

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DAMIEN L. BREWER,

Defendant-Appellant.

UNPUBLISHED

June 19, 2003

No. 239368

Calhoun Circuit Court

LC No. 01-002969-FC

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, assault with intent to rob while armed, MCL 750.89, first-degree home invasion, MCL 750.110a(2), and four counts of possession of a firearm during the commission of a felony, MCL 750.227b.¹ The trial court sentenced defendant to concurrent prison terms of 480 to 840 months on the armed robbery, assault, and home invasion convictions and to two-year prison terms for each felony-firearm conviction.² He appeals by right. We affirm defendant's convictions, but remand for correction of the judgment of sentence.

LaTino ("Tina") Warren testified that she lived at 198 Euclid Street³ on May 13, 2001 with her boyfriend Gary Carlton and her two small children. She explained that her bed was located in the living room of the residence. Warren indicated that sometime during the morning on that date she heard knocking on the front door and someone asking Carlton for a telephone number. She said that she eventually heard "a kick on the door, and then another kick, and I

¹ The judgment of sentence incorrectly indicates that defendant was convicted of two counts each of assault with intent to rob while armed and first-degree home invasion, but only two counts of felony-firearm.

² Of course, the felony-firearm sentences are concurrent to each other. However, the three felony-firearm convictions corresponding to convictions of a predicate felony are consecutive to the respective predicate felonies. The predicate felony for the fourth felony-firearm conviction was discharging a firearm in a building, MCL 750.234b, on which the jury acquitted defendant. See *People v Lewis*, 415 Mich 443; 330 NW2d 16 (1982).

³ The street is misspelled as "Uclid" in the trial transcripts.

recall someone saying this is a jack; move, B----, and they were in my house.” She understood “jack” to be a slang term for a theft or robbery. Warren testified that one black male and one white male entered the home and approached Carlton who was in the dining room at that point. She said that the white male, who she at some point learned was named Bobby Sisler (“Bobby”), approached Carlton and demanded money and that the black male also eventually demanded money from Carlton. Warren identified defendant as that black male. Warren testified that her purse was on the floor beside her bed and that she picked it up and clutched it. She said that Bobby hollered to defendant, “the purse is in here; the money is in here.” She testified that the purse contained about two hundred dollars and other items. In short, Warren indicated that Bobby tried to take the purse from her and that she struggled to keep it. Warren testified that at some point Bobby hit her in the head with, she believed, an empty beer bottle that was in the room, but she did not let go of the purse. She said that defendant had a gun in his right hand and that he struck her in the head with the gun. She did not remember the number of times he hit her with it, but she was bleeding after being hit with the bottle and gun. Warren said that at some point defendant threatened to shoot Carlton if she did not let go of the purse. She remembered the gun going off. When asked what happened to her purse, Warren said that she had “no idea” and that she “did not have it” and “could not find it when the police came,” although she did find pieces of a strap to her purse after the incident ended.

Carlton’s testimony was substantially similar to Warren’s testimony. He said that they lived together at 198 Euclid Street on May 13, 2001. Carlton testified that he knew Billy Sisler and that he had met his brother Bobby maybe four or five times before May 13, 2001. He indicated that after he fell asleep on the night of the incident, he heard loud pounding on the door. Carlton said that he got up and asked who was there and that he heard someone say “Bobby.” According to Carlton, Bobby asked him for a telephone number, and Carlton gave it to him. Carlton indicated that about four or five minutes later Bobby came back and asked him, through the door, to write down the number. Carlton said he walked in the dining room where they had pens and paper, and then he heard two “bangs” and saw Bobby (Sisler) come through the door. He testified that Bobby said something like “this is a jack move” and that Bobby kept hollering, “give me your money, give me your money,” to which Carlton replied, “I ain’t got nothing.” Carlton indicated that at some point he saw a black man with a gun. Carlton said that the black man hit him in the head with the gun and that he ended up in the kitchen on the floor. He testified that he heard Bobby say “purse” and that Bobby and defendant went toward the living room. Carlton said he was bleeding pretty badly. In short, Carlton indicated that he saw the black man hit Warren with the gun and that he (Carlton) grabbed the gun, which went off. Carlton testified that, after this, Bobby and the black man ran out of the home. He thought that they got the purse “as soon as the gun went off.” He explained the purse was not there after they left and that the strap to the purse was lying by the bed. Carlton went to a neighbor’s home and called the police.

Shawn Coughlin testified that he was in a blue Oldsmobile with Billy Sisler, Robert Sisler (i.e., Bobby), and defendant, who he knew as “D,” on the morning of May 13, 2001. According to Coughlin, Bobby said that he knew the people at 198 Euclid Street and that “he was about to go over there and rob him [sic].” Coughlin indicated that Bobby and defendant eventually left the car. He testified that when Bobby and defendant returned to the car and that Bobby said “hurry up and let’s go. I just did something crazy.” Coughlin also said that he

noticed blood on Bobby's clothing and shoes. Coughlin indicated that he was dropped off at his mother's house and that he then called Sergeant Todd Madsen.

Sergeant Madsen testified that he went to 47 South 22nd Street at about 5:30 a.m. on May 13, 2001 and that he saw Billy Sisler and a black male at that location. Officer Christopher Allen indicated that defendant was taken into police custody there. Officer Ken Millikin testified that he found a handgun in the water tank of the toilet in the apartment at 47 South 22nd Street.

Officer Timothy Gothard stated that he collected samples of what appeared to be blood from the Oldsmobile and packaged the samples in an envelope. Officer Michael Crawford testified that he obtained clothing from defendant and Bobby. Jeffery Nye, a forensic scientist with the state police, indicated that samples of suspected blood taken from the automobile were found to contain DNA from Warren and Carlton. Nye also found that DNA matching Warren was on the clothing taken from Bobby, but Carlton was excluded as a contributor. Warren, however, could not be excluded as a contributor. Nye further indicated that over ninety-nine percent of the white, black, and Hispanic populations could be excluded as contributors to the relevant samples from defendant's clothing.

I

Defendant first argues that the fact that he did not receive copies of the results of DNA testing conducted by the state police laboratory until shortly before trial constituted a discovery violation. We review a trial court's decision as to the appropriate remedy for noncompliance with a discovery order for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). As the trial court indicated, it appears that the long delay in receiving the test results occurred simply because the state police laboratory conducts many DNA tests. There is no indication that either the prosecution or the state police sought to deny defendant access to these test results in order to disadvantage defendant at trial. Further, we fail to discern any significant prejudice to defendant because defense counsel knew that DNA testing was being conducted and should have been prepared for the possibility that it would link Warren and Carlton to the automobile and clothing samples. Thus, the trial court did not abuse its discretion by failing to sanction for a discovery violation in this regard. We note that case law defendant cited pertaining to the prosecution withholding exculpatory evidence is inapposite because the DNA test results did not tend to exculpate defendant.

II

Defendant next argues quite vaguely that the admission of evidence, particularly DNA evidence, indicating Bobby's involvement in the offenses improperly "co-mingled" evidence against Bobby with evidence against defendant. As defendant acknowledges, this issue was not preserved below. Thus, we may grant relief only for plain error that resulted in the conviction of an actually innocent defendant or that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). Defendant has not established any plain error in connection with this issue. Relevant evidence is generally admissible. MRE 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401.

Contrary to the implication of defendant's position, the evidence linking Bobby to the crime, including DNA evidence and Carlton's testimony identifying Bobby as one of the assailants, was, when considered with other evidence, relevant as making it more probable that defendant was also involved in the crime. As set forth above, police found defendant at the same address as Bobby within hours of the incident, and Warren identified defendant as one of the assailants. Accordingly, evidence implicating Bobby was relevant to buttress the plausibility of Warren's identification of defendant as the other assailant given the evidence that defendant was with Bobby shortly after the crimes. Further, the DNA evidence was relevant because it tended to corroborate the truthfulness of Carlton's testimony implicating Bobby. In this regard, the relevancy of the evidence implicating Bobby must be considered in the context of the other evidence offered at trial. See *People v Brooks*, 453 Mich 511, 519; 557 NW2d 106 (1996), quoting 1 McCormick, Evidence (4th ed), § 185, p 776 (discussing the concept that an item of evidence "being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered" and using the analogy that "[a] brick is not a wall"). While as defendant indicates, a trial court may exclude evidence under MRE 403 on the ground that its probative value is substantially outweighed by the danger of unfair prejudice, it is readily apparent that the evidence implicating Bobby was highly relevant to the charges against defendant so that its probative value was not substantially outweighed by any danger of unfair prejudice. Defendant has not shown plain error to warrant relief based on this issue.

III

Defendant claims that trial counsel provided ineffective assistance of counsel by failing to request a defense DNA expert or to seek other relief based on the late production of the DNA evidence discussed above. We disagree. To establish ineffective assistance of counsel, a defendant must at minimum show that (1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability that the outcome of the proceeding would have been different but for trial counsel's errors. *People v Kevorkian*, 248 Mich App 373, 411; 639 NW2d 291 (2001).⁴ We conclude that defendant has not established his ineffective assistance of counsel claim because there is no reasonable probability that he could have discredited the DNA evidence presented by the prosecution with the effect of obtaining an acquittal of the crimes of which he was convicted. Apart from the DNA evidence, Warren

⁴ This Court also noted a defendant "must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial." *Kevorkian, supra* at 411. See *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001), where the panel indicated that, in addition to showing that counsel's performance fell below an objective standard of reasonableness and a reasonable probability that the result of the proceedings would have been different but for counsel's error, a showing of ineffective assistance of counsel requires establishing that "the attendant proceedings were fundamentally unfair or unreliable." Both *Kevorkian* and *Rogers* are consistent with prior jurisprudence holding that constitutional error warranting reversal does not exist unless counsel's error was so serious that it resulted in a fundamentally unfair or unreliable trial. *Lockhart v Fretwell*, 506 US 364, 369-370; 113 S Ct 838; 122 L Ed 2d 180 (1993); *United States v Cronin*, 466 US 648, 658; 104 S Ct 2039; 80 L Ed 2d 657 (1984). See also *People v Reed*, 449 Mich 375, 401 (Boyle, J.); 535 NW2d 496 (1995), and *People v Pickens*, 446 Mich 298, 312 n 12; 521 NW2d 797 (1994).

identified defendant as one of the assailants, and Carlton identified Bobby as the other. Bobby and defendant were found at the same address within hours of the incident. As a practical matter, if the DNA evidence implicating Bobby and to a somewhat lesser extent defendant, in the incident were inaccurate, then either Carlton was lying or mistaken in identifying Bobby as one of the assailants. It would be an extraordinary coincidence if the DNA testing were flawed, Carlton's identification were incorrect, and Bobby and defendant were found together with blood on their clothing within hours of the incident. Accordingly, we conclude that there is no reasonable probability that different action by trial counsel with regard to the DNA evidence would have resulted in a different outcome at trial in light of the strong evidence of guilt. Thus, defendant has not established his claim of ineffective assistance of counsel.

IV

Defendant argues that the trial court violated his constitutional right to due process by denying his post-trial motion for funds to retain a DNA expert. We disagree. The trial court denied defendant's post-trial request for a DNA expert stating that it was "not convinced of the need" (Hearing, 6/17/02, pp 5-6). Assuming for purposes of discussion that the due process right to receive expert assistance in certain circumstances extends to post-trial proceedings, a defendant must show that there is a reasonable probability that appointment of an expert would benefit the defense. See *People v Tanner*, 255 Mich App 369, 397-398; 660 NW2d 746 (2003), quoting *People v Leonard*, 224 Mich App 569, 582; 569 NW2d 663 (1998), quoting *Moore v Kemp*, 809 F2d 702, 712 (CA 11, 1987). For the reasons discussed in the preceding issue, there is no reasonable probability that appointment of a defense DNA expert would have benefited the defense. Thus, the trial court did not violate defendant's right to due process by denying his post-trial motion for appointment of a DNA expert.

V

Defendant argues that his conviction of both armed robbery, MCL 750.529, and assault with intent to rob while armed, MCL 750.89, violate his constitutional right to be free of double jeopardy. We disagree because each conviction involved a different victim. Warren was the victim of the armed robbery charge of which defendant was convicted, while Carlton was the victim of the assault with intent to rob while armed charge. As the prosecution notes, "double jeopardy does not apply to crimes committed against different victims, even if the crimes occurred during the same criminal transaction." *People v Hall*, 249 Mich App 262, 273; 643 NW2d 253 (2002), remanded on other grounds 467 Mich 888 (2002). Thus, defendant's convictions of both armed robbery and assault with intent to rob while armed did not constitute a double jeopardy violation in the present circumstances.

We note that defendant also vaguely refers to his first-degree home invasion conviction in connection with his double jeopardy argument. However, we do not read defendant's brief as setting forth a claim that being convicted of home invasion, along with his other convictions in this case, constituted a double jeopardy violation. Nevertheless, we note that the home invasion statute specifically provides that "[i]mposition of a penalty under this section does not bar imposition of a penalty under any other applicable law." MCL 750.110a(9). In this multiple punishment context, "the double jeopardy analysis is whether there is a clear indication of legislative intent to impose multiple punishment for the same offense. If so, there is no double

jeopardy violation.” *People v Mitchell*, 456 Mich 693, 695-696; 575 NW2d 283 (1998). Thus, the Legislature has clearly indicated—indeed flatly stated—its intent to allow multiple punishment for both a first-degree home invasion and another crime committed during the same criminal transaction. Accordingly, double jeopardy is not an issue where defendant was convicted of first-degree home invasion along with his other convictions.

VI

Finally, we note that the judgment of sentence incorrectly indicates that defendant was convicted of two counts each of assault with intent to rob while armed, first-degree home invasion, and felony-firearm. Defendant was actually convicted of one count each of assault with intent to rob while armed and first-degree home invasion (as well as one count of armed robbery as correctly indicated in the judgment of sentence) and four counts of felony-firearm. Thus, we remand for correction of the judgment of sentence to accurately reflect these convictions. MCR 7.216(A).

We affirm defendant’s convictions, but remand for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder