT 5/29/18 181). According to Mr. Simpson, he saw Petitioner with a knife during the altercation; however, the cell phone video he made depicted Mr. Tisdale with the knife lunging at Petitioner.

(TT 5/29/18 184-194). Mr. Simpson's video did not capture the actual shooting, but Mr. Simpson testified that the person that shot Mr. Tisdale was not in the courtroom. (TT 5/29/18 197-198).

The Grand Crew liquor store video depicted two men in an altercation with a third man holding the gun. (TT 5/30/18 70). The man holding the gun appeared to fire a shot which caused a muzzle flash in the video. (TT 5/30/18 70). The man holding the gun was wearing a gray sweatshirt. (TT 5/30/18 72). The video also depicted the man in a navy-blue sweatshirt (Mr. Tisdale) with both a knife and a stick at different points. (TT 5/30/18 97-98). No one else was seen holding a knife in the video. (TT 5/30/18 98).

During trial, the prosecutor permitted evidence through Officer Lamar Kelsey that he went to Taisha Brunson's house on October 7, 2017 to follow up regarding the shooting of Mr. Tisdale. (TT 6/1/18 66). He testified that while he was there, Ms. Brunson received a call from a man that she identified as Petitioner. (TT 6/1/18 67). Ms. Brunson put the call on speaker phone, and according to the Officer Kelsey, he heard the voice on the phone state that he was going to kill her and she was going to be on the news. (TT 6/1/18 68). Defense Counsel objected to the admission of such testimony arguing that it would violate MRE 403 as it was substantially more prejudicial than probative. (Final Conf 12/7/17 18). The prosecutor contended that:

These threatening statements shows an intent and it goes to a motive, and it shows that this is not a mistake. That this is an ongoing transaction and it goes to show what Petitioner was thinking at that time. It's his own statements. It's a consciousness of guilt. (Final Conf 12/7/17 18).

The trial court gave the following explanation for its ruling that the evidence was admissible: Okay, well I think that under the circumstances, that I now understand the context in which the alleged call from the defendant was made. I think that it's clearly something that the officers witnessed happening in the course of investigating the shooting. You know, I mean, I'm not exactly sure how my real question was the materiality of it, you know, if it made a fact at issue more or less likely to have occurred. And I understand the People's argument that these statements that are being made are, when he says, you know, I mean, she's clearly trying to trap him into admitting that he did it. He doesn't admit that he did it, he says you're going to be on the news and he hangs up. So, I mean, I'm not sure exactly that it makes the point that you think it makes, but you understand the facts of your case or your arguments a whole lot better

than I do. I mean, I'm not here to tell anybody how to try their case. But I think that under the circumstances that it occurred, and the fact that it's independently verifiable from someone other than her as to when the call was allegedly made in proximity to the shooting I believe that that makes it material and therefore relevant, and for whatever weight the jury decides to give it, you know, that will be up for the jury to decide. So it's the defendant's own statement allegedly, and if the jury believes that the defendant actually made that statement, they can give it whatever weight they feel it deserves. (Final Conf 12/7/17 18-19).

The trial court asked questions of several of the prosecution's witnesses during trial. First, during Mr. Tisdale's testimony, the court made the following inquiry:

The Court: Did you get a good look at the knife that you say the defendant threatened you with or - in the previous incident?

The Witness: I mean it was like a regular knife.

The Court: Do you know if it was the same knife you picked off the ground?

The Witness: I don't know, I couldn't tell you that, I don't - I can't say if it was or if it wasn't. (TT 5/31/18 90).

Then, during Larshone Brown's testimony, the trial court made the following comment regarding Mr. Brown's demeanor while testifying when defense counsel objected to the leading nature of the prosecutor's questions:

The Court: Ms. Barnwell, your objection is duly noted, but in this instance I believe it's appropriate under the circumstance because Mr. Cobb is attempting, I believe to establish that this - I mean you can look at the witness's demeanor, he's turned away from him, leaned away from him and he's simply just trying to establish for the record that this is a hostile witness who is here testifying under protest. So that's why I'm overruling your objection.

Ms. Barnwell: So just for the record, Your Honor, the witness's demeanor does not portray hostility -

The Court: You hold on just one moment, Ms. Barnwell, you have a seat. I make my -- represent my rulings as to what I observe. Now,

every other witness, if you want to do this we can, every other witness that has come on the stand and testified and any - even Stevie Wonder could see, will be facing forward and engage directly. This witness is turned to the side, leaned away with his head turned away, mumbling giving answers that are virtually inaudible and it's very clear from his body language, as well as the manner of speech that he does not want to be here and does not want to answer questions.

