S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 24, 2007
v	No. 265821 Washtenaw Circuit Court
GARY EARL LEITERMAN, Defendant-Appellant.	LC No. 04-002017-FC

Before: Davis, P.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of first-degree premeditated murder, MCL 750.316, for which he was sentenced to serve a term of lifetime imprisonment without the possibility of parole. We affirm.

I. Basic Facts and Procedural History

On the morning of March 21, 1969, the body of Jane Mixer was discovered in an out-of-the-way cemetery located several miles east of Ann Arbor. A law student at the University of Michigan, Mixer had been shot twice in the head with a .22 caliber firearm then strangled with a nylon stocking. Earlier that week Mixer had accepted a ride home to Muskegon with a stranger she had met through a ride-share bulletin board located in the basement of the law school. Mixer had told her parents that she would be leaving Ann Arbor at around 6:00 p.m. on March 20, 1969, with a man named David Johnson, and expected to arrive home by 9:30 p.m. that same evening. However, at approximately 10:00 p.m. that night, the roommate of a fellow student named David Johnson received a telephone call from a woman who identified herself as "Janie Mixer" and inquired whether Johnson still intended to drive her to Muskegon. The roommate, who told the caller that Johnson was on stage performing in a campus play at that moment and was not likely to go to Muskegon that evening, is believed to be the last person to have spoken with Mixer before her brief disappearance.[1]

[1] The man who was acting in the play the night of the murder testified at trial that he did not know and had never even spoken with Jane Mixer.

Mixer's abduction and murder was for a time investigated by a task force charged with examining a series of killings in the Ann Arbor and Ypsilanti areas between 1967 and 1969, which were believed to have been perpetrated by a serial killer. However, when no other murders occurred after the 1970 arrest and conviction of John Norman Collins for one of the deaths, the evidence collected during the investigation into Mixer's death was placed into long-term storage and active investigation of the case ceased for more than 30 years.

The evidence produced at defendant's trial showed that in 2001, various items of evidence collected during the 1969 investigation into Mixer's death were removed from long-term storage and sent to the state police crime lab in Lansing for deoxyribonucleic acid (DNA) testing and analysis. Included among the items sent to the lab were the pantyhose worn by Mixer at the time her body was found. There, lab employee Dr. Stephen Milligan took cuttings of sections of the pantyhose thought to contain stains of a biological nature. Subsequent testing of three of the cuttings revealed the presence of DNA, the profile of which matched that of defendant Gary Leiterman, who, although then living in Van Buren County, had lived in a town just northeast of Ann Arbor in 1969.[2]

DNA matching that of defendant was not, however, the only foreign genetic material discovered by Milligan. Testing of a single spot of dried blood identified as having been scraped from Mixer's left hand during her autopsy in 1969 revealed DNA matching the genetic profile of one John David Ruelas. Although recently convicted of the January 2002 murder of his mother, Ruelas was only four years old in 1969 and neither he nor his family, who resided in the Detroit area at that time, could be directly linked to either Mixer or defendant. Evidence collected from the investigation into the murder of Ruelas' mother was, however, processed by the biology unit of the state police crime lab during the same general time period as that collected during investigation into the murder of Jane Mixer.

Also, at defendant's trial, handwriting expert Thomas Riley testified on behalf of the prosecution that after comparing the words "Mixer" and "Muskegeon," which were found written on the cover of a phonebook seized from the basement of the law school library by investigators in 1969, with several known samples of defendant's handwriting, he believed it to be "highly probable" that defendant wrote the words on the phonebook cover. A former roommate additionally testified that while living with defendant during the late 1960s and early 1970s, he stumbled across a stack of newspapers kept by defendant on the floor of his bedroom closet. Featured in the publications found by the roommate were articles regarding John Norman Collins and his suspected role in the Ann Arbor/Ypsilanti area murders during the late 1960s.

The roommate also recalled that defendant owned a revolver and had set up a firing range in the basement of his home. While others who either lived or worked with defendant during that same time period did not recall him having constructed a firing range in his basement, state records confirmed that in 1967 defendant purchased and registered a six-shot .22 caliber Ruger revolver, which was reported by defendant as stolen from him in 1987. During a December 2004

[2] Milligan calculated the probability that someone other than defendant contributed the DNA found on these cuttings as, at its low end, one in more than 40 trillion.

search of defendant's Van Buren County home, however, the police seized a revolver cylinder that was determined by a state police firearms expert to be "consistent with the construction and design of a Ruger single 6 22-revolver cylinder." A state police ballistics expert additionally testified that bullet fragments removed from Mixer's brain during her 1969 autopsy were similar to several found in defendant's Van Buren County home in 2004, and could have been fired from a .22 caliber six-shot Ruger revolver. The ballistics expert further testified, however, that there are more than three dozen models of guns capable of firing similar bullets, which are among the most common sold for that caliber. Defendant's trial concluded with the jury finding him guilty of murdering Jane Mixer.

Following his conviction and sentence, defendant retained new counsel and moved for a new trial on the ground that the DNA evidence on which he was convicted "was so unreliable that it should never been allowed to ever be presented to the jury." In support of his motion, defendant presented a report prepared by Dr. Theodore Kessis, who concluded that the only "reasonable" explanation for the presence of Ruelas' DNA in the blood collected from Mixer's hand was cross-contamination of genetic samples taken in those cases, which were present in the state police crime lab at the same time. Relying on this conclusion, defendant asserted that "[w]ith such obvious evidence of contamination present in this [c]ase, none of the testing results regarding any of the samples tested can be deemed reliable," and were therefore inadmissible under the standard of reliability set forth in *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

Defendant additionally argued that problems with the testing performed by the state police crime lab, as set forth by Kessis in his report, further warranted the exclusion of that evidence at trial as wholly unreliable. Asserting that justice was not served because the facts and conclusions proffered by Kessis were not presented to the jury, defendant argued that a new trial was warranted on the basis of this newly discovered evidence, or in the alternative, because his trial counsel was ineffective for having failed to present such evidence to the jury. The trial court, however, denied the motion after concluding that defendant's principal "complaint," i.e., the credibility of the DNA evidence connecting defendant to the murder, was both adequately and legitimately presented to the jury as matter of the weight to be accorded that evidence. This appeal followed.

II. Arguments and Analysis

A. DNA Evidence

1. Admissibility Under *Daubert*

Citing Kessis' conclusion that cross-contamination of genetic samples taken in the Ruelas and Mixer cases is the only "reasonable" explanation for the presence of Ruelas' DNA in the blood collected from Mixer's hand, defendant asserts that the prosecution's failure to demonstrate the absence of any contamination in the DNA testing conducted by the state police crime lab rendered the results of that testing insufficiently reliable to meet the requirements for admission set forth in *Daubert*, *supra*. As previously noted, the trial court rejected this argument in denying defendant's motion for new trial. A trial court's ruling on a motion for a new trial will not be disturbed on appeal absent an abuse of discretion. *People v Crear*, 242 Mich App

158, 167; 618 NW2d 91 (2000). An abuse of discretion occurs when the result is outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Defendant is correct that the appropriate test for admissibility of expert scientific testimony in Michigan is the reliability standard announced in *Daubert*, *supra* at 587-590. See *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004). In *Daubert*, *supra*, the United States Supreme Court clarified the admissibility requirements for expert scientific testimony by holding that FRE 702 supersedes *Frye v United States*, 54 App DC 46; 293 F 1013, 1014 (1923), which required that expert scientific testimony had to be "generally accepted" to be admissible. According to the Court, "a rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their general approach of relaxing the traditional barriers to opinion testimony." *Daubert*, *supra* at 588 (citation and internal quotation marks omitted). To more accurately reflect the relaxing of such barriers, the Court set forth an illustrative, non-exhaustive list of factors that a trial court could consider when determining whether to admit scientific expert testimony, which include whether the theory or technique that forms the basis of the expert's testimony (1) has been or can be tested, (2) "has been subjected to peer review and publication," (3) has a high "known or potential rate of error," and (4) has a "general acceptance" with the scientific community. *Id*. at 593-595.

The factors that the courts of this state may consider in determining whether expert opinion evidence is admissible under MRE 702 have been amended explicitly to incorporate the standard set forth in *Daubert*.[3] *Gilbert*, *supra*. As stated in the staff comments that follow MRE 702, the purpose of that amendment was to emphasize the trial courts role as gatekeeper to exclude expert testimony that is unreliable because it is based on unproven theories or methodologies in conformance with *Daubert*. Importantly, this standard of reliability focuses on the scientific validity of the expert's methods rather than the soundness of his or her specific conclusions. *Daubert*, *supra* at 589. Thus, under *Daubert*, an expert's opinion is reliable if it is based on the "methods and procedures of science" rather than "subjective belief or unsupported speculation." *Id*. at 589-590.

Here, defendant does not argue that the evidence at issue is the result of faulty methodology or theory, and we are not inclined to so find. Indeed, the polymerase chain reaction (PCR) testing method and its statistical analysis that were utilized in this case have been widely accepted by Michigan courts as reliable. See *People v Coy*, 258 Mich App 1, 9-12; 669 NW2d 831 (2003); see also *People v Lee*, 212 Mich App 228, 281-283; 537 NW2d 233 (1995) ("trial courts in Michigan may take judicial notice of the reliability of DNA testing using the PCR

[3] MRE 702 provides:

> 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.

method").[4] Rather, relying on Kessis' report, defendant argues that the facts of this case suggest imperfect execution of laboratory techniques or procedures.

Specifically cited by defendant is the state police crime lab's initial failure to obtain a discernable DNA profile from a buccal swab taken from defendant for submission to the Combined DNA Index System (CODIS), through which the match of defendant's profile to evidence in this case was first discovered. Although acknowledging that profile testing does occasionally fail for apparently unexplained reasons, Kessis opined in his report that the initial failure to obtain a DNA profile from defendant's buccal swab "could have possibly" resulted from "some form of transfer" of defendant's genetic material from the card on which the genetic material obtained from the swab was stored by the lab, which he asserted "casts . . . doubt on the reliability of the testing."

With regard to the testing of Mixer's pantyhose, Kessis additionally noted that defendant's DNA was found in amounts "in vast excess" to that determined by the lab to have been contributed by Mixer. However, Kessis opined, given that Mixer was likely wearing the pantyhose at the time of her abduction and murder, one would expect her to have contributed a more equal amount of genetic material to the mixture. The differences in amount, Kessis concluded, suggests that Mixer's DNA was deposited on the pantyhose in 1969 and had since degraded, while defendant's was deposited "at a more recent point in time." Kessis also challenged the lab's lack of a centralized error log, as opposed to recordation of errors in individual files, as a hindrance to the lab supervisor's ability to identify and address systematic problems with testing.

We need not, however, address the merits of Kessis' challenges to the testing conducted by the state police crime lab as to the reliability and, therefore, its admissibility. Indeed, the Court in *Daubert* specifically counseled courts to respect the differing functions of judge and jury—stating that the focus of the reliability inquiry "must be upon the principles and methodology, not on the conclusions that they generate." *Id*. at 595. Thus, we join those courts that have concluded that because challenges such as those raised by Kessis concern the manner in which a method is applied in a particular case rather than the validity of the method, they affect the weight that should be given to the evidence rather than its admissibility. See, e.g., *United States v Chischilly*, 30 F3d 1144, 1154 (CA 9, 1994) (finding that, under *Daubert*, "the impact of imperfectly conducted laboratory procedures" is approached more properly as an issue going not to the admissibility, but to the weight of the DNA profiling evidence); see also *United States v Bonds*, 12 F3d 540, 563 (CA 6, 1993) ("in general, criticisms touching on whether the lab made mistakes in arriving at its results are for the jury").

Because the type of testing employed in this case has received general acceptance as reliable, *Coy*, *supra*, any objection to its results are relevant to the weight of the testimony and

[4] Although the now-supplanted *Davis-Frye* test was employed in both *Coy* and *Lee*, this Court has found it "unnecessary to access . . . DNA evidence . . . under the more relaxed [*Daubert*] standard" if it has been determined "to be admissible under even the more rigorous *Davis-Frye* standard." *People v McMillan*, 213 Mich App 134, 137 n 2; 539 NW2d 553 (1995).

not its admissibility. Indeed, the alleged errors identified by Kessis, and relied on by defendant in seeking a new trial in this matter, are insufficient to skew the otherwise reliable PCR methodology used in this case. Rather, the alleged errors strike at the weight of the evidence introduced by the prosecution. There was, therefore, no error in the admission of the testimony at trial, and the trial court did not abuse its discretion in denying defendant's motion for a new trial on that ground.[5]

2. MCL 770.1 and Kessis' Observations as Newly Discovered Evidence

Defendant next argues that a new trial is warranted under MCL 770.1, which permits a trial court to grant a new trial "when it appears to the court that justice has not been done," because Kessis' observations regarding "flaws" in the state police crime lab testing were not presented to the jury. Alternatively, defendant asserts that Kessis' observations and conclusions constitute newly discovered evidence warranting a new trial. These arguments too were raised before and rejected by the trial court in deciding defendant's motion for a new trial. Our review, therefore, is again for an abuse of the trial court's discretion. *Crear*, *supra*. We find the trial court's decision on these issues to be within the principled range of outcomes and, therefore, not an abuse of its discretion. *Babcock*, *supra*.

In *People v Yono*, 103 Mich App 304, 308; 303 NW2d 4 (1981), this Court recognized that "[a]lthough MCL 770.1 . . . authorizes a trial court to grant a new trial when 'it shall appear to the court that justice has not been done,' the statute has been construed as limited to those circumstances where the defendant has been denied a fair trial." (Citations and internal quotations marks omitted). Here, the record does not support that defendant was denied a fair trial as result of the jury not being presented with Kessis' observations and conclusions regarding purported "flaws" in the state's DNA testing.

At trial, defendant presented the testimony of Dr. Daniel Krane, who, like Kessis, opined that the fact that evidence from the Ruelas and Mixer murder cases was processed in the state police crime lab at around the same time raised the question of cross-contamination of the evidence and genetic samples collected during investigation of those matters. As support for this concern, Krane testified that DNA has been shown to be easily transferred in detectable amounts between inanimate objects, as well as from an object to a person to another object.

Krane further testified that given the ease with which DNA will be left by an individual, it is reasonably expected that a person will leave behind a detectable amount of genetic material on any clothing worn by that person. Thus, he found it "unusual" and "rather unexpected" that

[5] Defendant further argues that even if Kessis' observations and conclusions do not affect the reliability of the results of the testing performed by the state police crime lab in a manner sufficient to preclude its admission under *Daubert*, the testing problems identified by Kessis nonetheless render the test results so generally unreliable as to warrant their exclusion. Again, we do not agree. As stated by court in *Daubert*, *supra* at 596, where the basis of the scientific testimony meets the standards of reliability, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking [such] evidence."

Milligan had detected defendant's DNA on Mixer's pantyhose without also detecting a reportable amount of DNA from Mixer. Although expressly offering no dispute regarding the presence of the DNA of both Ruelas and defendant in the samples prepared and tested by the state police crime lab, Krane explained that the mere presence of DNA says nothing about the time frame during, or circumstances under which, that DNA became associated with an article. Noting that the biological material found on Mixer's pantyhose was definitively determined to be neither semen nor blood, Krane further explained that the material could have been buccal in nature, like the swab taken from defendant for testing in connection with this case. Additionally, Krane explained that given the ease with which a readily detectible amount of DNA can be transferred, and considering (1) that Ruelas' DNA was not a mixture with that of Mixer, (2) that evidence pertaining to investigation of Ruelas' murder of his mother was in the state police crime lab at the same time as that collected during Mixer's autopsy, and (3) that Ruelas was only four years old at the time of Mixer's death, the presence of Ruelas' DNA on evidence collected from Mixer was simply too coincidental to support any other conclusion than cross-contamination of the evidence collected in the two cases.

As found by the trial court in denying defendant's motion for a new trial, the issues of contamination and the reliability of the testing performed by the state police crime lab were aptly addressed by Krane during his testimony at trial. While Kessis offered additional and somewhat differing observations regarding the reliability of the testing results, ultimately his views were not so different from those offered by Krane as to persuade us that the failure to present Kessis' observations and conclusions denied defendant a fair trial. Accordingly, we find no abuse of discretion in the trial court's denial of defendant's motion for a new trial on the ground that justice has not been done.

