STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 23, 2001
v	No. 213331 St. Clair Circuit Court
HARVEY DANIEL EASTON, Defendant-Appellant.	LC No. 97-003671-FH

Before: Bandstra, C.J., and Wilder and Collins, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, attempted kidnapping, MCL 750.349; MSA 28.581, and MCL 750.92; MSA 28.287, and felonious assault, MCL 750.82; MSA 28.277. He was sentenced to concurrent prison terms of 80 to 120 months for the assault with intent to do great bodily harm conviction, forty to sixty months for the attempted kidnapping conviction, and thirty-two to forty-eight months for the felonious assault conviction. He appeals as of right. We reverse and remand for a new trial.

Defendant contends that the trial court's admission of several highly graphic pornographic photos requires reversal. We agree. Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401. Thus, evidence is relevant if two components are present, materiality and probative value. Materiality is the requirement that the proffered evidence be related to any fact that is of consequence to the action. "A fact that is 'of consequence' to the action is a material fact." *People v Crawford*, 458 Mich 376, 388-389; 582 NW2d 785 (1998). To be material, evidence need not relate to an element of the charged crime but it must, at least, be in issue in the sense that it is in the range of litigated matters in controversy. *People v Brooks*, 453 Mich 511, 518; 557 NW2d 106 (1996). "The probative force inquiry asks whether the proffered evidence tends 'to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence'". *Crawford, supra* at 389-390.

However, even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. "Unfair prejudice" does

not mean simply "damaging." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, modified 450 Mich 1212 (1995). Any relevant evidence offered against a defendant will be damaging to some extent. Rather, unfair prejudice exists when there is a tendency that marginally probative evidence will be given undue or preemptive weight by the jury and where it would be inequitable to allow the proponent of the evidence to use it. *Id*. at 75-76.

In this case, more than a dozen highly graphic pornographic photographs were introduced into evidence over objection. The photos were offered under the theory that defendant had viewed the photos on the Internet before the charged assault and that the photos were therefore proof of defendant's sexual motive in assaulting the victim.

To the extent the photos may have had any relevance for this purpose, we conclude that their probative value was minimal. The evidence showed that defendant apparently viewed these photographs on the Internet some eight hours before the assault. Presumably, any sexual arousal that might have been generated from viewing these photographs would have dissipated in the intervening time. In any event, there was certainly no evidence presented otherwise. Any conclusion that defendant's viewing these photographs might have provided a motivation with respect to the later crime, which was not even charged as a sexual offense, would have been speculation on the part of the jury.

We further conclude that, under the circumstances, any minimal probative value of the evidence was substantially outweighed by the danger of unfair prejudice caused by the graphic nature of the photos. To call the photographs lewd and offensive would be a gross understatement. The photographs show, in graphic detail, all sorts of aberrant sexual activity, some involving children.[1] Considering the shocking nature of the photos, we cannot conclude that there was no danger of unfair prejudice to defendant in having them placed before the jury. Jurors may well have concluded defendant deserved punishment simply because he viewed the photos, without properly limiting the inquiry to his involvement in the charged offense. We conclude that the trial court abused its discretion in admitting the evidence.

Further, we conclude that the erroneous admission of this evidence was not harmless. A preserved nonconstitutional error is not a ground for reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). In this case, while there were two teen-aged witnesses to the crime, they saw the perpetrator only briefly, under less than perfect conditions as he was running away. The victim herself admitted that she saw only half of her assailant's face, by moonlight, and that she could not be positive in her identification of defendant. Moreover, defendant presented an alibi defense, with seemingly credible evidence supporting it. We note that in a previous trial, the jury was not able to reach a guilty verdict against defendant. Considering these circumstances, we conclude that it is more probable than not that the highly inflammatory pornographic photos affected the outcome of trial. The jury may well have had reasonable doubts about defendant being involved in the assault,

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[1] The trial court made no attempt to review the photos individually and weigh the probative/prejudicial value of each.

considering the weak identification evidence and the alibi defense. It is quite probable that such doubts were resolved against defendant as an emotional reaction to the shocking photos that the jury was improperly allowed to consider. Defendant is entitled to a new trial.

Although our decision renders unnecessary any discussion of defendant's remaining claims, we will briefly discuss several of the issues raised for guidance to the trial court and the parties in the event of a retrial.

Defendant contends that the trial court erred in denying his request for a special instruction regarding the limitations of eyewitness identification. We disagree. We review a trial court's decision whether to give additional or supplemental jury instructions for an abuse of discretion. *People v Lobaito*, 133 Mich App 547, 564; 351 NW2d 233 (1984). As this Court determined in *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999), our Supreme Court's decision in *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), does not require a special jury instruction explaining the manner in which a jury should treat eyewitness identification testimony. The *Anderson* principles are adequately presented in CJI2d 7.8, pursuant to which the jury here was instructed. See *People v Carson*, 217 Mich App 801, 807; 553 NW2d 1 (1996) (*Carson I*), vacated 217 Mich App 801 (1996), adopted by *People v Carson*, 220 Mich App 662, 678; 560 NW2d 657 (1996) (*Carson II*) (special panel convened pursuant to Administrative Order No. 1996-4).

We also reject defendant's claim that the trial court erred in refusing to authorize fees for the appointment of an expert in the area of eyewitness identification. Rulings on pretrial requests for the payment of fees for expert witnesses are reviewed for an abuse of discretion. *In re Klevorn*, 185 Mich App 672, 678; 463 NW2d 175 (1990). A defendant is entitled to the appointment of an expert at public expense only if he cannot otherwise proceed safely to trial. *Carson I*, *supra* at 807; MCL 775.15; MSA 28.1252. In *Carson I*, this Court held that the absence of an expert in eyewitness identification did not prevent the defendant from safely proceeding to trial because (1) he presented alibi witnesses who, if believed, would have called the victim's identification of defendant into question, and (2) defense counsel argued that the victim's identification of defendant was not proved and that the victim had been subjected to a suggestive photographic array. *Id*. The present case is procedurally indistinguishable from *Carson I*. Accordingly, we conclude, as we did in *Carson I*, that the trial court's failure to authorize payment for an expert in eyewitness identification did not prevent defendant from safely proceeding to trial.

Defendant argues that reversal is required because the trial court refused to redact inadmissible testimony from defendant's first trial. We disagree. The decision whether to admit evidence is left to the discretion of the trial court. *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992). Although defendant correctly observes that, under MRE 103(c), the court should prevent the jury from hearing inadmissible evidence, he has failed to show how he was prejudiced by any of the evidence in question. Accordingly, this issue does not merit reversal.

We find no impropriety in the prosecutor's comment on defendant's failure to call a witness. Generally, a comment on a defendant's failure to call a witness does not shift the burden of proof unless the comment burdens the defendant's right not to testify. *People v Fields*, 450 Mich 94, 112; 538 NW2d 356 (1995). Defendant makes no argument that the prosecutor's

argument burdened his right not to testify. In addition, the comment was properly responsive to an issue raised by defense counsel and, therefore, does not warrant reversal. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

Finally, defendant contends that the trial court improperly considered his refusal to admit guilt as a basis for departing from the recommendation of the sentencing guidelines. A trial court cannot base its sentence, in whole or in part, on a defendant's refusal to admit guilt. *People v Yennior*, 399 Mich 892; 282 NW2d 920 (1977). In determining whether a sentence was improperly influenced by a defendant's refusal to admit guilt, three factors should be considered: (1) the defendant's maintenance of innocence after conviction; (2) the judge's attempt to get the defendant to admit guilt; and (3) the appearance that, had the defendant affirmatively admitted guilt, his sentence would not have been so severe. *People v Wesley*, 428 Mich 708, 713; 411 NW2d 159 (1987).

Here, the record does not suggest that the trial court improperly based its sentence on defendant's refusal to admit guilt. While defendant maintained his innocence, there was no indication by the court that an admission of guilt could have led to a reduced sentence. The court at no time asked defendant to admit his guilt. The remarks in question instead seem to be responsive to defendant's assertion that the verdict was against the great weight of the evidence. Further, the court indicated that it was departing from the guidelines for other reasons not associated with an alleged refusal to admit guilt by defendant. Under the circumstances, we are satisfied that the trial court did not improperly enhance defendant's sentence based on a refusal to admit guilt.

We reverse and remand. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Kurtis T. Wilder
/s/ Jeffrey G. Collins