Now, I'm sure that won't change when you start asking him questions. The man doesn't want to be here and that's very clear, and I believe that Mr. Cobb is appropriately using leading questions to establish why he's conducting himself in this way. So, you know, this is a video courtroom and if at any point somebody wants to get ahold of the video to see exactly what the witness is doing, and that is consistent with my ruling in this regard, I'm sure they're free to do so. (TTS/31/18 114-115)

The trial court further went on to ask Mr. Brown the following questions:

The Court: All right. So let me ask you this, sir. How would you characterize that neighborhood where that store is, a good neighborhood, a bad neighborhood, what kind of neighborhood is it?

The Witness: It's not too good.

The Court: All right. And is it popular to be someone who talks to the police or cooperates with the police in that neighborhood?

The Witness: I'm not sure.

The Court: Do they have a word for people who talk to the police in that neighborhood?

The Witness: Not sure.

The Court: Have you ever heard the term snitch?

Ms. Barnwell: Your Honor, he said he's not sure.

The Court: Okay. And I'm asking another question, so your objection's duly noted and preserved. Have you ever heard the term snitch?

The Witness: I heard of it.

The Court: What's a snitch?

The Witness: That's where you're talking to the police.

The Court: Oh, so you do know a word for what people are called that talk to the police.

The Witness: If that's what you call it.

The Court: Okay. Now, is that a good thing to be known in that neighborhood over there as a snitch or a person who talks to the police?

The Witness: Not good for no one.

The Court: All right. And is that affecting you wanting to be here to talk in this case?

The Witness: Yes.

The Court: Okay. But despite that, are you doing your best to tell the truth about what you remembered and what you saw?

The Witness: Yes.

The Court: Do you remember, word-for-word, everything that was said between you and the person with the burgundy sweatshirt?

The Witness: No. (TT 5/31/18 149-152).

Finally, when Taisha Brunson testified, the trial court asked the following questions:

The Court: You indicated that at the time -- at some point you were trying to keep -- you would make up excuses not to go to the Grand Crew Liquor Store because you were trying to keep Petitioner and Mr. Tisdale separated?

The Witness: Yes.

The Court: At what point in time was this?

The Witness: I'm not for sure exactly the dates, but I know that it was during the time that after Petitioner had moved out and Troy was there.

The Court: Okay. How long after Petitioner moved out did Troy move in? Or after Petitioner was put out 'cause you said he didn't move out, you put him out. How long after Petitioner was put out did Troy move in?

The Witness: I want to say a couple months, maybe two at the most.

The Court: Maybe two months at the most?

The Witness: Maybe two months

The Court: Now, during that period when you put Petitioner out, you moved Troy in, were you still romantically involved with Petitioner?

The Witness: Yes.

The Court: And how did you facilitate still being romantically involved with Petitioner if Troy Tisdale was living in the home?

The Witness: Petitioner would go get a room.

The Court: So by get a room you mean a hotel room? So you would spend time at a hotel with Petitioner while Troy Tisdale was living in the home with the kids?

The Witness: Yes.

The Court: To your knowledge, did Petitioner and Mr. Tisdale become aware that you were still romantically involved with Petitioner while Troy Tisdale was living in the home, to your knowledge?

The Witness: Yes.

The Court: When did that happen? When did they figure out that you were dealing with both of them?

The Witness: I think Petitioner had -- Petitioner found -- I want to say Petitioner said something to me first, 'cause he worked right around the corner and I guess him passing the house or he was passing that store he saw Troy and he mentioned it to me.

The Court: When was that?

The Witness: I'm not for sure of the date.

The Court: Okay. Well, the shooting happened in October, October 6th, early October.

The Witness: (Inaudible).

The Court: So would it be after Labor Day?

The Witness: Maybe September, so maybe September he had mentioned it to me. That was the last time I seen Troy (inaudible).

The Court: Okay. So when Petitioner mentioned it to you that, ~~he~~ you know, Troy was living in the house, was he happy about it?

The Witness: I'm sorry?

The Court: When Petitioner mentioned to you that he was aware that you had Troy over there in the house, was he happy about it?

The Witness: No (TT 6/1/18 51-53).

Arguments

1. The trial court's questioning of multiple witnesses that essentially advocated for and strengthened the prosecution's case pierced the veil of judicial impartiality, demonstrated the trial court's partiality toward the prosecution and improperly influenced the jury by creating an appearance of advocacy and partiality against Petitioner. In the alternative, defense counsel was ineffective for failing to object to the trial court's questioning of Mr. Tisdale and Ms. Brunson.

