STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 24, 2009
v	No. 286096 Washtenaw Circuit Court
RONNELL PHILLIP JOHNSON, Defendant-Appellant.	LC No. 07-001499-FC

Before: Meter, P.J., and Murphy, C.J., and Zahra, J.

PER CURIAM.

Following a bench trial, defendant Ronnell Phillip Johnson was convicted of armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a and 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to 15 to 25 years' imprisonment for the armed robbery conviction, 15 to 25 years' imprisonment for the conspiracy conviction, 2 to 7-1/2 years' imprisonment for the felon in possession conviction, and 2 years' imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant argues that the trial court should have suppressed the evidence obtained during the search of defendant's apartment because the warrant authorizing the search was not supported by probable cause. Specifically, defendant contends that probable cause did not exist because the only evidence of defendant's involvement in the crime was information from defendant's father, Ronald Johnson ("Johnson"), identifying defendant as one of the perpetrators as seen on video surveillance footage from the crime scene played on the local news.

Both the United States Constitution and the Michigan Constitution protect persons against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. "The constitutions do not forbid all searches and seizures, only unreasonable ones. Reasonableness depends on the facts and circumstances of each case." *People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2000) (citations omitted). With respect to the issuance of a search warrant, MCL 780.651(1) provides:

> When an affidavit is made on oath to a magistrate authorized to issue warrants in criminal cases, and the affidavit establishes grounds for issuing a warrant under this act, the magistrate, if he or she is satisfied that there is probable

> cause for the search, shall issue a warrant to search the house, building, or other location or place where the person, property, or thing to be searched for and seized is situated.

The Code of Criminal Procedure also provides the following directives in relation to the issue of probable cause:

> The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:
>
> (a) If the person is named, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information. . . . [MCL 780.653; see also *People v Keller*, 479 Mich 467, 482; 739 NW2d 505 (2007).]

"Probable cause exists when the facts and circumstances known to the police officers at the time of the search would lead a reasonably prudent person to believe that a crime has been or is being committed and that evidence will be found in a particular place." *People v Beuschlein*, 245 Mich App 744, 750; 630 NW2d 921 (2001). Here, the source of information supporting issuance of the warrant came from an identifiable person, Johnson, and identifiable citizens are presumably reliable. *People v Dowdy*, 211 Mich App 562, 567; 536 NW2d 794 (1995). Further, "[i]t is well settled that a search warrant may be issued where the police have conducted an independent investigation to verify the information supplied by the informant." *People v Harris*, 191 Mich App 422, 425-426; 479 NW2d 6 (1991).

Defendant maintains that the only information supporting the warrant was the wild claims of Johnson, who had a limited relationship with defendant and who had made no attempt to verify whether it truly was defendant he saw on the video before going to the police. "The defendant has the burden of showing, by a preponderance of the evidence, that the affiant knowingly and intentionally, or with a reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to the finding of probable cause." *People v Ulman*, 244 Mich App 500, 509-510; 625 NW2d 429 (2001). There is no evidence in the record indicating that Johnson provided false information to the police, let alone evidence that the police knowingly, intentionally, or with reckless disregard inserted false information obtained from Johnson into the affidavit submitted to the magistrate. Moreover, there is no legal support for defendant's proposition that an informant like Johnson needed to conduct a further inquiry on his own before going to the police. And regardless, Johnson did pursue the matter with family members, who confirmed Johnson's belief that it was defendant in the video footage, and Johnson did make an unsuccessful attempt to contact defendant regarding the situation. Additionally, we fail to see, under the circumstances, any real significance as to defendant's claim that he had a strained and limited relationship with Johnson, and Johnson was able to show that he had seen defendant a few months before the robbery.

Johnson's identification of defendant as one of the perpetrators of the armed robbery was premised on specific and distinctive characteristics of defendant with which Johnson, as defendant's father, was familiar, namely, the jacket, the blue bandana, the shaved eyebrows, and

defendant's overall appearance. Because Johnson was an identifiable citizen, his identification is presumed reliable. *Dowdy, supra* at 567. Additionally, a police officer completed an independent investigation into Johnson's identification of defendant and determined that the identification was reliable. Because this independent police investigation verified Johnson's claims, the information submitted to the magistrate supported the issuance of the search warrant. *Harris, supra* at 425-426; *People v Davis*, 146 Mich App 537, 543; 381 NW2d 759 (1985) (probable cause existed where, after an anonymous tip, the police independently concluded that the defendant committed the crime after comparing the bank surveillance photographs to the bank teller's description and photographs of the defendant). A reasonably prudent person would believe that defendant committed a crime and that evidence of the crime would be found in defendant's apartment based on (1) the similarities between one of the perpetrators on the surveillance videotape and defendant, (2) Johnson's assertions that defendant was one of the perpetrators, and (3) the police officers' independent investigation. *Beuschlein, supra* at 750. Thus, probable cause existed to justify the search.

