

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM HOWARD DICKSON,

Defendant-Appellant.

UNPUBLISHED

April 13, 2001

No. 217111

Oakland Circuit Court

LC No. 98-161195-FC

Before: Doctoroff, P.J., and Holbrook, Jr. and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). He was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to two terms of twenty-five to sixty years' imprisonment, to be served concurrently. Defendant appeals as of right. We affirm.

Defendant first claims that that his conviction should be reversed because the prosecution was required, but failed to submit evidence presented in the rape kit for deoxyribonucleic acid (DNA) identification testing. We review this issue de novo as a question of law. *People v Conner*, 209 Mich App 419, 423; 531 NW2d 734 (1995).

In *People v Vaughn*, 200 Mich App 611; 505 NW2d 41(1993), rev'd on other grounds 447 Mich 217 (1994), we rejected an argument similar to the claims defendant makes here. Like the defendant in *Vaughn*, defendant was aware of the availability of DNA testing at the time of trial, but never requested such testing below, and there is no indication that he would have been prohibited from conducting such testing. *Id.* at 619-620. Moreover, defendant failed to present authority to support his position that the prosecution was *required* to submit the evidence from the rape kit for testing or that its decision not to do so implicated its obligation to produce exculpatory evidence. As this Court noted in *Vaughn*, there is a distinction between the failure to develop evidence and the failure to disclose evidence. *Id.* at 619. Moreover, evidence was presented at trial indicating that it was unlikely that such testing would have yielded exculpatory evidence. Clearly, the prosecution was under no obligation to conduct DNA testing, and the absence of DNA evidence does not warrant reversal in this case.

We also reject defendant's claim that defense counsel's failure to request DNA testing during trial amounted to ineffective assistance of counsel. Effective assistance of counsel is

presumed and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* A defendant must also overcome the presumption that the challenged action or inaction was sound trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Decisions regarding what evidence to present are presumed to be matters of trial strategy, and we will not substitute our judgment for that of counsel, nor will we assess counsel's competence with the benefit of hindsight. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Here, defense counsel's decision not to request DNA testing was likely based on a realistic apprehension of creating detrimental evidence that did not otherwise exist. In addition, defense counsel apparently chose to use the lack of testing as an argument to attack the prosecution's case against defendant. This is supported by counsel's questioning surrounding the absence of DNA testing results during the cross-examination of the forensic scientist, and remarks made during closing argument. In fact, from the very onset of the case, defense counsel stated that there was no DNA evidence to support the prosecution's case. We conclude that defendant failed to overcome the presumption that defense counsel's decision not to request DNA testing was sound trial strategy.

Defendant next argues that the trial court abused its discretion in admitting photographs of the crime scene because they were taken two months after the incident and an inadequate foundation was laid. We review a trial court's decision to admit photographic evidence for an abuse of discretion. *People v Flowers*, 222 Mich App 732, 736, 565 NW2d 12 (1997). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

A proper foundation for the admission of a photograph is laid if an individual who is familiar with the scene testifies that the photograph accurately reflects the scene. *People v Curry*, 175 Mich App 33, 47; 437 NW2d 310 (1989). Here, the victim and her sister both testified that the photographs accurately depicted the house and the garage at the time of the offense. Any argument concerning the existence of inaccuracies in the photographs goes to the weight to be given to the photographs, not their admissibility. *Id.* Accordingly, the trial court did not abuse its discretion in admitting the photographs.

Defendant also argues that the trial court abused its discretion by allowing the emergency room physician who examined the victim to testify as an expert witness. We disagree. A trial court's determination that a witness is qualified as an expert is reviewed for an abuse of discretion. *People v Peebles*, 216 Mich App 661, 667; 550 NW2d 589 (1996). The admissibility of expert testimony is governed by a three-part test: (1) the expert must be qualified, (2) the evidence must serve to give the trier of fact a better understanding of the evidence or assist the trier of fact in determining a fact in issue, and (3) the evidence must be from a recognized discipline. MRE 702; *Peebles, supra* at 667-668.

Here, defendant claims that the doctor was not qualified because he had never before testified in a criminal matter. However, defendant failed to cite any authority to support this argument. An appellant may not simply announce his position and leave it to this Court to discover and rationalize the basis for his claim, nor may he only give cursory treatment with no citation of supporting authority. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998).

Furthermore, to the extent that defendant challenges the doctor's qualifications, his argument is without merit. The requirement in MRE 702 that an expert be qualified by "knowledge, skill, experience, training, or education" is broad, and the extent of an expert witness' knowledge is relevant to the weight rather than the admissibility of his testimony. MRE 702; *People v Moye*, 194 Mich App 373, 378; 487 NW2d 777 (1992), rev'd on other grounds 441 Mich 864 (1992). In this case, the expert in question was a board-certified physician practicing in the emergency department of Oakland General St. John's Hospital. In addition, he had been qualified as an expert witness in three civil cases. Based on this evidence, we conclude that the trial court did not abuse its discretion in qualifying the doctor as an expert witness in this case.

In his final argument, defendant raises numerous claims of prosecutorial misconduct. Because defendant failed to object to the alleged improper remarks below, appellate review is precluded unless a curative instruction could not have eliminated any possible prejudice or failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Our review of the record reveals that no miscarriage of justice occurred due to the allegedly improper conduct by the prosecutor. Rather, the challenged remarks and conduct by the prosecutor were either proper responses to defense counsel's arguments or reasonable inferences from the evidence produced at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992); *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). A prosecutor need not state his argument or inferences in the blandest possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Defendant is not entitled to relief on this basis.

Defendant also contends that defense counsel was ineffective because he failed to object to the prosecutor's allegedly improper remarks. Because the remarks were not improper, counsel was not ineffective for failing to object. Counsel is not required to make frivolous or meritless objections. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Joel P. Hoekstra