

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT DARWIN SMITH,

Defendant-Appellant.

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UNPUBLISHED  
February 24, 2004

No. 245257  
Calhoun Circuit Court  
LC No. 02-001945-FC

Before: Hoekstra, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of armed robbery, MCL 750.529, one count of first-degree home invasion, MCL 750.110a(2), and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to 35 to 60 years' imprisonment on each armed robbery conviction and 25 to 40 years' imprisonment on the home invasion conviction, to run concurrently, but consecutive to concurrent terms of two years' imprisonment on each felony firearm conviction. Defendant maintains on appeal that the evidence at trial was insufficient to convict him of the charged offenses and that the trial court abused its discretion in excluding evidence of an alibi defense. Because sufficient evidence was introduced to convict defendant and because excluding defendant's alibi defense was not an abuse of discretion, we affirm.

In this case, the victims testified that as they slept in their home one evening they were awakened by a loud noise and they observed four armed men wearing masks in the room with them. The men demanded money from the victims and during the course of the incident took some cash and a ring. Fearing for his life, one of the victims escaped by crashing through a closed window, and subsequently the other victim also managed to flee as well. The two victims found each other in the street a short distance from their residence, and after concluding that their attackers had left the area, they returned to their house and notified police.

At trial, defendant challenged the prosecution's claim that he was one of the perpetrators of this crime. The prosecution relied on the eyewitness identification of defendant made by the two victims. Both victims testified that they were acquainted with defendant to some extent and

claimed that despite the mask they were able to observe enough of defendant's face to identify him as one of the four perpetrators.<sup>1</sup> Furthermore, one victim testified that he also recognized defendant by the sound of his voice. Defendant attacked the credibility of those identifications and also sought to introduce an alibi defense, but the trial court refused to allow it because defendant had not provided proper notice.

Defendant first challenges the sufficiency of the evidence to support the jury's verdict that he committed the charged offenses. However, defendant does not maintain that the proofs failed to establish the elements of the charged crimes. Rather, defendant challenges the sufficiency of the eyewitness identification evidence.

In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, \_\_ Mich App \_\_; \_\_ NW2d \_\_ (2003) [Docket No. 236858, issued 12/30/03]. This Court should not interfere with the jury's role of determining the weight or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Questions of credibility should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

To support his argument that the evidence is insufficient, in his brief defendant highlights inconsistencies and weaknesses in the testimony of the victims regarding their identification of defendant and the absence of physical evidence linking defendant to the crime. However, the victims identified defendant at trial; their identification, if believed, is sufficient. In essence, defendant's argument requires that we invade the province of the fact-finder and access credibility; a function that we decline to undertake. *Wolfe, supra*; *Avant, supra*. Viewed in a light most favorable to the prosecution, the two victims' identification of defendant was sufficient.

Defendant next argues that the trial court abused its discretion in not allowing defense witnesses to testify; more specifically, in excluding evidence of an alibi defense despite defendant's failure to file a notice listing the proposed alibi witness. See MCL 768.20. We disagree. We review this issue for an abuse of discretion. *People v Travis*, 443 Mich 668, 679-680; 505 NW2d 563 (1993).

In determining whether to allow an alibi witness to testify despite a notice violation, the court should consider

“(1) the amount of prejudice that resulted from the failure to disclose, (2) the reason for nondisclosure, (3) the extent to which the harm caused by nondisclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant's guilt, and (5) other relevant factors

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<sup>1</sup> From our review of the transcript, it appears that the victims were able to identify at least one other person as well.

arising out of the circumstances of the case.” [*Travis, supra* at 682, quoting *United States v Myers*, 550 F2d 1036, 1043 (CA 5, 1977).]

Here, near the end of the first day of a two-day trial, defendant indicated that despite no previous filing of notice of witnesses to be called, let alone notice of an alibi witness, defendant sought permission to present an alibi witness at trial. However, despite repeated inquiries from his own counsel within five months of trial, defendant failed to reveal an alibi witness until the middle of trial, thus undoubtedly surprising the prosecution, who until that point had no need for alibi-related rebuttal witnesses or investigation. Moreover, defendant failed to present a compelling reason for his failure to disclose such witness to his counsel prior to mid-trial, especially in light of the numerous inquiries by his counsel. These circumstances, coupled with eyewitness testimony concerning defendant’s participation in the charged offenses, lead us to conclude that the trial court did not abuse its discretion when it denied defendant’s untimely request to present an alibi witness.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ E. Thomas Fitzgerald  
/s/ Michael J. Talbot