STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RENO ABRAMS,

Defendant-Appellant.

UNPUBLISHED
June 28, 1996

No. 174080
LC No. 93-001108-FC

Before: Hoekstra, P.J., and Saad and S. J. Latreille,* JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct (CSC-1), MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), armed robbery, MCL 750.529; MSA 28.797, and two counts of felony-firearm, MCL 750.227b(1); MSA 28.424(2)(1). The court then sentenced defendant to twenty-five to forty years in prison on the CSC-1 conviction, fifteen to thirty years in prison on the armed robbery conviction, and two years in prison on the felony-firearm conviction. Defendant now appeals of right and we affirm.

Defendant and three other men entered complainant's apartment, and defendant held a gun to the complainant's head and told her to give him her money. Defendant then cornered the complainant in a bedroom and, while armed with a gun, raped her. While defendant was raping the complainant, the other men stole several items from the apartment.

I.

Because the rapist was wearing a mask, the complainant was unable to identify him, other than to state that he was an African-American male, about five foot eight inches tall. However, at trial there was extensive evidence that the DNA of the seminal fluid matched the DNA of a blood sample taken from defendant. Two individuals were proferred by the prosecution and qualified by the court as experts in DNA analysis. In a nutshell, both experts testified about two different statistical formulas used to determine the probability of a DNA match. Under the "Fixed Bin Analysis" formula, the

* Circuit judge, sitting on the Court of Appeals by assignment.

probability of a match in this case was one out of every five billion Caucasians; one out of every thirty-two billion African-Americans, and one out of every one billion, four million Hispanics. (The current world population is estimated at 4½billion). According to the alternative "Modified Ceiling Principle Analysis" formula (which represented the "greatest possible benefit of doubt in determin[ing] frequency determinations"), there may be approximately four thousand other people in the world who could match defendant's DNA genetic markers.

A.

A Michigan trial court may take judicial notice of the reliability of DNA identification. *People v Chandler,* 211 Mich App 604, 611; 536 NW2d 799 (1995); *People v Adams,* 195 Mich App 267, 277; 489 NW2d 192 (1992), modified on other grounds, 441 Mich 916; 497 NW2d 182 (1993). Nevertheless, before a trial court admits the test results into evidence, the prosecutor must establish in each particular case that the generally accepted laboratory procedures were followed. *Chandler,* 211 Mich App at 611; 536 NW2d 799; *Adams,* 195 Mich App at 277; 489 NW2d 192. Defendant asserts that the trial court erred in not conducting a *pretrial* hearing to determine whether generally accepted DNA laboratory procedures were actually used in this case, in order to insure that the results were sufficiently reliable to be presented to the jury. Although no published Michigan decision has decided whether a trial court must hold a hearing prior to trial to ascertain whether the generally accepted laboratory procedures were followed, this procedure had been suggested in *People v Castro,* 545 NYS2d 985, 998-999, 144 Misc 2d 956 (1989), and *Minnesota v Jobe,* 486 NW2d 407, 419 (Minn, 1992). However, even if we held that such a pretrial hearing were necessary, it would only be required where a defendant challenged the testing procedures. Here, defendant did not challenge the testing procedures. Therefore, no hearing, pretrial or otherwise was necessary.

Even if we held that a pretrial hearing were required, defendant has not shown that the tests in this case were performed in an unacceptable manner. Therefore, defendant has not shown that he suffered any prejudice from the lack of a pretrial hearing.[1]

Furthermore, although the trial court never explicitly ruled that the prosecutor had established that the generally accepted laboratory procedures were followed, the record reveals that the prosecutor did lay this foundation at trial, before the specific tests were admitted. Therefore, the prosecutor complied with *Adams* by establishing that the appropriate laboratory procedures were followed in this case before the test results were admitted.

