

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 11, 2012

v

MARCUS DONTI HANSERD,

Defendant-Appellant.

No. 305804
Saginaw Circuit Court
LC No. 10-034377-FC

Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

A jury convicted defendant of first-degree murder, MCL 750.316(1)(a), carjacking, MCL 750.529a, felon in possession of a weapon, MCL 750.224f, carrying a dangerous weapon with unlawful intent, MCL 750.226, and four counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a second-offense offender, MCL 769.10, to concurrent prison terms of life for first-degree murder, 356 to 480 months for carjacking, 47 to 90 months for felon in possession of a firearm, and 47 to 90 months for carrying a dangerous weapon with unlawful intent. Defendant also received a consecutive two-year prison term for each count of felony-firearm, to be served concurrently to each other. Defendant appeals as of right. We affirm.

Defendant's convictions arise from the murder of Sheric Harris and related crimes that occurred after midnight on April 17, 2004. Two witnesses testified that defendant had committed a robbery at gun point at a Stop N Shop just before the shooting occurred at the Circle K party store. Defendant was identified by a witness at trial as the shooter from the Circle K. The same witness had also identified defendant in a corporeal lineup before trial. Evidence that the victim had been driving a Camaro, that defendant left the scene of the shooting in a Camaro, and that defendant's blood was found in the Camaro the victim had been driving once it was recovered, was also presented.

First, defendant argues that there was insufficient evidence presented to establish his identity as the shooter. We disagree. We review sufficiency of the evidence issues de novo. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). We examine the evidence in a light most favorable to the prosecution, and determine whether a rational trier of fact could have found that every essential element was proven beyond a reasonable doubt. *Id.* at 196. The prosecutor has the burden to produce evidence that demonstrates guilt beyond a reasonable

doubt. *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). Generally circumstantial evidence and the reasonable inferences that can be drawn from that evidence can amount to sufficient evidence. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). What inferences can be drawn from the evidence and the weight given to those inferences is a question left to the jury. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). The jury is also responsible for determining questions of credibility. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). We will not interfere with the jury's role in determining credibility and weight of the evidence. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992). Instead, when reviewing whether there was sufficient evidence, we are "required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The prosecutor must prove identity in all criminal prosecutions because identity is an element of every crime. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). The jury is responsible for determining the credibility of identification evidence. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Generally, a positive identification by a witness is sufficient evidence to support a conviction. *Id.*

Defendant argues that there were a number of inconsistencies between the identifying witness's testimony and her previous statements to police that render her identification of defendant unreliable.¹ Additionally, defendant argues that there were inconsistencies between various witnesses' testimony, further adding to the unreliability of the identification. However, all problems that defendant points out with the identification are credibility and weight issues, which are determinations to be made by the jury. *Davis*, 241 Mich App at 700; *Hardiman*, 466 Mich at 428. We will not interfere with the jury's role in determining credibility. *Wolfe*, 440 Mich at 514. When looking at the testimony in a light most favorable to the prosecution, a jury could have reasonably determined that defendant was the shooter. Defendant was identified as the shooter both in court and in a physical lineup before trial. An identification by a witness is sufficient evidence to support a conviction. *Davis*, 241 Mich App at 700. Additionally, there was evidence that defendant's blood was found in the car the victim had been driving. There was sufficient evidence presented for the jury to reasonably determine that defendant was the shooter.

Defendant also argues that there was insufficient evidence because the prosecution did not prove when defendant's DNA was deposited in the car. We disagree. Defendant offers no authority to support the proposition that the prosecutor had to prove that the DNA was deposited during the commission of the crime. A party cannot simply announce a position and then leave it to this Court to "discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) (citations omitted). Additionally, the prosecution does not

¹ We note that defense counsel brought out these inconsistencies during cross-examination.

have to negate every possible theory of innocence and must instead prove its theory beyond a reasonable doubt. *Nowack*, 462 Mich at 400. The prosecution offered testimony to establish that the victim was driving the Camaro on the night of the shooting, that defendant was the shooter, that defendant drove from the scene in the Camaro, and that defendant's DNA profile matched the DNA profile of the blood samples taken from the Camaro. Given this evidence, the jury could have reasonably inferred that defendant shot the victim, stole the car, and left his DNA in the car. The prosecutor provided enough evidence to prove its theory beyond a reasonable doubt and the jury was responsible for determining what credibility and weight to give the evidence.

