STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 12, 2002
v	No. 224966 Ingham Circuit Court
RONALD LEON ALLEN, Defendant-Appellant.	LC No. 99-074635-FC

Before: Cavanagh, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316, armed robbery, MCL 750.529, and felony-firearm, MCL 750.227b. We affirm.

On October 10, 1998, a Marathon service station was robbed and the service attendant was shot in the head and killed. A surveillance camera videotaped the robbery and murder, using a time-lapse recorder and VHS videotape. The police retrieved both the recorder and the videotape and had the videotape transferred from its analogue format into a digital format. The digital images were then viewed and still frames were selected, saved as an image file, transferred to a zip diskette, and given to the police. A detective then took the zip diskette to a printing service and had the selected images printed as photographs.

The police also contacted a videographer who copied the original surveillance videotape onto a one-inch, broadcast standard, tape, which would permit a higher quality image while maintaining the original analog format. The videographer also prepared two videotapes that recorded ten-minute segments of fourteen particular frames, i.e., each image would be held still for ten minutes, allowing time to examine each frame of interest. Ten-second segments of the same fourteen frames were also recorded on another videotape. The videographer also digitized specific frames or images from the videotape in the TIFF file format and transferred the data over the Internet to an imaging expert for the purpose of image recovery, i.e., reduction or removal of noise and blurring from the images.

Dr. Normal Sauer, a forensic anthropologist, reviewed the videotapes, photographs, and other still frames that resulted from the surveillance videotape and compiled a list of morphologic features of the perpetrator of the crime. He then compared, side-by-side, those surveillance images and the morphologic features of the perpetrator with known photographs of

defendant, as well as eight to ten other individuals, and could not conclude that defendant was not the person on the surveillance videotape.

Dr. Sauer also utilized superimposition techniques to compare the images. In particular, using a video mixer and two cameras situated on vertical rods, allowing photographs of different sizes to be compared by moving the cameras up or down the rods, Dr. Sauer performed two types of superimposition. First, he superimposed images from the surveillance tape over known photographs of defendant and proceeded to perform systematic horizontal and vertical "wipes" or erasures to determine whether particular morphologic features portrayed on the two comparative images were consistent or aligned. Dr. Sauer was unable to conclude that defendant was not the person on the surveillance tape. Second, he used a superimposition fading technique that permitted the comparative images to be integrated, also allowing comparisons of locations and proportions of morphologic features. Dr. Sauer testified that there were no significant differences between the features of the perpetrator in the surveillance tape and defendant's features. In sum, after performing his various identification studies, Dr. Sauer testified that he was unable to exclude defendant as a suspect and that it would be a "rare occurrence that two people would have the same identical [constellation of comparable] features." On cross-examination, however, Dr. Sauer testified that he was unable to conclude that the person on the surveillance tape and defendant were the same person, i.e., make a positive identification.

On appeal, defendant first argues that the trial court abused its discretion in admitting Dr. Sauer's testimony regarding his use of superimposition techniques to compare photographs without conducting a *Davis-Frye*[1] hearing to determine whether this methodology was reliable and, hence, the evidence admissible. We disagree. A trial court's decision to admit or exclude expert testimony is reviewed on appeal for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 224; 530 NW2d 497 (1995).

Expert testimony is admissible under MRE 702 if (1) the witness is qualified as an expert in a pertinent field, (2) the testimony is relevant in that it "assist[s] the trier of fact to understand the evidence or to determine a fact in issue," and (3) the testimony is derived from "recognized scientific, technical, or other specialized knowledge . . . ." MRE 702; *People v Beckley*, 434 Mich 691, 710-719; 456 NW2d 391 (1990). The issue in this case concerns the third requirement—whether identification testimony based in part on superimposing photographs to permit morphologic comparisons of facial features is reliable for purposes of MRE 702.

The *Davis-Frye* test is a means to determine whether proposed testimony regarding a novel scientific principle, technique, or methodology is "recognized," i.e., has gained general acceptance, within the relevant scientific community and, thus, is admissible as reliable evidence. *Beckley, supra* at 718. The burden of proving admissibility rests on the party offering the evidence. *People v Lee*, 212 Mich App 228, 262; 537 NW2d 233 (1995). The purpose of the *Davis-Frye* rule "is to prevent the jury from relying on unproved and ultimately unsound scientific methods." *People v Marsh*, 177 Mich App 161, 164; 441 NW2d 33 (1989), quoting *People v Gonzales*, 415 Mich 615, 623; 329 NW2d 743 (1982). However, the *Davis-Frye* rule

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[1] *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955); *Frye v United States*, 293 F 1013 (CA DC, 1923).

only applies to novel scientific techniques, methods, or principles; therefore, when a technique, method, or principle has been established as generally accepted, even when it is used in a novel application, the rule does not apply. *Lee*, *supra* at 282-283; *Haywood*, *supra* at 221; *People v Davis*, 199 Mich App 502, 512-513; 503 NW2d 457 (1993).

