STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 23, 2011
v	No. 296782 Kent Circuit Court
JEVON MARQUIS SAWYER, Defendant-Appellant.	LC No. 09-002097-FC

Before: SHAPIRO, P.J., and O'CONNELL and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for assault with intent to rob while armed, MCL 750.89; assault with intent to do great bodily harm less than murder, MCL 750.84; carrying a concealed weapon (CCW), MCL 750.227; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a habitual offender, second offense, MCL 769.10, to 25 to 50 years' imprisonment for his first assault conviction, 10 to 15 years' imprisonment for the second assault conviction, 24 to 90 months' imprisonment for the CCW conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first presents a challenge to the sufficiency of his assault convictions and also argues that his motion for a directed verdict should have been granted in this context. "A challenge to the trial court's decision on a motion for a directed verdict has the same standard of review as a challenge to the sufficiency of the evidence," *People v Lewis (On Remand)*, 287 Mich App 356, 365; 788 NW2d 461 (2010); however, we consider all of the evidence adduced up to the time of the motion. *People v Allay*, 171 Mich App 602, 605; 430 NW2d 794 (1988). Thus, we review this claim de novo, viewing the evidence in the light most favorable to the prosecution, to determine if the evidence was sufficient for a rational jury to find the defendant guilty beyond a reasonable doubt. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005).

The offense of assault with intent to rob while armed has the following elements: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed. *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). The offense of assault with intent to do great bodily harm less than murder has the following elements: (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder. *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230

(2005). Identity is also an element of every offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008).

Viewing the evidence in the light most favorable to the prosecution up until defendant's motion, there was ample evidence to sustain both of defendant's assault convictions. At trial, the victim, David Pirkola, testified that defendant pointed the handgun at Pirkola's face while demanding money. Pirkola's testimony establishes all of the elements of both offenses. It is axiomatic that pointing a handgun at another individual establishes assault under either statute. MCL 750.84; MCL 750.89. See also *People v Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999). Codefendant James Thompson's testimony established that defendant planned a robbery, was a participant thereto, and was the shooter. Defendant's fingerprints were also collected from the door to Pirkola's comic book store. Further, testimonial evidence from other witnesses demonstrated that defendant had access to the type of handgun used in the instant offenses and that he was in close proximity to the comic book store before the offenses occurred. Defendant also fled following the incident at issue and was arrested several months later in another jurisdiction. *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). We will not interfere with a jury's role in determining the weight of the evidence or the credibility of witnesses. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

On appeal, defendant essentially complains that there was insufficient evidence that Pirkola was a victim of an assault, namely that Pirkola's lack of fear and his counterattack on defendant with a phonebook demonstrated that the gun discharged accidentally. Further, defendant claims that there was insufficient evidence of defendant's identity. Defendant's arguments lack merit. First, "the subjective element of fear has no place in a criminal assault trial apart from an inferential determination of whether a rational person in the victim's shoes would have reasonably believed that the defendant's behavior threatened an immediate battery." *People v Davis*, 277 Mich App 676, 685-686; 747 NW2d 555 (2008), vacated in part on other grounds 482 Mich 978 (2008). The testimony of Pirkola and Thompson established that defendant's conduct would place another in reasonable apprehension of receiving an immediate battery. *People v Reeves*, 458 Mich 236, 244; 580 NW2d 433 (1998). While Pirkola expressed some uncertainty at trial due to the passage of time regarding defendant's identity; he, nonetheless, identified defendant from a photographic lineup, a live lineup, at the preliminary examination, and at trial. See *People v Edwards*, 55 Mich App 256, 259-260; 222 NW2d 203 (1974). Notably, Thompson also identified defendant as the gunman. On this record, we conclude that there was sufficient evidence to affirm defendant's convictions and the trial court's ruling that denied defendant's motion for directed verdict. *McGhee*, 268 Mich App at 622.

In reaching this conclusion, we note that defendant premised his arguments on the basis that the testimony of the witnesses for the prosecution was not credible. Essentially, this presents a great weight of the evidence argument, but this issue is not preserved because defendant failed to move for a new trial. MCR 2.611(A)(1)(e); *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). We, nonetheless, find defendant's arguments to be lacking in merit. "Criminal cases are usually fought on the battlefield of witness credibility." *People v Lemmon*, 456 Mich 625, 643 n 22; 576 NW2d 129 (1998). Defendant failed to carry the burden of demonstrating that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. MCR 2.611(A)(1)(e); *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

Next, defendant alleges that the trial court denied his constitutional and statutory right to a speedy trial. Whether a defendant has been denied his right to a speedy trial is a mixed question of fact and law. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). In determining whether a defendant has been denied his right to a speedy trial, a court must consider: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant. *People v Williams*, 475 Mich 245, 261-262; 716 NW2d 208 (2006).

In this case, 313 days passed between the date of defendant's arrest and the commencement of the trial. Because the delay was less than 18 months, defendant must prove prejudice, *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003), something he has failed to do. A defendant may experience two types of prejudice: (1) prejudice to his person, and (2) prejudice to the defense. *Williams*, 475 Mich at 264. Personal prejudice might include incarceration or mental anxiety. *Id.* Defendant claims that he suffered with mental health issues while incarcerated, but there is no record support for his claims. Prejudice to the defense is the more serious concern. *Id.* The record does not reflect that defendant's defense suffered as a consequence. Defendant asserts that "valuable witnesses" were lost due to the lengthy delay of his trial, but does not identify any such witnesses or proffer any proposed testimony by these witnesses, other than a general statement that these witnesses "would have testified that I engaged in no criminal activity as charged." There was no evidence that any witnesses were unable to testify due to the delay, or that any evidence was lost. Even in cases where the delay was presumed to be prejudicial to a defendant, there was no speedy trial violation where the defendant failed to prove prejudice resulting from the delay. *Id.* (19 months); *Gilmore*, 222 Mich App at 462 (18 months). Defendant's failure to prove prejudice resulting from the delay precludes relief.

Next, defendant argues that the trial court erroneously denied his request to retain an eyewitness-identification expert at public expense. We review for an abuse of discretion. *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003). "[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). 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. Defendant presented very little to support his request other than general references to *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), overruled on other grounds *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004), regarding the unreliability of eyewitness identifications; an article in the *Grand Rapids Press*; and defense counsel's representations that the specified expert was the leading authority in eyewitness identifications, even though he is no longer testifying in cases.

Michigan courts have not established a per se rule excluding expert testimony on eyewitness identification; however, the admission of expert testimony is subject to MRE 702. Under MRE 702, the trial court must "ensure that any expert testimony admitted at trial is reliable." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004). In this case, the trial court properly refused to appoint an expert for defendant at public expense. Given the dearth of information presented in support of defendant's motion, the trial court could not perform "a searching inquiry" to establish whether such testimony would even be admissible. *Id.*

The case relied on by defendant is also factually distinguishable,[1] and the *Grand Rapids Press* has no precedential value whatsoever. Defendant has demonstrated, at most, "a mere possibility of assistance from the requested expert," and even that is insufficient to warrant an expert witness. *Tanner*, 469 Mich at 443. Defendant ultimately failed to carry his burden to persuade the trial court that the purported eyewitness identification experts had specialized knowledge that would aid the factfinder in understanding the evidence or determining a fact in issue. *People v Smith*, 425 Mich 98, 112; 387 NW2d 814 (1986). Moreover, a fundamentally unfair trial did not result, where defendant was able to present his attack on the victim's identification through cross-examination and argument. See generally *People v Leonard*, 224 Mich App 569, 582-583; 569 NW2d 663 (1997). The trial court did not abuse its discretion in denying defendant's motion, as it fell within the range of reasonable and principled outcomes. *Babcock*, 469 Mich at 269.

Defendant next asserts that the trial court erroneously granted the prosecutor's motion in limine to exclude the results of the preliminary gunshot residue test of codefendants Thompson and Marvin Jones. While we generally review this decision for an abuse of discretion, *People v Johnson*, 133 Mich App 150, 156; 348 NW2d 716 (1984), we conclude that this issue is abandoned. Here, defendant has failed to address the reason for the trial court's ruling, which was that preliminary gunshot residue test had no scientific reliability under MRE 702. Defendant also cites no authority to support his implicit position that scientifically unreliable evidence can be used for cross-examination purposes. Defendant merely announced his position and left it to this Court to discover and rationalize the basis for his claim, giving it less than cursory treatment with no relevant citation of supporting authority. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). The issue is abandoned. *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004). We, nevertheless, are unconvinced that preliminary gunshot residue tests are scientifically reliable based on the limited information contained in the record and the lack of controlling authority on the subject. Thus, we cannot conclude that the trial court's decision was an abuse of discretion.[2]

Next, defendant claims that the trial court erroneously denied his motion in limine to exclude trial testimony of five witnesses for the prosecution. We note that two of the witnesses did not testify in this case and that the three witnesses who did provided very little trial testimony. This testimony was, however, relevant and admissible. Relevant evidence has "any tendency to make the existence of any fact that is of consequence to the determination of the

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[1] In *Anderson*, 389 Mich at 160, our Supreme Court discussed the known problems associated with eyewitness identifications in an appeal challenging a photographic show-up that was conducted without the defendant's counsel. It did not establish any rules with respect to experts in this area.

[2] We further note that the prosecution had previously sought to admit the same evidence during the trial of a codefendant, but the trial court determined it was inadmissible for failure to show scientific reliability. We find no abuse of discretion in the trial court's conclusion that the evidence should be treated the same way at both trials.

action more probable or less probable than it would be without the evidence." MRE 401. Much of this case turned on linking pieces of circumstantial evidence together. The testimony of the three testifying witnesses was relevant because it essentially corroborated Thompson's version of events. A witness's credibility is always a material issue. *People v Layher*, 238 Mich App 573, 580; 607 NW2d 91 (1999). The challenged testimony, along with Thompson's testimony, was relevant to place defendant in the general vicinity of the crime scene approximately 50 minutes before the shooting occurred. Contrary to defendant's assertion on appeal and below, the challenged testimony helps the jury resolve the question whether defendant was involved in the robbery. Moreover, prosecutors and defendants must be able to give the jury an intelligible presentation of the full context in which events at issue took place. *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996).

Further, while relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence," MRE 403, such a showing was not made. Defendant has a heavy burden of showing that the trial court abused its discretion by declining to exclude testimony on the ground that it would cause unfair prejudice. *People v Houston*, 261 Mich App 463, 467-468; 683 NW2d 192 (2004). On appeal, defendant suggests that the challenged testimony conveyed a negative impression of the subjects who entered the store. Whatever impressions can be gleaned from witnesses' testimony is best left for the jury. See *Williams*, 268 Mich App at 419. The record does not support that the evidence was given, or had the potential to be given, undue weight or that its use was inequitable, and there is no indication that the evidence confused the issues or misled the jury. MRE 403. The trial court, therefore, did not abuse its discretion in denying defendant's motion in limine. *Johnson*, 133 Mich App at 156.

Defendant next presents issues related to his jury. These issues are abandoned. On appeal, defendant sets forth numerous citations to law and reproduced excerpts therefrom. He also sets forth the relevant law regarding *Batson*[3] challenges. However, defendant failed to cite any facts to support either of his claims and essentially provides only a conclusion: "What transpired in this case was plain error and manifest injustice." We will not search for a factual basis to sustain or reject defendant's position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). We, nonetheless, reject the claims of error. First, defendant has failed to set forth a prima facie violation of the fair cross-section requirement where there is no indication that African-Americans were underrepresented in the panel, or that underrepresentation was the result of systematic exclusion. *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979). Second, as to the *Batson* challenge, we defer to the trial court's factual finding on discriminatory intent because it is based on evaluation of issues that lie peculiarly within a trial court's province. *People v Knight*, 473 Mich 324, 344-345; 701 NW2d 715 (2005). On the record, we agree with the trial court's conclusion that there was no basis for the *Batson* challenge.

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[3] *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

Defendant next contends that the trial court erroneously denied his motion to adjourn the trial. We review for an abuse of discretion. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). In denying defendant's motion, the trial court failed to follow the proper standard, where it essentially assessed defense counsel's lawyering skills. A defendant must show good cause and diligence in requesting a motion for adjournment. *Id.* A good cause determination may be based on the following factors: "whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments." *Id.* at 18.

In this case, defendant meets the first two prongs set forth above, where he was asserting his constitutional right to present a defense, and had a legitimate reason for doing so. US Const, Ams VI, XIV; Const 1963, art 1, §§ 13, 17, 20; *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006). In addition, we find no evidence to conclude that defendant was negligent in pursuing the adjournment. Although defense counsel was appointed on October 15, 2009, he informed the trial court that he did not find out he had been appointed until a week after the order was entered and that it was the second week of November before he received the discovery, and that he filed his motion for adjournment as soon as he realized that that it was not "a routine criminal case." Trial counsel bluntly informed the trial court, "You can order me to try the case and that's fine, and I'll do it. You can order me to do it, but I'm not ready to go to trial." Finally, although this was defendant's third trial attorney,[4] he had not previously requested an adjournment. Accordingly, we conclude that defendant had shown good cause and diligence and was entitled to a continuance.

Nevertheless, a trial court's denial of a motion for adjournment will not be reversed "unless the defendant demonstrates prejudice as a result of the abuse of discretion." *Coy*, 258 Mich App at 18-19. On appeal, defendant claims that he was prejudiced because defense counsel did not have adequate time to review his case file, interview witnesses, or develop briefs in support of his motions to admit the results from gunshot residue tests and to request the eyewitness-identification expert. The former claims cannot be substantiated on this record. With respect to the latter claims, the trial court properly excluded the results from the primarily gunshot residue test and correctly denied defendant's request to hire the eyewitness-identification expert. We further note that, based on the record, defense counsel provided a highly competent trial defense including excellent opening and closing statements and effective cross-examinations of witnesses. We find nothing in his performance that suggests that a more effective defense could have been presented with additional time and defendant does not point out any specific aspects of trial strategy that would have differed with additional time. Accordingly, even though we conclude that the trial court abused its discretion in failing to grant a continuance, we find that there was no prejudice suffered by defendant based on that error, such that reversal is unnecessary. *Id.*

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[4] Defendant's first attorney filed a motion to withdraw. His replacement was appointed October 5, 2009, but the parties stipulated that a conflict existed requiring withdrawal, which was granted October 15, 2009.

Next, defendant complains that the trial court issued two erroneous instructions to the jury. We review de novo claims of instructional error. *People v Hernandez-Garcia*, 266 Mich App 416, 417; 701 NW2d 191 (2005), vacated in part on other grounds 477 Mich 1039 (2007). As such, we "examine[] the instructions as a whole, and, even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried." *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006).

"Flight can result from factors other than guilt, and it is for the jury to determine what caused defendant to flee." *People v Taylor*, 195 Mich App 57, 63; 489 NW2d 99 (1992). The record provides that defendant fled from the scene of the crime and that he was in the company of his codefendants until 7:30 p.m. However, when the codefendants were later apprehended, defendant was not with them. The police received information that led to a nation-wide manhunt, after which, defendant was apprehended in another jurisdiction several months later. Defendant's actions meet our definition of flight. See *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Importantly, the trial court properly instructed the jury on how to evaluate this evidence in accordance with CJI2d 4.4, which we cited with approval in *Taylor*, 195 Mich App at 63-64. The challenged jury instruction had evidentiary support, *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988), and the trial court's flight instruction adequately presented the issue to be tried and protected defendant's rights. *Martin*, 271 Mich App at 337-338.

Defendant also asserts that it was error to give the jury an aiding and abetting instruction. To establish guilt under an aiding and abetting theory, the prosecutor must prove following elements: (1) the crime charged was committed by the defendant or someone else, (2) the defendant performed acts or provided encouragement that assisted with the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999). An aiding and abetting instruction is appropriate, "where there is evidence that (1) more than one person was involved in committing a crime, and (2) the defendant's role in the crime may have been less than direct participation in the wrongdoing." *People v Bartlett*, 231 Mich App 139, 157; 585 NW2d 341 (1998). In this case, there was more than one person involved in committing a crime, and even if defendant was not the shooter, there is evidence that he helped plan the robbery, and a reasonable inference existed that he supplied the shooter with the .380-caliber handgun. *Id.* Thus, the challenged jury instruction had evidentiary support contrary to defendant's claim. *Johnson*, 171 Mich App at 804. The trial court provided a suitable aiding and abetting instruction for the jury. *Martin*, 271 Mich App at 337-338.

Defendant next suggests that the cumulative effect of all errors deprive defendant of a fair trial. In this case, none of defendant's allegations of error have merit. Thus, we reject defendant's cumulative-error claim, because there were no errors unfairly prejudicial to defendant. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003).

Finally, defendant protests that the trial court erroneously scored four offense variables (OV) of the sentencing guidelines. We generally review such issues for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). First, defendant objects to

his OV 1, 2, and 3 scores as contrary to our Supreme Court's holding in *People v Morson*, 471 Mich 248; 685 NW2d 203 (2004). OV 1 addresses the "aggravated use of a weapon, and defendant received 25 points, where he discharged a firearm at a human being. MCL 777.31(1)(a). OV 2 addresses the "lethal potential of the weapon possessed or used," and defendant received five points for possessing a pistol. MCL 777.32(1)(d). OV 3 assesses points when a victim suffers a physical injury. MCL 777.33(1). Defendant received 25 points, because the victim sustained a "[l]ife threatening or permanent incapacitating injury." MCL 777.33(1)(c). Defendant essentially argues that he should not have been assessed points pursuant to OV 1, 2, and 3, because his codefendants were not assessed points under these OV scores. We agree with defendant's statement of the law, as our Supreme Court has held that the relevant statutes require that the sentencing court assess the same number of points to multiple offenders. *Id.* at 260.[5] However, defendant has not established the sentencing court's scoring of OV 1, 2, and 3 for codefendants. As the appellant below, defendant bore the burden of furnishing this Court with a record to verify the factual basis of any argument upon which reversal was predicated. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). Moreover, defendant's presentence investigation report (PSIR) provides that he and his codefendants were all scored 25 points for OV 1 and 3.

With respect to OV 2, the PSIR states that "the defendant and co-defendant Thompson were accurately scored 5 points (Co-defendant Jones should have received 5 points as well.)." In *Morson*, 471 Mich at 259, 261, the Court indicated that where a codefendant's score was inaccurate and the argument to that effect is made, the sentencing court is not bound to apply that erroneous score to defendant. The PSIR implicitly provides that Jones received an inaccurate or erroneous score for OV 2. Below, the trial court and the prosecutor acknowledged that Jones received an incorrect OV 2 score. We conclude that the sentencing court in this case was not bound to the erroneous OV 2 score when scoring defendant's OVs. *Id.*

Defendant also claims that Thompson, having agreed to plead, effectively received zero points for these OV scores. Defendant cites no case law to support this proposition and defendant's PSIR provides that Thompson received the same scores as defendant for OV 1, 2 and 3, as required under *Morson*. See also *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997) (a defendant's PSIR is presumed to be accurate, unless challenged by the defendant; and a trial court is entitled to rely on the factual information therein).

Defendant lastly contends that the trial court erred in assessing ten points for OV 14, which is scored for an offender's role in the criminal transaction. MCL 777.44. The trial court assessed ten points to defendant for OV 14 for his role as leader in this multiple offender situation, MCL 777.44(1)(a), finding that such a score was appropriate because defendant was the actual shooter, he was the only one armed among his confederates, and he confronted the

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[5] In *Morson*, 471 Mich 248, our Supreme Court did not address a challenge to OV 2; however, MCL 777.32 has a similar provision regarding multiple offenders as MCL 777.31 and MCL 777.33. We find that the Court's holding also applies to OV 2 scores.

victim with a demand for money. The record supports the trial court's findings. We affirm the trial court's OV 14 score. See *People v Kegler*, 268 Mich App 187, 190; 706 NW2d 744 (2005).

Affirmed.

/s/ Douglas B. Shapiro
/s/ Peter D. O'Connell
/s/ Donald S. Owens