Nor do we find that the trial court abused its discretion in rejecting defendant's claim that Kessis' observations and conclusions constitute newly discovered evidence warranting a new trial. For a new trial to be granted on the basis of newly discovered evidence, a defendant must show (1) that the evidence itself, not merely its materiality, is newly discovered, (2) that the newly discovered evidence is not cumulative, (3) that the defendant could not, with reasonable diligence, have discovered and produced the evidence at trial, and (4) that the new evidence makes a different result probable on retrial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003).

Here, the "evidence" relied on by defendant in seeking a new trial is not newly discovered, and is effectively cumulative to that presented to the jury. Indeed, the materials on which Kessis' relied in developing his opinion, i.e., the reports prepared by state police crime lab personnel, were the same as that relied on by Krane, who, as already discussed, used these materials to reach and present to the jury the same general opinion—that cross-contamination of evidence rendered the testing performed by the lab unreliable. The "new evidence" offered by defendant also would likely have made no difference in the outcome of his trial. As noted above, Kessis' observations and conclusions were not so different from those offered by Krane. Furthermore, the discovery of defendant's DNA on Mixer's pantyhose was not the only evidence supporting his guilt. To the contrary, and as recognized by the trial court in denying defendant's motion, the telephone book cover and related handwriting comparison testimony placed defendant at the law school near the time of Mixer's abduction and murder. Further, there was evidence defendant was in possession of a handgun of the same caliber used in this homicide

during this time period. The trial court did not abuse its discretion in denying defendant's motion for a new trial on the ground that Kessis' observations and conclusion constitute newly discovered evidence warranting a new trial.

3. Effectiveness of Counsel

Defendant next argues that he was denied the effective assistance of counsel as a result of several alleged failures of his trial counsel, including his counsel's failure to challenge the admissibility of the state's DNA evidence under *Daubert*. Defendant raised the issue of ineffective assistance of counsel in his motion for a new trial; therefore, the issue is preserved for review. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). "However, because the trial court did not hold an evidentiary hearing, our review is limited to the facts on the record." *Id*. To prove that counsel was ineffective, defendant must show that his counsel's performance was deficient, and that there is a reasonable probability that but for that deficient performance, the result of the trial would have been different. *People v Matuszak*, 263 Mich App 42, 57-58; 687 NW2d 342 (2004).

As discussed above, this Court has long held that "trial courts in Michigan may take judicial notice of the reliability of DNA testing using the PCR method." *Lee*, *supra* at 282-283; see also *Coy*, *supra* at 10-11. Consequently, defendant cannot demonstrate that defense counsel's failure to challenge admission of the state's DNA evidence under *Daubert* was either defective or prejudicial and, thus, he cannot establish a claim of ineffective assistance of counsel on that ground. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (noting that trial counsel is not required to advocate a meritless position). Indeed, defendant's counsel did not object to the admissibility of the DNA evidence at trial because no reasonable objection could be made.[6]

Relying on the following observations and conclusions by Kessis in his post-trial report, defendant asserts additional constitutional failures of his trial counsel. Kessis asserted that defendant's trial counsel wrongly focused on the possibility of a secondary transfer of DNA between evidentiary samples, rather than pursuing laboratory error and contamination in conjunction with DNA testing of Mixer's pantyhose. Kessis similarly challenged counsel's failure to confront the implication by prosecution witnesses that if the controls used during testing fail to indicate that contamination of the sample has occurred, contamination has not in fact occurred. Kessis asserted that counsel's "failure to impeach such misrepresentations clearly had the potential of leaving the [j]ury with the impression that the testing in this case was reliable, when in fact evidentiary samples can be cross-contaminated without involving the controls." Kessis additionally asserted that defendant's trial counsel improperly failed to elicit from or otherwise permit Krane to clarify that his agreement with the sate police crime lab's determination of a match between evidence found on Mixer's pantyhose and defendant's DNA profile represented a "true positive," or was simply the result of cross-contamination. According to Kessis, "[i]n the absence of such clarification, the [j]ury was undoubtedly left with the impression that Dr. Krane agreed with the State's premise that the testing was reliable." We do

[6] See note 4, *supra*.

not find these statements by Kessis sufficient to support that defendant's trial counsel was constitutionally ineffective.

Trial counsel's decision to focus on a secondary transfer of DNA as the likely source of contamination is a matter of trial strategy which will not be viewed in hindsight. *Matuszak*, *supra* at 58; see also *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (decisions about what evidence to present are presumed to be matters of trial strategy). Moreover, review of Krane's testimony in its entirety does not support a potential for misrepresentation of his opinion concerning the reliability of the testing performed by the state police crime lab in this case. To the contrary, Krane clearly impressed upon the jury his belief that the testing performed by the lab should not be trusted, as the potential for cross-contamination of the evidence collected in this case was simply too great. Accordingly, we find no merit to defendant's claim that he was denied the effective assistance of counsel.

B. Handwriting Comparison Testimony

1. General Reliability

Defendant next challenges the admission of expert testimony regarding handwriting comparison and analysis. In doing so, defendant again cites *Daubert*, and asserts that such testimony is inherently unreliable and should not, therefore, have been admitted at his trial. Because defendant failed to raise this argument below, he must demonstrate plain error in the admission of the challenged testimony. MRE 103(d); see also *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We find that he has failed to do so on the record before us.

In support of his challenge to the general reliability of handwriting comparison evidence, defendant provides only the assertion that "courts around the country have raised grave doubts about the accuracy of handwriting in general." Although in support of this assertion defendant cites several federal district court cases in which handwriting comparison testimony was excluded under *Daubert*, he offers no substantive analysis of the basis for the courts' decisions in those cases. Our review of these cases reveals, however, that in most of the cases the decision to exclude the proffered testimony stemmed not from the "inherent" unreliability asserted by defendant, but rather the specific evidence offered (or not offered) by the government in response to an express challenge to the admissibility of particular testimony from a particular individual. See, e.g., *United States v Lewis*, 220 F Supp 2d 548, 553 (SD WV, 2002), and *United States v Rutherford*, 104 F Supp 2d 1190, 1194 (D Neb, 2000). See also *United States v Saelee*, 162 F Supp 2d 1097, 1106 (D Alaska, 2001) (wherein the court expressly noted that "it is not holding that handwriting analysis can never be a field of expertise under the Federal Rules of Evidence," but rather "merely . . . that the Government has failed to meet its burden of establishing that the proffered expert testimony in th[at] case is admissible under Rule 702"). Thus, we do not view these cases as supportive of defendant's position.

In any event, as recognized by the court in *United States v Crisp*, 324 F3d 261, 270 (CA 4, 2003), although some federal district courts have determined that handwriting comparison testimony does not meet the *Daubert* standards, "every circuit to have addressed the issue has concluded . . . that such evidence is properly admissible." *Id*. at 270, citing *United States v Jolivet*, 224 F3d 902, 906 (CA 8, 2000); *United States v Paul*, 175 F3d 906, 911 (CA 11, 1999); *United States v Jones*, 107 F3d 1147, 1161 (CA 6, 1997); *United States v Velasquez*, 64 F3d 844

(CA 3, 1995). In itself concluding that such testimony is admissible, the court in *Crisp*, *supra* at 271, found that "[t]he fact that handwriting comparison analysis has achieved widespread and lasting acceptance in the expert community gives us the assurance of reliability that *Daubert* requires."

The courts of this state have long received handwriting analysis testimony as admissible evidence. See, e.g., *Domzalski v Jozefiak*, 257 Mich 273, 279; 241 NW 259 (1932) (noting that, while various authorities disagree on the value of handwriting comparison testimony, "all agree that it is evidence, the weight of which is for the trier of the facts"). And,

> [u]nder *Daubert*, a trial judge need not expend scarce judicial resources reexamining a familiar form of expertise every time opinion evidence is offered. In fact, if a given theory or technique is "so firmly established as to have attained the status of scientific law," then it need not be examined at all, but instead may properly be subject to judicial notice." *Crisp*, *supra* at 268, quoting *Daubert*, *supra* at 592 n 11.

Given the history of general acceptance of handwriting comparison testimony by the courts of this state and the absence of any express, binding authority to the contrary, we cannot conclude that the admission of such testimony at defendant's trial was plainly erroneous. See, e.g., *Carines*, *supra* at 763 (to be "plain," error must be "clear or obvious").[7]

2. Specific Testimony

In a brief filed in propria persona, defendant additionally argues that the prosecution's handwriting expert, Thomas Riley, offered false and misleading testimony that deprived him of a fair trial. Because there was no objection to the testimony now challenged on appeal, our review is limited to determining whether defendant has established plain error affecting his substantial rights. *Id*.; see also *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). To obtain relief under the plain error doctrine, a defendant must demonstrate the existence of a clear or obvious error that affected the outcome of the case. *Carines*, *supra*.

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[7] For this same reason, we reject defendant's assertion that his trial counsel was ineffective for having failed to object to the admission of such testimony under *Daubert*. Indeed, in light of the history of general acceptance of handwriting comparison testimony by the courts of this state, we cannot conclude that trial counsel was deficient for having failed to challenge the admissibility of such evidence. Nor do we find that counsel was ineffective for having failed to object to the testimony of the prosecution's handwriting expert, Thomas Riley, as misleading for having been based on (1) a photograph of the questioned document, as opposed to the original, and (2) an analysis that ignored certain aspects of defendant's known writings. Even had such an objection been made, such matters affect the weight to be accorded Riley's opinion by the jury, rather than its admissibility. Moreover, the limitations associated with analysis of a photograph and the appropriateness of Riley's analysis were sufficiently challenged at trial by defense handwriting expert Robert Kullman.

Defendant first asserts that Riley's testimony concerning such matters as pen pressure and direction was "contrived" to mislead the jury because such characteristics could not be seen in the photographs used by Riley to compare defendant's known writings to the handwriting discovered by the police on the cover of the phonebook seized from the basement of the law school library in 1969. However, that analysis of the handwriting found on the cover of the telephone book was limited by the absence of the original phonebook, which had been accidentally thrown out by a custodian while cleaning an evidence storage area some 30 years prior, was made clear to the jury at trial. Indeed, although Riley testified that the photographs were of sufficient quality to permit an accurate comparison of the writings, he conceded during his testimony that his ultimate opinion was hampered by the absence of the original phonebook.[8] Defense handwriting expert Robert Kullman similarly testified that there are "limitations" to one's ability to render an opinion when working from a photograph, including the inability of the examiner to discern such things as the direction of pen strokes. Kullman further testified, however, that the photographs at issue were of "high quality" and represented an ample questioned writing from which to determine that, in his opinion, there was a "high degree of probability" that defendant did not write the words "Mixer" and "Muskegon" on the phonebook cover.[9] Given such testimony, we cannot conclude that the challenged testimony erroneously affected the outcome of defendant's trial.

Defendant also asserts that, contrary to Riley's testimony, none of the "Ks" or "Gs" found in defendant's known writings matched those present in the questioned writing. However, whether the characteristics relied on by Riley in forming his opinion were in fact similar between the writings is a matter of the credibility to be afforded Riley's opinion by the jury. In any event, Kullman expressly testified that nearly "everything" about defendant's known writings, including his formation of the letters "K" and "G," were characteristically different from the question writings with which it was compared. Under such circumstances, we again cannot conclude that the challenged testimony constitutes plain, outcome-determinative error.

Next, defendant challenges as "speculative" Riley's testimony that differences between the questioned writings and those known to be that of defendant could be explained by the fact that the questioned writing was "possibly" made while inside the cramped confines of a telephone booth. However, while defendant is correct that there was no evidence to support that the questioned writings were made while in a confined space, that fact was brought to the jury's attention when Riley acknowledged on cross-examination that while he had no express information concerning the conditions under which the questioned writing was made, the possibility was something that he "had to consider and weigh" in examining the writer's letter formation. Given this acknowledgement, we do not conclude that defendant has shown error, plain or otherwise, that was outcome-determinative.

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[8] Specifically, Riley testified that the absence of the original prevented him from expressly "identifying" the writing as that of defendant.

[9] Kullman additionally testified that he was "not certain" that examination of the original would have permitted him to render a more conclusive opinion.

Finally, defendant argues that Riley was improperly permitted by the prosecutor to testify that the location of the writing, and the fact that the word "Muskegon" was improperly spelled as "Muskegeon" on several of the exemplars provided by defendant, was significant to his opinion. In making this argument, defendant asserts that the prosecution was aware that defendant had been instructed as how and where the words should be written for the exemplar, but that Riley's testimony improperly left the jury with the impression that he had spelled and placed the words of his own accord. The record makes clear, however, that Riley was aware of the circumstances under which the exemplars were made, and that he found these aspects of the exemplar significant only to the extent that they might affect the style of a person's writing. Indeed, Riley expressly testified that he was aware that defendant had been instructed to write the words on a "general area" of book. The officer who took the exemplars from defendant also testified that defendant was told by him to misspell the word "Muskegon," and that he "pointed" to the area of the exemplar on which the words should be written. The record, therefore, does not support that the challenged testimony confused or otherwise mislead the jury. Accordingly, defendant has again failed to demonstrate plain, outcome-determinative error.

C. Prior Conviction

According to the parties, a sample of defendant's DNA was initially taken for submission to the state police and inclusion in CODIS following a conditional plea to the offense obtaining a controlled substance by fraud in violation of MCL 333.7407(1)(c) in January 2002. Before trial, defendant moved in limine to preclude the prosecution from questioning defendant, pursuant to MRE 609, about that offense should he testify at trial.[10] In addressing the motion, the trial court ruled that "the fact" of defendant's plea was relevant to explain the circumstances by which the police initially obtained defendant's DNA. The court further ruled, however, that this fact was admissible "solely" for that purpose and would therefore be accompanied by an instruction expressly limiting its use by the jury.

On appeal, defendant concedes the propriety of informing the jurors of the fact that a sample of his DNA was acquired by the police and submitted to CODIS by a "routine" process. Defendant argues, however, that it was unnecessary and an abuse of the trial court's discretion to additionally permit the jury to be informed of the nature and fact of his conviction. Regardless of the propriety of the trial court's ruling, however, neither the fact nor nature of the offense to which defendant pleaded was admitted during trial. Thus, even if the trial court erred in its ruling, such error was harmless because it does not "affirmatively appear that the error complained of has resulted in a miscarriage of justice." MCL 769.26; see also MCR 2.613(A). Reversal on this ground is not, therefore, warranted.

[10] MRE 609 permits the impeachment of a witness with prior convictions for crimes containing elements of dishonesty, false statement, or theft. See MRE 609(a). Here, defendant did not dispute the dishonest nature of the offense to which he had pleaded. Rather, defendant argued that dismissal of the charge following his successful completion of the "drug court" program to which he was sentenced removed the offense from the ambit of a "conviction" with which he could be impeached.

D. Testimony Concerning Former Lab Supervisor

Finally, defendant argues that the trial court erred in precluding defense counsel from eliciting testimony regarding alleged misconduct by Charles Barna, who had supervised the DNA subunit of the state police crime lab during the initial testing of evidence collected in the Ruelas' and Mixer cases. According to defendant, it was common knowledge that Barna had been forced to resign his position after it was discovered that he cheated on a required proficiency examination concerning the testing and profiling of DNA. The trial court, however, after confirming that Barna did not himself test or review the evidence in either of the cases, found the probative value of such facts, which it describe as "remote at best," to be outweighed by the danger of unfair prejudice. This Court reviews for an abuse of discretion the trial court's decision to exclude the proffered evidence. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). As previously noted, an abuse of discretion occurs when the result is outside the principled range of outcomes. *Babcock*, *supra* at 269.

Pursuant to MRE 403, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Evidence is relevant if it tends to make the existence of a material fact "more or less probable than it would be without the evidence." *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000), citing *People v Mills*, 450 Mich 61, 66-68; 537 NW2d 909 (1995). "Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence." *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002). We agree with the trial court that in light of Barna's indirect and admittedly limited involvement in the testing of the evidence at issue in this case, testimony concerning his alleged misconduct was of limited, if any, probative value. See *Sabin*, *supra* (the probative value of evidence concerns its "tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence"). We further agree that to permit the proffered line of questioning would have cast a pall over the work performed by the state police crime lab not warranted by such indirect involvement. Accordingly, we find no abuse of the trial court's discretion to preclude such questioning at trial.

Affirmed.

/s/ Alton T. Davis
/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio