ATTORNEY FOR APPELLANT:

MARK A. BATES
Appellate Public Defender
Crown Point, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

SCOTT L. BARNHART
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JAMEL GILBERT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A05-0610-CR-609
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Ross Boswell, Judge
Cause No. 45G03-0502-MR-1

September 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Jamal Gilbert ("Gilbert") appeals his conviction of murder, a felony.

We affirm.

ISSUE

1. Whether the trial court erred in admitting DNA statistical probability evidence.

2. Whether the trial court erred when it did not admit evidence of a prior unrelated shooting.

FACTS

On October 9, 2004, Demeka Smith invited several individuals to her birthday party located on Fourth and Tyler Street in Gary, Indiana. Invitees James Baker ("Baker") and Jewaun McFerson ("McFerson") arrived at the party at "10:00 [p.m.] or a little after." (Tr. 52). Shortly after the party began, a fight erupted directly outside the house, and the party ended. Baker and McFerson left the party in Baker's vehicle and proceeded to Baker's residence located on East Seventh Avenue. As Baker was driving away, McFerson, the front seat passenger in Baker's vehicle, noticed that a white four-door vehicle with tinted windows and rims was following directly behind them. Baker and McFerson arrived in front of Baker's residence and got out of the car, but Baker re-entered the vehicle to close his sunroof.

The white four-door vehicle that had been following them pulled up and stopped "a little bit past [Baker's] driveway." (Tr. 58). An individual exited the rear passenger-side of the white vehicle and walked toward Baker; three other individuals remained inside the vehicle. McFerson observed that the man, who had exited the rear passenger-

side, wore a red hooded sweatshirt and he commenced to fire five or six shots in rapid succession at Baker.

The police were called, and McFerson gave the officers a description of the vehicle. The description of the vehicle was dispatched. Officer Donald Evans ("Officer Evans") attempted to respond to the shooting near Seventh and Ohio Street; but, as he approached Tennessee and Eighth Street, he observed two red hooded sweatshirts lying in the middle of the street. Officer Evans stopped and maintained the area until the crime scene detectives arrived. The crime scene detectives collected the two red hooded sweatshirts for evidence. Shortly thereafter, Officer John Faulkner ("Officer Faulkner") stopped a vehicle matching the suspect vehicle's description. Officer Willie Oliver ("Officer Oliver") assisted with the stop. Officer Oliver testified that he pulled four individuals from the white four-door Dodge Dynasty in the following order: the driver, Paris [Albert]; the left rear passenger, Jackie Hicks; the right rear passenger, Gilbert; and the front seat passenger, Carlton Crosslin. That same night, McFerson positively identified the vehicle as the vehicle that was at the scene of the shooting. The following day, McFerson identified Gilbert in a photo array as the person who shot and killed Baker.

The State charged Gilbert with murder, and a jury trial commenced on July 31, 2006. At trial, the State called Rebecca Tobey ("Tobey"), a forensic expert, to testify regarding DNA evidence. Tobey reached the following conclusion:

> The DNA profile obtained from one sample of the sweatshirt, Item 3A3 in Item 3A, demonstrated the presence of a mixture [] with a major and a minor profile.

> In absence of an identical twin, Jamel Gilbert, Item 1A1, is the source of the major DNA profile to a reasonable degree of scientific certainty. James Baker, Item 7A1, can be excluded as being a possible contributor. An unknown individual cannot be excluded as being a possible contributor of the additional alleles.
>
> Additionally, in Item 3A, the DNA profiles obtained from the additional samples from the sweatshirt, Item 3A1 and 3A2 in Item 3A demonstrated the presence of a mixture of at least [] three individuals. Jamel Gilbert, Item 1A1, cannot be excluded as being a possible contributor . . .

(Tr. 451-452).

Over defense counsel's objection, Tobey testified that, based on her conclusions, Gilbert was the source of the major DNA profile to a reasonable degree of scientific certainty on a statistical calculation. According to the statistical calculation, in the U.S. Caucasian population, only "1 in 55 septillion" would match the DNA taken from the inside shirt seam of the sweatshirt. (Tr. 456). In the African-American population, "1 in 1.4 sextillion" would match, and in the Hispanic population, "1 in 35 septillion" would match. (Tr. 456).

Defense counsel also attempted to question Detective James Bond ("Detective Bond") regarding a shooting prior to October 9, 2004, involving a similar white vehicle. The State objected to this line of questioning, arguing that it was irrelevant, and the trial court sustained the objection based on relevancy.

Following the conclusion of the jury trial on July 31, 2006, Gilbert was found guilty of Baker's murder. The trial court set a sentencing hearing for September 22, 2006. At the sentencing hearing, Gilbert was sentenced to forty-five years in the Department of Correction.

DECISION

1. Admission of Evidence

Gilbert first argues that the trial court abused its discretion when it admitted testimony regarding DNA statistical probability evidence. We disagree.

The decision to "admit or exclude evidence lies within the trial's court sound discretion." *Prewitt v. State*, 819 N.E.2d 393, 409 (Ind. Ct. App. 2004). "We will not reverse that decision absent a showing of manifest abuse of discretion that results in the denial of a fair trial." *Id.* at 409-410.

> In accordance with Indiana Evidence Rule 702(b), expert scientific testimony is admissible only if reliability is demonstrated to the trial court. *Id.* at 410. Subsection (a) of that rule requires 'knowledge' that will 'assist the trier of fact to understand the evidence or to determine a fact in issue.'

Id.

As our Supreme Court explained in *Ingram v. State*, 699 N.E.2d 261 (Ind. Ct. App. 2000) (citing *Patterson v. State*, 729 N.E.2d 1035, 1039 (Ind. Ct. App. 2000)):

> DNA evidence is not automatically admissible. Under Indiana Evidence Rules 403 and 702(b), before expert scientific evidence may be admitted in Indiana, the trial court must be satisfied that (1) the scientific principles upon which the expert rests are reliable; (2) the witness is qualified; and (3) the testimony's probative value is not substantially outweighed by the dangers of unfair prejudice.

Id. at 262.

Gilbert does not argue that Tobey was not qualified as an expert in forensic DNA analysis and serology; nor does he argue that the testimony's probative value was substantially outweighed by the dangers of unfair prejudice. Rather, Gilbert argues that

the State's witness was not a statistician and was *not qualified* as such to testify regarding the use of statistics or the *reliability* of statistical analyses.

In *Prewitt*, the appellant also claimed that the trial court erred when it admitted testimony about statistical calculations because there was no evidence that the forensic expert had expertise or specialized knowledge in statistics or their interpretation. We noted in *Prewitt* that "an expert is permitted to testify to his opinion and the reasons therefore without first testifying to the underlying facts or data." *Id*. at 412; *see also* Ind. Evidence Rule 705. In other words, the expert is not required to explain the use of his statistics in order to make his testimony admissible. We held that the doctor's statistical methodology is a matter that goes to the weight of the evidence, not its admissibility. We find no error here.

Finally, we note that even if it can be said that the admission of Tobey's testimony was error, it was harmless at best. An error is harmless if the probable impact of the evidence upon the jury is sufficiently minor so as not to affect a party's substantial rights. *Prewitt*, 819 N.E.2d at 412. Here, the statistical calculations were not the only testimony that may have assisted the trier of fact to reach its decision. Tobey, without objection, also testified that Gilbert's DNA was the major profile on the sweatshirt, and Gilbert acknowledges that his DNA was found on the sweatshirt.

In addition, McFerson, the eyewitness who was in the car with the victim, testified that he noticed a white car with tinted windows and rims following them as they approached the victim's residence. McFerson saw the person exit that car from the rear passenger-side door and start shooting. The following day, McFerson identified Gilbert in

a photo array as the person who shot and killed Baker. Also Officer Oliver testified that he removed Gilbert from the white four-door Dodge Dynasty – identified by McFerson as the vehicle from which the shooter emerged, and Gilbert was seated in the right rear passenger seat of that vehicle – the same position from which McFerson testified that he had seen the shooter emerge.

Given the additional corroborating evidence, any error in the admission of Tobey's statistical calculation testimony was, at most, harmless error. Therefore, the trial court did not abuse its discretion.

2. Evidence of Prior Bad Acts

Gilbert next argues that the trial court erred when it did not admit evidence of a prior unrelated shooting. We disagree.

At trial, defense counsel attempted to question Detective Bond regarding a similar white car that was involved in a shooting prior to October 9, 2004; however, the State objected to this line of questioning. Gilbert's counsel asserted that the introduction of this evidence should have been admitted based on the similarities between the two crimes. Defense counsel explained that he had information regarding a picture of a white vehicle with a black roof, and that the police had been looking for that car in connection with a shooting in Wirt High School. The trial court sustained the State's objection based on relevance. Pursuant to Indiana Rule of Evidence 404(b), it states in pertinent part that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .

Gilbert specifically argues that under what has come to be called reverse 404(b), courts have held that a defendant can introduce evidence of someone else's conduct if it tends to negate the defendant's guilt. Our Supreme Court considered this argument in *Garland v. State*, 788 N.E.2d 425 (Ind. 2003), and stated that a "defendant may do so only when the exceptions of 404(b) apply." 788 N.E.2d at 430.

In *Garland*, our Supreme Court relied on a New Jersey case, *State v. Williams*, 214 N.J. Super. 12, 518 A.2d 234 (1986), where an assault victim's statements identifying her attacker were contradictory, and the defendant sought to admit testimony about similar crimes committed by someone else to prove that someone else must have committed the instant crime. The appellate court reversed the trial court, which excluded this evidence, and held "that the similarities between the instant crime and the prior offenses were so strong that evidence of [someone else's] bad acts was admissible on the question of identity." 788 N.E.2d at 430. Our Supreme Court noted in *Garland*, that "the test [] is whether the *crimes* are strikingly similar." *Id*. at 431. Earlier, in *Allen v. State*, 720 N.E.2d 707, 711 (Ind. 1999), our Supreme Court described the identity exception in Rule 404(b) as "crafted primarily for crimes so nearly identical that the modus operandi is virtually a 'signature.'"

Here, the trial court examined whether the line of questioning was relevant to identity or merely offered to demonstrate propensity to commit such a crime. The trial court concluded that the similarities between the two vehicles – one being a white vehicle and the other being a white vehicle with a black top were not enough. The test, instead, is whether the crimes are so strikingly similar that one can say with reasonable certainty

that someone else committed both crimes. Therefore, the trial court did not err when it did not admit the evidence of a prior unrelated shooting.

We affirm.

KIRSCH, J., and MATHIAS, J., concur.