2014 IL App (1st) 12-1179-U
Sixth Division
Order filed: December 12, 2014

No. 1-12-1179

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	No. 04 CR 21589 (01)
	)	
v.	)	
	)	
SAMUEL DUPREE,	)	Honorable
	)	Luciano Panici,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

Held: The defendant's conviction will be affirmed, where: his out of court identification from a photo array was not impermissibly suggestive; there was no error in the admission of chart evidence linking him to a cellular phone used in the commission of the offense; and there was no error in the admission of toolmark and firearm evidence without a *Frye* hearing.

¶ 1 A jury convicted the defendant, Samuel Dupree, of three counts of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2004)) for the shooting deaths of Carmelita Taylor, Cameron Young and Ryan Jernigan, and one count of attempted first-degree murder (720 ILCS 5/9-1(a)(1), 5/8-4(a) (West 2004)) for the shooting of Terrence Martin. The defendant was

subsequently sentenced to life imprisonment along with a consecutive prison term of 30 years. He now appeals, raising as issues whether (1) his out of court identification should have been suppressed because it was based upon an unduly suggestive photo array; (2) demonstrative evidence listing him as the user of a cell phone traced to the scene of the offense was inadmissible hearsay; and (3) the trial court erred in admitting firearm and toolmark identification evidence without conducting a hearing pursuant to *Frye v. United States*, 293 F. 1013, 1014 (D.C.Cir. 1923). For the reasons that follow, we affirm.

¶ 2 The defendant was indicted for first-degree murder and attempted first-degree murder along with co-defendants D'Andre Greer, James Massey and William Smith.[*] The indictment alleged that, on July 6 and 7, 2004, the defendant and his co-defendants participated in the murder of Taylor, the kidnapping and murders of both Jernigan and Young, and the attempted murder of Martin. Prior to trial, the defendant moved to suppress Martin's identification testimony of him as one of the shooters, alleging that, *inter alia,* (1) it was based upon an unduly suggestive photo array in which the defendant was the only person depicted who was bald, and (2) the identification was conducted while Martin was in the hospital and was under heavy sedation and suffering from impaired vision. The defendant also filed a motion *in limine* under *Frye,* seeking to exclude toolmark evidence connecting the recovered bullet fragments, cartridge cases and projectiles to a gun that was previously owned by the defendant's cousin, Donald Woodson. The trial court denied both motions.

[*] Greer, Massey and Smith are not part of this appeal; Greer, Smith and the defendant were tried at the same time but before separate juries; Massey negotiated a guilty plea deal in exchange for his cooperation with the State, including his agreement to testify against the defendant.

¶ 3 The facts adduced at trial may be summarized as follows. Taylor, Martin, and Jernigan shared an apartment in Robbins, and Martin and Jernigan worked together at Jernigan's auto repair business. Jernigan and Greer operated a drug business together. In July 2004, Greer contacted the defendant, who was his cousin, and Smith, and directed them to go to Jernigan's apartment and steal his drugs and money.

¶ 4 On July 6, 2004, the defendant and Smith went to Jernigan's residence with guns, but he was not home. When Taylor answered the door, the defendant and Smith forced their way into the apartment and, for the next few hours, proceeded to restrain, torture, threaten and sexually assault Taylor and Martin because they could not produce drugs or money. In the meantime, the defendant asked Massey to come to the apartment and help them; Massey agreed, and went to the Robbins apartment where he saw Martin and Taylor tied up. Jernigan, having been lured back to the apartment by the victims under force, arrived with Young. They were met by the defendant and Smith, who had their guns drawn. The defendant and Smith forced Jernigan into the trunk of Massey's Buick and ordered Young into the front of the vehicle. Massey and Smith waited in the car while the defendant went upstairs to the apartment and shot Taylor four times in the head while she was tied up on her bed. The defendant then turned to Martin and shot him in the head twice, leaving him for dead. However, Martin survived.

