

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LADARIUS KESHOUE GILBERT,

Defendant-Appellant.

UNPUBLISHED

June 17, 2008

No. 277879

Macomb Circuit Court

LC No. 2006-002154-FC

Before: Whitbeck, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

A jury convicted defendant Ladarius Gilbert of armed robbery,¹ third-degree fleeing a police officer,² and resisting and obstructing a police officer.³ The trial court sentenced Gilbert to 126 months to 30 years' imprisonment for the armed robbery conviction, 40 months to five years' imprisonment for the third-degree fleeing a police officer conviction and one to two years' imprisonment for the resisting and obstructing a police officer conviction. Gilbert appeals as of right. We affirm.

I. Basic Facts And Procedural History

On April 10, 2006, Hillary Juracek was working at the Mobil gas station near I-696 and Hoover Road in Warren, Michigan. Juracek was the only employee at the station and was working the 10:00 p.m.-to-6:00 a.m. shift. At approximately 2:50 a.m., Juracek left the station and went outside for roughly one minute. When she reentered the station, she noticed a man standing near the cooler. He was approximately six feet tall, wore a black jacket with the hood pulled over his head, and had a blue or red bandana covering the lower half of his face. Juracek then noticed that there was a second man, similarly dressed and also wearing a red or blue bandana, standing near the station's bathroom. She began to walk toward the counter, anticipating that she might have to call the police.

¹ MCL 750.529.

² MCL 257.602a(3).

³ MCL 750.81d(1).

As Juracek approached the counter, one of the men said something to her that she could not understand. As she asked him to repeat himself, she noticed the second man had approached her and was behind the counter. The second man was armed with a gun. Juracek, expecting to be shot, fell to the ground and curled in a ball. The gunman ordered her to open the cash register. Juracek complied and emptied the register of approximately \$100 in \$5 and \$1 bills. The gunman then ordered Juracek to open the lottery machine and the ATM. Juracek responded that the store did not have a lottery machine and she did not have keys to the ATM. The gunman then grabbed two cartons of Newport cigarettes, and the two men then left the station. Juracek observed the men walking southeast from the station and testified that she did not notice a car in the station's parking lot.

After the men left the station, Juracek called the police. At approximately 3:00 a.m., Officer Charles Younkin of the Warren Police Department was dispatched to the scene of the crime and provided with a description of the two suspects. When Officer Younkin was one block from the scene of the robbery, he observed a red Cougar driving northbound on Hoover road. As he pulled up along side the car and shined a light inside the window, he observed two black males with black hooded jackets in the vehicle. At trial, Officer Younkin identified Gilbert as the driver of the vehicle. Officer Younkin pulled behind the Cougar, activated his lights and siren, and notified dispatch that he had located possible suspects. The Cougar then increased its speed and merged on to I-696. Officer Younkin pursued the vehicle, which eventually merged on to I-94. As Officer Younkin pulled within 70 feet of the vehicle, he noticed a possible handgun sticking out of the passenger window. The Cougar exited I-94 in Detroit. By this point, other police officers joined the pursuit.

After the Cougar exited I-94, it eventually came to a slow roll, at which point both passengers leapt out of the vehicle. Officer Younkin began to chase Gilbert on foot, ordering him to stop running. Following a chase that led various officers through the backyards of several residences, the police cornered and apprehended Gilbert. However, as the officers attempted to place Gilbert under arrest, he repeatedly attempted to pull free. The officers applied force and eventually placed Gilbert in handcuffs.

When they searched Gilbert, the officers did not discover a weapon or any other incriminating contraband. Further, the officers searched the entire chase route in hope of finding the firearm used in the commission of the robbery, but the search was fruitless. The search of the red Cougar, however, led to the discovery of several pieces of evidence. Although neither the weapon used in the robbery nor the proceeds of the robbery were in the vehicle, the police found two t-shirts, one red and one blue, along with two cartons of Newport cigarettes. The cartons bore the same lot number as the other cartons in the Mobil station. Testimony at trial revealed that a large number of cartons would have been affixed with that particular lot number, indicating that the number itself was not definitive proof that the cartons were the product of the robbery. The police officers also discovered a Western Union receipt in the vehicle bearing the name of Chaza Marshall. Marshall's state identification was also in the car. Officer Younkin testified that Marshall was never found, but testimony from officers at the scene confirmed that Marshall was the other person in the vehicle.

After the Warren police arrested Gilbert, he eventually provided them with a statement. The police did not, however, write down or record the statement. At trial, Detective Brendan Brosnan testified regarding the contents of Gilbert's statement. According to Officer Brosnan,

Gilbert stated that he had been at a friend's condominium at Eleven Mile and Hoover Road when he received a phone call from Marshall asking Gilbert to come pick him up. Gilbert apparently could not provide the name of the individual who resided at the condominium, and it was not clear from his statement where Gilbert was supposed to pick Marshall up from. Upon meeting Marshall, Gilbert discovered that Marshall was with another man, who was either his brother or his uncle. The man apparently gave his clothes to Gilbert and told him to put them on. Gilbert complied. Gilbert dropped the man off at an unidentified location. Shortly thereafter, Gilbert saw a police car behind him attempting to pull him over. He informed Marshall that he did not have a license, and Marshall told him to keep driving because he had just robbed the gas station.

In contrast, Gilbert testified at trial that on the night of the robbery he and a female acquaintance were at a bar from around midnight until it closed. They stopped at a restaurant and then went to the motel where the woman was living at the time. At approximately 3:00 a.m., Gilbert received a call from Marshall's brother, "Chuck." (Gilbert stated that he did not know "Chuck's" last name, and there is no reference in the record to any effort to locate this individual). According to Gilbert, Chuck asked him to come and pick him and Marshall up from a friend's condominium at Eleven Mile and Hoover. When Gilbert arrived at the residence, Chuck asked him to trade coats with him. Gilbert then dropped Chuck off at his girlfriend's house, which was just off of I-696. While driving Marshall home, Officer Younkin pulled behind Gilbert and attempted to pull him over. Marshall then pulled out a gun and told Gilbert to keep driving. Gilbert denied any involvement with the robbery and stated that he was not at the gas station that night.

On May 16, 2006, Juracek identified Gilbert in a lineup that the Warren police conducted. The lineup was composed of six individuals, and Juracek viewed them from an approximate distance of eight feet. The police informed Juracek that one of the individuals in the lineup was the suspect in the robbery.⁴ She identified Gilbert after requesting each of the participants to cover the lower portion of their faces due to the fact that the robbers' faces were partially covered on the night in question. Before identifying Gilbert, Juracek apparently stated that if it were not for the fact that he had facial hair, she would have identified individual number four as the robber. Juracek also testified that she recognized Gilbert from his eyes and eyebrow area, even though she also admitted that there was nothing distinctive about Gilbert's eyes or eyebrow area. Juracek acknowledged that before participating in the lineup, she attended a hearing at district court on April 20, 2007, at which she was able to observe Gilbert.

Before Gilbert's trial, during jury selection, the trial court instructed all potential jurors to inform the court if they knew anyone involved in the trial. No jurors indicated that they were familiar with any of the participants. During voir dire, a potential juror named Sarah Smith stated that she was a corrections officer at Macomb County Jail and that her husband was a Macomb County Sheriff for five years. Defense counsel questioned Smith regarding her view of prisoners' honesty. Defense counsel and the prosecution ultimately accepted Smith as a juror.

⁴ *People v McElhaney*, 215 Mich App 269, 287; 545 NW2d 18 (1996) (stating that the fact that the complainant was told that the culprit would be in the lineup is not unduly suggestive).

At trial, defense counsel did not object to the trial court admitting evidence of Juracek's prior identification of Gilbert. Defense counsel did, however, cross-examine Juracek on the topic and highlighted her previous encounter with Gilbert in court. Further, over defense counsel's objection, the trial court permitted the expert testimony of Sergeant Edward Torley. After the robbery, Sergeant Torley converted the gas station's security camera footage so that it could be played on a standard VHS tape. After the conversion, Sergeant Torley brightened the images in order to make them more visible. He testified that he did not alter the content of the images in any way. After a brief evidentiary hearing, the trial court allowed Sergeant Torley to testify.

Following Gilbert's conviction, he filed a claim of appeal with this Court and then filed a motion to remand. This Court denied Gilbert's motion.⁵

II. Juracek's Identification

A. Standard Of Review

Gilbert contends that the trial court erred in admitting testimony regarding Juracek's lineup identification of him when she had encountered Gilbert at a prior court proceeding. Generally, the admission of identification evidence does not warrant reversal absent a determination of clear error.⁶ Because Gilbert failed to preserve this issue, we review his claim for plain error affecting his substantial rights.⁷

B. Applicable Legal Standards

"An identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification."⁸ In determining whether an identification procedure was overly suggestive, this Court examines the totality of the circumstances. Factors include the length of time between the crime and the preliminary examination confrontation, the opportunity of the witness to view the culprit at the time of the crime and the witness's degree of attention, the level of certainty demonstrated by the witness at the confrontation, and the accuracy of the witness's prior description of the criminal.⁹

In discussing the procedure a court should utilize in determining whether a pre-identification encounter results in the subsequent identification being necessarily unreliable, the Sixth Circuit explained, "First, the court evaluates the undue suggestiveness of the preidentification encounters. If the encounters were unduly suggestive, the court evaluates the

⁵ *People v Ladarius Keshoue Gilbert*, unpublished order of the Court of Appeals, entered February 12, 2008 (Docket No. 277879).

⁶ *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004).

⁷ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1990).

⁸ *Harris*, *supra* at 51.

⁹ *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998).

‘totality of the circumstances’ to determine whether there are nevertheless sufficient independent indicia of reliability.’”¹⁰

C. Applying The Standards

Juracek encountered Gilbert when he was at a district court proceeding following his arrest for the robbery. Juracek testified that she only saw Gilbert in the district court for a few seconds and that her identification was based on her memory from April 10, 2006, not from the encounter at the district court.

Even if Juracek’s identification testimony was not sufficiently reliable to be admitted at trial, Gilbert cannot establish that he was prejudiced by its admission. At trial, defense counsel was able to highlight on several occasions that Juracek’s identification was the result of a tainted procedure. Further, overwhelming evidence was presented at trial, independent of the identification, to establish Gilbert’s participation in the robbery. The police arrested Gilbert after he fled from them in a vehicle that contained a red shirt and blue shirt, items that fit the description of the red and blue coverings on the robbers’ face. Additionally, the police found cartons of Newport cigarettes in the vehicle and the cartons had lot numbers consistent with the other cigarettes in the Mobil station that was robbed. Gilbert was wearing a black hooded jacket similar to that of the assailant and provided an questionable explanation for his possession of the jacket. The record thus establishes that Gilbert’s conviction was not solely the product of Juracek’s identification of him. Rather, the multiple pieces of evidence supported the conviction, and the prosecution would have secured it regardless whether the trial court admitted Juracek’s identification.

III. Sergeant Torley’s Testimony

A. Standard Of Review

Gilbert contends that the trial court abused its discretion in allowing Sergeant Edward Torley to testify as an expert despite little advanced notice of his testimony. We review the propriety of a trial court’s admission of evidence for an abuse of discretion.¹¹

B. Applicable Legal Standards

An individual accused of a crime has a due process right to present a defense.¹² As the Michigan Supreme Court has explained, where a party intends to call an expert witness, it must disclose any reports prepared by that expert pursuant to rules of discovery.¹³ However, where an expert has produced no report, it is not necessary for him to produce such a report for the benefit

¹⁰ *Thigpen v Cory*, 804 F2d 893, 895 (CA 6, 1986).

¹¹ *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

¹² *Chambers v Mississippi*, 410 US 284, 296; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

¹³ *People v Phillips*, 468 Mich 583, 591; 663 NW2d 463 (2003).

of the opposing party.¹⁴ In order to be admissible, expert testimony must comply with a three-part test.¹⁵ First, the expert has to be qualified.¹⁶ Next, the expert's testimony must assist the jury in understanding the evidence or making an essential factual determination.¹⁷ Third, the evidence must arise from a recognized discipline.¹⁸

C. Applying The Standards

Sergeant Torley's testimony described the converted security camera footage from the night of the robbery. Sergeant Torley prepared a report, which was provided to defense counsel moments before he was permitted to testify. Defense counsel objected to Sergeant Torley being called as a witness, arguing that he had not been mentioned in either the prosecution's initial witness list nor its amended witness list, and he had not been referred to in the discovery materials. Defense counsel stated that he only even learned of Sergeant Torley's existence the day before he was called to testify, and defense counsel asserted that if he had had earlier knowledge, he could have obtained his own expert witness to analyze the report and evidence.

It is true that Gilbert did not have a meaningful opportunity to review Sergeant Torley's report or counter his testimony with his own expert. However, Gilbert does not provide any explanation of how advance notice of Sergeant Torley's testimony would have altered his cross-examination. He points to no flaw in Sergeant Torley's testimony nor does he demonstrate that Sergeant Torley's techniques were scientifically questionable or unsound. Had the prosecution given Gilbert notice of the testimony at an earlier date, Sergeant Torley's testimony would have had the same effect and the outcome of the trial would not have differed. Gilbert has failed to demonstrate that the trial court abused its discretion in allowing Sergeant Torley to testify.

Further, we disagree with Gilbert's allegation that his confrontation rights were violated by Sergeant Torley's testimony. A defendant is entitled to a reasonable opportunity to examine a witness's truthfulness.¹⁹ As described above, while Gilbert did not have time to thoroughly prepare a cross-examination strategy, he does not provide this Court with any examples of how the cross-examination would have differed had he been better prepared. Without describing how the lack of notice impeded cross-examination, Gilbert cannot establish that his confrontation rights were violated. As a result, Gilbert's claim that the lack of meaningful cross-examination amounts to a violation of his right to confrontation also fails.

¹⁴ *Id.*

¹⁵ *People v Coy*, 258 Mich App 1, 10; 669 NW2d 831 (2003).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 549 (1993).

IV. Ineffective Assistance of Counsel

A. Standard Of Review

Gilbert's claims that he was denied the effective assistance of counsel generally present questions of constitutional law that we review de novo.²⁰ However, because Gilbert failed to preserve his claims of ineffective assistance, our review is limited to errors that are evident on the record.²¹

B. Applicable Legal Standards

In order to prevail on an appeal based on ineffective assistance of counsel, a defendant must establish that his attorney's assistance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial."²² In order to demonstrate prejudice, a defendant must establish that there is a reasonable probability that, but for the mistakes of his attorney, the result of the trial would have been different.²³ The United States Supreme Court has further stated that the proper inquiry is whether, as a result of counsel's performance, the outcome of the trial was fundamentally unfair, unreliable, or prejudicial.²⁴ There is a strong presumption that defense counsel's actions were sound trial strategy.²⁵

C. Failure To Challenge Juracek's Identification Testimony

Gilbert contends that his defense counsel was ineffective for failing to object to Juracek's identification testimony. But because Gilbert cannot establish that the identification evidence prejudiced him, his unpreserved claim of ineffective assistance of counsel fails. As stated above, Gilbert cannot establish that the result of his trial would have differed had the trial court not allowed Juracek to testify regarding the lineup identification.

D. Counsel's Cross-Examination of Sergeant Torley

Because, as stated, Gilbert has not established that a well-prepared attorney could have cast doubt on Sergeant Torley's credibility or the validity of the procedures he used, he cannot establish that his counsel's cross examination of Sergeant Torley constituted ineffective assistance of counsel. Gilbert's attorney briefly questioned Sergeant Torley, focusing on whether his techniques altered the content of the videotape. The cross-examination revealed that the technique alters the luminous value of the images, but does not alter the substantive content of the images. Gilbert does not explain how this cross-examination was ineffective or how the

²⁰ *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

²¹ *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

²² *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

²³ *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997).

²⁴ *Lockhart v Fretwell*, 506 US 364, 369; 113 S Ct 838; 122 L Ed 2d 180 (1993).

²⁵ *Toma*, *supra* at 302.

cross-examination would have differed had counsel had ample time to prepare for Sergeant Torley.

E. Failure to Remove Juror Smith

Gilbert contends he was denied the effective assistance of counsel when his attorney failed to remove a juror, Sarah Smith, despite the fact that she was allegedly acquainted with him and familiar with the facts of his case.

Defendant's assertions that Juror Smith knew him and the events surrounding his trial prior to being selected as a juror, and the claim that Juror Smith's husband would come to his cell to mock him during the trial, are not supported by the record. The record merely establishes that Juror Smith is a corrections officer for the Macomb County Jail and that her husband has been a Macomb County Sheriff for five years. Furthermore, when the jury pool was asked whether anyone knew any of the individuals involved in the case, Juror Smith remained silent. Defense counsel questioned Juror Smith regarding her view of the veracity of prisoners as compared to the veracity of police officers. The record states that her response was inaudible. Next, defense counsel began to ask Juror Smith whether she understood the concept of burden of proof. She asked counsel to repeat the question. When he repeated it, she responded that she could not hear him. Counsel then proceeded to ask the question to all of the jurors as a group, not waiting for a response. The final jury, accepted by both parties, included Juror Smith.

Our review of the record does not establish that Gilbert's attorney had any reason to believe that Juror Smith was biased. Moreover, the record certainly does not demonstrate that Juror Smith and Gilbert know one another or that she knew the details of the alleged crime. As a result, Gilbert cannot establish that the result of his trial, at which the prosecution presented overwhelming evidence, would have differed had Juror Smith not been a part of the panel. Because Gilbert cannot establish that his attorney's inaction resulted in a denial of a fair trial, he is not entitled to relief.²⁶

Affirmed.

/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly

²⁶ *Id.* at 302.