In defendant's Standard 4 brief, Administrative Order No. 2004-6, Standard 4, defendant presents his own search warrant argument that Johnson provided false information to the police when he identified defendant as the perpetrator of the crime. Again, there was no evidence that Johnson provided false information to police, and this includes the information relative to the gloves worn during the robbery, the blue bandana, and defendant's shaved eyebrows, which pieces of evidence defendant incorrectly and unpersuasively argues were the subject of false information. The Standard 4 argument on this issue lacks merit and is rejected.

Defendant next argues that the trial court abused its discretion when it admitted certain physical evidence, namely, the gun found in defendant's apartment, the jacket defendant wore when he was arrested, and the neoprene hair wrap, where the evidence was irrelevant and unduly prejudicial, given the failure to definitively connect the evidence to the crime. In his Standard 4 brief, defendant also contends that evidence of his shaved eyebrows was unduly prejudicial because there was no proof that defendant had shaved eyebrows on the date of the robbery. In general, all relevant evidence is admissible. MRE 402; *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002). Relevant evidence is defined as "evidence having any tendency 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." MRE 401; *Taylor, supra* at 521. "Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*; MRE 403.

The gun, neoprene hair wrap, and jacket were all highly relevant to establish defendant's identity as the perpetrator of this crime. See *People v Hall*, 433 Mich 573, 580-581; 447 NW2d 580 (1989) ("Evidence of a defendant's possession of a weapon of the kind used in the offense with which he is charged is routinely determined by courts to be direct, relevant evidence of his commission of that offense."); *People v Furman*, 158 Mich App 302, 331; 404 NW2d 246 (1987) ("The fact that defendant possessed a coat hanger similar to the ligature found with the victim was relevant on the issue of the assailant's identity. Thus, its probative value outweighed its prejudicial effect."). Although the evidence at issue here was prejudicial, relevant evidence is inherently prejudicial to some extent, but the prejudice does not generally render the evidence inadmissible, unless the evidence is substantially outweighed by unfair prejudice. *People v*

Mills, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). There was sufficient testimony and evidence that could connect the items to the robbery, which connection becomes all the more apparent when the items are viewed in total, even if there was a lack of scientific evidence definitively making a connection.[1] Defendant's argument goes to the weight of the evidence, not its admissibility, and was a matter to present to the trier of fact. *People v Wager*, 460 Mich 118, 126; 594 NW2d 487 (1999). The probative value of the challenged evidence establishing defendant's involvement in the crime was not substantially outweighed by the danger of unfair prejudice. There was no plain error, nor were defendant's substantial rights affected, relative to this unpreserved evidentiary challenge. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant was not denied his due process right to a fair trial.

Defendant also argues that he was denied the effective assistance of counsel because defense counsel failed to question the victim and because defense counsel did not request the appointment of an expert witness on eyewitness testimony. Because the issue of ineffective assistance of counsel was not preserved, this Court's review of defendant's claim is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law that this Court reviews, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, *supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

[1] We also note that the gun was used to support the felon in possession and felony-firearm convictions aside from using it to connect defendant to the robbery.

First, the victim was cross-examined at length by defense counsel; thus, defendant failed to establish the factual predicate for his claim that the victim was not challenged by counsel. Second, defendant contends that defense counsel was ineffective for failing to request the appointment of an expert witness on eyewitness identification. Because defendant failed to establish that an appointed expert witness would have testified favorably for him and because defendant failed to overcome the presumption that defense counsel's decision was part of a valid trial strategy, we find that defendant has failed to establish a reasonable probability that but for counsel's alleged error the result of the proceedings would have been different. *People v Ackerman*, 257 Mich App 434, 455-456; 669 NW2d 818 (2003) (observing that the defendant did not establish a factual predicate for his claim because the defendant offered "no proof that an expert witness would have testified favorably if called by the defense"); *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999) (noting that the decision to not present expert testimony is presumed to be permissible trial strategy and that the defendant did not overcome that presumption.).[2]

Third, defendant argues in his Standard 4 brief that defense counsel was ineffective because he failed to admit evidence establishing defendant's height in order to prove that defendant did not commit the armed robbery. During the closing argument, defense counsel argued that defendant was 6'1" and that, based on the victim's testimony, defendant could not have been one of the perpetrators. This argument was presented to the trier of fact and defendant was present in the courtroom where the trier of fact could view his and the victim's height. Defendant fails to explain how evidence establishing height would have been outcome determinative. Defendant thus cannot prevail.

Finally, defendant contends, in his Standard 4 brief, that defense counsel was ineffective for not pointing out all of the discrepancies in Johnson's testimony. We conclude that defense counsel did not perform deficiently in addressing and challenging Johnson's testimony, nor has defendant established prejudice relative to this argument.

Affirmed.

/s/ Patrick M. Meter
/s/ William B. Murphy
/s/ Brian K. Zahra

[2] We also note that the trial court, sitting as the trier of fact in the bench trial, was certainly knowledgeable of problems inherently related to eyewitness testimony.