Petitioner's defense counsel objected to the trial court's characterization of Mr. Brown's demeanor and during the trial court's questioning of him, thus that issue is preserved. (TT 5/31/18 114-115, 152). However, Petitioner's defense counsel did not object to the trial court's questioning of Mr. Tisdale or Ms. Brunson, and those issues are not preserved. In the alternative, defense counsel was ineffective for failing to object to the trial court's questioning of Mr. Tisdale and Ms. Brunson.

The question of whether judicial misconduct denies a defendant a fair trial is a question of constitutional law that this Court reviews de novo. *People v. Swilley*, — Mich —; — NW2d — (2019) (Docket No. 154684); slip op at 9 (citing *People v. Stevens*, 498 Mich 162, 168; 869 NW2d 233 (2015)). When the issue is preserved, once a reviewing court has concluded that judicial misconduct has denied the defendant a fair trial, a structural error has occurred and automatic reversal is required. *Stevens*, 498 Mich at 168 (citing *Arizona v. Fulminante*, 499 US 279, 309; 111 S Ct 1246; 113 L Ed 2d 302 (1991)). Unpreserved errors are reviewed for plain error. *People v. Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The performance and prejudice components of an ineffective assistance of counsel claim are mixed questions of fact and law. *Strickland v Washington*, 466 US 668, 698; 104 S Ct 2052 (1984); *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Trial court findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *LeBlanc*, 465 Mich at 579. Clear error exists where the reviewing court is left with a definite and firm conviction that the trial court made a mistake. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

A judge's conduct pierces the veil of impartiality and "violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party." *Stevens*, 498 Mich at 171. When looking at the totality of the circumstances, a reviewing court should consider a variety of factors, including "The nature of the judicial conduct, the tone and demeanor of the trial judge, the scope of the judicial misconduct in the context of the length and complexity of the trial and issues therein, the extent to which the judge's conduct was directed at one side more than the other, and the presence of any curative instructions." *Id.* at 172.

The Michigan Code of Judicial Conduct states:

A judge may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear up some obscurity, but the judge should bear in mind that undue interference, impatience or participation in the examination of witnesses, or a severe attitude on the judge's part toward witnesses... may tend to prevent the proper presentation of the cause, or the ascertainment of truth in respect thereto... In addressing counsel, litigants or witnesses, the judge should avoid a controversial manner or tone. *Id.* at 174.

A criminal defendant is entitled to a trial before a "neutral and detached magistrate of justice." *People v Moore*, 161 Mich App 615, 619; 411 NW2d 797 (1987). Accordingly, a trial judge must avoid any invasion of the prosecutor's role and must exercise caution so that his comments will not be prejudicial, unfair, or partial. *People v Sterling*, 154 Mich App 223, 228; 397 NW2d 182 (1986). A judge's influence on a jury "is necessarily... of great weight and his slightest word or intimation is received with deference, and may prove controlling." *Quercia v United States*, 289 US 466, 470; 53 S Ct 698 (1932); see also *United States v Hickman*, 592 F2d 931, 936 (CA 6, 1979). A trial judge destroys the right to a fair trial when he injects prejudicial comments or berates the defense in front of the jury. *People*

v. Conyers, 194 Mich App 395, 404; 487 NW2d 787 (1992); People v Ross, 181 Mich App 89, 91; 449 NW2d 107 (1989); People v Wicksall, 160 Mich App 765, 771-75; 408 NW2d 551 (1987); People v Neal, 290 Mich 123, 129; 287 NW 403 (1939).

Here, the nature of the judicial conduct was the trial court's questioning of several prosecution witnesses that had the clear motive of bolstering the prosecution's case. First, during the testimony of Mr. Tisdale, the trial court made the following inquiry:

The Court: Did you get a good look at the knife that you say the defendant threatened you with or - in the previous incident?

The Witness: I mean, it was like a regular knife.

The Court: Do you know if it was the same knife you picked up off the ground?

The Witness: I don't know, I couldn't tell you that, I don't - I can't say if it was or if it wasn't. (TT 5/31/18 90).

At this point in the trial, there had been testimony by Mr. Simpson that he had seen Petitioner with a knife while Mr. Tisdale had testified that he never saw Petitioner with a knife and had found the knife on the ground. (TT 5/29/18 184; TT 5/31/18 21). Further, the cell phone video that had been previously played only depicted Mr. Tisdale with a knife. (TT 5/29/18 194). Thus, the trial court's questions took the prosecutor's case a step further by suggesting that the knife Mr. Tisdale picked up was possibly the same knife Petitioner had used in the alleged previous assault making it more likely that petitioner was using a knife during the incident on October 7, 2017.

