

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DARRIN AUSTIN MILLS,

Defendant-Appellant.

UNPUBLISHED

March 1, 2002

No. 224334

Calhoun Circuit Court

LC No. 99-001936-FC

Before: Bandstra, C.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of assault with intent to do great bodily harm less than murder, MCL 750.84, four counts of assault with intent to rob while armed, MCL 750.89, and one count of conspiracy to commit armed robbery, MCL 750.529. The trial court sentenced defendant to six to ten years' imprisonment for each of the assault with intent to commit great bodily harm convictions, life imprisonment for each of the assault with intent to rob convictions, and thirty-five to seventy years' imprisonment for the armed robbery conviction, all sentences to be served concurrently. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court erred in denying his motion for a change of venue on the basis of pretrial publicity. A motion for a change of venue is addressed to the trial court's discretion and the court's ruling will not be disturbed on appeal absent a palpable abuse of that discretion. *People v Jendrzewski*, 455 Mich 495, 500; 566 NW2d 530 (1997). Having reviewed the extensive jury voir dire conducted in this case, we conclude that defendant failed to show either (1) the existence of strong community feelings against him and that the publicity was so extensive that jurors could not remain impartial when exposed to it, or (2) that the jurors actually were prejudiced or the atmosphere surrounding the trial was such as would create the probability of prejudice. *Jendrzewski*, *supra* at 500-501; *People v Hack*, 219 Mich App 299, 311; 556 NW2d 187 (1996). Accordingly, we conclude that the trial court did not abuse its discretion in denying defendant's request for a change of venue.

Defendant next argues that he was deprived of his right to due process when the court denied his motion to exclude an in-court identification by one of the victims. Defendant maintains that the in-court identification was tainted because at a prior trial of a codefendant the victim was shown a photograph with defendant's name underneath. We review for clear error a trial court's decision to admit identification evidence. A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *People*

v Barclay, 208 Mich App 670, 675; 528 NW2d 842 (1995). Even assuming that the victim underwent an improperly suggestive pretrial photographic lineup procedure, our review of the totality of the circumstances demonstrates that a sufficient independent basis supported the victim's in-court identification of defendant. *People v Gray*, 457 Mich 107, 114-117; 577 NW2d 92 (1998); *People v Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000). Consequently, the trial court did not err in permitting the victim to identify defendant during his trial.

We next conclude that the trial court did not abuse its discretion when it denied two of defendant's requests for discovery. *People v Lemcool (After Remand)*, 445 Mich 491, 497; 518 NW2d 437 (1994). We note that the court correctly allowed discovery of evidence to the extent relevant under MRE 609 and that defendant expressed satisfaction with the court's ruling. Furthermore, defendant failed to adequately demonstrate his need for an expert regarding the effects of crack cocaine on a person's ability to remember or recall events. *People v Maranian*, 359 Mich 361, 368; 102 NW2d 568 (1960); *People v Tomko*, 202 Mich App 673, 679; 509 NW2d 868 (1993).

The next issue arises from a witness' testimony at trial that a teardrop tattoo signified that the person with the tattoo had killed someone. Defendant asserts that the trial court improperly admitted evidence that following the charged offenses he expressed a desire to obtain a teardrop tattoo. We review for a clear abuse of discretion the trial court's decision to admit evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). This evidence was probative of defendant's state of mind and possible participation in the charged offenses. MRE 401; *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). Additionally, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice; defendant offers no explanation of what unfair prejudice occurred beyond speculating regarding the evidence's emotional impact on the jury. MRE 403; *People v Fisher*, 449 Mich 441, 451-452; 537 NW2d 577 (1995); *People v Meadows*, 175 Mich App 355, 361; 437 NW2d 405 (1989).

Contrary to defendant's next, unpreserved contention, defendant had no right to counsel at the photographic showup that was conducted with one of the victims before defendant was taken into custody. *People v Williams*, 244 Mich App 533, 539-540; 624 NW2d 575 (2001); *People v Lee*, 243 Mich App 163, 181-182; 622 NW2d 71 (2000).

We reject defendant's further suggestion that a police officer provided inadmissible hearsay testimony when he testified that he "had been told" where some evidence could be located. No statement was received into evidence and the information referenced by the officer was not admitted for the truth of the matter asserted, but rather to explain why the officer went to a particular location. MRE 801(a), (c). Accordingly, we find meritless defendant's related, unpreserved contention that the officer's testimony violated the rule in *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968), regarding statements by a nontestifying codefendant.

Defendant argues that reversal is required because the trial court improperly admitted evidence of his flight. Because defendant did not object at trial to the evidence of flight, we review this issue for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We conclude that no plain error occurred, however, because evidence of flight is admissible as substantive evidence of a defendant's guilt. *People v Cutchall*, 200 Mich App 396, 398-399; 504 NW2d 666 (1993), overruled in part on other

grounds, *People v Edgett*, 220 Mich App 686, 691-694; 560 NW2d 360 (1996); *People v Casper*, 25 Mich App 1, 7; 180 NW2d 906 (1970).

Defendant lastly raises the unpreserved claim that instructional error occurred because the court did not specifically instruct the jury that its verdict must be unanimous with regard to each separate charged offense. In light of the facts that the trial court gave a general unanimity instruction and that defendant never requested that the jurors be polled regarding the verdict, we find no plain error that affected defendant's substantial rights. *People v Pollick*, 448 Mich 376, 386; 531 NW2d 159 (1995); *People v Burden*, 395 Mich 462, 468-469 (opinion by T. G. Kavanagh, C.J.), 470 (opinion by Williams, J.); 236 NW2d 505 (1975).

Affirmed.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage