

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EARNEST E. MATTHEWS,

Defendant-Appellant.

UNPUBLISHED

November 20, 1998

No. 203440

Recorder's Court

LC No. 95-007986

Before: Jansen, P.J., and Holbrook, Jr. and MacKenzie, JJ.

PER CURIAM.

A jury convicted defendant of carjacking, MCL 750.529a; MSA 28.797(a), three counts of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced him to fifteen to thirty years' imprisonment for the carjacking and armed robbery convictions, to be served consecutively to a two-year sentence for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Shortly after midnight on April 18, 1995, Mark Mitchell, Gina Saa, and Michelle Lambert were getting into Mitchell's Jeep Grand Cherokee when two men, one with a sawed-off shotgun and one with a handgun, ordered them to get out of the car and lay on the ground with their heads down. Mitchell identified defendant as the man with the shotgun. The men took the victims' money and jewelry at gunpoint and then drove away in the Jeep and another car. The following day, two police officers spotted the Jeep and, after a chase, caught the driver. The passenger, whom they identified as defendant, escaped on foot. Approximately two months later, defendant was arrested in another matter. He was wearing Mitchell's watch at the time of the arrest. Although Mitchell identified defendant in a lineup, Saa and Lambert did not.

During the cross-examination of Mitchell, defense counsel asked the witness if he had identified the second robber as David Bullock; Mitchell replied that he had. On cross-examination by defense counsel, Saa testified that she was a social acquaintance of Bullock's and that the second robber's voice did not sound like Bullock to her. Mitchell was subsequently re-called at defense counsel's request. At that time, the prosecutor asked Mitchell if he identified Bullock in a separate lineup.

Mitchell stated that he had. Following the close of proofs, defense counsel moved for a mistrial because he had not been given any information on Bullock's lineup, and the lineup had nothing to do with the case against defendant. The trial court denied the motion.

On appeal, defendant argues that the trial court erred in denying his motion for mistrial. Specifically, he contends that a mistrial was required because the prosecutor violated a discovery order by failing to provide defendant with material concerning Bullock's lineup and then brought up the lineup at trial. The claim is without merit.

As a threshold matter, the lower court record in this case contains no discovery order, although we recognize that this does not necessarily mean that an order was not issued. See *People v Davie (After Remand)*, 225 Mich App 592, 594-595 n 1; 571 NW2d 229 (1997). Assuming that the prosecution was ordered to turn over Bullock's lineup sheet in defendant's case, however, a mistrial was not warranted under the circumstances of this case. In exercising its discretion in cases of noncompliance with a discovery order, courts must consider all relevant circumstances, including a showing by the objecting party of actual prejudice. *Id.*, p 598. A mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way. *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988). Here, based on defense counsel's cross-examination of Mitchell, the defense was clearly aware that Mitchell had identified Bullock as the second robber. Defense counsel's questioning of Mitchell also made the jury aware of the identification. Furthermore, Bullock's lineup was completely irrelevant to the issue of defendant's guilt; it was apparently introduced by the prosecution in response to defense counsel's questioning of Mitchell and Saa. Under these circumstances, it is difficult to see how testimony concerning Bullock's lineup resulted in actual prejudice to defendant.

Moreover, even if the prosecutor violated a discovery order and the trial court improperly admitted evidence at trial, any error was harmless in light of the overwhelming evidence against defendant. Error in the admission of evidence is harmless if it is highly probable that the error did not contribute to the verdict. *People v Harris*, 458 Mich 310, 320; 583 NW2d 680 (1998). Defendant was identified by two police officers in separate lineups as the passenger in Mitchell's stolen vehicle one night after the carjacking. He was in possession of Mitchell's watch at the time of his arrest and was identified by Mitchell as one of the robbers. In light of this evidence, it is not highly probable that the evidence of Bullock's lineup contributed to defendant's conviction.

Affirmed.

/s/ Kathleen Jansen

/s/ Donald E. Holbrook, Jr.

/s/ Barbara B. MacKenzie