STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 29, 2007
v	No. 272241 Wayne Circuit Court
KEITH BYRON FRAILLEY, Defendant-Appellant.	LC No. 05-012191-02

Before: Saad, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

Defendant appeals his jury trial conviction for possession with intent to deliver a controlled substance over 50 grams but less than 450 grams, MCL 333.7401(2)(a)(iii). The trial court sentenced defendant to 7 to 20 years in prison for his conviction. We affirm.

I. Admission of Videotape

Defendant claims that the trial court abused its discretion when it admitted into evidence a videotape that the prosecutor failed to properly authenticate. We review a trial court's decision to admit or deny evidence for an abuse of discretion, *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000), and we review whether evidence is properly authenticated under the same standard. *People v Ford*, 262 Mich App 443, 460; 687 NW2d 119 (2004).

Pursuant to MRE 901(a), a party may authenticate evidence by presenting proof "sufficient to support a finding that the matter in question is what its proponent claims." Here, the trial court admitted an aerial video surveillance tape that showed the events leading to defendant's arrest. Detective Henry Herpel testified that he knew the police were conducting ground and aerial surveillance of defendant on the day of the crime. Detective Herpel participated in the ground surveillance and he remained in radio contact with the aerial surveillance team and he was aware that the aerial activities were videotaped. Detective Herpel verified the accuracy of the events shown on the videotape because he witnessed the events firsthand while conducting ground surveillance of the same activities. The prosecutor showed Special Agent Daniel Krause part of the videotape during his testimony and he also verified a portion of the videotape because he personally observed the events depicted on the tape.

Just as a photograph is admissible if someone familiar with the scene testifies that the photograph is an accurate representation, those who observed the same events shown on a

videotape may testify regarding their accuracy, regardless whether the witness is the photographer or videographer. *People v Heading*, 39 Mich App 126, 132; 197 NW2d 325 (1972). We hold that the testimony of Detective Herpel and Special Agent Krause properly authenticated the videotape.

Defendant also erroneously claims that the videotape is inadmissible hearsay. For the hearsay rule to apply, there must be a "statement" which, for nonverbal conduct like that shown on the videotape, includes only nonverbal conduct that is intended by the person as an assertion. MRE 801(a). No evidence suggests that the images on the videotape were intended as assertions and, therefore, the videotape is not a "statement" subject to the hearsay rules.

Defendant further argues that the admission of the videotape violated his constitutional right to confront the witnesses against him.[1] In *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court held that evidence of "testimonial" statements by a witness who is unavailable for cross-examination are not admissible unless the defendant had a prior opportunity to cross-examine the witness. Generally, a testimonial statement is one made as a formal declaration to government officers. *Id*. at 51-52. Defendant fails to explain how the videotape constitutes a "statement" or how it is "testimonial." However, were there a statement on the videotape to which defendant objects, the very nature of the covert surveillance recording suggests that it did not contain knowing responses to questioning in an investigative setting or under other formal circumstances that would lead someone to believe the statements would be used in future criminal proceedings. *Id*. Accordingly, defendant has failed to establish that the videotape constitutes a testimonial statement and his claim of error is without merit.

II. Voir Dire

Defendant contends that the trial court unfairly limited his questioning of potential jurors about possible racial bias.

The scope and the conduct of voir dire is within the discretion of the trial court. *People v Washington*, 468 Mich 667, 674; 664 NW2d 203 (2003). However, "a trial court may not restrict voir dire in a manner that prevents the development of a factual basis for the exercise of peremptory challenges." *People v Tyburski*, 196 Mich App 576, 581; 494 NW2d 20 (1992).

Here, defense counsel asked a potential juror how he would feel if he were charged with a crime and tried before a jury of African-Americans. The trial court excused the jury and correctly ruled that the question was improper.

When race is not a bona fide issue in a case, this Court has found that a trial court may properly limit questioning about racial prejudices. *People v Daniels*, 192 Mich App 658, 667; 482 NW2d 176 (1991); see also *Carter v Braunstein*, 89 Mich App 119, 121-122; 279 NW2d 596 (1979). Further, "[p]rotecting a defendant's right to a fair and impartial jury does not entail

[1] We review unpreserved constitutional challenges for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

ensuring any particular racial composition of the jury." *People v Knight*, 473 Mich 324, 349; 701 NW2d 715 (2005). There was no genuine racial issue in this case and the trial court correctly ruled that defense counsel's question was improper.

III. Motion to Disqualify Judge

Defendant claims that the trial judge demonstrated bias against defense counsel and should have disqualified himself from presiding over defendant's trial. Judicial disqualification is proper if a judge cannot impartially hear a case. MCR 2.003(B); *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). "Absent actual personal bias or prejudice against either a party or the party's attorney, a judge will not be disqualified." *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). "Comments critical of or hostile to counsel or the parties are ordinarily not supportive of finding bias or partiality." *Id*.

Here, defendant avers that the trial judge exhibited bias against defense counsel because the trial judge "over-reacted" to defense counsel's questions and objections, accused defense counsel of misconduct and disrespect, and made rulings in favor of the prosecution. The trial judge made comments about defense counsel's tactics, but they were in response to defense counsel's improper conduct and remarks. The judge noted that he has stepped down from cases handled by defense counsel because counsel displayed a disrespect for the court and the trial judge had concerns about the way counsel tried cases. And, it appears that the judge was removed from a previous case tried by defense counsel because there was a finding of personal bias. However, almost ten years has passed since the prior disqualification and judicial impartiality is presumed unless proven otherwise. *Wells*, *supra* at 391.

Despite the somewhat strained relationship between the trial judge and defense counsel, the trial judge did not demonstrate bias. Again, "comments critical of or hostile to counsel or the parties are ordinarily not supportive of finding bias or partiality." *Wells*, *supra* at 391. While it is also true that the trial court denied some of defendant's motions and overruled his objections, defendant cannot show that the rulings were incorrect. Moreover, this Court has found that "repeated rulings against a litigant do not require disqualification of a judge." *People v Fox*, 232 Mich App 541, 558; 591 NW2d 384 (1998). Because defendant has failed to show that the trial judge's comments, opinions and adverse rulings were evidence of "a deep-seated favoritism or antagonism," defendant has failed to show judicial bias. *Wells*, *supra* at 391.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Jane M. Beckering