Here, on appeal, defendant challenges the admission of Dr. Sauer's identification testimony with regard to his use of superimposition techniques to compare the images of the person in the surveillance tape with photographs of defendant.[2] See MCR 7.212(C)(5). However, this methodology was not novel; rather, it was essentially a photo-to-photo comparison but instead of the photographs being aligned side-by-side, they were layered on top of each other, through the use of a mixer, and then progressively "blended" to determine if there were consistencies in morphologic features. Comparing photographic images is not a new scientific technique. See, e.g., *Marsh*, *supra* at 167. Further, defendant's own expert videographer performed similar superimposition techniques and testified that the techniques were not new but that he did not have the expertise to perform comparisons of the resulting images for identification purposes. Dr. Sauer's use of superimposition techniques as a method of comparing photographic images to assist in his ability to reach conclusions was sound and offers a trustworthy foundation for his conclusions. The superimposition techniques presented the comparative evidence—the photographs—in a more perceptible and effective manner, without altering, manipulating, or distorting the original images. In sum, Dr. Sauer's testimony that relied on this method of displaying and comparing photographic evidence was admissible without first conducting a *Davis-Frye* hearing, and the trial court did not abuse its discretion in admitting this testimony.

Next, defendant argues that the trial court erred in admitting similar acts evidence regarding his alleged involvement in another shooting because the prosecutor did not give proper notice of such intent under MRE 404(b)(2) and because the testimony was inadmissible. We disagree.

First, because defendant did not object to the lack of notice under MRE 404(b)(2), our review is limited to whether the unpreserved error affected defendant's substantial rights. *People v Grant*, 445 Mich 535, 545, 551-552; 520 NW2d 123 (1994). In this case, defendant's substantial rights were not affected by the lack of notice because the contested testimony regarding defendant's alleged involvement in another shooting was presented at defendant's preliminary examination months before the trial and the witnesses were endorsed. Accordingly, defendant had the opportunity to object to and defend against the other acts evidence consistent with the purpose of the notice requirement. See *People v VanderVliet*, 444 Mich 52, 89, n 51; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994); *People v Hawkins*, 245 Mich App 439, 454-455; 628 NW2d 105 (2001).

We also reject defendant's claim that evidence prohibited under MRE 404(b) was improperly admitted. Because defendant did not object to the admission of this evidence at trial,

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[2] Although defendant appears to take issue with Dr. Sauer's allegedly "subjective" characterizations of the comparative morphologic features and his use of a non-exclusion hypothesis, defendant did not challenge Dr. Sauer's expertise on appeal.

the issue is forfeited unless plain error is established. See *Grant*, *supra*; *People v Pesquera*, 244 Mich App 305, 316; 625 NW2d 407 (2001).

Defendant argues that testimony regarding his alleged involvement in another shooting was improperly admitted. In particular, Bobby Simpson, Jr. testified that defendant shot at him six or seven times, striking him once in the arm, using a rusty .22-caliber Ruger handgun in September 1998. Antoine Williams testified that he saw defendant shoot Simpson. Williams further testified that, in early 1999, he found a .22-caliber Ruger pistol in a speaker box that he had observed in defendant's automobile in November or December of 1998, and he turned the gun over to police. An expert in firearm and tool mark identification testified that the shell casing recovered from the Marathon service station crime scene and the shell casings recovered from the Simpson shooting were fired from the .22-caliber Ruger pistol that Williams gave to police.

Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if the evidence is "(1) offered for a proper purpose and not to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, MRE 403." *People v Ho*, 231 Mich App 178, 185-186; 585 NW2d 357 (1998). Here, the contested evidence was not simply offered to show defendant's bad character. Contrary to defendant's argument on appeal, the testimony was not admitted by the prosecution for the purpose of supporting a modus operandi theory of identification; rather, the testimony was admitted for the purpose of linking defendant to the murder weapon. See *People v Yacks*, 49 Mich App 444, 451; 212 NW2d 249 (1973). The disputed testimony, coupled with the firearm expert's testimony, demonstrated that defendant previously possessed and was observed with the murder weapon. Finally, evidence is not inadmissible simply because the very nature of the evidence is prejudicial, and defendant has not demonstrated that he was unfairly prejudiced by the testimony. See MRE 403. In sum, defendant has failed to establish plain error warranting reversal. Further, because this testimony was admissible, defendant's ineffective assistance of counsel claim on this ground is without merit. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Peter D. O'Connell