STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 26, 2002
v	No. 223723 Oakland Circuit Court
RICKY MANLEY REID, Defendant-Appellant.	LC No. 99-164584-FC

Before: White, P.J., and Whitbeck, C.J., and Holbrook, Jr., J.

PER CURIAM.

Defendant was convicted of armed robbery, MCL 750.529, and assault with intent to murder, MCL 750.83, and was sentenced as an habitual offender to concurrent enhanced prison terms of twenty to sixty years, MCL 769.10. Defendant appeals as of right. We affirm defendant's convictions and sentences, but vacate the trial court's order of restitution.

Defendant argues that the trial court committed reversible error by permitting him to be fingerprinted before the jury. We disagree. The fingerprint evidence in this case was relevant to proving defendant was the same person who made fingerprint cards in 1972 and later in the state of California, which were connected to photographs of defendant, and therefore relevant to the identification of defendant as one of two robbers who perpetrated the crimes charged. MRE 401. While the in-court fingerprinting of defendant may have been unnecessary given the other fingerprint evidence offered, we are unable to conclude that the in-court procedure affected the outcome of the trial. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Next, defendant argues there was insufficient evidence to support an instruction on flight. We disagree. Defendant failed to preserve alleged instructional error by objecting at trial. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). The forfeited alleged error does not warrant reversal because it was not outcome determinative, and did not result in the conviction of an actually innocent defendant or seriously affect the fairness, integrity or public reputation of judicial proceedings independent of defendant's innocence. *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000), quoting *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Moreover, the trial court properly instructed on flight because the instruction was supported by the evidence, was consistent with the theories of the parties, and was an accurate statement of the law. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999); *People v Taylor*, 195 Mich App 57, 63-64; 489 NW2d 99 (1992).

Evidence of flight is admissible in a criminal case to support an inference of consciousness of guilt. *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001); *People v Cutchall*, 200 Mich App 396, 398-401; 504 NW2d 666 (1993), overruled on other grounds *People v Edgett*, 220 Mich App 686, 691; 560 NW2d 360 (1996). "The term 'flight' has been applied to such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody." *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). In the present case there was circumstantial evidence to support an inference that defendant left the state and began using different names and dates of birth to avoid apprehension for this offense. *Cutchall*, *supra*, 399-401. Lack of evidence concerning the details of the flight would go to the weight of the evidence, not its admissibility. *Compeau*, *supra*, 598.

The trial court read CJI2d 4.4 substantially verbatim, which is an accurate statement of the law. The instruction left to the jury the task of determining whether the evidence established flight (and consciousness of guilt), but also informed the jury that evidence of flight may be as consistent with innocence as with guilt. *Cutchall*, *supra,* 398; *Taylor*, *supra,* 63-64. Defendant was not prejudiced by the trial court's accurate statement of the law regarding flight. *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999). There was no plain error warranting reversal. *Carines*, *supra,* 761-762.

Defendant also claims he was deprived of effective assistance of counsel by counsel's failure to object to an instruction on flight; by counsel failing to object to and using a 1972 preliminary examination transcript; and by counsel failing to adequately question a witness. We disagree.

Under the two-pronged test for establishing ineffective assistance of counsel, the defendant has the burden of overcoming the presumption that counsel was effective. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must show that counsel's performance was deficient as measured against objective reasonableness under the circumstances according to prevailing professional norms. *Id.*, 687-688; *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994). Second, defendant must show that there is a reasonable probability that but for counsel's unprofessional error(s) the trial outcome would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Defense counsel is not required to advocate positions that lack merit. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001); *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000). As discussed above, the instruction on flight was proper, therefore counsel did not err by failing to object.

Defendant does not argue that use of the 1972 preliminary examination testimony to refresh the memory of the witness or to impeach the witness's trial testimony was improper. Rather, defendant argues that counsel was ineffective in failing to clarify that the preliminary examination was conducted relative to charges against a different defendant, and that defendant was not arrested and charged in 1972, but rather was not arrested and charged until 1999. However, given the totality of the testimony, there is no reason to believe that the jury concluded from the preliminary examination testimony that defendant was arrested in 1972.

Defendant's assertion that counsel was ineffective in his questioning of Sgt. Harvey regarding the jail witness' testimony also fails. Trial counsel's decisions regarding the manner in which to question a witness are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court will not second-guess counsel concerning trial strategy with the aid of hindsight or on the basis that the strategy was unsuccessful. *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000); *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Further, it is unlikely that the failure to clarify Harvey's testimony affected the verdict.

