

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL HOPSON,

Defendant-Appellant.

UNPUBLISHED

February 15, 2005

No. 250157

Wayne Circuit Court

LC No. 03-003741-01

Before: Schuette, P.J., and Sawyer and O’Connell, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for two counts of first-degree criminal sexual conduct (CSC-1), MCL 750.520b(1)(e) (weapon used), second-degree criminal sexual conduct (CSC-2), MCL 750.520c(1)(e) (weapon used), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to twenty-five years’ imprisonment for each of the CSC-1 convictions, ten to fifteen years’ imprisonment for the CSC-2 conviction, forty to sixty months’ imprisonment for the felon in possession of a firearm conviction and two years’ imprisonment for the felony-firearm conviction. We affirm.

On appeal, defendant challenges the trial court’s admission of complainant’s lineup and in-court identifications of defendant as her attacker. Defendant argues that the lineup at which complainant first identified defendant was unduly suggestive because complainant had previously identified another individual in a photographic identification, was informed that she failed to identify defendant at that time, and defendant was the only participant common to both the photographic array and the live lineup. We disagree.

“On review, the trial court’s decision to admit identification evidence will not be reversed unless it is clearly erroneous. Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made.” *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993) (citations omitted). However, where a trial court’s admission of identification evidence may deny a defendant due process of the law, “we review claims of constitutional error de novo.” *People v Geno*, 261 Mich App 624, 627; 683 NW2d 687 (2004). Thus, “[t]his Court’s review of a lower court’s factual findings in a suppression hearing is limited to clear error,” but, where a constitutional due process claim is involved, “we review de novo the lower court’s ultimate ruling with regard to the motion to suppress.” *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002) (citations omitted). “A photographic identification procedure

violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification.” *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998).

First, it should be noted that the trial court found nothing suggestive with regard to the photographic array. Although the photographic array was conducted while defendant was in custody, defendant’s counsel was present, and defendant does not challenge the content of the photographic array as impermissibly suggestive because of any physical differences in the participants or disproportionate sizes of the photographs. The officer conducting the photographic identification provided the photographs used in the identification procedure to the trial court, and the court had the opportunity to examine them. Thus, the trial court’s determination that the photographic array was not suggestive is a finding of fact and should not be disturbed unless this Court has a “definite and firm conviction that a mistake has been made.” *Kurylczyk, supra*, 443 Mich 303.

With regard to the identification at the live lineup, defendant argues that, because complainant was told that she had picked the wrong person in the photographic array and defendant was the only person common to both the photographic array and the live lineup, the lineup was impermissibly suggestive. Defendant also argues that the police department’s failure to take any video or photographs of the lineup prejudiced him regarding the trial court’s review of its suggestiveness. Defendant, however, had counsel present during the lineup and did not object to anything substantive with regard to the participants. The trial court heard testimony from the officer who conducted the lineup that the participants were all wearing green jumpsuits, were all between five feet ten inches and six feet one inch tall, between 165 and 200 pounds, and all had facial hair. The trial court observed her testimony and apparently found her credible. Moreover, even defendant’s counsel, who was present at the lineup, testified that the participants in the lineup all resembled defendant. The trial court found the identification at the lineup to be proper based on this testimony, and defendant does not argue that the photographs of the lineup would show anything different. Therefore, photographs of the lineup would not have affected the trial court’s determination, and defendant was not prejudiced. The trial court’s determination that the lineup was not suggestive is, likewise, a determination of fact and should not be reversed unless this Court finds it to be clearly erroneous. *Kurylczyk, supra*, 443 Mich 303.

On this record, there is nothing to suggest that the lineup procedure was “so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification.” *Gray, supra*, 457 Mich 111. This Court finds no clear error in the trial court’s determination that the lineup up was not impermissibly suggestive; therefore, there is no need to address whether an independent basis existed for complainant’s in-court identification of defendant. *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998).

Defendant has also filed a supplemental brief in propria persona, raising two issues. First, defendant argues that he was denied his presumption of innocence due to a reference to his being in the Wayne County Jail. We disagree. Certainly, references to a defendant’s custody status may constitute the denial of a fair trial by allowing the jury to improperly base its decision on the defendant’s custody status rather than the evidence of the crime. See *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002), citing *Taylor v Kentucky*, 436 US 478, 485; 98 S Ct 1930; 56 L Ed 2d 468 (1978). But in the case at bar, the reference to the Wayne County Jail was to where a DNA sample was obtained from defendant, not to where defendant was residing.

That is, from all that was stated to the jury, it may well have been the case that defendant voluntarily presented himself at the Wayne County Jail for the purpose of supplying the DNA sample, and then left. There was no reference to defendant being incarcerated in jail and we are not persuaded that he was denied a fair trial merely by a brief reference to the fact that he was at the jail at some point in time.

Next, defendant argues that he was denied a fair trial by an improper instruction on reasonable doubt. After the jury instructions were read, defense counsel stated that he would “like to preserve any rights” for defendant due to the failure of the court to give instructions that were not the composite instructions, but that otherwise “I have no objections at this point.” An express statement by defense counsel that he has no objections to the instructions given constitute an approval of those instructions and the waiver of appellate review of the instructions. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004). Therefore, defendant has waived any review other than the fact that the trial judge did not use the composite instructions. But use of the standard Criminal Jury Instructions is not mandatory. *People v Stephan*, 241 Mich App 482, 496; 616 NW2d 188 (2000). Therefore, it was not erroneous for the trial court to fail to use them.

Affirmed.

/s/ Bill Schuette

/s/ David H. Sawyer

/s/ Peter D. O’Connell