¶ 5 The defendant, Massey and Smith left Robbins in Massey's car with Jernigan in the trunk and Young in the backseat, and they drove to a remote location at 125th and Doty in Chicago. They released Young, but the defendant shot him in the head as he exited the vehicle. With Jernigan still in the trunk, they drove to the defendant's home in Dolton and parked in the garage, next to his cousin's Jaguar. Realizing he left his car (a cream-colored Aurora) near the Robbins crime scene, the defendant and Massey drove in the Jaguar back to Robbins, leaving Smith to

guard Jernigan in the trunk of the Buick. Upon returning to Dolton, the offenders moved Jernigan to the trunk of the defendant's Aurora; the defendant and Smith drove off in the Aurora and Massey followed in his Buick. They, along with Greer at another location, began calling Jernigan's friends and family members attempting to extort money from them in exchange for Jernigan's life. Eventually, after all attempts to get money from Jernigan's friends failed, the defendant, Massey, and Smith stopped their cars around 56th Street and Perry. Jernigan was released from the trunk of the defendant's car, but the defendant shot him as he started to walk away. All three men fled in their vehicles.

¶ 6 The evidence adduced at trial supported the State's summary of the case. Martin, the surviving victim, testified that, on the day of the crime, he and Taylor were in the apartment when the offenders broke in. Martin identified both the defendant and Smith as the offenders and identified their clothing (khaki pants and a uniform shirt with a nut-and-bolt emblem). Martin testified that Smith used extension cords to tie him up and both men repeatedly asked him and Taylor where Jernigan kept his money and drugs. Over the course of several hours, the defendant and Smith tortured and sexually assaulted Taylor, forced Martin and Taylor to have sex, and attempted to set Martin on fire by pouring flammable materials, including paint, on him and lighting matches.

¶ 7 Martin testified that, at one point, Jernigan's mother, Sheryl Parks, arrived at the apartment. He expected Parks because he was supposed to fix her car for her that day. He told Parks to leave, which she did, angrily stating that she would find Jernigan to fix her car. This detail was corroborated by Parks' testimony.

¶ 8 Martin also described a series of phone calls that took place during the course of the crime, including an incoming call from Jernigan to the apartment phone. When Jernigan called,

Martin and Taylor were forced to entice him to return home. Martin also described overhearing one of the defendant's phone calls in which he was able to identify Greer's voice as the caller. He heard Greer tell the defendant to kill Martin if he did not produce money or drugs. Martin testified that he recognized Greer's voice because he used to live with him. On one call, the defendant had Taylor provide directions to a man later identified as Massey. Sometime after Massey arrived at the apartment, Martin heard the men stating that Jernigan had arrived. Martin next remembered waking up disoriented, crawling to the downstairs neighbor to get help, and later awaking at the hospital.

¶ 9 Martin remained in a coma for several days, and testified that, after regaining consciousness in the hospital, he learned he had been shot four times in the head; twice in the neck and twice in his cheek. One of the bullets had lodged in his eye socket, and he suffers excruciating head pain. On July 14, 2004, Martin gave a description of the defendant to the police as "stocky" with a "low haircut [with] waves" that were "real short." He also provided a description of the clothes the defendant was wearing. Several days later, on July 20, Martin was shown a photo array from which he identified the defendant as the man who placed the gun to his head. Martin acknowledged that he was "seeing double" at the time he was shown the photo array. He further acknowledged that he was being given pain medication at night and that he was groggy at times; however, he denied that this influenced his identification, stating that "I knew who I was looking at."

¶ 10 Martin's version of events was corroborated by Massey, who testified pursuant to a plea agreement with the State. Massey testified that, on July 6, 2004, he agreed to pick up the defendant at an apartment in Robbins. The defendant gave Massey directions to the apartment over the phone, and Massey drove his Buick to the location. At the apartment, he saw Martin

tied up on the floor and Taylor sitting on the couch and the defendant and Smith, who were armed with pistols and wore gloves, khaki pants, and uniform shirts with nut-and-bolt emblems. Massey recognized the shirts from a company where he and the defendant once worked. The defendant and Smith repeatedly asked Martin where he kept the drugs and money, and they ransacked the home. Massey asked the defendant what was going on after the defendant had received a couple of phone calls. The defendant told him that Greer had "set up a lick," which meant an armed robbery. At one point, Martin got on the house phone and spoke to Jernigan, luring him to return to the apartment.

¶ 11 Massey testified consistently with Martin regarding the several hours of torture, including the attempted paint-and-fire attack, and the sexual assaults that the defendant and Smith inflicted upon Martin and Taylor. He stated that, eventually, Smith went downstairs to meet Jernigan while the defendant was on his cell phone. Shortly thereafter, Massey testified that the defendant ordered him to back his car into the driveway and open his trunk, which he did. The defendant forced Jernigan in the trunk and forced Young to lay on the armrest between the front seats of the vehicle. The defendant then went upstairs to the apartment, and Massey heard gunshots.

¶ 12 Massey further testified that they left the scene in his Buick and got on the expressway for a short time, exiting and parking near 115th Street and Doty. The defendant subsequently told Young that he was releasing him, but then shot him several times. Massey testified that he saw the defendant talking on his cell phone as they drove around but that he did not know to whom the defendant was speaking. After the defendant released Jernigan, Massey began driving away, but then saw the defendant draw his gun and heard several shots fired. Massey identified People's Ex. No. 70 as a gun that resembled the gun that the defendant used the night of the crime although he could not be certain that it was the exact gun.

¶ 13 Witness accounts regarding various phone calls corroborated the events described by the defendant and Massey. Parks testified that, after she left the Robbins apartment, Jernigan's downstairs neighbor called her and told her people had been shot. Parks returned to the scene, relieved to find out that Jernigan was not there. Shortly thereafter, she received a phone call from Greer, who asked for $10,000 in exchange for Jernigan's life. The next day, Parks received another call from Greer, who told her that Jernigan was dead.

¶ 14 Glenda Young, a friend of Greer, testified that she was with him on July 6, when Greer received a cell phone call. She heard Greer tell the caller to "kill that bitch and that nigger." Greer put the phone to Young's ear, and she heard Taylor screaming and begging for her life. Young and Greer returned to his home and went to his basement, where Greer received more cell phone calls. She heard Greer ask for Jernigan on one of the calls. Young testified that she saw the name "Jack" appear on Greer's incoming caller identification and that the defendant's nickname was "Jack."

¶ 15 The various phone calls described by the witnesses as used during the commission of the offense were corroborated by the phone records. The parties stipulated to subscriber information for the cell phones that were used; in particular, that one of the phones was registered to Greer, and another to Fransine Wells. Testimony of an investigating Officer, Karen Morrisette, established that Wells had shared a residence with the defendant and that she was his girlfriend. According to Niki Skovran, an expert in historical cell site analysis, a cell phone to which Greer subscribed had interacted with the phone registered to Wells at various times on July 6 and July 7, 2004. Skovran also provided testimony linking calls from Fransine Wells's phone made during the time of the offense to the various locations of the offense.

¶ 16 Megan Misura, a cell phone analyst employed by Chicago's High Intensity Drug Trafficking Area, provided further analysis of phone communications between the parties over the course of the offense. Using charts which detailed the date, time, and duration of each call, together with the number dialed and the phone subscriber, Misura linked each call to parties to the offense or to subscribers that were associated with the parties.

¶ 17 Other evidence submitted at trial included: the electrical cords, blood evidence; paint from Taylor's body; spent shell casings, projectiles, fired bullets, bullet fragments, copper-jacketed bullets and other ballistic evidence collected from the scenes and during the victims' autopsies; a 9 millimeter pistol; and a newspaper covering the crime retrieved from the defendant's home. Chicago Police Detective Brian Quinn testified that he recovered a 9 millimeter semi-automatic luger pistol after a passenger of a car which he was pursuing discarded it near 4111 West End Street. Firearms testing later connected the weapon with this crime.

¶ 18 Brian Mayland, an Illinois State Police Forensic Scientist and expert in firearms identification, explained the scientific methods, procedures, and equipment used in his field. In comparing and analyzing the firearm evidence in this case, Mayland determined that the bullets and fragments recovered that were suitable for comparison came from a 9 millimeter .38 caliber semi-automatic weapon. Mayland testified that, in his opinion, the thirteen bullets, bullet fragments, and projectiles recovered in this case were all fired from the same firearm, with the exception of one bullet recovered from the ground near Young's body on Doty.

¶ 19 On cross-examination, Mayland admitted the conclusions he makes, based on comparing the individual and class characteristics of the firearm evidence, are his subjective opinions. He testified that he cannot attach any type of probability to the certainty of his identifications, such

as 100% or 50%, because finding a "match" is a matter of his opinion. Mayland testified that standard protocol required his reports to be verified by a second examiner, and protocol was followed in this case.

¶ 20 Aimee Stevens, an Illinois State Police Forensic Scientist, testified that she tested the 9 millimeter semi-automatic luger pistol recovered by Detective Quinn and determined, by comparing test-fired bullets with crime scene evidence recovered in this case and stored in the Integrated Ballistics Identification System, that the weapon was used in this crime. On cross-examination, she admitted that her conclusion was her subjective opinion based on her review of the individual and class characteristics of the ballistic evidence. Stevens' report was also verified by a second examiner.

¶ 21 Following arguments, the jury convicted the defendant of murder and attempted murder, and he was sentenced to life imprisonment with an additional 30 year consecutive prison term. His post-trial motions were denied, and this appeal followed.

¶ 22 The defendant first argues that Martin's identification of him as the man who shot Martin should have been suppressed as the product of an unduly suggestive photo array. He contends that he "stood out" from the others in the array because he was the only man with a completely shaved head, and further, that his baldness in the photograph too closely resembled the prior description Martin gave to the police, that the defendant had a "low haircut." Defendant asserts that this, combined with Martin's medicated state and his subsequent testimony that he was "seeing double" at that time, made the identification unreliable. We disagree.

¶ 23 The State initially asserts that the defendant waived this issue by failing to specifically articulate it in his post-trial motion. Although we agree with this statement of the law (see

People v. Burrows, 148 Ill. 2d 196, 251 (1992)), we conclude that, even despite the forfeiture, the defendant's claim fails on its merits.

¶ 24 In a motion to suppress, it is the defendant's burden to prove that the pretrial identification was so suggestive that it violated the due process clause of the fourteenth amendment. *People v. Gabriel*, 398 Ill. App. 3d 332, 348 (2010). A motion to suppress should be granted only where the pretrial encounter was so impermissibly suggestive that it gave rise to a " 'very substantial likelihood of irreparable mistaken misidentification.' " *Id.*, citing *People v. Love*, 377 Ill. App. 3d 306, 311 (2007). Although suspects in a lineup should not stand out or appear to be substantially different from the "fillers" or "distracters" in the same lineup (725 ILCS 5/107A-5(c) (West 2010)), the law does not require that the participants all look alike or be physically identical. *Gabriel*, 398 Ill. App. 3d at 348; *Love*, 377 Ill. App. 3d at 311. Further, differences in appearance affect the weight to be given the identification testimony, not its admissibility. *People v. Allen*, 376 Ill. App. 3d 511, 520 (2007). This court has held that, where persons in a photo array all have otherwise similar characteristics, the fact that the defendant is the only bald individual does not alone render the array overly suggestive. *Id.* A trial court's determination on a motion to suppress will not be reversed unless it is manifestly erroneous. *Id.*

¶ 25 Here, the photo array depicts five men who appear to be of comparable age and size. One of the men has short waves in the front of his head with longer hair in the back, one has a very close haircut, two are nearly bald, and one is bald. We do not agree that the defendant unduly stands out in the photo array, nor do we conclude that the defendant's image too closely resembles Martin's earlier description of him to the police, in which he stated that the shooter had a "low haircut" with "real short" waves. In fact, Martin's description to the police more readily fits two or three of the other men in the array, each of whom could be described as having either

short waves or close haircuts. Accordingly, there was no error in the denial of the motion to suppress.

¶ 26 We also reject the argument that the identification was somehow tainted by the fact that Martin was on pain medication and had impaired vision in one eye at the time he viewed the photo array. At the hearing on the motion to suppress, Officer Morrissette testified that when she arrived at the hospital, she saw that Martin was seriously injured; nonetheless, he was awake and alert, responded appropriately to her questions, and agreed to view the photo array. According to Officer Morrissette, Martin affirmatively identified the defendant as the shooter when shown the photo array. Further, Martin testified at trial that he knew that the defendant was the shooter and that his vision problem did not impair his ability to make the identification. Indeed, the evidence showed that Martin had ample opportunity to view the defendant at close range during the long period at the Robbins residence. This is sufficient evidence to justify the admission of the photo array. Questions as to the credibility of these witness' testimony were for the trier of fact to resolve. See *Allen*, 376 Ill. App. 3d at 521. Thus, there is no basis to reverse the circuit court on this issue. In light of our determination, we need not reach the defendant's claim that the suggestive photo array resulted in an unreliable identification at trial.

¶ 27 Next, the defendant argues that the court erred in admitting charts detailing cellular phone activity at the time of the offense in an effort to link the defendant to the crime. The charts were presented in conjunction with the testimony of phone data expert Misura, and were comprised of columns listing the date, time and duration of each individual cellular call, the number dialed, and the subscriber of the phone that was used. This data was undisputedly derived from the business records of cellular providers, and was admitted pursuant to a stipulation between the parties. The final column of each chart, however, named the "phone user" for each call, which

Misura testified was given to her by the State's Attorney based upon its own investigation. The defendant now argues that the user information was inadmissible hearsay because Misura had no personal knowledge that the defendant was in fact the user of the phone at the time in question. The State responds that the charts were properly admitted as demonstrative evidence and that the user information did not constitute hearsay. We agree.

¶ 28 Initially, we recognize the State's argument that the defendant has forfeited this issue by failing to make his own objection at trial, even though the issue was raised and argued by counsel for the co-defendants. We reiterate that, in order to preserve an issue for review, both a trial objection and a post-trial motion asserting the issue are necessary. *Burrows,* 148 Ill. 2d at 251. Regardless of the forfeiture, however, the argument is without merit.

¶ 29 The use of charts as demonstrative evidence is viewed favorably by courts as a means to assist juries in understanding and interpreting complex issues at trial. *Burrows*, 148 Ill. 2d at 252; *People v. Cook*, 279 Ill. App. 3d 718, 725 (1996). The overriding considerations in admitting demonstrative evidence are relevancy and fairness. *Burrows*, 148 Ill. 2d at 252. The decision to admit such evidence lies within the trial court's discretion and is not subject to reversal absent an abuse of that discretion. *Id.* This court has declined to find an abuse of discretion in the admission of demonstrative evidence where the material underlying it is supported by other evidence that was properly admitted. See *People v. Hernandez*, 313 Ill. App. 3d 780, 786 (2000).

¶ 30 The defendant makes no argument that the charts in this case were irrelevant or that their use was unfair or otherwise unwarranted. He merely contends that the "phone user" column constituted inadmissible hearsay. However, Misura never purported to testify substantively with regard to the user data, and in fact acknowledged on cross-examination that this information was

provided to her by the State's Attorney's office and that she did not personally know who used the phones. Further, and more importantly, the users of the phones were independently established by other evidence admitted at trial. The charts indicated that there were multiple incoming and outgoing calls to and from a phone subscribed to by Fransine Wells, who was shown to be the defendant's roommate or girlfriend. Both Martin and Massey testified that the defendant made and received calls on a cell phone throughout the commission of the offense. Greer's girlfriend, Glenda Young, testified that she saw a nickname ascribed to the defendant on the caller identification of an incoming call to Greer. Accordingly, the circuit court did not abuse its discretion in admitting the charts. See *Burrows,* 148 Ill. 2d at 252.

¶ 31 The defendant finally contends that the court erred in admitting the toolmark and firearm identification evidence that linked the 9-millimeter weapon used in the offense to his cousin. He asserts that such evidence has not been accepted as uniformly reliable by the scientific community, and that, at a minimum, a *Frye* hearing should first have been conducted.

¶ 32 We have previously considered this exact argument in the appeal of the co-defendant Smith (*People v. Smith,* 2014 IL App (1st) 121062 (unpublished order under Supreme Court Rule 23)), and we reject the argument here for the same reasons as in that case.

¶ 33 The admission of scientific testimony in Illinois is governed by the "general acceptance" test set forth in *Frye,* which provides that such evidence is admissible only if the methodology or scientific principle upon which the opinion is based is sufficiently established to have gained general acceptance in its particular field. *People v. Robinson*, 2013 IL App (1st) 102476, ¶ 61 (*appeal denied,* No. 117135 (Mar. 26, 2014)); *Frye*, 293 F. at 1014. The *Frye* standard is limited to scientific methodology that is considered new or novel. *Robinson,* 2013 IL App (1st) 102476, ¶ 61; *People v. McKown,* 226 Ill. 2d 245, 257 (2007). General acceptance of a methodology

need not require that it be unanimously accepted or even accepted by a consensus or majority of experts. *Id.* Further, under *Frye*, a court inquires into the general acceptance of the methodology, not the particular conclusion reached or the methodology used by the specific expert in a particular case. *Id.*

¶ 34 In *Robinson*, we rejected the very argument raised here, finding that federal and state courts considering the issue have "uniformly" concluded that toolmark and firearms identification methodology is generally accepted and admissible at trial. *Robinson*, 2013 IL App (1st) 102476, ¶ 91 (after thorough examination of state and federal cases in ¶¶ 81-90). The court further concluded that the trial court did not err in admitting the evidence without a *Frye* hearing, "particularly where the trial judge barred the witnesses from testifying their opinions were 'within a reasonable degree of scientific certainty.' " *Id.*

¶ 35 In this case, the defendant does not cite to any authority which was not already addressed in *Robinson*. See *Robinson*, 2013 IL App (1st) 102476, ¶81-90 (discussing cases cited by the defendant here, including: *United States v. Glynn*, 578 F.Supp. 2d 567 (S.D.N.Y. 2008); *United States v. Monteiro*, 407 F.Supp. 2d 351 (D.Mass. 2006); *United States v. Green*, 405 F.Supp. 2d 104 (D. Mass. 2005)). As *Robinson* pointed out, no judicial decision, including the ones cited by the defendant in this case, has held that "traditional microscopic firearms comparison testimony [is] generally inadmissible." *Id,* ¶ 85. Additionally, like the experts in *Robinson,* Mayland and Stevens testified that their conclusions were their subjective opinions based on their comparisons of the characteristics of the bullets and fragments. Neither testified that their opinions were scientifically certain, and Mayland specifically testified that he could not attach any type of probability to his identifications.

¶ 36 Additionally, even if a *Frye* hearing was appropriate in this case, the court's admission of the toolmark and firearm evidence would have been harmless error. The admission of evidence may be held to be harmless '[w]hen the competent evidence in the record establishes the defendant's guilt beyond a reasonable doubt and it can be concluded that retrial without the erroneous admission of the challenged evidence would produce no different result.' " *McKown*, 226 Ill. 2d at 275 (quoting *People v. Arman*, 131 Ill. 2d 115, 124 (1989)). Here, even excluding the firearms expert testimony, the evidence in the record included the identification of the defendant by Martin and Massey, the cell phone records corroborating the testimony of the State's witnesses, and the videotaped confession of co-defendant Smith, also corroborating the details of the offense. On its own, the overwhelming remaining evidence established the defendant's guilt beyond a reasonable doubt and a retrial would not produce a different a result. Thus, any error in failing to conduct a *Frye* hearing amounted to harmless error under the facts of this case.

¶ 37 Based on the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 38 Affirmed