STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMIEL DENNIS VAUGHAN,

Defendant-Appellant.

UNPUBLISHED
October 10, 1997

No. 196422
Recorder's Court
LC No. 95-005435

Before: Bandstra, P.J., and Murphy and Young, JJ.

PER CURIAM.

Defendant was convicted in a jury trial of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), and assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. He was sentenced to life in prison for the CSC I conviction, and six years, eight months to ten years in prison for the assault with intent to do great bodily harm conviction, the two sentences to run concurrently. He appeals as of right. We affirm.

Defendant's first argument on appeal is that he was deprived of due process when the trial court refused to appoint a DNA expert at public expense to assist defendant in disputing the testimony of the prosecution's DNA expert. We disagree. The trial court's decision regarding the appointment of an expert is reviewed for an abuse of discretion. *People v Browning*, 106 Mich App 516, 528; 308 NW2d 264 (1981). In *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995), the Michigan Supreme Court held that a trial court's decision not to appoint an expert for the defense is not erroneous when there is no "indication that expert testimony would likely benefit the defense." See, also, *People v Leonard*, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 178121 and 186776, issued 7/18/97), slip op p 7 ("a defendant is not entitled to a DNA expert without making a particularized showing of need for the expert"). Here, defendant has made no showing of need, nor has he shown that his defense would have benefited from the testimony of a DNA expert. Defendant has offered no reason to believe that the results of an independent DNA analysis would differ in any respect from the results obtained by the prosecution's DNA expert. Further, defendant has not shown that there is any reason to call into question the results of the DNA analysis performed by the prosecution's expert. *Jacobsen*, *supra* at 642. We find no abuse of discretion. See, also, *Browning*, *supra* (trial

court's decision not to appoint a defense expert is not an abuse of discretion "[a]bsent some showing that the test results reached by the prosecutor's expert witnesses were in error or that the testing procedures were inadequate").

Defendant argues that failure to appoint a DNA expert denies him a "basic tool[] of an adequate defense or appeal" as required by *Ake v Oklahoma*, 470 US 68, 77; 105 S Ct 1087; 84 L Ed 2d 53 (1985) [quoting from *Britt v North Carolina*, 404 US 226, 227; 92 S Ct 431; 30 L Ed 2d 400 (1971)]. The United States Supreme Court in *Ake* held that where the defendant's sanity is a significant issue at trial, the state must provide the defendant with access to a competent psychiatrist. *Ake*, *supra* at 83. We do not believe that *Ake* requires the appointment of a DNA expert in this case. We find the Supreme Court's language in the later case of *Caldwell v Mississippi*, 472 US 320, 323 n 1; 105 S Ct 2633; 86 L Ed 2d 231 (1985), to be applicable in the present case. In *Caldwell*, the trial court had refused to appoint an investigator, a fingerprint expert, and a ballistics expert. *Id*. The Supreme Court stated that "[g]iven that petitioner [i.e., the defendant] offered little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process in the trial judge's decision." *Id*. Similarly, here, defendant has made no showing that the testimony of an independent DNA expert would benefit his defense. Therefore, the trial court's decision not to appoint an expert did not deprive defendant of due process. See, also, *Leonard*, *supra*, slip op pp 6, 7, 11.

Defendant's second argument on appeal is that he was denied the effective assistance of counsel because his trial attorney failed to move to suppress the in-court identification of defendant by the complainant based upon suggestive practices that occurred at a photographic presentation in which the complainant identified defendant. We disagree. Because defendant failed to move for a new trial or an evidentiary hearing on this basis below, appellate review is foreclosed "unless the record contains sufficient detail to support defendant's claims, and, if so, review is limited to the record." *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). A defendant claiming ineffective assistance of counsel based upon defective performance has

> the burden of showing that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that but for the unprofessional errors the result of the proceeding would have been different. [*People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997).]

Moreover, the defendant has the burden of overcoming the presumption that the challenged action constitutes sound trial strategy. *Id*. at 156.

Here, the record contains no indication of any suggestive practices at the photographic showup. Defendant speculates on appeal that the complainant was shown a picture of defendant and failed to recognize him in an earlier photographic presentation. However, there is no evidence to support that assertion. Given the lack of evidence of suggestive practices, counsel's failure to file a motion on that basis does not constitute deficient performance. Counsel "was not required to argue a frivolous or meritless motion." *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). In addition, counsel's decision not to raise the possibility of suggestive

practices on cross-examination is presumed to be sound trial strategy. See, generally, *People v Burns*, 118 Mich App 242, 247; 324 NW2d 589 (1982); *People v Moreno*, 112 Mich App 631, 638; 317 NW2d 201 (1981). Defendant has offered no reason to rebut this presumption. Because there is no record basis for believing that counsel's performance fell below an objective standard of reasonableness, defendant's claim of ineffective assistance must fail.

Defendant's third argument on appeal is that he received ineffective assistance of counsel when trial counsel neglected to develop a careful defense because she wanted the trial concluded by a certain time. We disagree. Our review is again limited to the record because defendant failed to preserve this issue below. *Barclay, supra*. Defense counsel told the trial court on the record that she could not be in court on Wednesday. However, the trial was concluded on Tuesday, and it never became necessary for counsel to be present on Wednesday. There is no evidence in the record that counsel's performance was influenced by scheduling concerns. Defendant has not identified a single witness or other piece of evidence that would have been presented had the trial been longer. We find no indication in the record that counsel's performance fell below an objective standard of reasonableness.

Defendant's fourth argument on appeal is that the trial court's instruction to the jury regarding the elements of CSC I permitted conviction of a person who coincidentally happens to be armed with a weapon while engaging in consensual sexual intercourse. This issue is not preserved for appeal because defendant failed to object below. MCR 2.516(C); *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Appellate review is only available to avoid manifest injustice. *Van Dorsten, supra* at 545. We find no manifest injustice here. The trial court instructed the jury that to be guilty of CSC I, defendant must have sexually penetrated the complainant while armed at the time with a weapon. There was no evidence that the parties engaged in consensual sexual intercourse, so defendant's concern about being convicted for engaging in consensual intercourse is not warranted in this case. Moreover, the evidence against defendant at trial was overwhelming. *People v Crawford*, 89 Mich App 30, 36; 279 NW2d 560 (1979). The complainant identified defendant in a photographic showup and at trial as the person who threatened her life, forced her to enter a vacant house, sexually penetrated her, and then struck her on the head several times with a pipe. DNA from defendant's blood matched DNA in sperm fragments taken from the complainant's clothes and body following the assault.

Further, defendant's assertion that trial counsel's failure to object to the jury instruction on CSC I constituted ineffective assistance of counsel is without merit. Given the overwhelming evidence against defendant, there is no reason to believe that the result of the trial would have been different but for the allegedly unprofessional errors of counsel. *Mitchell, supra* at 157-158.

We affirm.

/s/ Richard A. Bandstra
/s/ William B. Murphy
/s/ Robert P. Young