STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 28, 2006
v	No. 262293 Oakland Circuit Court
PHILLIP ALLEN LESTER, Defendant-Appellant.	LC No. 2004-198274-FH

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of and sentence for assaulting, resisting, or obstructing a police officer causing injury, MCL 750.81d(2). Defendant was sentenced as a habitual offender, fourth offense, MCL 769.12, to a prison term of 4 to 15 years to be served consecutively to a sentence related to a parole violation. We affirm.

In the early morning hours of August 27, 2004, Deputy Mike Blaszczak of the Oakland County Sheriff's Office saw a vehicle with a shattered back window traveling over the posted speed limit. Deputy Blaszczak activated his lights and followed the vehicle into a driveway. The driver of the vehicle, later identified as defendant, immediately exited the vehicle and, when ordered by Deputy Blaszczak, went to the ground. Deputy Blaszczak knelt down to talk to defendant, at which point defendant tried to grab his arms. During the ensuing struggle, defendant kept reaching toward his pocket, bit Deputy Blaszczak, then grabbed Deputy Blaszczak's flashlight, indicating that he was going to harm Deputy Blaszczak with it. A White Lake police officer eventually provided assistance and defendant was ultimately arrested.

Defendant first argues on appeal that the trial court abused its discretion and severely prejudiced him by allowing the prosecution's trial-day endorsement of the injured deputy's wife as a witness. We disagree. A trial court's decision to allow the late endorsement of a witness is reviewed for an abuse of discretion, *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995), as is its decision to sequester a witness and impose penalties for a violation of a sequestration order, *People v Nixten*, 160 Mich App 203, 209-210; 408 NW2d 77 (1987). An abuse of discretion occurs only where a court's decision is so violative of fact and logic as to constitute perversity of will or defiance of judgment. *People v Laws*, 218 Mich App 447, 456; 554 NW2d 586 (1996).

A prosecutor must attach to the information a list of known witnesses who might be called at trial. MCL 767.40a(1). No less than thirty days before trial, the prosecution is required to send defendant (or his or her counsel) a list of all witnesses it intends to call at trial. MCL 767.40a(3). However, MCL 767.40a(4) permits the prosecutor's late endorsement of a witness at any time upon leave of the court and for good cause shown. Generally, the late endorsement of a witness is permitted and a continuance is granted if necessary to prevent possible prejudice to the defendant. *People v Suchy*, 143 Mich App 136, 141; 371 NW2d 502 (1985).

Here, the trial court did not abuse its discretion in granting the prosecution's trial-day endorsement of the deputy's wife. During cross-examination of the injured deputy, defense counsel insinuated that defendant did not bite him, let alone cause an injury. The trial court apparently allowed the deputy's wife to testify to rebut defense counsel's claim that no bite occurred. Thus, good cause was shown to allow the assistant prosecutor in its case-in-chief to endorse a witness to rebut the claim that the deputy had not been bitten.

Defendant claims that the trial court should have *sua sponte* granted a continuance citing *People v Lino* (*After Remand*), 213 Mich App 89; 539 NW2d 545 (1995), overruled on other grounds *People v Carson*, 220 Mich App 662, 673-674; 560 NW2d 657 (1996), in support of his claim. However, *Lino* and *People v Williams*, 188 Mich App 54, 58-59; 469 NW2d 4 (1991), the case cited in *Lino*, do not stand for the proposition that a trial court is required to fashion a remedy when a discovery statute has been violated but rather that a trial court maintains discretion in fashioning a remedy if defendant can show prejudice from the violation. Here, defense counsel merely announced that § 40a(3) had been violated but did not ask for any type of remedy to prepare for the witness. Thus, while arguable whether a remedy would have been warranted if requested, the trial court was not required to *sua sponte* grant such relief.

Defendant next argues that he was denied a fair trial because the deputy's wife was allowed to testify in violation of the sequestration order. We disagree. A sequestration order serves to prevent witnesses from coloring their testimony in relation to the testimony of other witnesses. *People v Stanley*, 71 Mich App 56, 61; 246 NW2d 418 (1976). A defendant must demonstrate prejudice to obtain relief for a sequestration order violation. *People v Solak*, 146 Mich App 659, 669; 382 NW2d 495 (1985).

Here, contrary to defendant's claim, defendant was not prejudiced by the violation. Specifically, the injured deputy testified that defendant bit him, and the deputy who treated the wound testified that the mark looked like a bite mark. In that regard, because the testimony of the deputy's wife was cumulative, any prejudice that might have occurred was harmless. See, e.g., *People v Solomon*, 220 Mich App 527, 531; 560 NW2d 651 (1996).

Defendant next argues that the trial court erred by admitting the testimony concerning whether defendant's arm evidenced a bite mark without first conducting a *Davis-Frye*[1] hearing. We disagree. This alleged error is unpreserved because defense counsel did not ask for a *Davis-*

[1] *Frye v United States*, 54 App DC 46; 293 F 1013 (DC Cir, 1923); *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955).

Frye hearing as to the admissibility of lay testimony concerning whether the deputy had been bitten. Therefore, review is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999).

Under the *Davis-Frye* rule, novel scientific evidence must be established as having achieved general scientific acceptance in order to be admissible at trial. *People v Lee*, 212 Mich App 228, 262; 537 NW2d 233 (1995). However, when evidence becomes judicially recognized as generally accepted in the scientific community, a *Davis-Frye* hearing is no longer required. *People v Tanner*, 255 Mich App 369, 395; 660 NW2d 746 (2003), rev'd on other grounds 469 Mich 437 (2003).

Here, defendant's argument that a *Davis-Frye* hearing was required is misplaced because none of the three witnesses who testified about the bite mark testified as expert witnesses under MRE 702.[2] Moreover, the trial did not involve any scientific testimony. Thus, defendant's argument is without merit.[3]

Defendant next argues that the assistant prosecutor submitted and elicited improper MRE 404(b) testimony and evidence concerning defendant's prior convictions and actions involving assaultive behavior with officers from the White Lake Township Police Department. Alternatively, defendant argues that his trial counsel was constitutionally ineffective for failing to object to the testimony and evidence. This error is, as admitted by defendant, unpreserved. Review of the alleged evidentiary error is thus for plain error affecting defendant's substantial rights. *Carines, supra* at 762-763. Review of the ineffective assistance of counsel claim is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

Under MRE 404(b), evidence of other crimes, wrongs, or acts is admissible if the evidence is (1) offered for a proper purpose rather than to prove the defendant's character or propensity to commit the crime, (2) is relevant to an issue or fact of consequence at trial, and (3) is not unduly prejudicial under the balancing test of MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994). A proper purpose includes "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case." MRE 404(b).

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[2] Notably, this Court has previously concluded that a *Davis-Frye* hearing concerning expert bite-mark analysis is unnecessary because that science has gained general acceptance in the scientific community. *People v Marsh*, 177 Mich App 161, 162; 441 NW2d 33 (1989).

[3] The factors that a court may consider in determining whether expert opinion evidence is admissible under MRE 702 have been amended explicitly to incorporate the standard set forth in *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579, 589; 113 S Ct 2786, 125 L Ed 2d 469 (1993). See *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004).

Evidence of misconduct similar to that charged is logically relevant to show that the charged act occurred if the charged and other acts are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. *People v Sabin* (*After Remand*), 463 Mich 43, 63; 614 NW2d 888 (2000). However, a general similarity does not alone establish a plan, scheme or system. *Id.* at 64. Rather, there must be such a concurrence of common features that the various acts are naturally to be explained as individual manifestations caused by a general plan. *Id.* at 64-65.

Here, defendant's statements to the deputy who transported him to jail about the frequency with which he fought with White Lake Police Officers and his later admission during trial that he believed that the arresting deputy was a White Lake Police Officer are indicative of a common scheme to fight with those officers. We thus find no plain error because defendant's statements may have been admissible for a proper purpose, namely showing a common plan, scheme, or system.

Defendant alternatively argues that he was denied the effective assistance of counsel where his trial attorney failed to object to the admission of the alleged improper MRE 404(b) evidence. We disagree.

Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To prevail on a claim for ineffective assistance of counsel, a defendant must make two showings. First, the defendant must show that counsel's performance was so deficient that, under an objective standard of reasonableness, the defendant was denied his Sixth Amendment right to counsel. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Second, the defendant must show that the deficient performance prejudiced the defense. 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. *Carbin*, *supra* at 599-600.

Assuming that an objection would have been sustained concerning the alleged improper evidence, defense counsel's failure to object may have been an issue of trial strategy. Counsel could, for example, have thought it wise to allow defendant to explain differences in how he acted on the night at issue in relation to prior incidents when he had admitted fighting with other officers. This Court will not substitute its judgment for that of trial counsel on matters involving trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Moreover, there is not a reasonable probability that the outcome would have been different but for the alleged improper testimony, given the remaining testimony presented at trial concerning defendant's struggle with the deputy.

Acknowledging that there is no right under MCL 750.81d to resist a peaceful arrest regardless of its legality, defendant next argues that the jury should have been instructed that an

individual has the right to resist an excessively forceful arrest. However, this issue has been waived because defense counsel twice agreed with the instructions that had been given. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *Id.*

Defendant finally argues that the trial court improperly sentenced him outside the minimum sentencing guidelines range because defendant exercised his right to a jury trial. However, defendant was sentenced to 4 to 15 years, which appears to be within the minimum sentencing guidelines range. Moreover, contrary to defendant's claim, the record clearly indicates that defendant's minimum sentence was not increased as compared to the apparent plea offer because defendant exercised his right to a jury trial. To the contrary, the trial court clearly indicated that it was sentencing defendant at the top of the guidelines range because of his prior convictions and his apparent danger to the public. While a sentencing court may not consider factors for sentencing purposes that violate a defendant's constitutional rights, *People v Miller*, 179 Mich App 466, 469; 446 NW2d 294 (1989), "'it is not [constitutionally] forbidden to extend a proper degree of leniency in return for guilty pleas[,]'" *People v Godbold*, 230 Mich App 508, 519; 585 NW2d 13 (1998), quoting *Corbitt v New Jersey*, 439 US 212, 223; 99 S Ct 492; 58 L Ed 2d 466 (1978) (alteration by *Godbold*). In that respect, the converse is also true, it is constitutionally proper to extend leniency in exchange for a plea of guilty and not to extend "'leniency to those who have not demonstrated those attributes on which leniency is based.'" *Godbold*, *supra* at 519-520, quoting *Corbitt*, *supra* at 224. Again, the trial court's sentence was based on factors that were permissible to consider. Thus, defendant is not entitled to resentencing. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

Affirmed.

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