

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANNY EARL HANKS,

Defendant-Appellant.

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UNPUBLISHED

June 20, 1997

No. 187015

Cass Circuit Court

LC No. 95-008340-FC

Before: Reilly, P.J., and Wahls and N.O. Holowka,\* JJ.

PER CURIAM.

Defendant appeals as of right from his convictions for armed robbery, MCL 750.529; MSA 28.797, unlawful driving away a motor vehicle, MCL 750.413; MSA 28.645, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to terms of twenty to fifty years' imprisonment for armed robbery and three years, four months to five years' imprisonment for unlawful driving away a motor vehicle, to be served consecutively to a two-year term for felony-firearm. We affirm.

Defendant's first contention is that the circuit court failed to give his requested instruction regarding his defense of alibi. We review jury instructions in their entirety to determine if there is error requiring reversal. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996). The instructions must fairly present the issues to be tried and sufficiently protect defendant's rights, as well as include any material defenses if there is evidence to support them. *Id.* Here, the circuit court's instruction to the jury regarding defendant's alibi defense fairly presented the issue to the jury and sufficiently protected defendant's rights.

Next, defendant contends that because a photographic lineup took place without defendant having the benefit of counsel, the in-court identifications were contaminated. Defendant admits that his claim is not preserved. Although defendant characterizes his argument as one of constitutional magnitude, defendant did not have a right to counsel at a precustodial, investigatory photographic lineup.

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

*People v Kurylczyk*, 443 Mich 289, 297-302; 505 NW2d 528 (1993). There is no constitutional error. In any case, the other types of identification evidence against defendant were so overwhelming that any error would not have been decisive of the outcome. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

Defendant also contends that the court incorrectly scored OV 25 with fifteen additional points. We will not address this issue because even if defendant were correct, a change in his score would not change the fact that he was placed in Offense Severity Level IV. *People v Jarvi*, 216 Mich App 161, 164; 548 NW2d 676 (1996).

For his final contention, defendant argues that his sentence was disproportionate because his prior record lacks severity and he has a lengthy employment history. Defendant's sentence within the guidelines is presumptively proportionate. *People v Cotton*, 209 Mich App 82, 85; 530 NW2d 495 (1995). Neither employment nor lack of criminal history is such an unusual circumstance to overcome the presumption of proportionality. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994).

Affirmed.

/s/ Maureen Pulte Reilly

/s/ Myron H. Wahls

/s/ Nick O. Holowka