The trial court's conduct was similar during the testimony of Larshone Brown. Mr. Brown testified that he was working at Grand Crew liquor store on the evening of October 5, 2017, and that he heard the guy in the burgundy hoodie say "I was gonna kill him" in reference to Mr. Tisdale as he was walking out of the store. (TT 5/31/18 97, 103-105). When defense counsel objected the leading nature of the prosecutor's questions, the following exchange occurred:

The Court: Ms. Barnwell, your objection is duly noted, but in this instance I believe it's appropriate under the circumstance because Mr. Cobb is attempting, I believe to establish that this - I mean, you can look at the witness's demeanor, he's turned away from him, leaned away from him and he's simply just trying to establish for the record that this is a hostile witness who is here testifying under protest. So that's why I'm overruling your objection.

Ms. Barnwell: So just for the record, Your Honor, the witness's demeanor does not portray hostility -

The Court: You hold on just one moment, Ms. Barnwell, you have a

seat, I make my -- represent my rulings as to what I observe. Now every other witness, if you want to do this we can, every other witness that has come on the stand and testified and any -- even Stevie Wonder could see, will be facing forward and engage directly. This witness is turned to the side, leaned away with his head turned away, mumbling, giving answers that are virtually inaudible and it's very clear from his body language, as well as the manner of speech that he does not want to be here and does not want to answer questions.

Now, I'm sure that won't change when you start asking him questions. The man doesn't want to be here and that's very clear, and I believe that Mr. Cobb is appropriately using leading questions to establish why he's conducting himself in this way. So, you know, this is a video courtroom and if at any point somebody wants to get ahold of the video and see exactly what the witness is doing, and that is consistent with my rulings in this regard, I'm sure they're free to do so. (TTS/31/18 114-115).

Then, later on during Mr. Brown's testimony, the trial court went on to inquire about what kind of neighborhood the liquor store was in and the implications of being known as a snitch in that neighborhood despite defense counsel's objection. (TTS/31/18 150-152). The trial court further went on to inquire, "Okay. But despite that, are you doing your best to tell the truth about what you remembered and what you saw?" (TTS/31/18 151-152).

Mr. Brown's testimony was a large part of the prosecution's case as he was the only one who could testify as to anything Petitioner had said that would indicate his intent during the incident. During his testimony, Mr. Brown was perhaps not answering the prosecution's questions in the way that the prosecutor would have liked. Thus, the trial court's comment about Mr. Brown's demeanor and its questions about snitches and Mr. Brown telling the truth clearly bolstered his credibility as it gave an explanation for his demeanor that the jury might have otherwise looked at as an indication of untruthfulness. While it would certainly be within the prosecutor's purview to make such an inquiry, it was improper for the trial court to do so.

Finally, during Taisha Brunsur's testimony, the trial court's questions went in depth into

the fact that Ms. Brunson was still romantically involved with Petitioner while Mr. Tisdale was living with her. (TT 6/1/18 51-53). Specifically, the trial court elicited from Ms. Brunson that Petitioner would get a hotel room for the two of them while Mr. Tisdale was at home with her children and that she was trying to keep Mr. Tisdale and Petitioner separate so that they did not find out about each other. (TT 6/1/18 51-52). However, in September of 2017, Petitioner found out that Mr. Tisdale was living with Ms. Brunson and was not happy about it. (TT 6/1/18 52-53). This line of questioning by the trial court improperly bolstered the prosecution's case by further developing a motive for Petitioner's assault on Mr. Tisdale, especially since the trial court's questions elicited that Petitioner had learned about Ms. Brunson's continued involvement with Mr. Tisdale close in time the incident on October 6, 2017.

While appellate courts typically do not witness a trial court's tone or demeanor first hand, a trial court's "hostility, bias, or prejudice can sometimes be gleaned from the nature or choice of the words used by the judge or the series or structure of the court's questions." Stevens, 498 Mich at 186. Here, the trial court's questions of all three witnesses were clearly designed to elicit testimony that was helpful to the prosecution's case and damaging to the defense. This is particularly evident in the ~~the~~ trial court's questioning of Mr. Brown regarding snitches as it continued to push the issue even after Mr. Brown indicated that he was not sure ~~what~~ what a snitch was. (TT 5/31/18 151). Thus, this factor also weights in support of a finding that the trial court pierced the veil of judicial impartiality.

The scope of the trial court's judicial misconduct in context of the length and complexity of the trial and the issues therein also supports a finding that the trial court pierced the veil of judicial impartiality.

In long or complicated trial, "it may be more appropriate for a judge to intervene a greater number of times than in a shorter or more straightforward trial." Stevens, 498 Mich at 176. This is especially so "where a witness testifies about a topic that is convoluted, technical, scientific, or otherwise difficult for a jury to understand." Id. However, "when a witness testifies on a clear and straightforward issue, judicial questioning is less warranted..." Swilley, — Mich at —; slip op at 15. Here, while the evidence portion of Petitioner's trial lasted for days, there was nothing overly complex about the trial itself or the issues involved therein that would have warranted the trial court's conduct. Mr. Tisdale, Mr. Brown and Ms. Brunson were all fact witnesses and their testimony was straightforward. Mr. Tisdale testified about the details of the assault, Mr. Brown testified regarding what he overheard Petitioner say, and Ms. Brunson testified about her relationship with Mr. Tisdale.

and Petitioner and her subsequent contact with both of them following the incident. Further, while Mr. Brown testified that he did not want to be there and according to the trial court, his body language reflected that, he answered all of the questions asked of him and certainly did nothing to warrant the trial court's attempt to rehabilitate him as a witness during its questioning. Thus, this factor also weighs in support of finding that the trial court pierced the veil of judicial impartiality.

This factor also weighs in favor of a finding that the trial court pierced the veil of judicial impartiality. "Judicial impartiality may be exhibited when an imbalance occurs with respect to either the frequency or the intervention or the manner of the conduct." *Stevens*, 498 Mich at 177. Thus, the inquiry is twofold and "a reviewing court must evaluate both the frequency of the questions and the manner in which they are asked." *Swoilley*, — Mich at 16.

Here the defense did not present any witnesses, so all of the trial court's questions were directed at prosecution witnesses. However, there was an imbalance in the manner and style of the trial court's questioning of these witnesses because the majority of the questions asked served to bolster the prosecution's case or further weaken Petitioner's case. For example, the trial court's questioning of Mr. Smith essentially served to rehabilitate a very important prosecution witness, its questioning of Ms. Brunson further established a motive for the assault and its questioning of Mr. Tisdale regarding the knife attempted to establish the possibility that the knife Mr. Tisdale picked up off the ground belonged to Petitioner. Thus, this factor also weighs in support of finding that the trial court pierced the veil of judicial impartiality.

Finally, while Judge Lillard gave the generic instruction at the beginning and end of the trial that the jurors should disregard any belief that the trial court had an opinion about the case. (TT 5/29/18 122-123; TT 6/1/18 192-193), this was not enough to overcome the piercing of the veil. A curative statement can only lessen somewhat the danger that a judge's comments and questions will influence the jury. However, "a jury may give great weight to a judge's remarks, even if told it should disregard them." *US v August*, 745 F2d 400, 405 (1984) (citing *Quercia*, 289 US at 470). While curative instructions may ensure a fair trial despite minor or brief inappropriate conduct, *People v Stevens*, supra at 177, the conduct here was neither minor nor brief. Some incidences of partiality may be so apparent that no instruction can cure the influence the conduct had on the jury. See *In re Parkside Housing Project*, 290 Mich. 582, 599-600; 287 NW 571 (1939), holding that "although the trial judge repeatedly

told the jury that he was present only in an advisory capacity, and that the determination of the verdict was solely in its hands, and in spite of a fair charge to the jury, further emphasizing such statements at the conclusion of the hearing, we are of the opinion that the effect of his observations and conduct of the proceeding was too vitiating and prejudicial to defendants' rights to be thereby corrected." Jurors are very prone to follow the slightest indication of bias or prejudice upon the part of the trial judge. *Schwanz v Wujek*, 163 Mich 492, 495, 128 NW 731 (1910).

Here, these instructions did not cure the judicial bias shown throughout the trial. The trial court's bias toward the prosecution's case is apparent from the prosecutorial type questions asked of the witnesses that served to bolster the prosecution's case. Thus, while the trial court's preliminary and final instructions indicated that its questions were for the purpose of asking about things that had not been fully explored, these instructions had little meaning to the jury when the trial court's questions went far beyond clarifying the testimony and served to rehabilitate witnesses and strengthen the prosecution's case.

When a reviewing court determines that the veil of impartiality has been pierced, a structural error has been established and a new trial is required. *Stevens*, 498 Mich at 178 (citing *Arizona v Fulminante*, 499 US 279, 111 S Ct 1246 (1991)).

"Accordingly, judicial partiality can never be held to be harmless and, therefore, is never subject to harmless-error review." *People v Stevens*, supra at 178-179.

The trial court's comments regarding Mr. Brown and its later questioning that served to rehabilitate him as a witness is alone enough to establish that the trial court pierced the veil of impartiality. As discussed above, Mr. Brown was a vital prosecution witness and the trial court's questioning of him regarding snitches and confirming that Mr. Brown was telling the truth was highly improper. Further, the damage done by the trial court's questioning of Mr. Brown did not stop after he testified. Rather, the prosecutor continued with the spirit of that questioning during closing argument stating:

Let's take the store clerk, Larshore Brown. He came in here, he told you straight out, he doesn't want to be here. He kind of talked about what it is to be a snitch, he didn't want to testify, he didn't want to say anything. (TT 6/1/18 163-164).

Therefore, the trial court's comments about and questioning of Mr. Brown alone is enough to

Find that the trial court pierced the veil of judicial impartiality.

However, the trial court also plainly erred in its questioning of both Mr. Tisdale and Ms. Brunson. A defendant who has forfeited his claim of error must show (1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, *Carines*, 460 Mich at 763. The trial court's questioning of Mr. Tisdale and Ms. Brunson were both clearly error as it served to strengthen the prosecution's case by suggesting that the knife Mr. Tisdale picked up during the October 6, 2017 incident was Petitioner's knife and as well as further develop a motive for Petitioner to assault Mr. Tisdale. As discussed above, it is highly improper for a trial court to ask questions of witnesses in order to bolster one side of the case over the other. Thus, the trial court's questioning of Mr. Tisdale and Ms. Brunson deprived Petitioner of his substantial right to a fair trial.

Further, the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. The prosecutor's case against Petitioner hinged on its ability to prove Petitioner's intent during the incident with Mr. Tisdale on October 6, 2017. The trial court's questioning of Mr. Tisdale suggested that Petitioner may have had the same knife he allegedly had during the alleged previous assault of Mr. Tisdale. The trial court's questioning of Ms. Brunson regarding her involvement with the two men at the time of the incident strengthened the prosecutor's case in suggesting a motive for the October 7, 2017 assault.

In the alternative, defense counsel was ineffective in failing to object to the trial court's questioning of Mr. Tisdale and ~~Ms. Brunson~~ Ms. Brunson. The state and federal constitutions guarantee a criminal defendant the right to the effective assistance of counsel. US Const, Am V, XIV; Const 1963, art 1, §20. The test for determining ineffective assistance is twofold: whether "counsel's performance was deficient," and if so, whether his "deficient performance prejudiced the defense." *Strickland*, 466 US at 687. Counsel's performance is deficient if it falls "below an objective standard of reasonableness under prevailing professional norms." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). The defendant is prejudiced where "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Stanaway*, 446 Mich at 687-688; see also *People v Pickens*, 446 Mich 298, 314, 326; 521 NW2d 797 (1994).

In Petitioner's case, there could be no strategic reason to fail to object to the trial court's questioning of witnesses that served to strengthen the prosecution's case and weaken the

defense case. This is especially so, where Petitioners' defense counsel repeatedly noted during cross-examination of witnesses that the videos admitted did not show Petitioner with a knife (TT 5/30/18 98; TT 5/29/18 194). Further, the prosecution's case hinged on its ability to prove Petitioners' intent, and thus Ms. Brunsun's testimony that Petitioner had found out that Mr. Tisdale was living with her not long before the October 6, 2017 incident and was not happy about it, served to strengthen its case. Again, there could be no reason to fail to object to questioning that strengthened the case against Petitioner. Absent this and the similar errors in this case, a different result is reasonably likely.

The Court of Appeals erred in holding the trial court's questioning of multiple prosecution witnesses did not pierce the veil of judicial impartiality. Additionally, the Court's decision in this case directly conflicts with the Court's decision in *People v Elliot*, unpublished per curiam opinion of the Court of Appeals, issued March 5, 2020 (Docket No. 3447410) where the Court held that nearly identical questioning of a witness from the same trial judge pierced the veil of judicial impartiality. Specifically, in *Elliot*, the Court held the trial court's questioning of a prosecution witness regarding what it means to be a snitch impermissibly bolstered the witness's credibility in favor of the prosecution and that "the trial court went beyond the scope of its discretion under the Constitution and laws of this state." *Id.* at 6, 8.

Further, the Court of Appeals erred in the instant case in determining that Petitioners' judicial impartiality claim was unpreserved. While it is true that defense counsel did not specifically state that she was objecting to the trial court piercing the veil of judicial impartiality, defense counsel objected multiple times to the trial court's characterization of Larshone Brown's demeanor and the continued questioning of Mr. Brown regarding snitches when he had already answered that he was not sure. (TT 5/31/18 114-115; TT 5/31/18 149-152). However, even if the claim is unpreserved, Petitioner has established plain error as a result of the trial court's questioning of Mr. Brown in combination with other prosecution witnesses.

While the Court of Appeals may be accurate in its characterization of the trial court's questioning of witnesses as "a judicial side show" *Harris*, unpub. op. at 11, the trial court's actions went far beyond that and ultimately pierced the veil of judicial impartiality. Therefore, for all of the above reasons, Petitioners' convictions must be reversed and the matter remanded for a new trial.

2. The trial court reversibly erred when it admitted highly prejudicial and irrelevant evidence regarding an alleged threat to Ms. Brunsun by Petitioner following the shooting incident with Mr. Tisdale.

In general, a trial court's determination of evidentiary issues is said to be reviewed for abuse of discretion. However, where a preliminary question of law bears on the evidentiary ruling, such as whether a rule of evidence precludes admission, the preliminary question of law is reviewed de novo and it would be an abuse of discretion to admit evidence that is legally inadmissible. *People v Jackson*, 498 Mich 246, 257, 869 NW2d 246 (2015); *People v Denson*, 500 Mich 385, 396, 902 NW2d 306 (2017). Defense counsel preserved the errors by objecting to the prosecution's motion to present such evidence at a pretrial hearing. (TT 12/7/17 18). Preserved non-constitutional error is reviewed under the "more probable than not" standard. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

During the trial, the prosecutor admitted evidence through Officer Lamar Kelsey that he overheard a phone call between Petitioner and Ms. Brunsun where Petitioner stated that he was going to kill her and that she was going to be on the news. (TT 6/1/18 68). The prosecutor contended the evidence was relevant because it showed intent, motive, the absence of mistake as well as consciousness of guilt. (Final Conf 12/7/17 18). When ruling in the prosecution's favor, the trial court stated:

Okay, Well, I think that under the circumstances, that I now understand the context in which the alleged call from the defendant was made. I think that it's clearly something that the officers witnessed happening in the course of investigating the shooting. You know, I mean, I'm not exactly sure how my real question was the materiality of it, you know, if it made a fact at issue more or less likely to have occurred. And I understand the People's argument that these statements that are being made are, when he says, you know, I mean, she's clearly trying to trap him into admitting that he did it. He doesn't admit that he did it, he says you're going to be on the news and he hangs up. So, I mean, I'm not sure exactly that it makes the point that you think it makes, but you understand the facts of your case or your arguments a whole lot better than I do. I mean, I'm not here to tell anybody how to try their case.

But I think that under the circumstances that it occurred, and the fact that it's independently verifiable from someone other than her as to when the call was allegedly made in proximity to the shooting, I believe that that makes it material and therefore relevant, and for whatever weight the jury decides to give it, you know, that will be up for the jury to decide. So it's the defendant's own statement allegedly, and if the jury believes that the defendant actually made that statement, they can give it whatever weight they feel it deserves.

(Final Conf 12/7/17 18-19).

However, the evidence of this alleged threat to Ms. Brunson by Petitioner had no probative value, was not relevant at all, see MRE 401, and was more unfairly prejudicial than probative, see MRE 403.

MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

This Court adopted a three-part test that the prosecution must satisfy before introducing other acts evidence under MRE 404(b). *People v Vandervliet*, 444 Mich 52, 508 NW2d 114 (1993) (adopting approach laid out by the United States Supreme Court in *Huddleston v United States*, 485 US 681, 691-692, 108 S Ct 1496 (1988)); *Denson*, supra. First, the prosecutor must offer the evidence under a theory other than character or propensity. The prosecutor bears the burden of establishing the proper purpose. Second, the evidence must be relevant, and third, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. *Vandervliet* at 74-75; *Denson* at 397-399. In Petitioner's case, the prosecutor did not satisfy any part of this test.

First, the prosecutor did not offer the evidence for a proper purpose under MRE 404(b). The prosecutor stated that the evidence went to intent, motive or absence of mistake. (Final

Conf 12/7/17/18). However, this evidence supports none of those purposes. This alleged threat to Ms. Brunson occurred hours after the incident between Petitioner and Mr. Tisdale. Thus, such evidence does not say anything about Petitioners' intent or motive as the incident had already occurred. Absence of mistake is also not a proper purpose in this case. The defense never asserted that the incident was the result of a mistake. Both the prosecution and the defense agreed that a dispute occurred between Petitioner and Mr. Tisdale. The only issue was the sequence of events during that dispute. Rather, the prosecutor's only true purpose for admitting such evidence was to suggest that if Petitioner was threatening to kill Ms. Brunson after the incident, then he too also must have been trying to kill or harm Mr. Tisdale, i.e. the forbidden character or propensity inference.

Second, the evidence of Petitioners' threat to Ms. Brunson was not relevant. MRE 401 provides that relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The fact that Petitioner allegedly threatened Ms. Brunson on October 7, 2017, has no bearing on his guilt or innocence in the incident on October 6, 2017 with Mr. Tisdale. The prosecutor also contended that this threat showed consciousness of guilt. However, that is not the case. As the trial court noted, Petitioner never admitted to any involvement in the incident during the phone call. Further, a threat to Ms. Brunson has no bearing on whether or not Petitioner was guilty of the assault against Mr. Tisdale. The trial court itself even noted in its ruling that it was not sure if the evidence at issue made a fact at issue more or likely to have occurred. (Final Conf 12/7/17/18). However, the trial court still ruled that the evidence of the alleged threat was admissible because it was Petitioners' own statement. (Final Conf 12/7/17/19). The fact that the evidence in question is the defendant's alleged statement does not end the inquiry regarding admissibility. Regardless if it was Petitioners' statement or not, the evidence still served no relevant purpose.

Third, even if this Court were to find that the evidence was relevant, it still does not satisfy the balancing test under MRE 403. MRE 403 provides for the exclusion of evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury..." In this case, evidence that Petitioner threatened to kill Ms. Brunson following the incident with Mr. Tisdale is highly prejudicial and substantially outweighs any probative value the evidence might

have. Such evidence suggests that Petitioner is a dangerous person capable of violence and that he if he threatened Ms. Brunson, then he must be guilty of assaulting Mr. Tisdale. In fact, the prosecutor stated it best during his closing argument:

The fact that she called 911, the fact that she was that scared gives credibility to the fact that this is a dangerous person. That this is a person that is capable of killing somebody. She knows him. He just got done shooting her children's father. And now he threatened her on the phone, you heard testimony from the officer, that there was multiple calls, and that the call, I'm going to kill you, you'll be on the news. I don't know, ladies and gentlemen, but you typically don't get on the news in situations like that for winning an award and things like that. You infer what you'll be on the news means. (II 6/1/18 164-165).

The prosecutor's use of such evidence during closing argument further demonstrates the danger of unfair prejudice that outweighs any probative value of such evidence.

While the jury acquitted Petitioner of AWIM, the jury was given an instruction regarding felonious assault, but chose to convict Petitioner of GBH. The above discussed evidence that Petitioner threatened to kill Ms. Brunson could have been what ultimately swayed the jury to convict Petitioner of GBH rather than felonious assault or completely acquit him of all charges. Without the evidence of Petitioner's alleged threat to Ms. Brunson, it is more probable than not that the jury would have acquitted Petitioner or at the very least found him guilty of felonious assault.

For all of these reasons, the trial court erred in admitting this evidence. Reversal is required.

Reasons For Granting The Petition

Petitioner, DeAndre Harris was convicted following a jury trial and was sentenced on June 20th, 2018, Petitioner appealed by right and filed a timely brief on appeal in the Court of Appeals on August 26th, 2019. On April 2nd, 2020 the Court of Appeals issued an opinion affirming Petitioner's conviction but remanding his case to the trial court for resentencing. *People v. Harris*, unpublished ~~opinion~~ per curiam opinion of the Court of Appeals, issued April 2nd, 2020 (Docket No. 345136).

On June 24th, 2020, Petitioner then applied for leave to appeal to the Michigan Supreme Court holding that the Court of Appeals decision in this case conflicts with its decision in *People v. Elliot*, unpublished per curiam opinion of the Court of Appeals, issued on March 5th, 2020 (Docket No. 344740), where the court held nearly identical questioning of a prosecution witness from the exact same trial court judge ~~questioned~~ Qiana Lillard pierced the veil of judicial impartiality, MCR 7.305 (5)(b).

Further the Court of Appeals clearly erred in holding that the trial courts questioning of multiple prosecution witnesses that bolstered the prosecution's case did not pierce the veil of judicial impartiality, and that error will ~~not~~ cause material injustice to Mr. Harris/Petitioner. MCR 7.305 (5)(a).

On October 27th, 2020, the Michigan Supreme Court denied Petitioner's application for leave to appeal (Docket No 161524), which is a blatant disregard to the protections allotted to petitioner, DeAndre Harris, as well as every United States citizen under our great Constitution. For this reason, Petitioner asks this court to grant this petition for Writ of Certiorari, or take other appropriate action.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

_____

Date: 12-30-2020

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DeAndre Harris — PETITIONER
(Your Name)

VS.

Michigan — RESPONDENT(S)

PROOF OF SERVICE

I, DeAndre Harris, do swear or declare that on this date, December 30th, 2020, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Clerk
Supreme Court of the United States
Washington, Dc 20543

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 30th, 2020

DeAndre L. Harris
(Signature)