

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT FERENSIC,

Defendant-Appellant.

---

UNPUBLISHED

July 31, 2001

No. 221806

Wayne Circuit Court

LC No. 97-009879

Before: Doctoroff, P.J., and Murphy and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions on two counts of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to twenty to sixty years' imprisonment for each armed robbery conviction, ten to twenty years' imprisonment for the first-degree home invasion conviction, and to two years' imprisonment for the felony-firearm conviction. We affirm.

The victims, an elderly, married couple, identified defendant as one of two perpetrators who broke into their house and robbed them of money and other valuables at gunpoint. After describing defendant to the investigating officers, the victims met with a police sketch artist, who sketched composites of the perpetrators based on the victims' descriptions. One of the officers in charge of the investigation recognized defendant, a former police officer, and defendant's roommate from these sketches, and compiled a photographic array that included defendant. Only one of the victims was able to identify defendant from the photographic array. However, both victims identified defendant from a live lineup and at defendant's preliminary examination.<sup>1</sup> The victims' identification of defendant, along with the officer's testimony that he recognized the two individuals based on the sketch artist's renderings, was the only evidence that defendant was involved in the offenses.

---

<sup>1</sup> Neither of the victims was able to identify defendant's roommate from a photographic array or a live lineup as the second perpetrator.

Defendant first contends that the trial court violated his rights to present a defense and to a fair trial when it abused its discretion in excluding the testimony of defendant's expert witness on identification because the expert's report was not sent to the prosecution two months before trial as specified by the trial court's discovery order. We disagree. This Court reviews a trial court's decision to exclude testimony for failing to comply with a discovery order for an abuse of discretion. MCR 6.201(J); *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997).

When fashioning a remedy for noncompliance with a discovery order, a trial court must first determine whether the objecting party's interest in preparing its own case or its opportunity to test the authenticity of its opponent's evidence has been prejudiced by the noncompliance, and then, if that be the case, must consider what remedy may be appropriate, giving due regard to the competing interests of the opposing party, the court and the public. *People v Taylor*, 159 Mich App 468, 486-487; 406 NW2d 859 (1987). The trial court must also inquire into all the relevant circumstances, including the reasons behind noncompliance and whether the objecting party was actually prejudiced. *Davie, supra* at 598; *Taylor, supra* at 487. Finally, the remedy for noncompliance should not put the objecting party in a better position than the party would have enjoyed if the discovery order had been complied with. *Taylor, supra* at 487. Thus, the exclusion of otherwise admissible evidence should be limited to the "most egregious cases," in which other less severe remedies would fail to protect the parties' competing interests. *Id.*

In denying the prosecution's relevant motion in limine six months prior to defendant's trial, the court ruled that the expert would be permitted to testify so long as defendant furnished a copy of the expert's report to the prosecution two months before trial. In violation of that order, defendant mailed a copy of the expert's report to the prosecution only eleven days before trial. Following the parties' opening statements, in which each party emphasized that the identity of the perpetrators was the central issue in the case and in which defendant repeatedly told the jurors that defendant would present expert testimony on the inherent unreliability of eyewitness testimony, the prosecution successfully moved to exclude defendant's expert witness from testifying. The court reasoned that the prosecution was unable to retain its own expert witness on identification without delaying the trial, and that although defendant mailed the report on the same day he received it, it had been his responsibility to chase up the expert to ensure compliance with the order.

We find no abuse of discretion in the court's ruling, notwithstanding its failure to explicitly place on the record a detailed analysis of each of the relevant factors outlined in *Davie* and *Taylor*. The result of the ruling, the concededly severe sanction of exclusion of this expert testimony, was nothing more than the court had warned of six months before trial. Furthermore, the ruling did not put the prosecution in a better position than it would have enjoyed had the order been complied with because defense counsel was otherwise able to effectively challenge inconsistencies in the victims' identification testimony.

As for defendant's related argument, we likewise find no abuse of discretion in the court's denial of defendant's motion seeking a brief adjournment, see *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000), which decision resulted in the preclusion of testimony from another proposed defense witness. In determining whether a trial court abused its discretion in

denying a motion for an adjournment, this Court should consider “whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments.” *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). Defendant must also show that he was prejudiced by the denial of the adjournment. *Id.* The witness in question would have testified to some differences in identification of the offenders and the vehicle they were driving. The purported testimony was not especially strong, however, and inconsistency inherent in the victims' identification was otherwise shown. Accordingly, defendant has failed to satisfy the requirement that he show prejudice.

For similar reasons, defendant's challenge to the effectiveness of his trial counsel's assistance also fails. Although counsel's failure to secure the testimony of these two witnesses was objectively unreasonable, defendant has not shown that absent this deficient performance the outcome of his trial would have been different. See *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). The victims' identification of defendant was effectively attacked through other means, and standing alone, the testimony of the officer who recognized defendant from the sketch artist's rendering would arguably have been sufficient to convict.

Finally, we hold that defendant's claims of prosecutorial misconduct are without merit. Defendant did not object to the alleged misconduct and our review is accordingly limited to consideration whether this alleged misconduct constitutes plain error. See *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). The challenged prosecutorial references, one regarding defendant's accomplice and one concerning a highly theoretical motive for the offenses, were grounded in the evidence presented and represent appropriate inferences drawn from that evidence. See *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Consequently, we find that no error occurred. *Carines*, *supra* at 763.

Affirmed.

/s/ Martin M. Doctoroff  
/s/ William B. Murphy  
/s/ Brian K. Zahra