

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LEWIS ALLEN,

Defendant-Appellant.

UNPUBLISHED

August 6, 1996

No. 177282

LC No. 93-1571-FC

Before: Hood, P.J., and Griffin and J.F. Foley*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and escape from lawful custody, MCL 750.197a; MSA 28.394(1). He was sentenced to concurrent terms of eighteen to thirty years' imprisonment for the second-degree murder conviction and 360 days for the escape from custody conviction, consecutive to the mandatory two-year term for the felony-firearm conviction. We affirm in part and reverse in part.

Defendant first argues that he was denied a fair trial when the prosecution cross-examined him regarding whether he or the prosecution witnesses giving testimony that conflicted his were lying. We disagree. The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994).

In this case, defense counsel objected to the questioning and the trial court admonished that such questioning was improper and that any questions of credibility were for the jury to decide. Furthermore, prior to deliberations, the trial court instructed the jury that it was the sole judge of the witnesses' testimony. Although this type of questioning is improper, any prejudice that may have flowed from it was cured. *People v Buckey*, 424 Mich 1, 17-18; 378 NW2d 432 (1985); *People v Austin*, 209 Mich App 564, 570; 531 NW2d 811 (1995).

Defendant next argues that the standard jury instruction given by the trial court regarding reasonable doubt, CJI 2d 3.2, failed to adequately inform the jury of the requirements of that standard. However, the instructions given adequately conveyed the concept of reasonable doubt. Because defendant failed to object to the instruction below and we are not persuaded that it caused manifest injustice, appellate review is precluded. *People v Watkins*, 209 Mich App 1, 4; 530 NW2d 111 (1995); *People v Ferguson*, 208 Mich App 508, 510; 528 NW2d 825 (1995). *People v Sammons*, 191 Mich App 351, 372; 478 NW2d 901 (1991). Furthermore, excessive verbiage is not required to convey the concept of reasonable doubt to the jury. *People v Stubenvoll*, 62 Mich 329, 334; 28 NW 883 (1886).

Defendant also argues that he was denied a jury chosen from a cross-section of his community. Defendant admits that this issue is raised without the factual support required by *People v Guy*, 121 Mich App 592, 599; 329 NW2d 435 (1982). In particular, defendant has failed to provide this Court and failed to provide the trial court with any facts to support a finding that African-Americans were unreasonably underrepresented in this venire or that there was any systematic exclusion of any race in the selection process. As a result, his argument fails and reversal is not required.

Defendant finally argues that the trial court erroneously instructed the jurors that they could find him guilty of escape from lawful custody if they found that he had attempted to escape. We agree. In this case, the trial court instructed the jurors that they could find defendant guilty of the crime of escape from lawful custody if they found either that he escaped or attempted to escape. The statute codifying this offense, MCL 750.197a; MSA 28394(1), contains no reference to attempts. Presuming, as we must, that the jury followed the incorrect portion of the instruction and found defendant guilty merely on a finding that he attempted an escape, the jury failed to consider the material issue of whether defendant, in fact, had escaped. *People v Frederico*, 146 Mich App 776, 787; 381 NW2d 819 (1985). The manifest injustice resulting from the erroneous instruction and subsequent conviction requires that we reverse his conviction of escape from lawful custody. *People v Johnson*, 187 Mich App 621, 628; 468 NW2d 307 (1991), *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994). His convictions for second-degree murder and felony-firearm are affirmed.

Affirmed in part, and reversed in part. We do not retain jurisdiction.

/s/ Harold Hood

/s/ John F. Foley