No. 17-2389

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HARVEY PRESTON,

Petitioner-Appellant,

v.

WILLIE SMITH, Warden,

Respondent-Appellee.

ORDER

Harvey Preston, a pro se Michigan prisoner, appeals the district court's judgment denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Preston moves the court for a certificate of appealability (COA), to proceed in forma pauperis on appeal, and for appointment of counsel.

A jury convicted Preston of carjacking, first-degree home invasion, unarmed robbery, and two counts of second-degree criminal sexual conduct, and the trial court sentenced him to an aggregate term of thirty to sixty years in prison. The Michigan Court of Appeals affirmed, *People v. Preston*, No. 298796, 2012 WL 5853223 (Mich. Ct. App. Oct. 30, 2012), and the Michigan Supreme Court denied leave to appeal, *People v. Preston*, 829 N.W.2d 225 (Mich. 2013) (mem.). In March 2014, Preston filed an amended § 2254 habeas petition, raising thirteen claims. The district court adopted a magistrate judge's report that concluded that Preston's petition should be denied. The district court denied Preston's petition and declined to issue a COA.

Preston appealed and moves the court for a COA on the following claims: (1) the evidence was insufficient for the jury to convict him; (2) the victim's in-court identification was tainted by an illegal pretrial identification process; (3) the trial court erred in denying his motion

to quash the information; (4) his right to a speedy trial was violated; (5) the trial court erred in failing to change venue due to inflammatory pretrial publicity; (6) he was denied a fair trial and equal protection because the jury had only one African American member; (7) the trial court violated his right to due process by mis-scoring sentencing variables and basing his sentence on inaccurate information; and (8) the prosecution engaged in misconduct by eliciting testimony that he refused to participate in a line-up, thus violating his rights against self-incrimination and to a fair trial. By limiting his COA application to these issues, Preston has waived appellate review of the remaining claims in his petition. *See Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000). Additionally, Preston did not present the third, fourth, and seventh claims of his COA application to the district court. Accordingly, Preston has waived appellate review of those claims too. *See Seymour v. Walker*, 224 F.3d 542, 561 (6th Cir. 2000); Rule 2(c)(1) of the Rules Governing § 2254 Cases (requiring the prisoner's petition to "specify all the grounds for relief available to the petitioner").

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the applicant must demonstrate that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Under the Antiterrorism and Effective Death Penalty Act, a district court shall not grant a habeas petition with respect to any claim that was adjudicated on the merits in the state courts unless the adjudication resulted in a decision that: (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court"; or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Preston's first claim is that the evidence was insufficient for the jury to convict him. The Michigan Court of Appeals held that the victim's identification of Preston as the perpetrator, coupled with evidence that Preston was driving the victim's car when the police arrested him,

was sufficient for the jury to convict him. *See Preston*, 2012 WL 5853223, at *1-2. The district court concluded that the state court's decision was not contrary to or an unreasonable application of *Jackson v. Virginia*, 443 U.S. 307 (1979). Reasonable jurists would not debate the district court's resolution of this claim. *See Tucker v. Palmer*, 541 F.3d 652, 658-59 (6th Cir. 2008) ("[T]he testimony of the victim alone is constitutionally sufficient to sustain a conviction.") (collecting cases).

Preston's second claim is that the victim's in-court identification of him as the perpetrator was tainted by an unduly suggestive pretrial identification process because she saw him during the preliminary examination at the defense table in shackles and jailhouse clothing. The Michigan Court of Appeals pointed out that before the preliminary examination, the victim picked Preston out of a photo lineup with 80% certainty, and that she became 100% certain at the preliminary examination after hearing Preston's voice. The court concluded that despite the allegedly improper identification process, there was an independent basis for the victim's in-court identification. Consequently, the court rejected this claim. *See Preston*, 2012 WL 5853223, at *3. The district court concluded that the state court's decision was not contrary to or an unreasonable application of clearly established federal law.

A witness's identification of the defendant will be admissible at trial, despite law enforcement's use of an unnecessarily suggestive identification procedure, if the identification is reliable under the totality of the circumstances. *See Perry v. New Hampshire*, 565 U.S. 228, 238-40 (2012). If the police did not use an unduly suggestive identification procedure, the witness's testimony is admissible and "unreliability should be exposed through the rigors of cross-examination." *Howard v. Warden, Lebanon Corr. Inst.*, 519 F. App'x 360, 366-67 (6th Cir. 2013). The petitioner has the burden to prove that the police used an improper procedure. *See id.* If the witness identified the defendant under suggestive circumstances, but those circumstances were not arranged by the police, then the witness's identification testimony is admissible, with reliability to be tested through normal trial safeguards, such as cross-

examination, cautionary jury instructions on eyewitness testimony, and the prosecution's burden of proof. *See Perry*, 565 U.S. at 233.

In this case, the victim viewed several photo arrays following the incident in which she was assaulted and robbed before identifying Preston with 80% confidence. Preston has not pointed to anything in the record that shows that the photo lineup that the police presented to the victim was impermissibly suggestive. *See Simmons v. United States*, 390 U.S. 377, 384 (1968) ("[C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."). The victim became 100% certain that Preston was the man who attacked her when she heard him speak before the preliminary examination hearing started, evidently when Preston became irate and began yelling at his attorney. That was not a circumstance that was arranged by the police. Thus, although the victim did see Preston in shackles and jailhouse clothing before the hearing, a reasonable jurist could not conclude that the victim's identification testimony was tainted by improper police conduct. *See Smith v. Perini*, 723 F.2d 478, 482 (6th Cir. 1983) (affirming the district court's denial of a habeas petition, despite suggestive identification procedures, because there was an independent basis for the witness's identification of the petitioner—her selection of the petitioner's photograph from an array). Reasonable jurists therefore would not debate the district court's resolution of this claim.

Preston's fifth claim is that the trial court erred by not ordering a change in venue due to inflammatory pretrial publicity. The Michigan Court of Appeals reviewed this claim for plain error because Preston failed to move the trial court to change venue and rejected it because there was no evidence of inflammatory pretrial media coverage. Moreover, the court concluded, the jury voir dire showed that no juror had any preexisting knowledge of the parties or the case. *See Preston*, 2012 WL 5853223, at *5-6. The district court concluded that this claim lacked evidentiary support in the record, and therefore that the state court's decision was not contrary to

or an unreasonable application of clearly established federal law, or based on an unreasonable determination of the facts.

Media coverage presumptively violates a criminal defendant's right to due process if it "utterly corrupted" the trial atmosphere. *Skilling v. United States*, 561 U.S. 358, 380 (2010) (quoting *Murphy v. Florida*, 421 U.S. 794, 798 (1975)). Reasonable jurists would not debate the district court's conclusion that the record does not support Preston's claim that there was pervasive and inflammatory media coverage of his trial. Furthermore, reasonable jurists would not debate the district court's conclusion that Preston failed to show that the state court clearly erred in finding that he was not actually prejudiced by media coverage because none of the jury members had any preexisting knowledge of his case. *See* 28 U.S.C. § 2254(e)(1); *Foley v. Parker*, 488 F.3d 377, 387 (6th Cir. 2007) ("The primary tool for discerning actual prejudice is a searching voir dire of prospective jurors.").

Preston's sixth claim is that he was denied a fair trial and equal protection because the jury venire had only one African American member. The Michigan Court of Appeals reviewed this claim for plain error because Preston failed to object at trial and rejected it because he failed to show that African Americans were systematically excluded from the county's jury selection process or were underrepresented on his jury venire. *See Preston*, 2012 WL 5853223, at *6. The district court concluded that the state court's resolution of this claim was reasonable.

A criminal defendant has a Sixth Amendment right to an impartial jury drawn from a fair cross-section of the community. *See Berghuis v. Smith*, 559 U.S. 314, 319 (2010). To establish a violation, Preston had to show, among other things, that African Americans were systematically excluded from the jury selection process. *See id.* Reasonable jurists would not debate the district court's resolution of this claim because Preston admitted that he had no evidence that African Americans were systematically excluded from his jury pool.

Preston's final preserved claim is that the prosecution committed misconduct because police officers testified that he refused to participate in a corporeal lineup. The Michigan Court of Appeals rejected this claim because participating in a line-up is non-testimonial, and therefore

that testimony concerning Preston's refusal to participate in a line-up did not implicate his Fifth Amendment rights. *See Preston*, 2012 WL 5853223, at *8. Reasonable jurists would not debate the district court's conclusion that the state court's decision on this claim was not contrary to or an unreasonable application of clearly established federal law. *See United States v. Wade*, 388 U.S. 218, 221-23 (1967).

Accordingly, the court **DENIES** Preston's COA application and **DENIES** as moot his motions to proceed in forma pauperis and for appointment of counsel.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk