

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTIN FRANKLYN ROSE,

Defendant-Appellant.

UNPUBLISHED

September 22, 2005

No. 252935

Ingham Circuit Court

LC No. 03-000518-FC

Before: Sawyer, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree felony-murder, MCL 750.316(1)(b). We affirm.

On February 20, 2003, the victim was found dead in her home by her son. According to testimony offered at trial, the victim had been repeatedly hit in the head area with a blunt instrument, most likely a hammer or a stool. Witnesses testified that they saw defendant leaving the victim's home on the day of the murder, and provided police with a composite drawing of defendant.

Defendant had been living at the home of friends who, following a news story about the homicide, contacted the police and gave them a sweatshirt owned by the defendant. The victim's DNA was found on that sweatshirt, which witnesses stated defendant was wearing on the day of the murder. Although there was no blood visible to the eye on the sweatshirt, scientific testing suggested the presence of blood on the sweatshirt, and it was in one of these areas where the victim's DNA was found. Witnesses also testified that the night before the murder, defendant stated that he was owed some money and was going to Gier Street, where the victim lived, to collect it. Defendant admitted to police that he had gone to purchase some marijuana from the victim on the day of the homicide, but he denied any involvement in her murder.

Defendant first argues that the trial court abused its discretion by allowing an expert witness to testify concerning a blood spatter experiment she preformed. We review the admission of expert testimony for an abuse of discretion. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004). "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 Stiller*, 242 Mich App 38, 54; 617 NW2d 697 (2000).

At the time of defendant's trial, MRE 702 stated:

If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.^[1]

Expert testimony is necessary "to explain things not readily comprehensible to the jury." *People v Christel*, 449 Mich 578, 597; 537 NW2d 194 (1995). Expert testimony should be helpful to the jury and aid the jury in its search for the truth. *People v Beckley*, 434 Mich 691, 714-715; 456 NW2d 391 (1990) (Brickley, J., plurality opinion).

At trial, Ann Gordon, a forensic scientist with the Michigan State Police, testified that she performed an experiment in 2001, before the crime occurred, which attempted to replicate the blood spatter that would occur from being hit with a hammer. Gordon testified that she assaulted a dummy that had blood soaked sponges attached to it with a hammer around four times and discovered that she had few, if any, blood stains on her clothing after assaulting the dummy. The prosecutor offered the evidence to help explain why defendant, when seen leaving the victim's home on the day of the crime, may not have had visible blood stains on the sweatshirt he was wearing.

Defendant argues that this testimony was not admissible because it was not helpful to the jury. Defendant asserts that there were too many differences between the way the experiment was performed and the actual assault on the victim. However, the prosecution experts testified that the victim had been struck by several blows from a blunt object. A layperson may very well believe that a person who repeatedly strikes another would be covered in blood. It was therefore incumbent on the prosecution to demonstrate to a jury why the eyewitness who saw defendant leave the home would not have been covered in blood. Accordingly, this evidence was helpful to the jury in understanding the prosecutor's theory of why the sweatshirt defendant was wearing may not have been covered in blood.

Defendant's arguments against the introduction of this evidence go to the fact that the prosecution's expert did not reproduce the actual conditions of the event. However, the lack of exact identity in an experiment versus the actual conditions that occurred goes to the weight of the testimony about the experiment, not the admissibility of that testimony. *Osner v Boughner*,

¹ MRE 702 was amended effective January 1, 2004 and currently states:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

180 Mich App 248, 260; 446 NW2d 873 (1989). Accordingly, during cross-examination, defendant was able to bring up the fact that the sponges did not cover the dummy's entire body, that the dummy was not moving, and that there was no way of knowing whether Gordon was in the same position as the perpetrator of the crime. Defendant also emphasized that Gordon only hit the dummy with the hammer four times, whereas evidence suggested that the victim was hit twenty to thirty times. Because the testimony helped the jury to understand the prosecutor's theory on how defendant left the victim's home with no visible blood on his clothing and defendant was able to inform the jury of differences between the experiment and the actual killing, it was not an abuse of discretion for the trial court to allow Gordon's testimony about the experiment.

Defendant next argues that his trial counsel was ineffective for failing to request and obtain a DNA expert to review the prosecutor's DNA expert's findings. Because there was no *Ginther*² hearing held in the trial court, this Court's review is limited to mistakes that are apparent from the lower court record. *Id.* To establish a claim of ineffective assistance of counsel defendant must show that "(1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability that the outcome of the proceedings would have been different but for trial counsel's errors." *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Normally, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy,' which [this Court] will not second-guess with the benefit of hindsight." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (citations omitted). Counsel will be deemed ineffective for failing to call a witness only if it deprives the defendant of a substantial defense. *Id.* Defendant has offered no proof that a DNA expert would have been able to present evidence favorable to the defense, and therefore, defendant has not shown a factual basis for his claim. See *Ackerman*, *supra* at 455. Thus, defendant has not shown a reasonable probability that trial counsel's failure to obtain a DNA expert affected the outcome of the trial.

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Talbot
/s/ Stephen L. Borrello

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).