

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 20, 2011

v

RASHAWN DEANGELO CERVANTES,

Defendant-Appellant.

No. 299491
Jackson Circuit Court
LC No. 09-006187-FC

Before: M. J. KELLY, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

In July 2010, a jury found Rashawn Deangelo Cervantes guilty of armed robbery,¹ felon in possession of a firearm,² and possession of a firearm during the commission of a felony.³ The trial court sentenced Cervantes as a habitual offender, third offense,⁴ to 20 to 40 years' imprisonment for armed robbery, 3 to 10 years' imprisonment for felon in possession of a firearm, and 2 years' imprisonment for possession of a firearm during the commission of a felony. Cervantes appeals as of right. We affirm.

I. BASIC FACTS

In the early hours of October 27, 2009, Cervantes robbed Richard Mullen as Mullen walked home from a friend's house. Cervantes approached Mullen from behind and held a pistol to his face. Mullen said, "I know you. You'll have to kill me," and slapped the pistol away. Cervantes then shot Mullen in his left leg and took Mullen's cigarettes and cellular telephone. Cervantes fled the scene on foot while Mullen managed to walk to a nearby sheriff's station, where an ambulance took him to a hospital.

¹ MCL 750.529.

² MCL 750.224f.

³ MCL 750.227b.

⁴ MCL 769.11.

While waiting for the ambulance to arrive, Mullen informed police that he did not know identity of the gunman. However, a citizen who observed the incident and called 911 stated that he saw the two men walking together. The 911 caller told police what he had seen, but he was subsequently unavailable to testify at trial.

When Mullen arrived at the hospital, he told police that the gunman looked familiar and that he believed he spent time in jail with the gunman. The day after the robbery, Mullen picked Cervantes out in a photographic lineup and stated that he was positive the gunman was the Cervantes. Mullen stated that he recalled seeing Cervantes around the neighborhood before. When Mullen identified Cervantes as the gunman during trial, defense counsel specifically cross-examined him regarding inconsistencies in his description of Cervantes and his ability to remember and perceive the event. During closing argument, defense counsel pointed out all the reasons Mullen would have difficulty identifying Cervantes. Specifically, defense counsel discussed faulty eyewitness identification as the basis for wrongful convictions in other cases.

As stated, the jury convicted Cervantes of the robbery, and Cervantes now appeals.

II. DENIAL OF EYEWITNESS IDENTIFICATION EXPERT

A. STANDARD OF REVIEW

Cervantes argues that the trial court abused its discretion when it denied his request for an eyewitness identification expert. This Court reviews a trial court's decision regarding whether to grant an indigent defendant's request for the appointment of an expert witness for an abuse of discretion.⁵ A trial court abuses its discretion when its decision results in an outcome falling outside the range of principled outcomes.⁶

B. LEGAL STANDARDS

Publicly provided services of an expert witness are authorized when an indigent defendant can demonstrate "that there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to trial"⁷ In its discretion, the trial court may grant funds for the retention of an expert witness after a defendant demonstrates that he cannot safely proceed to trial without that specific witness.⁸ In order "to obtain the appointment of an expert, an indigent defendant must demonstrate a nexus between the facts of the case and the need for an expert."⁹ A defendant must show more than a "mere possibility of

⁵ MCL 775.15; *People v Carnicom*, 272 Mich App 614, 616; 727 NW2d 399 (2006).

⁶ *Id.* at 617.

⁷ MCL 775.15.

⁸ *Id.*; *Carnicom*, 272 Mich App at 617.

⁹ *People v Tanner*, 469 Mich 437, 443; 671 NW2d 728 (2003) (citation and quotation omitted).

assistance from the requested expert.”¹⁰ A trial court does not abuse its discretion in denying funding for an expert if the defendant fails to demonstrate that the expert testimony “would likely benefit the defense.”¹¹

C. APPLYING THE STANDARDS

Cervantes argues that he could not safely proceed to trial without an expert because the eyewitness identification was the entire basis of his conviction. Cervantes also argues that an expert was necessary to educate the jury about the inherent problems with eyewitness identification. However, this Court has recognized that it is obvious to jurors that memories and perceptions of an eyewitness are sometimes inaccurate.¹²

Defense counsel specifically cross-examined Mullen regarding inconsistencies in his description of the assailant and his ability to remember and perceive the event. During closing argument, defense counsel pointed out all the reasons a victim would have difficulty identifying his assailant and specifically discussed the fact that faulty eyewitness identification has been the basis for wrongful convictions in other cases. Therefore, Cervantes was able to present the possibility that Mullen did not accurately identify him to the jury even without the assistance of an expert at trial.

Moreover, Cervantes has not demonstrated a nexus between the facts of this case and the need for an expert.¹³ Cervantes specifically argues that an expert was necessary to discuss the impact of stress on: eyewitness accuracy, weapon focus, the relationship between eyewitness confidence and actual accuracy, and the necessity of using specific photographic lineup procedures in order to avoid the risk of misidentification. However, because it is “obvious” that memories and perceptions of an eyewitness are sometimes inaccurate,¹⁴ an expert was not necessary to educate the jury about the likelihood that the victim improperly identified his assailant.

We also consider whether a defendant has other means of calling a witness’s identification into question when determining whether a trial court abused its discretion by refusing to appoint an expert witness.¹⁵ In this case, Cervantes questioned Mullen’s identification by pointing out the inconsistencies between Mullen’s version of the events and the

¹⁰ *Id.*

¹¹ *Id.* (citation and quotation omitted).

¹² *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999).

¹³ *Tanner*, 469 Mich at 443.

¹⁴ *Id.*

¹⁵ *People v Carson*, 217 Mich App 801, 807; 553 NW2d 1 (1996), readopted in pertinent part by a special panel in *People v Carson*, 220 Mich App 662, 678; 560 NW2d 657 (1996) (holding that the trial court’s denial of expert funds was not an abuse of discretion because the defendant presented numerous reasons to doubt the identification without expert testimony).

account given by the citizen who called 911. Further, Cervantes pointed out the fact that Mullen initially told police he did not know who shot him. And during closing argument, defense counsel also explained to the jury that there were a number of reasons the eyewitness identification may be inaccurate. In sum, Cervantes was able to present to the jury the possibility that Mullen did not accurately identify him without the assistance of an expert at trial. Therefore, the trial court did not abuse its discretion in denying his request for an expert in eyewitness identification.

III. RIGHT TO PRESENT A DEFENSE

A. STANDARD OF REVIEW

Cervantes argues that the trial court's denial of his request for an expert infringed on his right to present a defense. Because Cervantes did not raise this issue at trial, we review this argument for plain error affecting his substantial rights.¹⁶

B. ANALYSIS

The trial court's refusal to grant funds for an expert did not deprive Cervantes of his right to present a defense because Cervantes was able to present the defense of misidentification during trial without expert testimony. Accordingly, Cervantes cannot demonstrate his substantial rights were affected by the trial court's decision.

IV. ADMISSION OF EXPERT'S TESTIMONY UNDER MRE 702

In his brief, Cervantes addressed the issue of whether an eyewitness identification expert's testimony would be admissible pursuant to MRE 702. However, we decline to address this argument because the admissibility of such an expert's testimony is irrelevant where no expert was appointed or retained. "Courts ordinarily will not decide a case or question, in or on which there is no real controversy."¹⁷ "Thus, an issue generally will not be reviewed if it does not reflect an actual, existing controversy, but merely a potential one."¹⁸

We affirm.

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck

¹⁶ *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999).

¹⁷ *People v Conat*, 238 Mich App 134, 145; 605 NW2d 49 (1999) (quotation and citation omitted).

¹⁸ *Id.*