

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WALTER EVERETT CUMMINGS,

Defendant-Appellant.

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UNPUBLISHED

May 11, 2004

No. 246883

Wayne Circuit Court

LC No. 01-014177-01

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

PER CURIAM.

Defendant Walter Everett Cummings appeals as of right his jury trial convictions for armed robbery,<sup>1</sup> and possession of a firearm during the commission of a felony.<sup>2</sup> The circumstances surrounding defendant's convictions arose from the armed robbery of Sparky's Restaurant in Detroit on the afternoon of October 11, 2001. Defendant was sentenced to 285 months to 60 years' imprisonment for his armed robbery conviction, and two years' imprisonment for his felony-firearm conviction. We affirm.

I. Jury Instructions

Defendant first claims that the trial court violated his right of due process by failing to give a cautionary instruction regarding the unreliability of eyewitness identification testimony. We disagree. "We review jury instructions in their entirety to determine if error requiring reversal occurred."<sup>3</sup> Defendant's failure to request a specific identification instruction or to object to the jury instructions as given, however, limits our review to plain error affecting defendant's substantial rights.<sup>4</sup>

Before the jury instructions were given, defense counsel specifically stated that he had no requests for special jury instructions. Defense counsel replied affirmatively when the trial court

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<sup>1</sup> MCL 750.529.

<sup>2</sup> MCL 750.227b.

<sup>3</sup> *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

<sup>4</sup> *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

subsequently offered to give an identification instruction. Thereafter, the trial court read an identification instruction virtually identical to CJI2d 7.8. Defendant now argues that, according to the opinion of our Supreme Court in *People v Anderson*<sup>5</sup> the trial court should have read a special instruction regarding the unreliability of eyewitness identification. However, *Anderson* involved the admissibility of pretrial identifications at trial. “*Anderson* does not require any special jury instruction regarding the manner in which a jury should treat eyewitness identification testimony.”<sup>6</sup> Since the instruction given was virtually identical to CJI2d 7.8, we find that the instruction properly informed the jury regarding identification testimony.<sup>7</sup> Therefore, defendant has failed to show a plain error affecting his substantial rights.

## II. Judicial Disqualification

Defendant also claims that the trial judge violated his right to due process by failing to disqualify herself although personally biased against defendant. Specifically, defendant contends that the trial judge formed a negative opinion of him while presiding over, and sentencing him in, his previous armed robbery trial. We disagree. We review a lower court’s decision on a motion for disqualification for an abuse of discretion.<sup>8</sup> As a general rule, a judge will not be disqualified absent a showing of actual bias or prejudice.<sup>9</sup>

Here, the trial judge presided over a previous trial regarding defendant’s involvement in another armed robbery. Defendant argues that since the judge heard evidence regarding instances of terror perpetrated by defendant in the previous case, and since she sentenced defendant to the maximum term in prison, that she would be biased against defendant in this case. However, “[o]pinions formed by a judge on the basis of facts introduced or events occurring during the course of the current proceedings, or of prior proceedings, do not constitute bias or partiality unless they display a deep seated favoritism or antagonism that would make fair judgment impossible.”<sup>10</sup> Defendant merely suggests that it would be more difficult for the trial judge to be impartial; however, he has failed to give specific instances of any actual bias toward him. Accordingly, the trial court did not have an affirmative duty to disqualify itself, and therefore, properly denied defendant’s disqualification motion.

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<sup>5</sup> *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973)

<sup>6</sup> *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999); see also *People v Carson*, 220 Mich App 662, 678; 560 NW2d 657 (1996), adopting in relevant part *People v Carson*, 217 Mich App 801, 807; 553 NW2d 1 (1996).

<sup>7</sup> See *People v Pollick*, 448 Mich 376, 383; 531 NW2d 159 (1995), quoting *People v Goldsmith*, 411 Mich 555, 561; 309 NW2d 182 (1981).

<sup>8</sup> *People v Bennett*, 241 Mich App 511, 513; 616 NW2d 703 (2000).

<sup>9</sup> MCR 2.003(B)(1); see also *Cain v Dep’t of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996).

<sup>10</sup> *Cain*, *supra* at 496.

### III. Sentencing

Defendant's final issue on appeal is that he is entitled to resentencing, as the trial court incorrectly assigned fifty points to OV 7, aggravated physical abuse.<sup>11</sup> We disagree. The sentencing court has discretion in determining the number of points to be scored, provided that there is evidence on the record that adequately supports a particular score.<sup>12</sup>

A sentencing court may assign OV 7 fifty points when the victim was treated with terrorism, sadism, torture, or excessive brutality.<sup>13</sup> Terrorism is defined as "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense."<sup>14</sup> The owners of Sparky's Restaurant, Spartak Lilaj and his wife, Rolanda Lilaj, testified at trial that defendant held a gun to the back of Spartak's head and told Rolanda that if she moved he would kill Spartak. Defendant violently kicked Spartak in the side of the head knocking him partially unconscious. Furthermore, Rolanda testified that defendant began hitting Spartak in order to find out where the rest of the money was, and when she pleaded for defendant to stop, he told her to shut her mouth. Defendant's physical violence and death threats toward the Lilaj's amounted to conduct designed to substantially increase their fear and anxiety during the robbery. There was more than enough evidence to support a finding of terrorism. Therefore, the trial court properly scored defendant fifty points for OV 7.

Affirmed.

/s/ Jessica R. Cooper  
/s/ Richard Allen Griffin  
/s/ Stephen L. Borrello

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<sup>11</sup> MCL 777.37.

<sup>12</sup> *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

<sup>13</sup> MCL 777.37(1)(a).

<sup>14</sup> MCL 777.37(2)(a); *People v Wilson*, 252 Mich App 390, 396; 652 NW2d 488 (2002).