Defendant points out that the prosecutor argued that the victim was the driver of the Camaro, but that the witnesses to the shooting testified that the victim was the passenger in a third car. Defendant asserts that the prosecutor's theory was therefore insufficient to support the jury's verdicts. Defendant also maintains that the witnesses' accounts were inconsistent with the Stop N Shop robbery because defendant left witnesses at the first scene but killed someone at the second scene. It is possible that the victim got out of the Camaro and was sitting in the third car talking to someone. Such an inference would be consistent with the prosecutor's theory. Regardless of where the victim was, the jury had sufficient evidence available to make reasonable inferences that defendant shot the victim and stole the Camaro. Moreover, it does not matter why defendant shot the victim but did not shoot anyone at the first scene. All these problems and inconsistencies are credibility and weight issues that the jury was responsible for sorting out.

Defendant asserts that medical examiner's testimony about bullet paths indicated that the shooting could not have occurred in the manner claimed by the witnesses. However, because it cannot be determined which wounds the victim received first, and the victim was moving around during the incident, there is no definitive indication that the autopsy report was inconsistent with the testimony. Additionally, it was up to the jury to determine what weight to give the evidence. *Hardiman*, 466 Mich at 428.

Next, defendant argues that the trial court erred in denying his motion for an appointed expert to explain problems associated with eyewitness identification. We disagree. We review "a trial court's decision whether to grant an indigent defendant's motion for the appointment of an expert for an abuse of discretion." *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003). An abuse of discretion occurs when the decision falls outside the range of principled results. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). The trial court is not required to provide an indigent defendant with funds for an expert witness. *Tanner*, 469 Mich at 442. Instead, an expert will be provided for when the indigent defendant can demonstrate "a nexus between the facts of the case and the need for an expert." *Id.* at 443 (internal quotation marks and citation omitted). The defendant must also demonstrate that he cannot safely proceed to trial absent the expert. *Id.* at 443, 444.

Defendant goes through a lengthy analysis of *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), overruled on other grounds in *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004), as well as psychological studies and cases discussing the problems with eyewitness identification. However, nowhere in *Anderson* or current case law is there a holding that eyewitness identifications are inherently unreliable. Defendant does not cite nor is there any

current case law that forbids the use of eyewitness identification. Again, the jury is responsible for determining the credibility of eyewitness identification. *Davis*, 241 Mich App at 700.

Defendant argues that the unreliability of eyewitness identification made an expert necessary for proper investigation and trial testimony. He further asserts that the line-up procedures used in this case were impermissible and suggestive, and that an expert was necessary to explain the effects of a tainted lineup on identification. However, defendant did not object to the lineup procedure when it occurred, nor did defendant object to the in-court identification. Furthermore, the record does not reflect procedures that were impermissibly suggestive. We will not review identification issues on appeal if not raised before the trial court. *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995). Moreover, defendant has not demonstrated that he could not safely proceed to trial absent an expert. *Tanner*, 469 Mich at 443-444. In *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999) this Court noted that it would be obvious to jurors that memories and perceptions of an eyewitness are sometimes inaccurate. Defense counsel extensively cross-examined each witness and raised the inconsistencies in testimony that defendant points to on appeal. The issues with identification raised by defendant were questions of credibility properly left to the determination of the jury. *Davis*, 241 Mich App at 700. The trial court did not abuse its discretion in denying defendant's request for an appointed expert. *Tanner*, 469 Mich at 442.

Defendant also argues that the trial court erred in admitting other acts evidence under MRE 404(b). We disagree. We review a trial court's decision to admit other acts evidence for an abuse of discretion. *People v Waclawski*, 286 Mich App 634, 670; 780 NW2d 321 (2009). MRE 404(b) prohibits evidence of other acts if being offered to prove the character of the defendant. However, MRE 404(b) allows other acts evidence for a purpose other than character such as "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident." *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended by 445 Mich 1205 (1994), established that MRE 404(b) evidence will be admissible when (1) the evidence is offered to prove something other than character, (2) the evidence is relevant under MRE 402, and (3) the evidence's probative value is not substantially outweighed by its prejudicial effect. *VanderVliet*, 444 Mich at 74-75. Moreover, when using other acts evidence under MRE 404(b) to establish identity, the following must be established:

- (1) there is substantial evidence that the defendant committed the similar act
- (2) there is some special quality of the act that tends to prove the defendant's identity
- (3) the evidence is material to the defendant's guilt, and
- (4) the probative value of the evidence sought to be introduced is not substantially outweighed by the danger of unfair prejudice. [*People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998), citing *People v Golochowicz*, 413 Mich 298, 307-309; 319 NW2d 518 (1982).]

Finally, only relevant evidence is admissible. Evidence is relevant if it has any tendency to make a fact of consequence more or less probable. MRE 401. However, relevant evidence will be excluded if the probative value is substantially outweighed by the prejudicial effect. MRE 403; *People v Ortiz*, 249 Mich App 297, 305-306; 642 NW2d 417 (2001). In order to admit evidence

of a defendant's other acts, the trial court must still conduct an MRE 403 balancing test. *VanderVliet*, 444 Mich at 75.

Defendant's primary argument is that there were not sufficient special circumstances between the shooting at the Circle K and the robbery at the Stop N Shop to be admissible to prove identity under *Golochowicz*. However, both crimes took place outside convenience stores and both crimes involved the use of a gun. That the caliber of the gun used could have been different is a minor detail that would go to the weight of the evidence rather than the admissibility. See *People v Barrera*, 451 Mich 261, 289; 547 NW2d 280 (1996). Both crimes also involved robberies and were committed within a close proximity and a short time of one another. Both crimes involved defendant, as identified by witnesses. The inconsistencies relied on by defendant to establish that the crimes were not similar was information for the jury to determine the weight of the evidence; the differences did not have a bearing on the admissibility of the evidence. *Barrera*, 451 Mich at 289. The trial court did not abuse its discretion.

Defendant also argues that he was denied a fair trial when the trial court denied his request for a special jury instruction on eyewitness identification. We disagree. Claims of instructional error are reviewed de novo. *People v Hartuniewicz*, 294 Mich App 237, 242; 816 NW2d 442 (2011). However, a trial court's decision on whether a particular instruction is applicable to the facts of a case is reviewed for an abuse of discretion. *Id.* When reviewing jury instructions for error, this Court reviews the instructions as a whole. *People v Richardson*, 490 Mich 115, 119; 803 NW2d 302 (2011). The trial court must instruct the jury on the applicable law and the instructions must include "all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). However, imperfect instructions are not grounds for reversal if the instructions given "fairly presented the issues to be tried and adequately protected the defendant's rights." *People v Kowalski*, 489 Mich 488, 501-502; 803 NW2d 200 (2011).

The trial court gave instructions on the presumption of innocence and the burden of proof. With regard to identification, the trial court denied defendant's request for a special instruction and instead gave the following:

One of the issues in this case is the identification of defendant as the person who committed the crime. The prosecutor must prove beyond a reasonable doubt that the crime was committed and that the defendant was the person who committed it.

In deciding how dependable an identification is, think about such things as how good a chance the witness had to see the offender at the time, how long the witness was watching, whether the witness has seen or known the offender before, how far away the witness was, whether the area was well lighted, and the witness's state of mind at that time.

Also, think about the circumstances at the time of the identification, such as how much time had passed as to the crime, how sure the witness was about the identification, and the witness's state of mind during the identification.

You may also consider any times that the witness has failed to identify the defendant or made an identification or gave a description that did not agree with his or her identification of the defendant during trial. You should examine the witness's identification testimony carefully. You may consider whether other evidence supports the identification, because, then, it may be more reliable. However, you may use the identification testimony alone to convict the defendant as long as you believe the testimony and you find that it proves beyond a reasonable doubt that the defendant was the person who committed the crime.

The trial court also gave an instruction on inconsistent statements and how the jury could use them to determine whether the trial testimony was truthful and to determine the facts of the case.

Defendant's proposed instruction was not a proper recitation of the applicable law. *McGhee*, 268 Mich App at 606. It recapped commentary in *Anderson* about the problems inherent in eyewitness testimony. However, as discussed above, nowhere in *Anderson* or current case law was there a holding that eyewitness identifications are inherently unreliable. Defendant's proposed instruction skewed *Anderson* and would likely have confused the jury. Defendant's proposed instruction was better suited as a possible defense argument rather than as an instruction for the jury. The instructions given by the trial court adequately protected defendant's rights. The jury had adequate instruction to be able to determine what weight and credibility to give the identification evidence, and the trial court did not abuse its discretion in declining to give the proposed instruction.

Defendant also argues in his standard four brief that he was denied the effective assistance of counsel because defense counsel did not call a particular witness to testify at trial. We disagree. Unpreserved claims of ineffective assistance of counsel are reviewed for errors apparent on the record. *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008). Both the United States and Michigan Constitutions guarantee the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1 § 20. Generally, effective assistance is presumed and the defendant carries the burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). When raising a claim of ineffective assistance of counsel, the defendant must show: (1) that counsel's performance fell below professional norms, and (2) that but for counsel's ineffectiveness, the ultimate result would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713, cert den 552 US 1071; 128 S Ct 712; 169 L Ed 2d 571 (2007). In addition, the defendant must show that the proceedings were fundamentally unfair or unreliable because of counsel's ineffectiveness. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Defense counsel has wide discretion in trial strategy, including whether to call or question witnesses, and what evidence to present. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Failure to call a particular witness will constitute ineffective assistance of counsel only when the failure would deprive the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). A substantial defense is one that may have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902; 554 NW2d 899 (1996). But, this Court will not substitute its judgment for that of counsel when it comes to matters of

trial strategy. *Payne*, 285 Mich App at 190. This Court will also not judge counsel's competence with the advantage of hindsight. *Id.*

Defendant argues that counsel should have called a witness who testified at the preliminary examination, maintaining the witness said that defendant was not the shooter. However, defendant mischaracterizes the witness's actual testimony. The witness testified that a man named "little Mark" was not defendant. However, the witness never said that "little Mark", and implicitly not defendant, was responsible for the shooting; instead the witness claimed he did not remember the events on April 17, 2004. Defendant's assertion that trial counsel erred in failing to call the witness is meritless. Based on the preliminary examination testimony that the witness did not remember the incident, the witness would not have helped the defense. Additionally, the testimony from the preliminary examination did not assist the defense because the witness never said "little Mark" and not defendant was the shooter.

Defendant maintains that the prosecution's whole case was built around the eyewitness's testimony and that if called at trial his witness would have testified that defendant did not commit the crime. Defendant offers no proof to support his position. Defendant cites to a police report and letters from the witness; however, this was not evidence introduced at trial or included in the lower court record. Defendant merely claims that favorable testimony would have been offered. However, based on the witness' unpredictability, it cannot be said how he would have testified. The prosecutor indicated at the preliminary examination that the witness was expected to testify differently. And the witness consistently maintained throughout the preliminary examination that he did not remember the incident. In light of the evidence offered by the prosecution at trial and the witness's unpredictability, defense counsel's decision not to call the witness appears to have been a sound trial strategy.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot