STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALFRED ROSS WINGATE,

Defendant-Appellant.

UNPUBLISHED
May 17, 1996

No. 164807
LC No. 92-001597

Before: Taylor, P.J., and Fitzgerald and P.D. Houk,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28l.549, and was sentenced to a prison term of twenty to fifty years. He appeals as of right. We affirm defendant's conviction, but remand for consideration by the sentencing judge of a motion for resentencing.

Defendant first claims that he was denied a fair trial by improper prosecutorial comments. Defendant failed to object to all except two of the allegedly improper comments, thereby waiving appellate review in the absence of a miscarriage of justice. *People v Gonzalez*, 178 Mich App 526, 534-535; 444 NW2d 228 (1989). We have reviewed the comments to which no objection was made and find that they were either not improper or that failure to review the issues would not result in manifest injustice. *Id*.

With regard to those comments to which defendant did raise objections, we find no impropriety in the comments. First, the prosecutor permissibly argued that defendant's arguments concerning a witness' identification of defendant in a photo as opposed to a lineup was not relevant to establishing defendant's guilt of this crime. Second, comments regarding the credibility of witnesses are not improper when the prosecutor does not vouch for the credibility of the witness. *People v Stacy*, 193 Mich App 19, 37; 484 NW2d 675 (1992).

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

Defendant next claims that he was denied a fair trial by the trial court's failure to excuse a juror who indicated that she knew the victim's relatives. He also claims that his counsel was ineffective for failing to challenge the juror for cause. We disagree with both of defendant's claims. Under MCR 2.511(D)(3), a juror who is biased for or against a party may be challenged for cause. The burden of proof is on the defendant to show that jurors were potentially biased. *People v Hughes*, 85 Mich App 8, 18; 270 NW2d 692 (1978). Here, on the first day of trial, a seated juror informed the court that she had worked with the victim's mother and that she knew the victim's sister. In response to questioning from the court, the juror indicated that she could be fair and impartial. A juror's expressed lack of prejudice and ability to render an impartial verdict are all that is required to uphold the selection of the juror. *Id*. Hence, the trial court did not abuse its discretion in failing to find that the juror was biased. Likewise, in the absence of any evidence to dispute the juror's statement that she could render a fair and impartial verdict, we see no deficiency in defense counsel's failure to challenge the juror for cause. *People v Pickens*, 446 Mich 298; 521 NW2d 794 (1994).

Next, defendant contends that zero points rather than twenty-five points should have been scored for Offense Variable 4.[1] We agree. Twenty-five points may be scored under OV 4 when the facts reveal "aggravated physical injury or criminal sexual penetration." Zero points are to be scored if there is no aggravated physical abuse. Here, the victim suffered a single gunshot wound that caused death. The facts do not reveal any aggravated physical abuse. Cf. *People v Hoffman*, 205 Mich App 1, 24; 518 NW2d 817 (1994)(the victim suffered numerous stab wounds), and *People v Daniels*, 192 Mich App 658, 674; 482 NW2d 176 (1992)(the victim was shot once, stabbed five times, and dragged down an alley). Therefore, we find that zero points should have been scored under OV 4. The correct OV score should therefore have been thirty rather than fifty-five, placing defendant in offense severity level III instead of IV. The correct guidelines' range should have been 120 to 300 months rather than 180 to 360 months. Although defendant's sentence is within the corrected guidelines' range, the proper remedy is to remand the matter to the trial court to determine whether resentencing is required in light of the corrected scoring. *People v Chesebro*, 206 Mich App 468, 473; 522 NW2d 677 (1994).

Last, defendant raises two arguments in support of his claim that the trial court erred by failing to suppress identification evidence. First, he asserts that he was denied the right to have counsel of his choice present during a lineup. However, in *People v Szymanski*, 52 Mich App 605, 609; 218 NW2d 95 (1974), the Court found no error requiring reversal where the defendant was represented by substitute counsel at the lineup and where the appointed counsel indicated at an evidentiary hearing that she was satisfied that the lineup was fairly conducted. Similarly, in the present case defendant was represented by appointed counsel at the lineup, and counsel indicated that he was satisfied that the lineup was fairly conducted. Accordingly, we find no error.

Second, defendant asserts that the lineup was unduly suggestive because the other participants in the lineup had different hairstyles. However, physical differences between a suspect and other lineup participants do not, in and of themselves, constitute impermissible suggestiveness. *People v Kurylczyk*, 443 Mich 289, 312; 505 NW2d 528 (1993). The burden rests with the defendant to factually support

a claim that lineup was impermissibly suggestive. *People v Benson*, 180 Mich App 433, 438; 447 NW2d 755 (1989), rev'd in part on other grounds 434 Mich 903 (1990).

In the present case, counsel indicated that although defendant's hair style appeared to be different from the other lineup participants, he had no objection to the lineup. The trial court reviewed the photographs from the lineup and indicated that it did not find the lineup impermissibly suggestive. Under these circumstances, we do not believe that the trial court erred in admitting the identification evidence. *Kurylczyk, supra* at 303.

In a supplemental brief, defendant suggests that the trial court erroneously instructed the jury that it had to find the defendant not guilty of the principal offense before considering the lesser included offenses. We note, however, that defendant failed to object to the instruction. Failure to object to jury instructions waives error unless relief is necessary to avoid manifest injustice. *People v Hendricks*, 446 Mich 435; 521 NW2d 546 (1994).

Manifest injustice is not present in this case. Contrary to defendant's suggestion, the trial court's instructions did not require the jury to acquit on the principal charge before considering the lesser included offenses. Rather, the trial court instructed the jury that "If you believe the defendant is not guilty of first degree premeditated murder *or if you cannot agree about that crime*, you should consider the less serious crime of second degree murder . . . " Thus, unlike the instructions given in the cases on which defendant relies, see, e.g., *People v West* 408 Mich 332; 291 NW2d 48 (1980), and *People v Mays*, 407 Mich 619; 288 NW2d 207 (1980), the instructions did not interfere with the jury's deliberations by requiring agreement of all the jurors to acquit defendant of the offense charged before considering the lesser included offenses.

Defendant's conviction is affirmed, and the case is remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Clifford W. Taylor
/s/ E. Thomas Fitzgerald
/s/ Peter D. Houk

[1] The trial court originally scored fifty points for OV 3 and zero points for OV 4. Upon a defense challenge to the scoring of OV 3, the trial court stated that it was changing the scoring of OV 3 to twenty-five points and the scoring of OV 4 to twenty-five points. However, the trial court failed to revise the SIR to reflect the revisions. It is clear from the trial court's comments at sentencing that the failure to revise the SIR was merely an oversight. On remand, the trial court should revise the SIR to reflect a score of twenty-five points in accordance with the trial court's ruling at sentencing.