STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONNELL HOLMES,

Defendant-Appellant.

UNPUBLISHED
November 14, 1997

No. 198450
Recorder's Court
LC No. 96-000101

Before: Saad, P.J., and O'Connell and M.J. Matuzak*, JJ.

PER CURIAM.

A jury convicted defendant of two counts of robbery armed, MCL 750.529; MSA 28.797, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He appeals as of right, and we affirm.

I

Defendant first argues that the trial court's interruptions and criticisms of defense counsel during his trial denied him a fair trial. We disagree. A defendant is deprived of a fair trial when the actions of the trial court pierce the "veil of judicial impartiality." *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). On appeal, we must review the record to determine if the trial court's comments and questions unjustifiably aroused suspicion in the mind of the jury and whether the trial court's partiality possibly could have influenced the jury to the detriment of defendant. *People v Conyers*, 194 Mich App 395, 405; 487 NW2d 787 (1992).

We have carefully reviewed the record and note that the trial judge did interrupt defense counsel on numerous occasions in the presence of the jury. The trial court explained how to ask proper questions, explained the reason why witnesses are sequestered, and summarized testimony for defense counsel. However, while we do not condone, and in fact seriously question the condescending attitude of the trial judge,[1] we do not believe that his behavior pierced the veil of judicial impartiality. We therefore do not believe that defendant was denied a fair trial.

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* Circuit judge, sitting on the Court of Appeals by assignment.

II

Next, defendant argues that the jury instructions were in error because they were so lengthy. We review jury instructions in their entirety to determine if there was error. Even if the instructions were improper, there is no error if they fairly presented the issues and protected defendant's rights. *Davis*, 216 Mich App at 54. After a careful review of the trial court's admittedly lengthy charge, we see no error.

III

Defendant next challenges the sufficiency of the information, contending that he was not sufficiently apprised of the charges against him. As a threshold matter, defendant did not properly preserve the issue regarding the sufficiency of the information. See MCL 767.76; MSA 28.1016, *People v Kiser*, 122 Mich App 321, 324; 332 NW2d 477 (1983). Therefore, review of this issue is limited to whether an amendment to the information would have been prejudicial to defendant, and in order to establish prejudice, defendant must demonstrate surprise. *Id.* The test for sufficiency of the information is:

> Does it identify the charge against the defendant so that his conviction or acquittal will bar a subsequent charge for the same offense; does it notify him of the nature and character of the crime with which he is charged so as to enable him to prepare his defense and to permit the court to pronounce judgment according to the right of the case? *People v Weathersby*, 204 Mich App 98, 101; 514 NW2d 493 (1994).

Here, defendant was charged with a four count information. The first two counts were the armed robbery counts. The third and fourth counts were the felony firearm counts. The third and fourth counts read identically, as follows:

> Defendant (s) 01 WEAPONS-FELONY-FIREARM did carry or have in his/her possession a firearm, to wit: A GUN, at the time he/she committed or attempted to commit a felony, to wit: ROBBERY ARMED, contrary to MCL 750.227b; MSA 28.424(2) [750.227B-A]
>
> FELONY: 2 Years consecutively with and preceding any term of imprisonment imposed for the felony or attempted felony conviction.

Applying the *Weathersby* test here, the information was sufficient. The information identified the charge and notified defendant of the nature and character of the charge—possession of a gun during the commission of an armed robbery. The two felony firearm counts were in the same information as the two robbery armed charges. "[I]t [is] clear that the Legislature intended, with only a few narrow exceptions, that every felony committed by a person possessing a firearm result in a felony-firearm conviction." *People v Morton*, 423 Mich 650, 656; 377 NW2d 798 (1985). Reason dictates that if one is accused of two counts of robbery armed and two counts of felony-firearm, then the robbery

armed counts alleged in the same information must be the felonies that form the basis for the felony-firearm counts. The information was sufficient.

IV

Defendant's next assignment of error is a challenge to the scoring of the sentencing guidelines. Pursuant to *People v Mitchell*, 454 Mich 145, 177-178; 560 NW2d 600 (1997) (decided after appellant's brief was filed), review of this issue is precluded.

V

In his final claim of error, defendant seeks a limited remand for clarification that his two felony firearm sentences are to be served concurrently, and that following this two year period, defendant is to commence his two concurrent sentences for the armed robberies. We believe this was the clear intent of the sentencing court and defendant has produced no evidence to suggest that the Department of Corrections has interpreted the judgment of sentence otherwise.

Affirmed.

/s/ Henry William Saad
/s/ Peter D. O'Connell

[1] While the trial court may have been disconcerted by inexperienced trial counsel, the trial court must lead by example and should bear in mind a judge's duty to uphold the integrity and dignity of the judiciary.