Next, we address defendant's claim that he was deprived of a fair trial by misconduct of the prosecutor questioning witnesses and in closing argument. Because defendant failed to preserve this issue by objection at trial, he must demonstrate plain error affecting his substantial rights before we may reverse on this basis. *Carines, supra*, 763-764. The test for prosecutorial misconduct is whether defendant received a fair trial and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Applying these standards, defendant has shown no basis for reversal.

Defendant argues that his sentence is disproportionate. We disagree. Appellate review of the sentence in this case is limited to whether the sentencing court abused its discretion. *People v Milbourn*, 435 Mich 630, 644; 461 NW2d 1 (1990); *Compeau*, *supra*, 598. An abuse of discretion occurs when a sentence is not proportionate to the seriousness of the offense and the defendant's prior record. *Milbourn, supra*, 636, 651; *Compeau*, *supra*, 598.

Defendant's primary argument that his sentence is disproportionate is based on the allegation that his codefendant, the actual shooter of the off-duty officer, received a minimum sentence of only nine years. However, defendant appears to be wrong on both the facts and the law. The prosecutor has attached what purports to be docket entries for the codefendant's case indicating the codefendant was sentenced in 1973 to a prison term of 20 to 40 years. Moreover, a sentencing court is not required to consider the sentence of a codefendant. *In re Jenkins*, 438 Mich 364, 376; 475 NW2d 279 (1991), abrogated in part on other grounds *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997). Further, Paschall was sentenced only for armed robbery after a guilty plea, while defendant was sentenced for both armed robbery and assault with intent to commit murder after being convicted following trial after a lengthy period as a fugitive.

Finally, defendant's argument concerning restitution need not be addressed because restitution is not authorized in this case. At the time of the instant offenses, restitution could only be ordered in conjunction with a probationary sentence. *People v Neil*, 99 Mich App 677, 680-681; 299 NW2d 23 (1980); see also *People v Jones*, 168 Mich App 191, 195; 423 NW2d 614 (1988). With the passage of the Crime Victim's Rights Act in 1985, MCL 780.751 *et seq*., and related amendments of the Code of Criminal Procedure, specifically MCL 769.1a, the trial courts of this state were authorized to order restitution in conjunction with a prison sentence for offenses occurring on or after July 10, 1985. *People v Littlejohn*, 157 Mich App 729, 733; 403 NW2d 215 (1987) (Kelly, P.J., concurring).

This Court held in *People v Slocum*, 213 Mich App 239, 243-244; 539 NW2d 572 (1995), that restitution is a form of punishment subject to the Ex Post Facto Clause of Const 1963, art 1,

§ 10. Specifically, the panel in *Slocum* held that an amendment of the Crime Victims' Rights Act would not apply retroactively to permit the county in that case to obtain an order of restitution for extradition expenses. *Id.* Thus, the restitution ordered in this case was not authorized by law and must be vacated. *Slocum, supra,* 244.

Defendant raised several issues in a supplemental brief filed *in propria persona.* All but one of the issues restated issues raised in his brief on appeal and have been addressed. Defendant's remaining issue concerns the trial court's denial of his motion for appointment of an expert witness on eyewitness identification. Defendant argues that such testimony was essential under the circumstances that the identification was made twenty-five years after the offense, a cross-racial identification was involved, and the identifying witness was a police officer.

The decision to admit or exclude evidence rests within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr,* 457 Mich 490, 494; 577 NW2d 673 (1998). A trial court's denial of a motion requesting the appointment of an expert witness is also reviewed for an abuse of discretion. *People v Jacobsen,* 448 Mich 639, 641; 532 NW2d 838 (1995); *People v Hill,* 84 Mich App 90, 96; 269 NW2d 492 (1978). The admission or exclusion of expert testimony is not grounds for reversal unless manifest injustice results. MCL 769.26; *Lukity, supra,* 495-496. The party claiming error bears the burden of establishing prejudice by showing it was "more probable than not that a different outcome would have resulted without the error." *Lukity, supra,* 495. Denying an indigent defendant a court-appointed expert does not warrant reversal unless it results in a fundamentally unfair trial. *People v Leonard,* 224 Mich App 569, 582-583; 569 NW2d 663 (1998).

We conclude that the trial court did not abuse its discretion by denying defendant's motion to appoint an expert to provide testimony on the fallibility of eyewitness testimony, and that defendant's trial was not fundamentally unfair.

Before trial, defense counsel moved to allow defendant to present expert testimony on the "pitfalls of eyewitness identification" and requested public funds to pay the expert an initial fee of $500, and $600 per day to testify. Defense counsel argued that the case was twenty-five years old and two victims had not been able to identify defendant, but an (off-duty police) officer present at the time was able to identify defendant. Defense counsel asserted that the expert would testify that "eye witness identification is not always good identifications [sic] and he would give reasons why." Further, the expert would testify that "you can't believe everything that you see, and there's [sic] possibility that after all of these years that maybe his identification isn't as good as it should be."

The trial court denied defendant's motion:

> The Court is satisfied that we give instructions to the jury that they're to use their common sense and their everyday experiences in rendering decisions as to whether or not the prosecutor has prove [sic] beyond a reasonable doubt as to whether or not this is the individual who committed the crime.
>
> I'm satisfied that adding this witness to the witness list for this trial will not help the jury, will not aide [sic] them in their ultimate decision responsibility. Therefore, I'm going to deny your motion, [defense counsel].

At the conclusion of the trial, the trial court included in its instructions to the jury CJI2d 3.06 (witness credibility) and CJI2d 7.8 (identification).

There are three prerequisites to the admission of expert testimony. First, the witness must be an expert; second, facts must be in evidence that require or are subject to analysis by a competent expert; and third, the knowledge of the expert must of a particular subject that belongs more to experts than to the common person. *People v Beckley*, 161 Mich App 120, 125; 409 NW2d 759 (1987), aff'd 434 Mich 691; 456 NW2d 391 (1990). The party proffering the expert bears the burden of persuading the trial court that the expert has specialized knowledge that will aid the factfinder in understanding the evidence or determining a fact in issue. *People v Smith*, 425 Mich 98, 112; 387 NW2d 814 (1986). The critical inquiry is whether the expert testimony will aid the factfinder in making the ultimate decision in the case. *Id*. at 105. The trial court in the present case primarily relied on this last point in denying defendant's motion to admit expert testimony on the fallibilities of eyewitness identification.

In *Hill, supra*, 92, this Court addressed whether the trial court erred by not conducting a hearing required by *People v Anderson*, 389 Mich 155, 169; 205 NW2d 461 (1973), to determine that the identification of two eyewitnesses had an independent basis untainted by pretrial identification procedures without counsel and whether the trial court erred by excluding expert testimony on how "people perceive and remember events and how pretrial identification procedures could affect this process." On the former issue, this Court held that the trial court abused its discretion by not conducting an *Anderson* hearing and remanded to the trial court to conduct one. *Hill, supra*, 84 Mich App 95. On the second issue, this Court held that "expert testimony on the perception and memory processes and how pretrial identification procedures can affect it may be relevant in some cases." *Id.* at 96. However, this Court noted that admissibility was within the trial court's discretion, subject to possible exclusion under MRE 403, and that if excluded, error warranting reversal only occurs where the trial court's decision was inconsistent with substantial justice. *Id.* This Court determined that the trial court had not abused its discretion by excluding the proposed expert testimony, and that the verdict was not inconsistent with substantial justice, because "[t]he expert had not interviewed [] any of the eyewitnesses," and because defense counsel was permitted to argue the issue in closing. *Id.* at 96-97.

In *People v Carson*, 217 Mich App 801, 806-807; 553 NW2d 1 ["*Carson I*"], vacated on reh by conflict resolution panel 220 Mich App 662**;** 560 NW2d 657 (1996) ["*Carson II*"], this Court followed *Hill, supra.* [*Carson* I was released June 4, 1996, but vacated by order of this Court dated June 14, 1996, establishing a conflict resolution panel under Administrative Order No. 1996-4 (now MCR 7.215(I)) to resolve the issue of proportionality analysis applied to a parolable life sentence. The holding of *Carson* I on the issue of expert testimony on eyewitness identification was adopted by the conflict resolution panel in *Carson* II, *supra*, 678.] The *Carson* Court said:

> Defendant also contends that the trial court erred in refusing to appoint for him an expert witness in the field of eyewitness identification. We disagree.
>
> The court did not abuse its discretion in refusing to appoint an expert in eyewitness identification. In *People v Hill*, 84 Mich App 90, 95-96; 269 NW2d

492 (1978), this Court reviewed a similar argument and concluded that the trial court had not committed error requiring reversal in excluding expert testimony regarding the process by which people perceive and remember events and how pretrial identification procedures can affect this process. We agree with this holding in *Hill* and find defendant is not entitled to any relief regarding this issue. See also *People v Sanders*, 11 Cal 4th 475, 507-510; 905 P2d 420; 46 Cal Rptr 2d 751 (1995).

A defendant is entitled to the appointment of an expert at public expense only if he cannot otherwise proceed safely to trial. MCL 775.15; MSA 28.1252. The lack of such an expert did not prevent defendant from safely proceeding to trial because he presented alibi witnesses who, if believed, would have called the victim's identification of defendant into question. Moreover, defense counsel argued that the victim's identification was not proved and that the victim had been subjected to a suggestive photographic array.

Defendant also claims that the trial court erred in declining to instruct the jury regarding the findings and studies on eyewitness identifications contained in *People v Anderson*, 389 Mich 155, 173; 205 NW2d 461 (1973). We decline to reverse on this ground. We find that the *Anderson* principles were adequately presented in the jury instruction given by the trial court. In fact, it appears that the jury instruction, CJI2d 7.8, was drafted to reflect the *Anderson* opinion. In any event, this instruction did apprise the jury of the proper considerations in determining whether to accept or reject eyewitness identifications. [*Carson I, supra*, 806-807.]

In the present case, the trial court did not abuse its discretion by declining to appoint an expert on eyewitness identification because there was an insufficient showing of necessity for an expert where defendant was safely able to present his attack on the witness' identification through cross-examination, argument, and the trial court's jury instructions, including CJI2d 3.06 (witness credibility) and CJI2d 7.8 (identification).

Moreover, due process in a criminal trial does not require the appointment of an expert on demand. *Leonard*, *supra*, 582-583. In *Leonard,* the trial court had granted a new trial to the defendant, who was not accorded an expert to counter the prosecutor's DNA evidence. *Id.* at 579. This Court found persuasive the reasoning of the Eleventh Circuit in *Moore v Kemp*, 809 F2d 702, 712 (CA 11, 1987), quoting it as follows:

"[A] defendant must demonstrate something more than a mere possibility of assistance from a requested expert; due process does not require the government automatically to provide indigent defendants with expert assistance upon demand. Rather, a fair reading of these precedents [*Ake v Oklahoma*, 470 US 68; 105 S Ct 1087; 84 L Ed 2d 53 (1985), and *Caldwell v Mississippi*, 472 US 320; 105 S Ct 2633; 86 L Ed 2d 231 (1985),] is that a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to

> the defense and that denial of expert assistance would result in a fundamentally unfair trial." [*Leonard, supra*, 582.]

Thus, this Court concluded that even if an indigent defendant is denied an expert, through trial court error or deprivation of a constitutional right, such as ineffective assistance of counsel, "it [is] incumbent on the [reviewing] court to determine if defendant was prejudiced and received a fundamentally unfair trial as the result of not having expert assistance." *Id*., 582-583.

In the present case, defendant received a fundamentally fair trial. There was no argument below or on appeal that improper pretrial identification procedures tainted the witness' in-court identification. To the contrary, counsel below conceded that despite his efforts to move defendant around in the corporeal pretrial lineup, the witness was able to identify defendant years after the event. In addition, defense counsel was able to explore fully the accuracy of the witness' identification through cross-examination and argument. Furthermore, the trial court accurately instructed the jury both on witness credibility and that the jury should "examine the witness's identification testimony carefully," CJI2d 7.8(5) The trial court thus acquainted the jury with the proper considerations to determine whether to accept or reject the eyewitness identification in this case through jury instruction. *Carson I, supra,* 807.

Moreover, defendant was not denied a fair trial by the prosecutor's argument that the witness focused on defendant, had more time to observe defendant than the citizen-victims, and used his police training. The prosecutor's argument was based on evidence and reasonable inference. Further, testimony was also presented that police officers are trained to make observations. In *United States v Langan*, 263 F3d 613, 624 (CA 6, 2001), the Court found that the witness' Air Force National Guard specialized training in combat and hostile threat situations, as well as the need to remain calm and focused in stressful situations, was one reason that the district court did not abuse its discretion by not permitting expert testimony on general factors that may affect a witness' identification. Thus, the Court opined that "[i]n light of this specialized training, [the expert's] generalized testimony regarding such distracting factors as stress and the presence of a gun would not necessarily have helped the jury in evaluating [the witness'] identification of Langan." *Id.*

Defendant's convictions and sentences are affirmed, but the restitution order is vacated.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Donald E. Holbrook, Jr.