Defendant next argues that if we find that defense counsel's failure to object to the absence of a pretrial hearing left this issue unpreserved, "then the trial counsel was ineffective under the standard of *People v Pickens,"* 446 Mich 298; 521 NW2d 797 (1994). Ineffective assistance of counsel requires a showing by defendant that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced defendant as to deprive him of a fair trial. *Pickens,* 446 Mich at 302-303; 521 NW2d 797. Defendant has not satisfied either of these tests. As has been noted, there is no Michigan case law which requires that a pretrial hearing be conducted to assure that the

DNA testing followed generally accepted laboratory procedures. Thus, counsel's performance did not fall below an objective standard of reasonableness. Moreover, defendant has not shown that there was any error in the testing procedures used, and therefore, he has not shown that he suffered any prejudice. Accordingly, counsel was not ineffective in failing to object to the fact that no hearing was held to determine the admissibility of the DNA evidence.

B.

Defendant next argues that neither Dr. Julie Howenstine nor Mr. Charles Barna (the two DNA experts who testified at trial) possessed sufficient knowledge or expertise to be qualified as experts in the field of DNA profiling. When an individual's testimony will assist the trier of fact to understand the evidence or to determine a fact in issue, the individual may be qualified as an expert "by knowledge, skill, experience, training, or education." MRE 702; *People v Haywood,* 209 Mich App 217, 224-225; 530 NW2d 497 (1995). Based on Dr. Howenstine's and Mr. Barna's knowledge, experience, and training, the trial court did not abuse its discretion in allowing these witnesses (both of whom have been qualified as testifying experts in this field) to testify as expert witnesses in the field of DNA profiling.

C.

Defendant next argues that due to a change in the attitude of the scientific community, statistical analysis of DNA evidence no longer meets the "general acceptance in the community" test, adopted from *People v Davis,* 343 Mich 348; 72 NW2d 269 (1955), and *Frye v United States,* 54 US App DC 46; 293 F 1013 (DC App, 1923). Under the *Davis-Frye* rule, evidence based on a novel scientific principle is admissible when the proponent of the evidence has shown that the evidence has gained general acceptance within the scientific community to which it belongs. *People v Vettese,* 195 Mich App 235, 238; 489 NW2d 514 (1992). However, defendant failed to object at trial to the admission of the statistical analysis of the DNA evidence. Therefore, this issue has not been preserved for review. See *City of Westland v Okopski,* 208 Mich App 66, 73; 527 NW2d 780 (1994). If the issue had been preserved, we note that, regardless of any scientific debate over the acceptability of the statistical analysis, in Michigan, such statistical analysis evidence is admissible and any questions concerning the validity of such evidence goes to its weight. *Chandler,* 211 Mich App at 611-612; 536 NW2d 799.

Defendant also argues that his trial counsel's failure to lodge an objection to the statistical analysis testimony constitutes ineffective assistance of counsel. However, counsel's performance did not fall below an objective standard of reasonableness. *Pickens,* 446 Mich at 302-303; 521 NW2d 797. As discussed above, this Court held in *Adams,* 195 Mich App at 276-280; 489 NW2d 192, that statistical analysis of DNA testing is admissible and that any questions regarding this type of evidence go to the weight of the evidence. Therefore, trial counsel was not ineffective in this aspect of his representation.

II.

Defendant next argues that the trial court abused its discretion by denying trial counsel's motion to withdraw due a breakdown in the attorney-client relationship. This motion was filed a few weeks before trial and noted that defendant had filed a grievance against his counsel. Although an indigent defendant is constitutionally guaranteed the right to counsel, the indigent defendant, by simply requesting that his appointed counsel be replaced, is not entitled to have the attorney of his choice appointed. *People v Jones,* 168 Mich App 191, 194; 423 NW2d 614 (1988). Appointment of substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1989). Good cause exists if a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. *Id.*

We have carefully reviewed the record, with deference to the lower court's findings at the hearings. Contrary to defendant's argument, neither counsel's pretrial preparation methods and communications, nor the filing of the grievance, caused a breakdown of the attorney-client relationship. Because counsel informed the court that despite the filing of the grievance, he would "do [his] job at trial," there was no need for the court to question counsel about whether he could continue to vigorously represent defendant. Defendant was not denied his right to counsel.

III.

Defendant also alleges prosecutorial misconduct arising out of three unrelated issues, which will be addressed individually.

A.

Defendant claims prosecutorial misconduct because the prosecutor implied that defendant was affiliated with a gang called the Oakhill Lynch Mob. Defense counsel's initial objection to certain questions posed to the apartment manager about familiarity with this gang, was overruled by the court upon the prosecutor's representation that he would be able to establish the relevance. However, almost immediately, the trial court, sua sponte, dismissed the jury to explore the relevance of this testimony with counsel. When the jury returned, the court gave a strong curative instruction, and ordered them to disregard any references to the gang and to other criminal activities at the complainant's apartment complex.

Defendant argues that the prosecutor repeatedly stated to the jury that defendant was a member of the Oakhill Lynch Mob. Yet the only time that the prosecutor made this assertion was during opening statement. When a prosecutor states that evidence will be submitted to the jury and later that evidence is not presented to the jury, reversal is not warranted if the prosecutor acted in good faith. *People v Johnson,* 187 Mich App 621, 626; 468 NW2d 307 (1991). At the time he made his opening statement, the prosecutor believed that the testimony was admissible as relevant evidence because the gun had been handed back and forth between gang members and because this evidence

showed that defendant had been out with these individuals on other occasions. Therefore, reversal is not warranted because there was no showing that the prosecutor acted in bad faith.

Defendant also argues that, even *after* the court told the prosecutor not to introduce testimony about the Oakhill Lynch Mob, the prosecutor impermissibly elicited testimony from Detective Keller about the gang. However, defendant's argument is without merit because the only such testimony was elicited by *defense* counsel. Defendant may not claim on appeal error that he created. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995).

Similarly, we find no merit to defendant's claim that the prosecutor erred at sentencing by requesting that the presentence report be amended to show that defendant was a member of the Oakhill Lynch Mob gang because the test for prosecutorial misconduct is whether defendant was denied a fair and impartial *trial*. *People v McElhaney*, 215 Mich App 269, 283; ___NW2d ___ (1996). Therefore, the prosecutor's comments during sentencing are irrelevant in determining whether prosecutorial misconduct occurred. Furthermore, it is well-settled that, at sentencing, the prosecutor is permitted to advise the court of any circumstances which he or she believes that the court should consider before imposing sentence.

B.

Defendant next raises several prosecutorial misconduct issues arising out of questioning about the gun used in the crime. We note initially that the issues relating to the questioning of Weld were not preserved for review on appeal. Had an objection been lodged in a timely fashion, a curative instruction could have been issued. We do not address these issues.

Defendant also complains that the prosecutor asked Detective Keller if he "had information about the gun that was used by [defendant] in the armed robbery because you were aware that it had been taken in a breaking and entering case? Just yes or no, if you could please?" Defense counsel objected, and the prosecutor rephrased the question by simply asking Keller if he had information about where the gun came from. Keller responded that he did have information about the gun, and that from this information, he was able to identify the owner of the gun, as well as its make and model number. Defendant argues that through these questions the prosecutor improperly elicited testimony that defendant used a stolen gun. However, in answering these questions, Keller did not testify that defendant had stolen the gun; he only stated that he had information about where it came from. Although the prosecutor did ask a question about whether the gun had been stolen, the jurors were instructed that they were to return their verdict based on the evidence, and that the questions of attorneys are not evidence. Therefore, the prosecutor did not elicit improper testimony, and defendant was not denied a fair trial.

C.

Finally, defendant argues that the prosecutor impermissibly vouched for the credibility of witnesses Mattern and Weld by eliciting testimony that they had agreed to testify truthfully as part of their plea agreements. Because no objection was made to this testimony below, we have reviewed this issue only for manifest injustice. Noting that defense counsel himself used the terms of the plea agreements to impeach these witnesses, we find no manifest injustice in this case.

Finding no error, we affirm.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Henry William Saad
/s/ Stanley J. Latreille

[1] Although defendant argues that the absence of a pretrial hearing caused him to suffer prejudice because the statistical analysis was based on a methodology that has not gained general acceptance, as discussed later in this opinion, challenges to the statistical analysis go to the weight of the evidence, not to its admissibility. *Chandler*, 211 Mich App at 611; 536 NW2d 799.