

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

vs.

Criminal Action No: 86-678412

Court of Appeals No:

TIMOTHY J. SMELTER,

Defendant/Appellant.

100234

abt

BRIEF IN SUPPORT OF DEFENDANT'S APPEAL  
FROM JUDGMENT OF CONVICTION

ORAL ARGUMENT REQUESTED

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COURT OF APPEALS  
FIRST DISTRICT  
R.L. OZIERBICKI

RECEIVED

Respectfully submitted,

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Dated: November 10, 1987

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STATEMENT OF FACTS

On or about August 4, 1986, at or about 7:05 p.m., Defendant, Timothy J. Smelter, was driving his car in a Westerly direction on Gibraltar Road, City of Gibraltar, County of Wayne, State of Michigan, waiting to turn onto Southbound West Jefferson when Officer Lehr, of the Gibraltar Police Department, passed him turning East on Gibraltar Road from Northbound West Jefferson. Officer Lehr made a U-turn and stopped Defendant's car approximately one-quarter ( $\frac{1}{4}$ ) mile South on West Jefferson.

Defendant pulled his car completely off the road onto the right shoulder. Defendant at the time was proceeding to a local grocery store less than one (1) mile from his home. Officer Lehr later testified that he stopped Defendant to see if his license was suspended. Defendant gave the officer his car registration and a license that had restrictions on it but which restrictions had expired. Officer Lehr ran a check on Defendant's license and discovered it had been suspended. Defendant was unaware of the license suspension and had not received notice.

Officer Lehr then asked Defendant to get out of the car, which he did, and take some sobriety tests, which he passed. The Officer then placed hand-cuffs on Defendant and informed him he was under arrest while putting him in the back of the police car.

The Officer removed the license plates from Defendant's car and called a tow truck to impound the car even though Defendant requested the car be taken to his home nearby. Before the tow truck arrived Officer Lehr searched the car and confiscated some pills, which were found to be caffiene pills, and a device known as a "Defender".

Defendant was taken to the police station where he passed a breathalyzer test. He was later charged with driving with a suspended license, failure to have proof of insurance with him and expired plates. Officer Lehr contacted Officer Meyer who came down to the police station to interrogate Defendant concerning the "Defender". Defendant was released that night.

The next day a warrant was sworn out for Defendant's arrest charging possession of a weapon prohibited by MCLA § 750.224A. Defendant was convicted in Wayne County Circuit Court before Judge John H. Gillis, Jr. and sentenced March 4, 1987. During the trial the prosecution moved to qualify one Dr. Werner Spitz as an expert in pathology, forensic pathology and the effects of electricity on the human body. (TR II,6) The Judge granted the motion (TR II,11) over Defendant's objection (TR II,8) that Dr. Spitz had already testified that he was not prepared to testify as to what amounts of electricity are needed to injure, incapacitate or kill. (TR II,7,8) Also during the trial the Prosecutor made several prejudicial remarks concerning testing the "Defender" on Defendant and his expert witness, which remarks were reiterated in closing arguments. (TR II,78,103,124) Further, the trial court refused to give certain jury instructions requested by Defendant that caused harmful error to Defendant's case. Finally, at the close of the Prosecution's case, Defendant moved for dismissal on the grounds that the statute under which Defendant was charged is unconstitutional under the U.S. and Michigan Constitutions.

Defendant appeals from the Order entered below in the instant case.

STATEMENT OF QUESTIONS INVOLVED

I.

Should this Court reverse the Judgment of conviction rendered below where the Court allowed Prosecutor's witness to testify as an expert on subjects that the witness had already testified he knew nothing about? YES.

II.

Should this Court reverse the Judgment of conviction rendered below where the Court refused to give proper jury instructions requested by the Defendant? YES.

III.

Should this Court reverse the Judgment of conviction rendered below where the statute Defendant is charged to have violated is in violation of the Constitution of the United States and Michigan? YES.

IV.

Should the Court reverse the Judgment of conviction rendered below where the prosecutor's conduct was extremely prejudicial to Defendant's case and denied him a fair trial? YES.

LAW AND ARGUMENT

I.

This Court should reverse the Judgment of conviction below where the trial judge committed reversible error by abusing his discretion in qualifying the Prosecution's witness Dr. Spitz as an expert and also allowed Dr. Spitz to testify as to matters he had earlier testified he had no knowledge of.

The Michigan Rules of Evidence allow opinion testimony of expert witnesses. (See MRE 702) If a witness is to give an opinion an untrained layman could not, the witness must first qualify himself. Moore v. Lederle Laboratories, 392 Mich 289, 220 NW2d 400 (1974); Bryant v. Biggs, 331 Mich 64, 49 NW2d 63 (1951).

"Testimony of an expert is admissible only where the witness is first shown to possess special knowledge as to the very matter on which he proposes to give an opinion."

11 Michigan Law and Practice § 352, pg. 466. And while it is within the trial court's discretion whether to qualify a witness as an expert the Court on appeal will review that decision for an abuse of discretion. Coger v. Mackinaw Products Co., 48 Mich App 113, 210 NW2d 124 (1973).

In the instant case there was clear abuse of discretion, first in qualifying the Prosecution's witness, Dr. Werner Spitz, as an expert on the question whether the instrument in question could work so as to place it within the proscription of the statute, and then to allow him to testify as to matters he had earlier testified he was not qualified to testify about.

The Court below in the instant case qualified, Dr. Spitz, on motion by the Prosecution and over the objection of defense counsel, as an expert "on the effect of electricution or electrical current on the body". (TRII, 11) However, Dr. Spitz had already testified that he was not prepared to testify as to what certain wattage is required before death occurs, whether a certain amperage is necessary as compared with a certain amount of voltage to have death occur or what amount of wattage, voltage or amperage in any combination is necessary to injure or incapacitate. (TR II,8)

Dr. Spitz testified that he knew relatively little about electricity and that what he did know was from examining dead body tissue that has had electricity pass through it. (TR II,7) This hardly qualifies the doctor to testify, whether an instrument producing a certain amount of voltage and amperage will injure or incapacitate someone. And yet, the Court below overruled Defendant's objection and allowed Dr. Spitz to testify as to what an instrument generating Fifty Thousand (50,000) volts will do, what a stun gun will do and what would be the effect of being

subjected to Fifty Thousand (50,000) volts at Ten Thousand (10,000) amps and/or Ten Thousand (10,000) milli-amps. (TR II,15-17). Then on cross examination Dr. Spitz said he was unable to testify what circumstances a patient may be injured by a diathermy machine (TR II,21) (Diathermy is a process by which electricity is passed between two electrodes through the body to create deep heat [TR II,19-21]).

It was a clear abuse of discretion for the Court below to qualify Dr. Spitz to testify as an expert on the effects of electricity on the body after he had testified he was not prepared to so testify. This error was also very prejudicial in that there was no other evidence offered by the prosecution to show that the device in question would injure, incapacitate or kill an individual, and indeed there was ample evidence that the contrary was in fact, true.

This Court should reverse the judgment of conviction rendered below and dismiss the charges against Defendant.

## II.

This Court should reverse the Judgment of conviction rendered below where the Court improperly refused to give proper jury instructions requested by Defendant?

MCR 2.516 authorizes the Court to give jury instructions that have been requested by a party. Where an accused requests an instruction on any point of law it is reversible error for the Court to refuse to so instruct the jury if the substance of the requested instruction is not otherwise given to the jury. MCLA 768.29. See also People v. Jacks, 76 Mich 218, 42 NW 1134 (1889).

In the instant case, Defense counsel made a timely written request for certain jury instructions including SJI 52.02, 52.03 and 52.11. (TR



II, 140) Defense counsel further requested the court to instruct the jury as follows:

That the Michigan Constitution provides that a person may bear arms for the defense of himself or the state. If you find that the device which the Defendant is charged with possessing was a defensive weapon which he possessed for his defense, you should find the Defendant not guilty (TR II,141).

and

The statute the Defendant is charged with violating provides among other things that a weapon must be capable of directing an electrical current, impulse, wave or beam. If you find that the device was that which the Defendant is charged of possessing could not direct an electrical current, impulse, wave or beam, you should find the Defendant not guilty. (TR II,141)

and, finally,

The statute which the Defendant is charged with violating, provides among other things, that a weapon must be capable of temporarily incapacitating, injuring, or killing a human being before possession is illegal. If the device the Defendant is charged with possessing, could not temporarily incapacitate, injure or kill, you should find the Defendant not guilty. (TRII,141,142)

These instructions were properly requested by the Defendant but the Court below refused to give them. The requested instructions properly state the law as it applies to the facts in this case and were necessary to aid the jurors to come to a proper and just verdict. Refusal to give the requested instructions prejudiced Defendant's case and is reversible error. The judgment of conviction rendered below should be reversed because of said error.

### III.

This Court should reverse the Judgment of conviction rendered below as the statute which the Defendant was charged with violating is unconstitutional under the Constitutions of the United States and Michigan.

The Constitution of the United States states that:

"A well regulated Militia, being necessary to the security of a free State, the right of the People to keep and bear arms, shall

not be infringed."

U.S. Constitution, Amendment II

While the Constitution of the United States speaks in terms of a well regulated militia, the Constitution of the State of Michigan is much broader in its scope. "The protection of the constitution is not limited to militiamen nor military purposes, in terms, but extends to 'every person' to bear arms for the 'defense of himself' as well as the State." People v. Brown, 253 Mich 537, 540 (1931). Article 1 § 6 of the Michigan Constitution of 1963 states that:

"Every person has a right to keep and bear arms for the defense of himself and the State."

This provision in the Constitution granting the right to bear arms for all persons is a limitation upon the power of the legislature to enact any law to the contrary. People v. Zerillo, 219 Mich 635, (1922).

The guaranty of the right of every person to bear arms in defense of himself means the right to possess arms for the legitimate use in defense of himself. The Court in Zerillo, supra, in stating the true meaning of this constitutional provision, quoted the Colorado State Constitution (Art 2 § 13) which states:

"That the right of no person to keep and bear arms in the defense of his home, person or property, or in aid of the civil power when there to legally summoned, shall be called into question; but nothing herein contained shall be construed to justify the practice of carrying a concealed weapon."

Id. at 638.

We point out here that it is well settled that the legislature may, pursuant to the police power, regulate the carrying of firearms and of certain weapons. However, the statute under which Defendant was prosecuted is not one of regulation but is one of prohibition and confiscation.

Some arms, although they have a valid use for the protection of the State by organized and instructed soldiery in times of war or riot, are too dangerous to be kept in a settled community by individuals, and, in times of peace, find their use by bands of criminals and have legitimate employment only by guards and police. Some weapons are adapted and recognized by the common opinion of good citizens as proper for private defense of person and property. Others are the peculiar tools of the criminal. The police power of the State to preserve public safety and peace and to regulate the bearing of arms cannot fairly be restricted to the mere establishment of conditions under which all sorts of weapons may be privately possessed, but it may take account of the character and ordinary use of weapons and interdict those whose customary employment by individuals is to violate the law. The power is, of course, subject to the limitations that its exercise be reasonable and it cannot constitutionally result in the prohibition of the possession of those arms which, by the common opinion and usage of law-abiding people, are proper and legitimate to be kept upon private premises for the protection of person and property.

253 Mich at 541.

In Brown, supra, the question before the Court was the constitutional validity of a statute prohibiting the possession of a blackjack. The Court emphasized that:

The list of weapons in section 16751 (now MCLA §750.224) is significant and demonstrates a definite intention of the legislature to protect society from a recognized menace. It does not include ordinary guns, swords, revolvers, or other weapons usually relied upon by good citizens for defense or pleasure. It is a partial inventory of the arsenal of the "public enemy," the "gangster." It describes some of the particular weapons with which he wars on the State and reddens his murderous trail.

253 Mich at 541.

The statute in the instant case does not regulate a weapon that would be found in the "arsenal of the public enemy". Instead it prohibits the possession of a purely defensive device. The device is advertised as "designed to deter a criminal assault". (TR II,102, People's Exhibit 3) Defendant told the investigating officer and testified in Court that the device was purchased in order to be used solely for self-defense. (TR I,116 and TR II,67)

The history of law in the United States and the different states therein, is replete with vigorous assertions of the right of the

individual to possess and bear arms. Most often the controversy involves a particular weapon that could be used by an individual to commit a crime, and whether the state has a significant or compelling interest in prohibiting the use or possession of a weapon that is equally, if not more, offensive than defensive in nature. More often than not statutes that prohibit possession and allow for confiscation of firearms merely because of their existence are found to be contrary to the State and Federal Constitutions.

In a State and Country where it is unconstitutional to prohibit ammunition that can pierce or burn through armour, semi-automatic weapons and handguns designed solely to cripple or kill, it would be most peculiar, and even border on the ludicrous, to be within the state's police power to absolutely ban a device specifically designed for individual self-defense in a non-lethal manner.

This Court should reverse the Judgment of conviction rendered below in that the statute under which the Defendant was charged is unconstitutional.

#### IV.

This Court should reverse the Judgment of conviction rendered below where the record clearly shows that remarks made by the prosecutor were so prejudicial to the Defendant's case as to deny him a fair trial.

It is reversible error for the prosecuting attorney to make unwarranted attacks upon respondent's witnesses calculated to arouse in the jury an unjust suspicion of their character and truthfulness. People v. Lieska, 161 Mich 630 (1910). Zeal in a prosecuting attorney is entitled to the highest commendation, but it must be exercised within proper limits. Witnesses are entitled to respectful consideration, and it is

the duty of the courts to see that they are protected from insinuations and attacks of counsel. Juries very properly regard the prosecuting attorney as unprejudiced, impartial, and non-partisan; and insinuations thrown out by him regarding the credibility of witnesses for the defense are calculated to prejudice the respondent. The prosecuting attorney has no right to discredit a witness, including the defendant, by inuendo. *Id.* at 638.

When it is manifest that the design or effect of questions is not to elicit facts, but to cast suspicion upon the character and credibility of the witness, courts must intervene, or trials will result in a miscarriage of justice. People v. Gotshal, 123 Mich 474 (1900). In Gotshal the prosecuting attorney had no expectation that the defendant would admit that he was guilty of arson in the several cases inquired about. The Court stated that:

"The purpose of these questions is too manifest. It was designed to convey to the jury the impression that the prosecuting officer believed he was guilty of [the inquired of fires]. The books are full of cases condemning such practice."

*Id.* at 484.

Further, it is a well-settled rule that if the Defendant does not put his character in issue, the state may not offer proof of a lack of good character. People v. Hammond, 394, Mich 627 (1975); People v. Boske, 221 Mich 129 (1922); 1 Wigmore, Evidence (3rd Ed.) § 57, pg. 456.

In the instant case, the prosecuting attorney, in an obvious attempt to attack Defendant's and Defendant's witnesses' truthfulness and credibility, improperly challenged the Defendant and Defendant's expert witness to test the electrical device in question on themselves.

After the defendant testified on direct examination that nothing had happened when the device was accidentally triggered on his

step-brother (TR II,70) the prosecutor on cross-exam, asked the Defendant to open his coat so that he could test the device on Defendant. Not knowing what condition the device was in at the time or what changes it may have undergone since its confiscation, Defendant refused. (TR II,77). Defense counsel objected to this question and the insinuation that Defendant would not be a test subject because he knew that the device would injure him. The objection was overruled at which point the following exchange took place:

The Court: The gun has been demonstrated to the jury. There's no need to shoot the gun anymore, Mr. Simon.

Mr. Simon: Mr. Smelter, do you want to demonstrate this?

Mr. Counard: I object your honor.

Witness: No, sir, I don't.

Mr. Simon: You're afraid of this gun?

Witness: Yes sir, I am.

Mr. Simon: I don't blame you.

(TR II,78)

These questions were obviously improper and greatly prejudiced the Defendant's case. The prosecuting attorney compounded this prejudicial injury by having a similar exchange with Defendant's expert witness, a sixty-seven (67) year old man with a heart condition. (TR II,103). The Court below allowed the questioning, over Defense counsel's objections and then compounded its error by allowing the prosecution to continue commenting on the witnesses' refusal to be the subject of a demonstration of the device during closing argument. (TR II,111,124)

The remarks made by the prosecuting attorney in the presence of the jury were improper and prejudicial to Defendant. They were not corrected by an instruction to the jury and they were exacerbated by

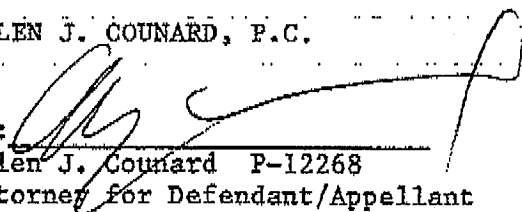
counsel in closing argument. The prejudice to Defendant's case clearly rises to the level of denial of a fair trial.

This Court should reverse the judgment of conviction rendered below in that the misconduct of the prosecutor prejudiced the Defendant's case to the point where Defendant was denied a fair trial.

CONCLUSION

In light of the discussion supra, Defendant prays this Court reverse the Judgment of Conviction rendered by the trial court below.

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