FIRST DIVISION
October 11, 2011

No. 1-09-0740

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 03 CR 4836
	)	
WILLIAM ATKINS	)	
	)	Honorable
	)	Bertina E. Lampkin,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Karnezis concurred in the judgment.

ORDER

¶ 1 ***HELD:*** Defendant's murder conviction affirmed, where defendant did not demonstrate any prejudice to support assertion that defense counsel failed to provide ineffective assistance by failing to request a *Frye* hearing prior to the admission of fingerprint evidence at trial.

¶ 2 Following a jury trial, defendant, William Atkins, was convicted of murder and sentenced to a term of natural life imprisonment. On appeal, defendant asserts that his trial counsel provided ineffective assistance of counsel by failing to request a hearing regarding the admissibility of fingerprint evidence, pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (a *Frye* hearing). For the following reasons, we affirm.

¶ 3 I. Background

¶ 4 In February of 2003, defendant and his codefendant, Ivory Lloyd[1], were charged by indictment with the 1981 murder of Elvio Mercuri. Defendant and Mr. Atkins were each charged with one count of intentional murder, one count of knowing murder, and three counts of felony murder predicated on a further allegation of either rape, deviate sexual assault, or armed robbery. The State filed a notice of intent to seek the death penalty, and both defendants waived their right - should they be found guilty - to a jury during the eligibility and sentencing phases. The charges against defendant and Mr. Lloyd ultimately proceeded to simultaneous, but severed, jury trials in August and September of 2008.

¶ 5 Mr. Lloyd is not a party to this appeal, having filed a separate appeal challenging his conviction. That appeal was recently resolved - and Mr. Lloyd's conviction affirmed - by our recent order in *People v. Lloyd*, No. 1-09-0332 (2011) (unpublished order under Supreme Court Rule 23). Because most of the relevant proceedings of defendants' simultaneous trials are fully set out in our recent order in *Lloyd*, we restate here only those facts necessary to resolve defendant's current appeal.

¶ 6 Prior to trial, the State filed a motion to admit evidence of other crimes to establish "the defendants' identity, *modus operandi*, and common scheme or design." In its motion, the State asserted that, with respect to the January 4, 1981, incident for which the two defendants were charged:

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[1] Throughout the record on appeal, codefendant's last name is spelled both "Lloyd" and "Loyd." Where this order contains a direct citation to that record, we will retain the original spelling.

"around 1:30 a.m., Elvio Mercuri and [T.C.] had just finished a date and were sitting in the front seat of Mercuri's car that was parked in front of [T.C.]'s home at 5361 N. Nordica, Chicago. At that time, the defendants both forced their way into the front seat of Mercuri's car and began demanding money. Loyd was armed with a pistol and struck Mercuri in the face with it before he pushed Mercuri into the back seat. Atkins drove Mercuri's car away from that location while Loyd raped [T.C.] vaginally and anally. [T.C.] was ordered to look away from her attackers. At one point, the car stopped and the defendants pulled Mercuri from the back seat and threw him in the trunk of the car where the defendants shot him once in the neck killing him. The defendants returned to the car and Atkins anally raped [T.C.] while Loyd drove. After driving further, one of the defendants said, 'Don't you move for fifteen minutes or I will blow you away.' [T.C.] waited for a few minutes before she drove away to get help."

¶ 7 With respect to the evidence of other crimes that the State sought to admit at trial, the State's motion indicated:

"Late on January 3, 1981 into January 4 ***, a few hours before Mercuri and [T.C.] were attacked at 5361 N. Nordica, Al McNair and his girlfriend, [C.K.], were outside the rear entrance to the Maxi Club Lounge located at 141 S. Troy. McNair managed the lounge and he and [C.K.] were loading bottles of champagne into a 1978 Chevy Monte Carlo when two male blacks confronted them. One of the men pushed a silver revolver to McNair's side and forced him into the back seat of the Monte Carlo where he held the gun to McNair's neck. The other man drove the Monte Carlo after he directed [C.K.] into the front seat. The

offenders warned [C.K.] and McNair not to look at them. The armed offender hit McNair in the face with the gun and took $200 from him. He also took some jewelry from [C.K.]. After driving for a time, the car stopped and the offenders wanted to put McNair in the trunk but McNair had accidentally locked that key inside the trunk when loading the champagne earlier. The offenders then took McNair and [C.K.] into an abandoned building at 32 N. Long where they separated McNair and [C.K.] and then the offenders both raped [C.K.]. Before leaving, the offenders told McNair and [C.K.] that they would return."

¶ 8 Furthermore, the State's motion asserted that: (1) both Mr. McNair and C.K. provided a description of the offenders that generally matched defendant and Mr. Lloyd; (2) fingerprint evidence from the Monte Carlo matched defendant; (3) the Monte Carlo was found parked on the same block where Mr. Mercuri and [T.C.] were abducted; and (4) DNA evidence linked both defendants to the rape of [T.C.]. The trial court granted the State's motion to admit the evidence of the McNair/C.K. incident as "proof of *modus operandi*," concluding that: "Here, the defendant's crimes against the McNair/[C.K.] couple and the Mercuri/[T.C.] couple possessed significant and compelling similarities."

¶ 9 Also prior to trial, defendant filed a motion to suppress a confession he gave to the police and prosecutors in 2003. Defendant asserted that his statement was only given after he was informed of his *Miranda* rights, requested an attorney, and chose to remain silent. Defendant also contended that his statement was the product of verbal and physical abuse by the police and prosecutors present at the time of his interview. After a hearing, the trial court denied defendant's motion to suppress his statement.

¶ 10 At trial, the State presented testimony regarding the Mercuri/T.C. incident that generally paralleled the description contained in their pretrial motion to admit evidence of other crimes - albeit with additional detail. Specifically, T.C. testified and described the two men who abducted her and Mr. Mercuri as two black men wearing army fatigue jackets and hats. The man who got into the passenger side of Mr. Mercuri's car had the gun, and he also wore sunglasses and had sideburns. T.C. testified that the man with the gun raped her orally, vaginally, and anally, while the man who initially drove the car raped her anally. After the incident, T.C. was taken to the hospital, and DNA rape kits were completed. T.C. also subsequently provided prosecutors with a DNA sample. T.C. testified that she was never able to identify the offenders, as it was dark, the men wore hats, and she was told to keep her eyes closed during the incident.

¶ 11 The State then offered evidence regarding the prior McNair/C.K. incident. Specifically, C.K. testified regarding the incident involving her and Mr. McNair, and again her testimony largely mirrored the description contained in the State's pretrial motion. She further indicated the offenders were two black men, although only one wore an army fatigue jacket and neither man wore a hat or gloves. Both men raped her vaginally, and one also raped her orally. After the incident, Mr. McNair's car was missing. No DNA evidence was collected from the rape of C.K., as she did not inform the police of the incident for two days.

¶ 12 Willie Alice Atkins, defendant's wife, and Lafondraetta Lanier, Mr. Lloyd's former girlfriend, also testified at trial. Ms. Atkins and Ms. Lanier testified that defendant and Mr. Lloyd were good friends in 1981. Ms. Atkins stated that Mr. Lloyd may have worn an army fatigue jacket at that time, but she did not recall that defendant did so. Ms. Atkins also testified that, in the late 1970's

and early 1980's, she lived on or near the 3300 block of West Maypole Avenue in Chicago, including for a time with defendant. Defendant's father also lived on that block as well. At trial, the State presented evidence that items belonging to Mr. Mercuri and T.C. were found in an alley on the 3300 block of West Maypole Avenue on the day after they were abducted.

¶ 13 The State also presented testimony that buccal swabs were obtained from defendant, Mr. Lloyd, and T.C., and that DNA profiles were created for all three individuals. These profiles were then compared to the DNA profiles created from the rape kits initially completed at the time of T.C.'s rape in 1981.

¶ 14 Kathleen Kozak, a forensic scientist working at the Illinois State Police lab, testified as an expert witness without objection. Ms. Kozak testified that she examined the anal and vaginal DNA samples produced from the rape kits. With respect to the evidence from the anal swabs, the most that Ms. Kozak could say was that there were two male DNA profiles present and defendant and Mr. Lloyd could not be excluded as the donors. However, the vaginal samples indicated the presence of one male and one female DNA profile. Assuming that T.C. was the donor of the female profile, Ms. Kozak testified that the male profile matched Mr. Lloyd's DNA profile.

¶ 15 Finally, the State presented additional evidence regarding the police investigation of this case. After Mr. McNair's Monte Carlo was found parked near where Mr. Mercuri and T.C. were abducted, the vehicle was processed and a number of latent fingerprints were identified. Those prints were ultimately compared with those of defendants in 2003 and 2008 by William Kovacs, a Chicago police department fingerprint examiner. Mr. Kovacs testified that over a dozen of these finger prints matched defendant, the rest were unidentified, and none matched Mr. Lloyd. Mr.

Kovacs testified as an expert witness over a defense objection, with defense challenging his testimony on cross-examination by obtaining an admission that neither Mr. Kovacs or his lab were accredited.

¶ 16 The State also presented testimony regarding defendant's oral statement. That testimony established that in January of 2003, defendant was incarcerated on an unrelated charge when he was interviewed by Chicago police officers and Cook County prosecutors. During that interview, defendant admitted to his participation - along with Mr. Lloyd - in both the McNair/C.K. and the Mercuri/T.C. incidents. Defendant also provided a description of the events of those incidents that largely matched the testimony of C.K and T.C. While defendant was given a choice to provide a videotaped or written confession, he declined the opportunity to do so.

¶ 17 The State also introduced evidence that Mr. Mercuri died of a single gunshot wound to the neck.

¶ 18 The state rested its case, and aside from a stipulation, the defense presented no additional evidence or testimony. Defendant's motions for directed verdict and to strike Mr. Kovacs' testimony were denied. The jury returned a verdict finding defendant guilty of murder. The trial court found defendant was not eligible for the death penalty, because the evidence at trial did not establish whether defendant or Mr. Lloyd shot Mr. Mercuri. Because defendant had a prior murder conviction in an unrelated case, however, the trial court sentenced him to a term of life imprisonment. Defendant timely appealed.

¶ 19 II. Analysis

¶ 20 On appeal, defendant asserts that his trial counsel provided ineffective assistance by failing

to request a *Frye* hearing before the admission of the fingerprint evidence. We disagree.

¶ 21 To establish ineffective assistance of counsel, a defendant must show: (1) his counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Evans*, 186 Ill. 2d 83, 93 (1999). While the defendant must establish both prongs of this two-part test, a reviewing court need not address counsel's alleged deficiencies if the defendant fails to establish prejudice. See *Strickland*, 466 U.S. at 687; *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). As such, an assertion of ineffective assistance is properly denied where the evidence of a defendant's guilt is so overwhelming that a defendant cannot show a reasonable probability that the outcome of the trial would have been different if his trial counsel had acted differently. *People v. Mercado*, 397 Ill. App. 3d 622, 634-35 (2009).

¶ 22 With respect to the issue of a *Frye* hearing, "[i]n Illinois, scientific evidence is admissible at trial only if it meets the standard expressed in *Frye*, which dictates that 'scientific evidence is admissible at trial only if the methodology or scientific principle upon which the opinion is based is "sufficiently established to have gained general acceptance in the particular field in which it belongs." ' " *People v. McKown*, 226 Ill. 2d 245, 254 (2007) (quoting *In re Commitment of Simons*, 213 Ill.2d 523, 529-30 (2004). "A court may determine the general acceptance of a scientific principle or methodology in either of two ways: (1) based on the results of a *Frye* hearing; or (2) by taking judicial notice of unequivocal and undisputed prior judicial decisions or technical writings on the subject." *Id*.

¶ 23 As an initial matter, we note that in Illinois, "the application of the *Frye* standard is limited to scientific methodology that is considered 'new' or 'novel.' " *Id*. at 257. As this court recently recognized, fingerprint analysis is neither novel nor new and there is no authority to support defendant's contention that he was entitled to a *Frye* hearing on the admissibility of the fingerprint evidence in this case. *People v. Mitchell*, 2011 IL App (1st) 083143, ¶ 31. We need not further address the issue of defense counsel's failure to request a *Frye* hearing, however, as we find defendant cannot demonstrate any prejudice resulting from that failure. *Strickland*, 466 U.S. at 687; *Edwards*, 195 Ill. 2d at 163.

¶ 24 On appeal, defendant claims that he was prejudiced because: (1) assuming that a *Frye* hearing was held and the fingerprint evidence tying him to the Monte Carlo found inadmissible the trial court would likely not have admitted the damaging testimony regarding the McNair/C.K. incident as other-crimes evidence; and (2) without the fingerprint evidence there was a reasonable probability that he would have been acquitted by the jury. We disagree with both assertions.

¶ 25 Before other-crimes evidence is admitted, it must first be shown that a crime took place and that the defendant committed it or participated in its commission. *People v. Thingvold*, 145 Ill. 2d 441, 455 (1991). "Proof that the defendant committed the crime, or participated in its commission, need not be beyond a reasonable doubt [citation], but such proof must be more than a mere suspicion." *Id*. at 456. Here, even disregarding the fingerprint evidence tying defendant to Mr. McNair's vehicle, the State offered evidence that defendant confessed to his and Mr. Lloyd's involvement in both incidents. That confession was then corroborated by evidence that: (1) defendant and Mr. Lloyd were good friends at the time of the two incidents, and both C.K. and T.C.

provided physical descriptions that generally matched defendant and Mr. Lloyd; (2) both C.K. and T.C. testified that at least one of the offenders wore an army fatigue jacket, and there was testimony that Mr. Lloyd wore such a jacket around the time of the attacks; (3) Mr. McNair's vehicle was found parked on the same block where Mr. Mercuri and T.C. were abducted, and items belonging to Mr. Mercuri and T.C. were found near where defendant lived at the time; and (4) DNA evidence tied Mr. Lloyd to the rape of T.C. and could not exclude defendant as one of the offenders who raped T.C. In light of this additional independent evidence, we find that the State would have been permitted to use the McNair/C.K. incident as other-crimes evidence even without the admission of the fingerprint evidence.

¶ 26 Similarly, we find defendant cannot show a reasonable probability that the outcome of his trial would have been different if the fingerprint evidence had been excluded. "[C]onfessions frequently constitute the most persuasive evidence against a defendant." *People v. Clay*, 349 Ill. App. 3d 24, 31 (2004). While it is true that "the prosecution must also adduce corroborating evidence independent of the defendant's own statement * * * that evidence need not, by itself, prove the existence of the crime beyond a reasonable doubt. If the defendant's confession is corroborated, the corroborating evidence may be considered together with the confession to determine whether the crime, and the fact the defendant committed it, have been proven beyond a reasonable doubt." *People v. Sargent*, 239 Ill. 2d 166, 183 (2010). Here, defendant confessed to his involvement in the Mercuri/T.C. incident and his confession was corroborated by significant evidence independent of the results of the fingerprint analysis. On such a record, defendant cannot establish any prejudice in support of his claim that the failure to request a *Frye* hearing amounted to ineffective assistance

of counsel. See *People v. Smith*, 341 Ill. App. 3d 530, 547 (2003) (rejecting claim of ineffective assistance of counsel where evidence of defendant's guilt, including confession and other corroborating evidence, was overwhelming).

¶ 27 III. Conclusion

¶ 28 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 29 Affirmed