

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANNY DELANO COTTON,

Defendant-Appellant.

UNPUBLISHED

January 26, 2001

No. 218027

Calhoun Circuit Court

LC No. 98-002926-FH

Before: Saad, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), and assault with intent to commit sexual penetration, MCL 750.520(g)(1); MSA 28.788(7)(1). Defendant was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to a prison term of twenty-five to fifty years for the home invasion conviction and ten to twenty years in prison for assault with intent to commit sexual penetration. He now appeals by right. We affirm.

Defendant first asserts that the trial court improperly denied his request to adjourn the trial until the completion of DNA tests or to authorize funds for defendant to have his own tests conducted. We disagree. This Court reviews the trial court's denial of a continuance for an abuse of discretion. *People v Charles O Williams*, 386 Mich 565, 578; 194 NW2d 337 (1972). Constitutional questions are reviewed de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

In criminal cases, the prosecution is not required to do DNA testing. *People v Vaughn*, 200 Mich App 611, 619; 505 NW2d 41 (1993), rev'd on other grds 447 Mich 217; 524 NW2d 217 (1994). Further, this Court will not order DNA testing or reverse a trial court's refusal to order DNA testing in cases where other significant identification evidence is presented against the defendant, *id.* at 619-620, or where the exculpatory theory about the evidence is highly speculative because it is "unlikely" that DNA evidence would be present, *People v Sawyer*, 215 Mich App 183, 192; 545 NW2d 6 (1996). When reviewing a trial court's denial of a motion to adjourn the trial, several factors should be considered: (1) whether the defendant asserted a constitutional right, (2) whether the defendant had a legitimate reason for asserting that right, (3) whether the defendant was negligent, (4) whether the defendant previously requested an adjournment, and (5) whether the defendant has demonstrated prejudice. *People v Wilson*, 397

Mich 76, 81; 243 NW2d 257 (1976); *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). Even assuming that defendant has satisfied some of the above factors, in light of the significant evidence presented at trial against defendant, defendant has failed to demonstrate prejudice. See *Vaughn, supra*; *Lawton, supra* at 348-349.

The victim testified that she immediately recognized defendant as the man who assaulted her in her home by his hair, frame, body build, and his face. The victim testified that she got a “good look” at the intruder’s face before the assault, and she had “no doubt” that defendant was the man who intruded into her home. Further, immediately after the assault, the victim ran outside, and while standing with her neighbor to wait for the police, a man, whom the victim immediately recognized as the person who had just assaulted her, approached her and stated that he saw someone run out of the back door of her home. Although the victim did not know this man, the man spoke directly to her and not to the neighbor who was standing next to the victim. The man then rode off on a bicycle, which the victim had never seen before, that was parked in front of the victim’s home. After only a few minutes, a suspect matching the description of the man at the victim’s house was detained by the police. Shortly thereafter, although the man was now wearing glasses and a baseball hat, the victim identified this man, i.e., defendant, as the person who had intruded into her home and who had approached her outside her home immediately following the assault. Although the victim’s neighbor could not identify defendant by his face, in a separate identification, the neighbor did identify the man detained by the police based on his clothing, height, and his bicycle as the man who approached and spoke to the victim immediately following the assault. Thus, contrary to defendant’s testimony that he had not assaulted the victim in her home nor had he been near the victim’s home that day, two witnesses identified defendant as being at the victim’s home on the morning the crime was committed. Further, the evidence reveals that defendant had an abrasion on his hand at the time he was detained by police. Although defendant testified that he scraped his hand on a screwdriver in his tool kit on his bicycle, the jury could have inferred that defendant scraped his hand when he repeatedly punched the victim in the mouth.

With respect to defendant’s argument that he was not allowed to present a defense because the trial court would not adjourn the trial until the DNA results were completed, we disagree. Defendant explicitly testified that he was not present at the victim’s home nor on her street on the day of the assault. Moreover, the record does not support defendant’s assertion that the DNA test results would have likely exonerated defendant based on the presence of blood from the intruder. See *Lawton, supra* at 348 (this Court held that no abuse of discretion occurred in the trial court’s denial of a continuance to await testimony that was unlikely to exonerate the defendant). The record indicates that the struggle perhaps only lasted a few minutes, and during that time, the victim struggled with the intruder by kicking him. The victim testified that she did not scratch the intruder, and the only other evidence that the attacker might have been slightly injured was when he punched the victim in the mouth. Because of the other identification testimony against defendant, *Vaughn, supra*, and because defendant’s exculpatory theory is speculative due to the unlikelihood of someone else’s blood being on the sheets other than the victim’s, *Sawyer, supra*, the trial court properly denied the continuance request and properly refused to authorize funds for independent testing.

Further, with respect to defendant's assertion that he is entitled to independent DNA testing and a DNA expert because he has demonstrated "a nexus between the facts of the case and the need for an expert," we disagree. *People v Leonard*, 224 Mich App 569, 582; 569 NW2d 663 (1997). Defendant has not shown a need for a DNA expert and testing or that no testing rendered defendant's trial fundamentally unfair. *Id.* at 581-583, 586. "[A] defendant must demonstrate something more than a mere possibility of assistance from a requested expert." *Id.* at 582, quoting *Moore v Kemp*, 809 F2d 702, 712 (CA 11, 1987). At most, defendant has shown only that there is a "mere possibility" that an expert or testing would have been helpful. Further, this Court has previously stated that the lack of testing in criminal cases tends to "injure [the prosecution's] case more than defendant's since the prosecution has the burden of proving guilt beyond a reasonable doubt." *People v Stephens*, 58 Mich App 701, 705; 228 NW2d 527 (1975).

Defendant also asserts that the trial court improperly allowed lay witness testimony comparing defendant's bicycle tires with photographs of tire tracks found outside the victim's home. We disagree. This Court reviews the admissibility of lay witness testimony for an abuse of discretion. *Richardson v Ryder Truck Rental, Inc.*, 213 Mich App 447, 454-455; 540 NW2d 696 (1995); *People v Daniel*, 207 Mich App 47,57; 523 NW2d 830 (1994).

Pursuant to MRE 701, witnesses may give their lay opinions under certain circumstances. MRE 701 provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Further, MRE 602 states that in order to give testimony, a witness must have personal knowledge of the matter.

With regard to lay person testimony, this Court has stated that lay testimony is proper when the witness' conclusions are not "overly dependent on scientific, technical, or specialized knowledge" *Richardson, supra* at 456. In *Richardson, supra* at 454-455, two police officers were allowed to give their lay opinions, based on viewing skid marks left on the road, about how a traffic accident had occurred. Similarly, in *Mitchell v Steward Oldford & Sons, Inc.*, 163 Mich App 622, 629; 415 NW2d 224 (1987), an officer was permitted to offer his lay opinion, based on his observation of the accident scene and skid marks, about the position of the vehicles before and during the accident and one of the vehicle's estimated speed at impact. The officer's testimony was deemed proper because it "pertained to his perception of the accident scene which aided a clearer understanding of the facts at issue," it contained conclusions from facts which people in general could make, and it was "not overly dependent on scientific, technical or other specialized knowledge." *Id.* at 629-630.

In this case, over defense objection, police officer Wilder was allowed to testify regarding his personal observations about the tire tracks found at the victim's home and the tires found on defendant's bicycle. Officer Wilder testified that he personally observed the tires on defendant's bike and the tracks outside the victim's home and formed the opinion that the tracks appeared to

match defendant's bicycle tires. Moreover, it was clear that Officer Wilder was not testifying as an expert.

After reviewing Officer Wilder's testimony, we conclude that the trial court did not abuse its discretion in allowing the lay testimony. *Richardson, supra*. The testimony was based on the witness' perception and personal knowledge, was helpful in determining a fact in issue in the case, and was not overly dependent on specialized knowledge. MRE 602 and 701; *Richardson, supra* at 455-456; *Daniel, supra*; *Mitchell, supra*. Moreover, even if the trial court improperly allowed the lay testimony, in light of the other ample evidence against defendant, we do not conclude that a different outcome would have resulted without the error. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

We affirm.

/s/ Henry William Saad

/s/ Joel P. Hoekstra

/s/ Jane E. Markey