

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HATTIE MAE TANNER,

Defendant-Appellant.

FOR PUBLICATION

February 18, 2003

9:05 a.m.

No. 31966

Calhoun Circuit Court

LC No. 00-003176-FC

Updated Copy

April 25, 2003

Before: Cooper, P.J., and Jansen and R. J. Danhof*, JJ.

R.J. DANHOF, J. (*concurring in part and dissenting in part*).

I respectfully disagree with part II of the majority's opinion. The trial court's denial of defendant's request to pay for an expert in either DNA or serology did not result in a fundamentally unfair trial.

This Court reviews the decision whether to appoint an expert for an abuse of discretion. *People v Lueth*, 253 Mich App 670; ___ NW2d ___ (2002). An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it shows a perversity of will or the exercise of passion or bias rather than the exercise of discretion. *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 381; 652 NW2d 474 (2002). In general, either permitting or excluding expert testimony is not grounds for reversal unless the party claiming error establishes prejudice by showing it was "more probable than not that a different outcome would have resulted without the error." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999); MCR 2.613(A); MCL 769.26. Denying an indigent defendant a court-appointed expert does not warrant reversal unless it results in a fundamentally unfair trial. *People v Leonard*, 224 Mich App 569, 582-583; 569 NW2d 663 (1997). We must remember that the standard outlined in *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995), requires a defendant to demonstrate a nexus between the facts of the case and the *need* for an expert. In all cases, the defendant must show a need for an expert: that the defendant cannot proceed safely to trial without expert assistance. MCL 775.15; *Leonard, supra* at 582.

In this case, there were two types of scientific evidence presented by the prosecution, DNA analysis and blood serology, as well as statistical population data. The DNA evidence was clearly exculpatory. As the majority notes, Clement testified that, on the basis of the DNA profile obtained from the blood on the victim's shirt, "it could not have been Ms. Tanner." The prosecution's DNA experts not only excluded defendant and her associates as contributors to the

DNA found on the evidence but also established a DNA profile of an unknown female from the blood found on the victim's shirt. In fact, it was defense counsel that moved for the admission of the prosecution's expert's report. Defendant does not explain how she was unable to proceed safely to trial as a result of the prosecution's witnesses' stating unequivocally that the blood was not hers. In fact, defendant's appellate brief does not discuss the DNA evidence at all, only the serological evidence. On the facts of this case, the absence of a defense expert was not outcome-determinative, nor did it deny defendant a fundamentally fair trial. *Lukity, supra* at 495-496; *Leonard, supra* at 583-584.

The majority relies on *State v Scott*, 33 SW3d 746 (Tenn, 2000), where the court found that expert assistance in the field of DNA evidence "was absolutely crucial to competent representation given that the subject matter was inordinately complex and beyond the common understanding of most attorneys" in a prosecution where there were "inconsistent results regarding the donor of the hair samples." *Id.* at 754. However, an important difference in this case is that, unlike *Scott*, the DNA evidence did not contribute to defendant's conviction; in fact, it exculpated her. It is not enough for defendant to argue simply that the subject is complex or highly technical, she must show that the presence of an expert would have changed the outcome of the trial. *Leonard, supra* at 584-585 & n 5; *Lukity, supra* at 495-496.

Likewise, defendant has not established an actual need for a serologist. The blood evidence was the only physical evidence linking defendant to the scene. However, there was no dispute over the results of the tests and no allegations that the procedures were faulty. See *In re Klevorn*, 185 Mich App 672, 679; 463 NW2d 175 (1990). The majority, citing *Scott, supra* at 754, proposes that defendant needed an expert to "explain[] that it constituted an anomalous test result." *Ante* at _____. But the testing anomalies and contamination present in *Scott* do not exist in this case.

Defendant does not explain how an expert would help, other than arguing that, without a defense expert, the prosecutor's serologist "was free to present what might have been grossly-exaggerated findings." This presents only a mere possibility of assistance from an expert, and fails to meet the burden on defendant of showing that she could not "proceed safely to trial." *Leonard, supra* at 582; MCL 775.15; *Lueth, supra* at 688. Defendant does not argue that an expert would have refuted the conclusion that the blood found and defendant's blood were of the same type, and that none of the other suspects had that type blood. Defendant's theory, that someone else with the same type blood was the perpetrator, was fully explored on cross-examination and in closing argument. Defendant fails to explain how the absence of an expert jeopardized her ability to prepare a defense; I therefore find no error in the trial court's denial.

Finally, although I would find no error in this matter, I include a brief response to the majority's conclusion that the prosecutor failed to prove "beyond a reasonable doubt that the constitutional error in question did not contribute to defendant's guilty verdict." *Ante* at _____. I would beg to differ. While the *evidence* may have contributed to the verdict, I do not find that the alleged *error*, i.e., the trial court's denial of a defense expert, contributed to the verdict. The blood evidence likely played a role in convincing the jury of defendant's guilt, but nothing defendant argued in this Court demonstrates that the evidence would have been any different with court-provided, expert assistance.

Similarly, appellate counsel's argument that the trial court erred in denying the motion for funds to retain a serology expert must be rejected because he has alleged no specific need for an expert. *Jacobsen, supra* at 641; *Leonard, supra* at 581-584. There are a vast number of scientific articles, treatises, and published appellate decisions available to a lawyer who lacks knowledge of the "arcane" world of criminal forensics and population genetics. General allegations that the field is technical or that expert assistance is required are insufficient to establish a need to appoint an expert. *Id.* at 584-585 & n 5.

I would affirm defendant's conviction of felony murder and the sentence for that conviction.

/s/ Robert J. Danhof