

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEOFFREY LAVAR LAWSON,

Defendant-Appellant.

UNPUBLISHED

June 26, 2012

No. 302128

Genesee Circuit Court

LC No. 08-024090-FC

Before: MURRAY, P.J., and WHITBECK and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions following a jury trial of first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a; MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.¹ Defendant was tried with codefendants Deondra Williams² and Cortez Bailey. Defendant was sentenced to life in prison for felony murder, 22 1/2 to 45 years for armed robbery and conspiracy to commit armed robbery, and 2 years for felony-firearm. For the reasons stated in this opinion, we affirm.

I. SUMMARY OF FACTS

On September 21, 2008, Saba's Mini Mart was robbed and the clerk, Monir Alyatim, was shot and killed. The surveillance footage from the Mini Mart admitted into evidence shows three men entering the store shortly after 11:00 p.m. The first subject to appear is wearing dark pants and a dark hooded sweatshirt with the hood up. Shortly thereafter, a second subject is seen running up to the front counter. The second subject jumps on the counter, puts his arm over the

¹ Defendant was also found guilty of being a felon in possession of a firearm, MCL 750.224f. At sentencing, the prosecutor moved to dismiss this charge because she had been informed that regarding the prior charge of carrying a concealed weapon, defendant had been placed on Homes Youthful Trainee Act, MCL 762.11 *et seq.*, status.

² This case is being submitted with *People v Williams* (Docket No. 302371). Following a bench trial, Williams was convicted of first-degree felony murder, armed robbery, conspiracy to commit armed robbery, and felony-firearm.

bulletproof glass, and points a handgun in the direction of the clerk. While the second subject is on the counter, a third subject is seen inside the store holding a pistol grip shotgun. The clerk is seen emptying the registers and handing the money to the second subject. After taking the money, the second subject shoots the clerk and flees the scene with the other subjects. Defendant, Williams, and Bailey were eventually identified as being involved in the robbery and murder. Defendant was identified as the person who shot the clerk.

II. EAR IDENTIFICATION TESTIMONY

Defendant first argues that he is entitled to a new trial because expert testimony from Dr. Norman Sauer was improperly admitted.³ Dr. Sauer, an expert in forensic anthropology specializing in image and facial identification, reviewed the surveillance footage with the purpose of determining whether it was possible to identify the man who jumped on the store counter and shot the clerk by comparing his ear to images of ears captured on the surveillance footage. Dr. Sauer selected five images from the surveillance video for this comparison, and then had a videographer film defendant's left ear. Dr. Sauer then examined 13 features of the ear images taken from the surveillance video and performed a side-by-side comparison with images taken of defendant's ear, part of which involved superimposing the images. Based on his comparisons, Dr. Sauer was unable to find any differences between defendant's ear and the ear captured in the surveillance video. Therefore, he was unable to exclude defendant as the shooter. However, he declined to make a positive identification.

Defendant concedes that Dr. Sauer used the scientific method in his comparison, and that his hypothesis was technically testable. However, defendant argues that the theory on which Dr. Sauer's testimony was based was not trustworthy because there is no scientific basis to support the hypothesis that every ear is unique. Therefore, defendant argues that Dr. Sauer should not have been allowed to testify and that defense counsel was ineffective for failing to object to the testimony. Because defendant failed to object to Dr. Sauer's testimony, review of the evidentiary challenge is limited to plain error affecting substantial rights. MRE 103(d); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Whether defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). However, because he failed to raise this issue below, review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

The admission of expert testimony is governed by MRE 702, which provides as follows:

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

³ Defendant's Standard 4 brief contains an unpreserved challenge to the admission of Dr. Sauer's testimony, while defendant's appellate counsel argued that the failure of defendant's trial counsel to object to Dr. Sauer's testimony constituted the ineffective assistance of counsel.

(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.

MRE 702 imposes “an obligation on the trial court to ensure that any expert testimony admitted at trial is reliable.” *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004).

In its current incarnation, MRE 702 incorporates the reliability standards set forth by the United States Supreme Court in *Daubert*.⁴ *Gilbert*, 470 Mich at 781. *Daubert* requires that the trial court perform “a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.” 509 US at 592-593. To aid in this inquiry, the Supreme Court set forth a non-exhaustive list of factors to be considered: (1) whether the theory or technique has been tested; (2) whether the theory or technique has been subjected peer review and publication, (3) the known or potential rate of error; and (4) the general acceptance of the scientific technique. *Id.* at 593-594.

The technique employed by Dr. Sauer was a photographic comparison. There is nothing new or novel about comparing photographs, and courts have generally permitted experts to offer opinions regarding similarities and difference in the physical features of a defendant and a suspect based on photographic comparisons. See, e.g., *United States v Sellers*, 566 F2d 884, 886 (CA 4, 1977); *United States v Snow*, 552 F2d 165, 167 (CA 6, 1977). However, the circumstances of the comparison done in the case at hand are different from these cases because the only physical feature that was compared was an ear.

Defendant argues that ear identification is not generally accepted in the scientific community unless there is some sort of unique or individualizing characteristic. In support, defendant cites *State v Kunze*, 97 Wash App 832, 855; 988 P2d 977 (1999), in which the Washington Court of Appeals reversed a defendant’s conviction that was procured on the theory that he was the source of a latent earprint discovered at the scene of the crime. The appellate court concluded “that latent earprint identification is not generally accepted in the forensic science community.” *Id.* *Kunze*, however, dealt with latent earprints, not photographic comparisons. As reflected in *Kunze*, a problem with using latent earprints is pressure distortion:

pressure distortion is not a problem that prevents you from making an identification or a comparison between ears, even though you must “get the same pressure on the ear as the ear that was found on the scene of a crime”; the solution, he thought, was merely to take several exemplars under different degrees of pressure, then “pick the one that comes closest” to the latent print. [*Id.* at 839 (footnotes omitted).]

The same limitations are not present in photographic comparisons. To make an accurate photographic comparison, one must attempt to best duplicate the surveillance images, and that

⁴ *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

process does not present a risk of distorting an image. Rather, it simply makes a photographic comparison more accurate and reliable by trying to match perspective. Further, *Kunze* was decided under the standard articulated in *Frye*,⁵ which required that scientific evidence be shown to have gained general acceptance in the scientific community to be admissible at trial. 97 Wash App at 852-853. Under *Daubert*, 509 US at 593-594, general acceptance is one of many non-dispositive factors to be considered, with the analysis focusing on the reliability of the evidence.

We conclude that the admission of Dr. Sauer's testimony was neither an abuse of discretion nor a plain error. The methodology employed Dr. Sauer is not new or novel science, and there is nothing inherently unreliable in pointing out similarities in the morphologic features of an ear. Dr. Sauer also did not make a positive identification.⁶ As such, defendant cannot show that he suffered plain error, or that his trial counsel was ineffective for failing to object to Dr. Sauer's testimony. See *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).⁷ That the jury requested to see Dr. Sauer's testimony is also of no consequence since there could be a multitude of reasons for the request, and in any event, the testimony was never provided to the jury.

The final issue⁸ raised by defendant is that he was denied his right to a fair trial when convicted of the charge of felon in possession of a firearm on the erroneous belief that he was a convicted felon. Although defendant's conviction was ultimately dismissed, he argues that he was prejudiced because the jury heard evidence that he was a convicted felon barred from possessing a firearm. On this basis, defendant argues that the jury may have convicted him on the improper status of a convicted felon.

⁵ *Frye v United States*, 54 US App DC 46; 293 Fed 1013 (1923) superseded by statute *Daubert*, 509 US at 579.

⁶ Defendant also argues that even if Dr. Sauer did not explicitly identify him, the prosecutor did in closing arguments by saying that "[t]hat's his ear ladies and gentlemen." There was nothing improper about the prosecutor's argument. A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). The prosecutor's argument was a reasonable inference based on the evidence presented.

⁷ Though unpublished opinions of this Court have no precedential value, MCR 7.215(C)(1), we point out that a prior panel has also upheld the admissibility of Dr. Sauer's testimony. *People v Allen*, unpublished opinion per curiam of the Court of Appeals, issued July 12, 2002 (Docket No. 224966); see, also, *United States v McClintock*, unpublished opinion of the Eastern District of Pa, issued January 5, 2006 (Docket No. 05-441) (admitting similar evidence).

⁸ Defendant argues that he was denied his right to an appeal because he was deprived of a copy of the surveillance footage. On February 2, 2012, we issued an order requiring the prosecutor's office to provide this Court and appellant counsel with a viewable version of the surveillance footage. *People v Lawson*, unpublished order of the Court of Appeals, entered February 2, 2012 (Docket No. 302128). The prosecutor has complied with our order. As such, the issue has been resolved and need not be addressed.

However, defendant stipulated in the trial court to his status as a convicted felon, and the prosecutor stipulated to not reveal the nature of the underlying felony. Having stipulated to being a convicted felon below, defendant has waived any claim of error on appeal. “‘A party cannot stipulate a matter and then argue on appeal that the resultant action was error.’” *Holmes v Holmes*, 281 Mich App 575, 588; 760 NW2d 300 (2008) (quotations and citation omitted). Likewise, “a party may not harbor error at trial and then use that error as an appellate parachute.” *People v Szalma*, 487 Mich 708, 726; 790 NW2d 662 (2010).

Affirmed.

/s/ Christopher M. Murray
/s/ William C. Whitbeck
/s/ Michael J. Riordan