

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY DESHAWN CONLEY,

Defendant-Appellant.

UNPUBLISHED

May 21, 1999

No. 203874

Kent Circuit Court

LC No. 96-013406 FC

Before: Sawyer, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Defendant Timothy Deshawn Conley was charged with one count of assault with intent to murder, MCL 750.83; MSA 28.278, and one count of carrying a concealed weapon, MCL 750.227; MSA 28.424, both as a fourth-time felony offender, MCL 769.12; MSA 28.1084, and with one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). A jury convicted defendant on all three counts. The sentencing court sentenced defendant to a term of twenty-five to fifty years' imprisonment for his conviction for assault with intent to murder, five to fifty years' imprisonment for carrying a concealed weapon, and the mandatory term of two years' imprisonment for the felony-firearm conviction. The sentence on the felony-firearm conviction is to be served consecutive to and before the other two sentences, which will run concurrent with one another. Defendant appeals of right. We affirm.

I

Defendant first contends that the trial court abused its discretion in refusing defendant a new trial where defendant could present evidence on the unreliability of cross-racial identification. We disagree. Whether to grant new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *People v Legrone*, 205 Mich App 77, 79; 517 NW2d 270 (1994).

On several occasions before trial, witness Frank Abissi indicated that he was less than certain that he would be able to identify the defendant at the time of trial. When on the stand at trial, however, Abissi did in fact identify the defendant. Defendant claims that the identification of defendant by Abissi in court was such a shock that had counsel known that Abissi would testify this way, he would have

been prepared to impeach Abissi's testimony with expert testimony on the inaccuracy of cross-racial identification. Abissi is Caucasian and defendant is African-American. When defendant raised this issue below, the trial court ruled that, based upon the police reports and investigative reports associated with this case, Abissi's in-court identification of defendant should not have been a surprise.

Defendant argues that the trial court's ruling runs counter to the evidence and the reasonable expectations of trial counsel regarding Abissi's ability to identify defendant. We disagree. It is clear from the statement of the trial court that the court relied on the police reports and the investigative reports in holding that defendant should have been aware of the "good possibility" that Abissi could identify the defendant. Attached to defendant's motion for a new trial filed with the trial court was "Exhibit B; 10/10/96," which consists of two pages of the "investigating officer's offense report follow-up" with Abissi. This report states:

Abissi stated that the subject that had the gun was in the Conley mugdrop. Abissi stated that if he saw the person again in person he could probably id [sic] the subject. (Emphasis added).

Therefore, given the reasons expressed by the trial court, we conclude that the trial court did not abuse its discretion in finding that there were no grounds for granting defendant's motion for a new trial.

II

Defendant next contends that the trial court abused its discretion in refusing to grant a new trial or an evidentiary hearing, where the defendant could examine the jury selection system for the Kent Circuit Court for systemic exclusion of minorities from jury venires. Questions of systemic exclusion of minorities from venires are reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 464-465; 552 NW2d 493 (1996).

Defendant admits that he failed to object to the composition of the venire panel or the jury selection system before the petit panel, which convicted defendant, was selected and sworn. Accordingly, the issue is not properly preserved for appellate review. *Id.* at 464-465; *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). Additionally, defendant expressed satisfaction with the jury. Under the facts of this case, we conclude that defendant has waived the issue of jury composition for appellate review, and we find no reason to grant defendant's request that he be excused from the requirements of preserving this issue.

III

Defendant next contends that the trial court's refusal to give the jury defendant's proposed instructions on identification and reasonable doubt led to a conviction which is manifestly unjust. Claims of instructional error are reviewed de novo on appeal. *Hubbard, supra* at 487. "The standard of review for alleged errors concerning jury instructions requires, first, that there be a proper objection in the trial court, and, second, that the jury instructions are to be read as a whole, not extracted in a

piecemeal fashion. Moreover, relief will be given only when necessary to avoid manifest injustice.” *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1990).

Defendant argues that his proposed instruction regarding identification and reasonable doubt were superior to the standard instructions, CJI2d 7.8 and CJI2d 3.2, respectively, which were given by the trial court. Because defendant’s claims with regard to each instruction’s superiority vary, each will be dealt with separately.

First, defendant argues that the failure of the trial court to supplant CJI2d 7.8 with defendant’s requested instruction on identification denied defendant a fair trial and violated due process. Defendant asserts that because of the certainty of Abissi’s identification of defendant on the stand, which defendant characterizes as a surprise in light of Abissi’s previous inability to identify defendant, the proper response of the court should have been to give the jury defendant’s proposed instruction, which defendant characterizes as addressing “the ‘significant limitations on the reliability of eyewitness identifications,’ [by] pointing out that ‘Mistaken identifications do occur.’” We disagree.

The comment on use of CJI2d 7.8 states that “[t]he bracketed portion should be given, upon request, when supported by the evidence.” The “bracketed portion” is paragraph four of the instruction, which states:

[(4) You may also consider any times that the witness failed to identify the defendant, or made an identification or gave a description that did not agree with (his/her) identification of the defendant during trial.] -

This instruction was given by the trial court, and we conclude that the instruction “adequately informs the jury of the problems with eyewitness identification testimony and the factors that may affect an eyewitness’s identification of defendant” and that “there is no need to supplement it to make it more favorable towards defendants.” *People v Young*, 146 Mich App 337, 338-339; 379 NW2d 491 (1985).

We also reject defendant’s contention that CJI2d 1.9, which is identical to CJI2d 3.2, is constitutionally deficient because it fails to correctly inform the jury as to the standard of proof beyond a reasonable doubt required by the state and federal constitutions. The crux of defendant’s proposition is that because the standard instruction does not state that proof beyond a reasonable doubt is proof to a “moral certainty,” the standard instruction erodes the high level of proof required by its historic conception. This Court, however, has directly ruled to the contrary. See *People v Sammons*, 191 Mich App 351, 372; 478 NW2d 901 (1991). Accordingly, defendant’s challenges to the jury instructions are without merit.

IV

Finally, defendant argues that because of the seriousness of the “unsubstantiated information as to his character and reputation” in defendant’s presentence investigation report, defendant should be resentenced or alternatively the matter should be remanded for removal of the unsubstantiated negative

remarks, in order that defendant's prison records not be filled with unproven allegations. Defendant's request for resentencing is without merit, but defendant's request for remand has merit, and this case must be remanded to the trial court for correction of defendant's presentence investigation report.

It is settled that where, as here, the sentencing judge does not take the objected-to information into account in sentencing a defendant, the defendant is not entitled to resentencing. See *People v Landis*, 197 Mich App 217, 219; 494 NW2d 865 (1992); *People v Norman*, 148 Mich App 273, 275-276; 384 NW2d 147 (1985). However, based on this same precedent, defendant is entitled to have each piece of information, which defendant expressly challenged at sentencing and which the sentencing court stated on the record would not be considered in sentencing, stricken from his presentence investigation report. See also *People v Taylor*, 146 Mich App 203, 205-206; 380 NW2d 47 (1985).

Accordingly, defendant's convictions and sentences are affirmed, but this case is remanded to the trial court for correction of defendant's presentence investigation report.

Affirmed and remanded. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ William B. Murphy

/s/ Michael J. Talbot