STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUBEN PINO MESA,

Defendant-Appellant.

UNPUBLISHED
May 26, 2000

No. 219078
Kent Circuit Court
LC No. 98-007614-FH

Before: Doctoroff, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unarmed robbery, MCL 750.530; MSA 28.798. Defendant was sentenced as a fourth felony offender, MCL 769.12; MSA 28.1084, to an enhanced prison term of 5 to 15 years. Defendant appeals as of right. We affirm.

This case arises out of a robbery that occurred on May 16, 1998, in Grand Rapids. Defendant first argues that the trial court abused its discretion by denying his motion for a new trial based on the prosecutor's failure to comply with a discovery order. We disagree. Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). An abuse of discretion occurs when the decision was so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias. *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997).

Shortly after defendant's trial and conviction, the prosecutor informed the court that a recording of the July 8, 1998, interview of defendant by Detective Betz of the Grand Rapids Police Department had been discovered. The recording contained the following exchange:

> *Betz:* What about this deal when you were down at the Heartside Ministries when you took off and left? You saw Kenny down there?
>
> *Mesa:* No. We walkin' and over there this way, me and friend of mine.

* * *

Betz: Kenny was outside?

Mesa: No. Jimmy was—well, Kenny was in inside.

Betz: Okay.

Mesa: On the inside, I think. Ah, he walkin' in over there and Jimmy, Jimmy walkin' from outside. And I was over there and, ah, there was two or three more guy over there. And (?)--, ah, [Harden] come and tell, ah, ah, Kenny 'Ruben, Ruben right there. This is the one that got my money.' I said 'Jimmy, (?)—'. When I told Jimmy, Jimmy (?) –than I got for you, some other guy got, ah, grab some chair and he hit Kenny in the back, in the back on the chair . . .

Betz: Um-hum.

Mesa: . . . and they started fightin' and shit and fightin' and shit. And Jimmy take off. Jimmy the one that take off.

Betz: So Jimmy was the one that ran?

Mesa: Um-hum . . . .

Defendant argues that the trial court should have granted a new trial or dismissed the charges against defendant because of the prosecutor's failure to produce the recording during discovery. We review a trial court's decision "regarding the appropriate remedy for noncompliance with a discovery order for an abuse of discretion." *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). The trial court must inquire into "all the relevant circumstances, including 'the causes and bona fides of tardy, or total, noncompliance, and a showing by the objecting party of actual prejudice.'" *Id.*, quoting *People v Taylor*, 159 Mich App 468, 487; 406 NW2d 859 (1987). Defendant argues that reversal is warranted because he was severely prejudiced by the prosecutor's failure to produce the tape.

Defendant contends that the failure to produce the recording was prejudicial because

> Officer Betz misinterpreted or distorted [defendant's] remarks when he claimed [defendant] said Harden 'ran away' from the Heartside scene. Yet, as a result of the prosecution's failure to produce the tape for trial, [defendant] was deprived of the opportunity defend [sic] himself by confronting Betz and exposing the spuriousness of his testimony, thus rehabilitating himself from the prosecution's suggestion that he must be lying if he claimed a cripple man [sic] could run.

This argument is meritless. Detective Betz testified that defendant told him that it was Harden who ran from the Heartside Hotel area on May 30, 1998:

> *A*. [Defendant] said that there was an altercation between Kenny Gowens and somebody else, and that it was Jimmy Harden, James Harden, that ran away, not him.
>
> *Q*. Just so I'm clear on this, [defendant] says James Harden, the man who was walking with the cane and had the back problems he was describing, ran away?
>
> *A*. Yes.

The transcript of the recording clearly shows that defendant did tell Betz that Harden ran from the area of the Heartside Hotel. Contrary to defendant's contention, there is no contradiction between the trial testimony of Betz and the recording of his interview with defendant. Therefore, the trial court did not abuse its discretion by denying defendant's motion for a new trial because defendant failed to show actual prejudice caused by the failure of the prosecutor to produce the recording.

Defendant next argues that the trial court abused its discretion by refusing to read a special instruction on eyewitness identifications, and choosing to read instead the standard jury instruction on eyewitness identifications. We disagree. We review claims of instructional error for an abuse of discretion. *RCO Engineering v ACR Industries*, 235 Mich App 48, 65; 597 NW2d 534 (1999).

Defendant contends that according to the holding of *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), the trial court was obligated to give a special jury instruction on the inherent unreliability of eyewitness identifications. While the holding of *Anderson* does relate to the inherent unreliability of eyewitness identifications, the case contains no rules, either explicit or implied, relating to jury instructions. The rules of *Anderson* are clearly stated by the Court in its opinion:

> From our own examination of the authorities as cited in this opinion and discussed briefly in Appendix A, we conclude that eyewitness identification through photographs is at least as hazardous as corporeal identification and probably is more hazardous to the securing of correct identification.
>
> We therefore derive the following two rules:
>
> 1. *Subject to certain exceptions, identification by photograph should not be used where the accused is in custody.*
>
> 2. *Where there is a legitimate reason to use photographs for identification of an in-custody accused, he has the right to counsel as much as he would for corporeal identification procedures.* [*Anderson, supra*, 389 Mich at 186-187, emphasis in original.]

The rules of *Anderson* are inapplicable in the present case. Defendant's apparent contention that *Anderson* stands for the proposition that the standard jury instruction on eyewitness identification may be inadequate in certain cases is erroneous.

The trial court instructed the jury on eyewitness identifications pursuant to CJI2d 7.8. Defendant has not presented, and we have not discovered any case law supporting defendant's contention that CJI2d 7.8 may be inappropriate in certain cases involving eyewitness identifications. The present case did involve an eyewitness identification. Thus, it was appropriate for the trial court to read Michigan's standard jury instruction on eyewitness identifications. The trial court did not abuse its discretion by refusing defendant's request that a special jury instruction be read rather than CJI2d 7.8.

Affirmed.

/s/ Martin M. Doctoroff
/s/ David H. Sawyer
/s/ Mark J. Cavanagh