STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 1, 2011
V	No. 292312 Kalamazoo Circuit Court
JON PAUL KEAN, Defendant-Appellant.	LC No. 2008-001131-FH

Before: GLEICHER, P.J., AND HOEKSTRA AND STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant appeals as of right his convictions for first-degree home invasion, MCL 750.110a(2); conspiracy to commit first-degree home invasion, MCL 750.147a and MCL 750.110a(2); possession of burglar's tools, MCL 750.116; and larceny in a building, MCL 750.360. The jury acquitted defendant of assault with a dangerous weapon (felonious assault), MCL 750.82. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to 319 to 483 months' imprisonment each for the home invasion and conspiracy convictions, 49 to 480 months' imprisonment for the possession of burglar's tools conviction, and 26 to 180 months' imprisonment for the larceny conviction. We affirm.

Defendant's first two questions presented and the related sub-parts essentially ask this Court to decide whether the trial court properly granted the prosecutor's motion in limine to preclude defendant's eyewitness identification expert from testifying at trial. The grant of such motion effectively denied defendant's request for an expert witness at the public's expense.

We review for an abuse of discretion a trial court's decision regarding the admission or exclusion of expert testimony, *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007), a trial court's decision whether to deny an indigent defendant's motion for the appointment of an expert, *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003), and a trial court's a decision on a motion in limine, *People v Johnson*, 133 Mich App 150, 156; 348 NW2d 716 (1984). "[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The admissibility of expert witnesses begins with MRE 702:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 592; 113 S Ct 2786; 125 L Ed 2d 469 (1993), the United States Supreme Court established a two-part test for the admissibility of scientific testimony, which requires a trial court to determine whether the proposed expert's testimony reflects valid scientific knowledge, and if it does, whether the expert's testimony "will assist the trier of fact to understand or determine a fact in issue." On appeal, defendant appears to complain that the trial court improperly conducted a *Daubert* hearing with respect to defendant's eyewitness identification expert without some sort of formal request by the prosecutor. Defendant has ignored the trial court's obligation under MRE 702 to "ensure that any expert testimony admitted at trial is reliable." *Gilbert*, 470 Mich at 780.

Michigan courts have not established a per se rule excluding expert testimony on eyewitness identification, and a majority of federal courts have rejected a per se rule of exclusion of this type of expert testimony. See generally *United States v Rodriguez-Felix*, 450 F3d 1117, 1124 (CA 10, 2006).[1] However, eyewitness identification expert testimony is generally permitted only in cases where the primary issue concerns the accuracy and reliability of the eyewitnesses' identifications such testimony is most significant when the prosecution presents no other admissible inculpatory evidence to tie the defendants to the offenses. See e.g. *United States v Brownlee*, 454 F3d 131, 141, 141 n 7 (CA 3, 2006).

Dr. Solomon M. Fulero, defendant's proposed expert witness, offered the following outline of the testimony he planned to provide at defendant's trial:

> the generally accepted theory of memory in the field of psychology, and the division of the memory process [which is divided] into three stages: acquisition,

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[1] Because MRE 702 is virtually identical to FRE 702, it is appropriate to look to federal precedent for guidance in interpreting the rule. *D'Agostini v City of Roseville*, 396 Mich 185, 188; 240 NW2d 252 (1976); *Dean v* Dep't of Corrections, 208 Mich App 144, 151; 527 NW2d 529 (1994). See also United States v Brien, 59 F3d 274, 277 (CA 1, 1995); United States v Lumpkin, 192 F3d 280, 289 (CA 2, 1999); *United States v Stevens*, 935 F2d 1380, 1400-1401 (CA 3, 1991); *United States v Harris*, 995 F2d 532, 534-535 (CA 4, 1993); *United States v Moore*, 786 F2d 1308, 1312-1313 (CA 5, 1986); *United States v James Smith*, 736 F2d 1103, 1107 (CA 6, 1984); *United States v Hall*, 165 F3d 1095, 1106-1107 (CA 7, 1999); *United States v Blade*, 811 F2d 461, 465 (CA 8, 1987); *United States v Rincon*, 28 F3d 921, 926 (CA 9, 1994). But see *United States v Fred Smith*, 122 F3d 1355, 1357-1359 (CA 11, 1997) (reaffirming earlier precedent creating a per se rule of inadmissibility).

retention, and retrieval. Factors present at each stage can affect the accuracy of eyewitnesses.

A. Acquisition stage

1. Exposure time (longer, more accurate; but also time overestimation)

2. Detail salience (unusual details grab attention but detract overall)

3. Stress (high stress conditions cause more mistakes (not fewer, as is commonly assumed) and time overestimation)

4. Weapons focus (attention time spent focused on weapons; less time to focus on other stimuli)

5. Cross-racial identification (worse than same race)

6. Effects of set and expectancy

7. Obvious factors (lighting, eyesight, age, etc.)

8. Police or people with "special training" (no better or worse than lay eyewitnesses)

B. Retention stage

1. Length of interval (longer, less accurate)

2. Post-event information (photospreads; Identi-Kit; line-ups, descriptions, composites, hypnosis, mugshots, later views of defendant, etc., may get incorporated into memory of original event; "unconscious transference," especially with multiple procedures)

3. Bias in post-event information (leading questions; one-on-one confrontations; multiple procedures, etc.)

4. Knowledge of the identity of the suspect by the person conducting identification procedure (can be communicated unintentionally; "double blind" technique should be used)

5. Conformity effects (multiple witnesses and/or communication)

6. Suggestivity/bias (one picture/person standing out or different is more likely to be picked regardless of accuracy; match photos to description rather than to suspect)

7. Sequential vs. simultaneous presentation of photos (sequential technique reduces false alarms/misidentifications)

8. Instructions given to witnesses (specific instructing that perpetrator "may or may not" be in photospread reduces false alarms/misidentifications)

9. Effect of post-identification feedback (should not tell witnesses that they "got it right"; can effect [sic] witness memory and later confidence report)

C. Retrieval stage

1. Unconscious transference (is the in-court identification that of the perpetrator, or the person picked from the identification procedure or seen at some other (earlier) time?)

2. Confidence of witness (virtually unrelated to accuracy, contrary to lay view)

Neither Dr. Fuerlo nor defense counsel note informed the trial court whether any of the factors impacting eyewitness identification evidence set forth in the outline actually implicated the facts of the instant case. Dr. Fulero's affidavit included no salient facts from the instant case upon which his testimony would focus. Neither Dr. Fulero nor defense counsel ever described a connection between the information outlined in the affidavit and the facts of the case. This significant omission supported the judge's ruling that the defense failed to establish that the proposed expert's testimony was relevant to the case at hand and therefore not likely to assist the trier of fact in resolving any relevant issue in the case.

In *Gilbert*, 470 Mich at 783, citing *General Electric Co v Joiner*, 522 US 136, 146; 118 S Ct 512; 139 L Ed 2d 508 (1997), the Supreme Court noted that an "analytical gap" may separate case data and an expert's opinion. The pertinent language in *Joiner* reads:

> Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. [*Id.*]

Because Dr. Fulero's non-specific affidavit lacked any reference to the identifications made by the eyewitnesses in this case, a yawning void separated the affidavit from the eyewitness identification evidence. We hold that because defendant failed to explain how Dr. Fulero's

testimony could enhance the ability of *defendant's* jury to perform its fact-finding role, the trial court did not abuse its discretion by excluding this evidence.[2]

In considering the prosecutor's motion in limine, the trial court fulfilled its gate keeping function under MRE 702. The trial court's ruling was based on an appropriate consideration: "whether the testimony would be helpful or confusing to the jury." *Gilbert*, 470 Mich at 789-790; *Smithers*, 212 F3d at 314, and *Hall*, 165 F3d at 1107. On appeal, defendant raises other arguments, and makes a number of excellent points in discussing the necessity of eyewitness identification expert testimony in criminal trials. As a general principle, relevant evidence should be admitted, including expert testimony meeting the foundational predicates for scientific or technical evidence. Here, however, defendant's evidentiary proffer fell short of satisfying the requirements of MRE 702. Further, a close call on an evidentiary matter is not ordinarily an abuse of discretion, *People v Bauder*, 269 Mich App 174, 180; 712 NW2d 506 (2005), and we conclude that the trial court's ruling fell within a range of reasonable and principled decisions. *Babcock*, 469 Mich at 269.

Additionally, to obtain appointment of an expert, an indigent defendant must demonstrate a nexus between the facts of the case and the need for an expert. *Tanner*, 469 Mich at 443 (citation omitted). Our Supreme Court has held that "[i]t is not enough for the defendant to show a mere possibility of assistance from the requested expert." *Id.* Denying an indigent defendant an expert at public expense does not warrant reversal unless it results in a fundamentally unfair trial. *People v Leonard*, 224 Mich App 569, 582-583; 569 NW2d 663 (1997). On appeal, defendant suggests that public funds would have been necessary to pay his eyewitness identification expert. The trial court never issued an ultimate ruling on whether to grant defendant's motion for funds for an expert. However, the trial court's ruling on the prosecutor's

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[2] The United States Court of Appeals for the Third Circuit has explained, "admission depends upon the 'fit,' i.e., upon a specific proffer showing that scientific research has established that particular features of the eye-witness identifications involved may have impaired the accuracy of those identifications." *United States v Downing*, 753 F2d 1224, 1226 (CA 3, 1985). The Third Circuit elaborated:

> [A] defendant who seeks the admission of expert testimony must make an on-the-record detailed proffer to the court, including an explanation of precisely how the expert's testimony is relevant to the eyewitness identifications under consideration. The offer of proof should establish the presence of factors (e.g., stress, or differences in race or age as between the eyewitness and the defendant) which have been found by researchers to impair the accuracy of eyewitness identifications. . . . Failure to make such a detailed proffer is sufficient grounds to exclude the expert's testimony." [*Id.* at 1242 (internal citations omitted).]

Downing was decided before the United States Supreme Court rendered its decision in *Daubert.* Post-*Daubert*, the Third Circuit maintains the same requirement. *United States v Brownlee*, 454 F3d 131, 143 (CA 3, 2006).

motion in limine effectively denied defendant's request for an expert at public expense. While defendant on appeal asserts without authority that "[i]f a scientific expert is essential to present a valid defense, the criminal defendant has a right to offer expert testimony," defendant failed to establish necessity for an expert. Ultimately, denying an indigent defendant an expert at public expense does not warrant reversal unless it results in a fundamentally unfair trial. *Id.* There is no indication that defendant's convictions were the result of a fundamentally unfair trial.

Next, defendant has set forth a confusing question presented, which suggests numerous claims of error. Defendant then provides a two paragraph discussion, which amounts to unsupported allegations that the police compromised, in part by an unduly suggestive photographic lineup, the eyewitnesses' identifications in order to frame defendant for the instant offenses. We will not entertain this claim of error, because there is no record support for defendant's allegations and defendant has failed to properly brief the merits of these allegations of error. *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004). Nonetheless, viewing the totality of the circumstances of this case, we note that nothing in the record to substantiate defendant's claim that the pretrial identification procedures were unduly suggestive. *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974).

Next, defendant claims that trial counsel rendered ineffective assistance of counsel by (1) failing to cross-examine the police witnesses regarding the photographic lineup procedures; (2) failing to call the eyewitnesses to testify at the suppression hearing to determine if their identifications were due to improper suggestions by the police; (3) failing to have the eyewitness identification witness, Dr. Fulero, attend the instant trial; (4) failing to object to the trial court's reliance on facts from codefendant's trial in deciding whether to preclude Dr. Fulero from testifying in the instant trial; and (5) failing to request a transcript from codefendant's trial. Defendant further asserts that, as a result of the ineffective assistance of his counsel, the trial court should have granted him a new trial. We disagree.

"The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). We review a trial court's rulings on motions for new trial for an abuse of discretion. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). We find that defendant has abandoned his claims of ineffective assistance of counsel, where he failed to adequately brief the merits of his allegations of ineffective assistance of counsel. *McPherson*, 263 Mich App at 136. Ultimately, however, we have reviewed each allegation and conclude that defendant failed to establish that trial counsel's performance was deficient or that any deficiency prejudiced the defense. *Cline*, 276 Mich App at 637. We conclude that trial counsel's actions constituted sound trial strategy, and reject defendant's claims of ineffective assistance of counsel. *Id.* As such, the trial court, did not abuse its discretion by denying defendant's motion for new trial on grounds of ineffective assistance of counsel. *Blackston*, 481 Mich at 460.

Finally, defendant claims that he was prejudiced at trial when the jurors saw him in shackles. "Included within the right to a fair trial, absent extraordinary circumstances, is the right to be free of shackles or handcuffs in the courtroom." *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009). The right is not absolute, and a defendant may be shackled "on a finding supported by record evidence" that it "is necessary to prevent escape, injury to persons in the courtroom or to maintain order." *Id.* (quotation omitted). In this case, there was no such

finding. The trial court appeared to defer to the courtroom deputies' judgment. Shackling should be an extraordinary security remedy since the potential for prejudice is tremendous. The court's failure to make a fact finding to support the restraints was an abuse of discretion. Even where a trial court abuses its discretion and requires a defendant to wear restraints, however, "the defendant must show that he suffered prejudice as a result of the restraints to be entitled to relief." *Id.* "[A] defendant is not prejudiced if the jury was unable to see the shackles on the defendant." *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008).

In this case, the trial court found and the record supports there is no indication that any juror observed the shackles on defendant's legs. On appeal, defendant misrepresented the record by concluding that "[t]he testimony and argument [at the motion for new trial hearing] leaves doubt about whether jurors saw [defendant] in shackles." We disagree, and conclude that defendant failed to demonstrate prejudice. *Payne*, 285 Mich App at 186.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens