STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL EDWARD BIERI,

Defendant-Appellant.

UNPUBLISHED
May 9, 2000

No. 206707
Muskegon Circuit Court
LC No. 96-139815-FH

Before: Bandstra, C.J., and Markman and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction and sentence for second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3). At issue in this case is whether the trial court properly excluded defendant's alibi testimony and, if so, the effect of such exclusion. We reverse and remand for a new trial.

Defendant's conviction arose from an assault on an eleven-year-old girl at Hoffmaster State Park in Norton Shores on September 8, 1996. The victim was on a boating excursion with a friend's family, the Gauthiers, when they stopped at the park to climb the dunes. While running down the dunes, the victim saw a man coming up the dunes, from the direction of the beach, toward her and her friend. She later described the man as having brown hair, a "scruffy" beard, wearing glasses, "salmon"-colored shorts, boat clogs, and carrying a large green backpack with a canteen hanging from the pack. The man stepped around the victim's friend, blocked the victim's path, put his hand on her breast, squeezed it, and made a comment relative to her breasts. The victim screamed at the man to stop, then ran to the boat and told the Gauthiers what had happened. Mr. Gauthier and one of his daughters searched for the man for an estimated five to ten minutes, then returned to the boat, radioed the United States Coast Guard, and began piloting their boat down the shoreline.[1] The victim soon spotted a man wearing salmon-colored shorts, on the beach with a dog; no dog was present at the time of the assault. The victim claimed that, although she was too far away to see physical details of the person spotted on the beach, she "had a feeling" that it was the man who had assaulted her. The Gauthiers' two daughters agreed that the man on the beach was the person they had also passed on the trail. Mr. Gauthier maneuvered the boat closer to the shore, approximately seventy to eighty feet from the man on the

beach, and the girls agreed that this was the man they had seen on the trail. Mr. Gauthier made a second call to the Coast Guard after the victim identified the man on the beach as her attacker. The Gauthiers then began calling to the dog, hoping to find identification tags that could help identify the man on the beach, but the man called the dog back and restrained it. Shortly after being spotted, the man went behind some bushes, changed into other shorts, returned to the beach, and began watching the Gauthier boat through binoculars. By this time, the Gauthiers had maneuvered their boat away from the shore and toward the public beach. It is undisputed that defendant was the man on the beach.

Trey Scott of the United States Coast Guard was informed of the Gauthiers' call at 3:52 p.m. and arrived at their boat approximately seven minutes later. He spoke briefly with the Gauthiers, then watched defendant on the beach, seeing him disappear into the woods a short time later. The record is unclear with respect to precisely what time Scott saw defendant. He testified that upon his arrival, he met with the Gauthiers on land, but then observed defendant through binoculars from his boat, approximately 200 yards away from defendant. Viewing the evidence in the light most favorable to the prosecutor, we presume that Scott spotted defendant no later than 4:05 p.m. According to Scott, defendant was wearing pink shorts at that time, but after he disappeared into the woods, he emerged approximately twenty minutes later wearing different clothing. This testimony was inconsistent with that of the victim and the Gauthiers, who testified that defendant changed from the pink shorts in almost plain sight and returned to the beach at approximately the same time the Coast Guard boat arrived.

Scott testified that he contacted the Norton Shores police shortly after spotting defendant, recognizing that his jurisdiction did not extend to the beach area. The record is unclear with respect to the communications leading to the local police involvement in the case. Although Scott's testimony clearly indicates that he did not contact the local police until after he arrived at the Gauthiers' boat and had watched defendant for a short time, Thomas Sabo, a Norton Shores police detective, testified that he heard the dispatch call regarding the incident at 3:49 p.m.-- three minutes before Scott received the information. He later clarified that he, personally, did not receive the call; rather, it was received by the police department at 3:49 and was relayed to officer Jose Gutierrez, not to Sabo.

Sabo testified that he arrived at the park at approximately 3:54 p.m., but on cross-examination, it was pointed out that his written report repeatedly indicated that he arrived at 4:20 p.m. He eventually suggested that Gutierrez had perhaps arrived at 3:54, while Sabo arrived later.[2] Sabo ultimately found defendant approaching a car in the east parking lot of the park. When asked what time he had arrived "at the beach," defendant responded that it had been between 3:00 and 3:30.[3] At Sabo's request, defendant emptied his backpack into the trunk of his car. It contained, among other things, pink or salmon-colored shorts, gloves, a ski mask, condoms, and other items of clothing.[4] Sabo claimed that he then returned the items to the backpack before taking the pack into custody. He testified that the bag contained a canteen, but that he left the canteen in the trunk. The bag did not contain boat clogs, nor was defendant wearing boat clogs at the time of his arrest. Defendant explained that he always carried his gloves and ski mask because he hiked quite often and was therefore always prepared for inclement weather. When questioned with respect to the condoms, he speculated that they had likely been in the backpack for several years, pointing out the packages' worn condition.

Defendant testified that, upon arriving at the park, he removed his backpack from his car, put

his dog on a leash, and walked a trail called the Walk-a-Mile Trail to the beach, cutting across the dunes as he neared the end of the trail. He estimated that it took approximately forty minutes to walk from the parking lot to the beach and that he let his dog off the leash during most of the walk. According to defendant, he sat down at the shoreline and let his dog play in the water, then went into the bushes and changed his clothes before swimming for approximately ten minutes. He claimed that he noticed the Gauthiers' boat when the occupants began calling to his dog. He first believed that they were upset because he had allowed the dog to run loose, but then became suspicious of their motives, fearing they might be trying to steal the dog. According to defendant, he watched the boat through his binoculars, trying to obtain the license number so he could give it to DNR officials. At some point after he changed his clothing and after watching the Gauthiers' boat for a short time, he saw a Coast Guard boat, then saw an officer leave that boat and approach him on the beach. When the officer turned around and returned to the boat, defendant decided to leave the beach and go home. He denied seeing the victim in the dunes area.

Prior to opening statements, the prosecutor brought a motion in limine to prevent the testimony of several members of defendant's church who planned to testify that they saw defendant enter the park between 3:20 and 3:30 p.m. The prosecutor argued that defense counsel had given no notice of an intent to present an alibi defense, and thus should be precluded from calling these witnesses. Defendant argued that the disputed witnesses were not alibi witnesses but were res gestae witnesses. The court ruled:

> I'm going to take it under advisement until such time as the People finish their proofs and have established what the time sequence is. It would appear that if the call from the boat was around 3:52, and if, in fact, these people testify that they saw him arrive around 3:20, I'm not sure that the People are prejudiced by that.

Conflicting testimony was presented with respect to how long it would take a person to get from the parking lot to the beach where defendant was ultimately spotted by the Gauthiers and the Coast Guard. Karen Hemmelsbach, a DNR employee working at the park, testified that, it would take approximately 1-1/4 hours to reach the beach via the Walk-a-Mile Trail from the parking lot.[5] However, she also testified that, by jogging and cutting through the dune area off the trails, a person could reach the beach area in which defendant was seen in one-half hour. Moreover, a flight of stairs located 30 to 40 yards from the parking lot provided almost immediate access to the public beach, located one-half to one mile from the beach area at which defendant was spotted by the Gauthiers and the Coast Guard.[6]

During opening statements, defense counsel contended that the evidence would show that, because of the time frame in which the attack occurred, it was physically impossible for defendant to have committed the crime. At the conclusion of the prosecutor's case in chief, the court returned to the motion in limine. After hearing the testimony of two witnesses, Philip and Louisa Wheeler, and the investigating officer in the case, the court granted the prosecutor's motion. Ultimately, the proposed witnesses were allowed to testify with respect to defendant's reputation in the community, but were not allowed to testify with respect to their encounters with defendant at the park. Defense counsel moved

for a mistrial and also requested that the court stay the proceedings pending an interlocutory appeal to this Court. Those motions were denied, and the jury found defendant guilty of second-degree criminal sexual conduct. MCL 750.520c; MSA 28.788(3).

Following trial, a *Ginther* hearing was held, along with hearings with respect to defendant's post-trial motions for additional discovery and for a new trial. The court denied defendant's motions and concluded that, while defense counsel's performance in not filing a notice of alibi fell below an objective standard of reasonableness, it did not so prejudice defendant as to deprive him of a fair trial. Defendant appealed to this Court. At the close of oral arguments, we requested the parties to provide supplemental briefing on the sole issue of whether, if believed, the excluded testimony would have made it impossible for defendant to be on the beach where he was spotted by the Coast Guard at approximately 4:05 p.m. The parties have complied with our request and we now reverse and remand.

MCL 768.20(1); MSA 28.1043(1) provides that a defendant intending to offer alibi testimony must notify the prosecutor not less than ten days before trial of his intention to raise an alibi defense. The trial court has the discretion to exclude alibi testimony when the defendant violates the notice provisions of MCL 768.20; MSA 28.1043. MCL 768.21; MSA 28.1044; *People v Travis*, 443 Mich 668, 679; 505 NW2d 563 (1993). As an initial matter, defendant contends that the proffered testimony was not, in fact, alibi testimony; however, this conflicts with defense counsel's opening statement, predicting that the evidence would show that it was impossible for defendant to have been at the scene of the attack when it took place. Alibi testimony is testimony offered for the sole purpose of placing the defendant elsewhere than the scene of the offense at the time the offense was committed. *People v McGinnis*, 402 Mich 343, 345; 262 NW2d 669 (1978). If believed, alibi testimony often forms the "perfect defense," as the defendant could not have been where the prosecution claimed he was. Alternatively, it may serve to raise a reasonable doubt with respect to identification even if defendant's presence at another place is not adequately established. *People v Burden*, 395 Mich 462, 467; 236 NW2d 505 (1975); *People v Erb*, 48 Mich App 622, 630; 211 NW2d 51 (1973). The evidence in this case satisfied the latter purpose; if believed, it could have raised a reasonable doubt as to the identification testimony. As a result, we conclude that it constituted alibi testimony.

The purpose of MCL 768.20; MSA 28.1043 is to avoid unfair surprise. *Travis*, *supra* at 675-676. Notice-of-alibi statutes assist in serving the ends of justice by facilitating liberal discovery which gives "both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial." *Wardius v Oregon*, 412 US 470, 473; 93 S Ct 2208; 37 L Ed 2d 82 (1973). Requiring advance notice of an alibi defense is also a recognition that an alibi can be easily fabricated, and that the State has a legitimate interest in protecting itself against such tactics. *Williams v Florida*, 399 US 78, 81; 90 S Ct 1893; 26 L Ed 2d 446 (1970). Requiring advance notice affords the prosecutor the time and the information necessary to investigate the merits of an alleged alibi. *People v Merritt*, 396 Mich 67, 77; 238 NW2d 31 (1976). On the other hand, excluding such evidence is a severe remedy and should be limited only to egregious cases, after examining the competing interests involved. *Id.* at 82; *People v Burwick*, 450 Mich 281, 294; 537 NW2d 813 (1995). Thus, not only must we analyze the issue pursuant to the statutory notice requirements, but a defendant's right to produce witnesses in his favor is also an important

consideration. US Const, Am VI; Const 1963, art 1, § 20; MCL 763.1; MSA 28.854.

We turn first to the statutory notice requirement. In exercising its discretion with respect to whether to exclude alibi testimony on the basis of failure to comply with the notice requirements of MCL 768.20; MSA 28.1043, a trial court should consider the following factors: (1) the amount of prejudice resulting 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 arising out of the circumstances of the case. *Travis, supra* at 682. We find that the elements of this test, considered as a whole, militate in favor of introduction of the evidence.

First and foremost, we fail to see how the People were prejudiced by defendant's failure to provide notice of this testimony. The prosecutor was not only aware of at least two of the alibi witnesses, Philip and Louisa Wheeler, more than six months before trial, but these witnesses were subpoenaed as witnesses for the People and were included on defendant's witness list filed twelve days before trial. The prosecutor argued that, because of the lack of notice, he failed to question these witnesses with regard to what time they had seen defendant enter the park. Yet, the prosecutor's own investigator, police detective Elmer Ogg, testified that he was aware of the Wheelers' claims that they and eight others had seen defendant enter the park earlier in the day. Detective Ogg visited Mrs. Wheeler and had a telephone conversation with Mr. Wheeler. He knew what time the Wheelers and their eight companions left Grand Rapids, he knew that this group spoke with defendant at the time defendant entered the park, and Ogg was subsequently instructed by the prosecutor to retrace their route to establish the amount of time it would have taken this group to travel from their Grand Rapids departure point to Hoffmaster State Park.

The purpose of MCL 768.20; MSA 28.1043 is to avoid surprise, not to disparage an alibi defense. *Merritt, supra*, at 77. The prosecutor here explained that he deliberately avoided questioning the witnesses with respect to a specific time line for fear of suggesting that they could help defendant by creating an alibi for him. It is clear that the prosecutor knew that these witnesses might be able to establish the time of defendant's arrival at the park, but chose not to explore this evidence. To say that the prosecutor can be prejudiced, not by surprise but because of its trial preparation, would effectively transform the discretionary exclusion of alibi testimony to a mandatory exclusion. The Michigan Supreme Court has made clear that the exclusion of this evidence is discretionary. *Travis, supra* at 679-80. Although defense counsel's failure to file notice violated MCL 768.20; MSA 28.1043, the only harm which resulted from this failure was due to the prosecutor's specific decision to not inquire of the witnesses about possible alibi testimony. As the trial court noted, the prosecutor acknowledged that he anticipated defendant would raise an alibi defense. The prosecutor cannot now legitimately claim he was surprised by either the defense or the identity of the witnesses.

The trial court also noted that the People would be prejudiced by granting a continuance because the jury could not be expected to clearly remember the testimony already presented. However, this situation was the result of the court's decision to take the matter under advisement rather than rule on the motion *before* the prosecutor presented his case in chief. As such, it cannot be considered in our analysis of the prejudice caused by *defendant's* failure to comply with the notice

statute.

The second factor to consider in our analysis is defendant's reason for non-disclosure. Here, defendant maintained that the Wheelers and the others that saw him at the park entrance were res gestae witnesses, not alibi witnesses; therefore, no notice was required. While we disagree with the conclusion that this was not alibi testimony, defendant raises a reasonable argument. A res gestae witness is "an eyewitness to some event in the continuum of a criminal transaction and [one] whose testimony will aid in developing a full disclosure of the facts surrounding the alleged commission of the charged offense." *People v Hadley*, 67 Mich App 688, 690; 242 NW2d 32 (1976). "One need not be an actual eyewitness in order to be a res gestae witness if his or her testimony would assist in developing a full disclosure of the facts." *People v Baskin*, 145 Mich App 526, 531; 378 NW2d 535 (1985). This Court has also explained that res gestae witnesses are those "whose testimony may aid the making of a fair presentation of the res gestae of the crime charged and may be necessary to protect the accused from being victimized by false accusations." *Baskin*, *supra* at 533, citing *People v Fudge*, 66 Mich App 625, 629; 239 NW2d 686 (1976). It was reasonable for defense counsel to believe that the Wheelers and the other individuals who saw defendant enter the park were res gestae witnesses. The prosecutor made a significant argument that the articles found in defendant's backpack-- ski mask, gloves, and condoms-- were evidence that defendant came to the park with the specific purpose of committing a sexual assault, contending that this was not a random, spur-of-the moment attack, but was premeditated. In light of this theory, defendant's actions before the attack could reasonably be considered part of the res gestae of the crime. This is particularly true where the witnesses were included on the prosecutor's witness list. Presumably, they were included to testify with respect to events at the park on the day of the attack. While this does not excuse defense counsel from filing the requisite notice, we find that defendant offered a relatively reasonable explanation for that failure. That is, this is not apparently a case in which defense counsel attempted to manufacture a late-hour alibi defense or conceal the existence of evidence to gain a tactical advantage. Therefore, we conclude that this factor weighs in favor of allowing the evidence.

Third, with respect to the extent to which any harm to the prosecutor was, or could have been, mitigated by subsequent events, we find that this factor also weighs in favor of admitting the testimony. As previously discussed, any harm to the prosecutor was a result of trial strategy, not lack of notice; and the prejudice caused by the court's decision to delay ruling on the motion to exclude the evidence was not prejudice attributable to defendant. At the time the motion was brought, any prejudice resulting from the prosecutor's investigation and trial strategy could have been mitigated by allowing the prosecutor additional time to investigate the merits of the alibi defense.

Moreover, as the trial court noted, there was significant difficulty in establishing the exact time the attack took place. The disputed witnesses only estimated the time at which they saw defendant enter the park, and even this testimony could not establish conclusively that defendant could not possibly have been on the trail at the time the attack took place. Additionally, these witnesses were clearly long-time friends of defendant. Thus, effective cross-examination with respect to inconsistencies in their estimated times and with respect to their motives could well have mitigated any prejudice caused by admitting the witnesses' testimony.

The fourth factor, the weight of the properly admitted evidence supporting defendant's guilt, deals largely with the degree to which the prosecutor would be harmed by the admission of the alibi testimony. That is, this factor addresses another aspect of prejudice caused by the lack of notice. In *Travis*, *supra*, the Supreme Court addressed the *prosecutor's* failure to provide notice of alibi rebuttal witnesses. *Id.* at 668. In addressing this factor of the test, the Court described a victim's identification of the defendant buttressed by a description of the attacker as "substantial but not overwhelming," and therefore found that this factor weighed in favor of excluding the evidence. That is, because the prosecutor failed to give the requisite notice, and because the properly admitted evidence was not overwhelming, the prosecutor was not allowed to buttress a marginal case against defendant with a surprise witness. Likewise, where a defendant fails to give notice of an alibi defense, that defendant may not buttress an otherwise marginal defense with the surprise witnesses. The instant case was very much a credibility contest. The victim and her two friends identified defendant as the man they saw on the trail; defendant admitted that he was at the park and likely followed a route which included the trail on which the attack took place, but denied committing the attack. Thus, this factor, in our judgment, weighs in favor of excluding the evidence.

Fifth, in considering the other relevant factors arising out of the circumstances of the case, we note that the excluded witnesses would have offered more than alibi testimony, yet were excluded from doing so. The prosecutor relied heavily on defendant's alleged admission that he arrived at the beach itself between 3:00 and 3:30 p.m. and relied on defendant's time line estimates that would have placed him on the beach at the time the attack occurred. Absent the excluded testimony, defendant's only opportunity to rebut this implication was through his own explanation that he meant he arrived at the *park* between 3:00 and 3:30, and his explanation that he could only *estimate* how long it took to drive to the park, how long it took to walk to the beach, and how long he was there before seeing the Coast Guard boat. The witnesses would have provided the jury with additional time line information from which to determine first, whether defendant was fabricating his testimony, and second, the accuracy of defendant's own estimates. For example, defendant estimated that he arrived at the park between 3:00 and 3:30 p.m. The prosecutor attempted to impeach this testimony by defendant's statements suggesting that he arrived at the *water* between 3:00 and 3:30. Absent the collaborating testimony of those who saw defendant enter the park, the jury could reasonably believe that defendant arrived at the water well before the attack, making it more likely that he was the person walking *from* the beach area, up the trail. If, however, he was allowed to present evidence that he was at the parking lot shortly before the attack, it would not only be less likely that he was on the trail at the time of the attack, but it would be far less likely that he would have been traveling *from* the beach area. Rather, even if defendant was somewhere on the trail at the time of the attack, he was likely traveling *toward* the beach rather than away from it. Similarly, if defendant was at the parking lot at approximately 3:20, it was unlikely that he told the police officer that he was at the *water* between 3:00 and 3:30.

The prosecutor suggested that the jury consider several instances in which defendant's demeanor indicated his guilt: removing a ring from his hand during the preliminary examination; watching the Gauthiers' boat through his binoculars; taking a different route from the beach to the parking lot, allegedly to avoid arrest. The disputed witnesses saw defendant when he returned to the parking lot later in the afternoon, and would have testified with regard to his demeanor at that time, suggesting that

he was relaxed and not attempting to leave the park in a hurry. This was not alibi testimony; rather, it could have been offered to rebut the prosecutor's suggested inferences of guilt. Nevertheless, it was excluded by the court's instructions limiting the testimony to reputation in the community and specifically precluding any testimony with regard to seeing defendant at the park. Thus, the court's ruling precluded more than mere alibi testimony. Therefore, this factor also weighs in favor of admitting the testimony. Because four of the five factors relevant to the statutory duty to provide notice weigh in favor of allowing the testimony, we find that the trial court erred in excluding the testimony under the statute.

Finally, we turn to defendant's right to present witnesses in his own defense. US Const, Am VI; Const 1963, art 1, § 20; MCL 763.1; MSA 28.854 . In doing so, we must necessarily examine the degree of prejudice to defendant resulting from exclusion of the testimony. See, e.g., *People v McMillan*, 213 Mich App 134, 140; 539 NW2d 553 (1995). As the trial court acknowledged, establishing the time the attack took place was difficult, if not impossible, in this case. The only precise evidence with respect to the disputed time line was Trey Scott's testimony that he was dispatched to the Gauthiers' boat at 3:52. Even this, however, was subject to inaccuracy, for Scott also testified that this was not necessarily the exact time the call came in to the Coast Guard, and the record does not establish whether Scott was dispatched after the Gauthier's first call to the Coast Guard or their second call, *after* defendant was spotted on the beach. Rather, it was merely the time that the incident was relayed to Scott from the dispatcher. Even presuming that the dispatcher relayed the call immediately after it was received and that this dispatch was available to other law enforcement agencies, officer Sabo testified that he heard the call at 3:49. Thus, the testimony did not clearly establish at what time the call was made to the Coast Guard or which of two calls precipitated the initial dispatch.

In support of his motion in limine, the prosecutor contended that the attack took place between 3:17 and 3:32 p.m. However, during his closing statement, he repeatedly explained to the jury that the incident took place five to ten minutes before the 3:52 p.m. call to the Coast Guard–that is, between 3:42 and 3:47. This does not necessarily comport with the testimony. Joel Gauthier testified that after the victim returned to the boat, he and his daughter searched for the attacker for five to ten minutes. Even assuming that the first call precipitated the dispatch, the prosecutor's estimate regarding the time of the attack did not account for the amount of time it would have taken the victim to get back to the boat following the attack, the amount of time she spent explaining to the Gauthiers what had happened, the amount of time it took Joel Gauthier and his daughter to get back to the place of the attack, or the amount of time it took them to return to the boat after they had given up their five- to ten-minute search. If the jury believed defendant's testimony that he arrived at the park between 3:00 and 3:30, and that it took approximately forty minutes to reach the beach, the jury could reasonably conclude that he was on the trail five to ten minutes before the attack. That is, a 3:00 arrival could have placed defendant at the beach by 3:40, consistent with the prosecutor's argument that the attack took place between 3:42 and 3:47. However, if defendant did not leave the parking lot until 3:20 or later, it is significantly less probable that he committed the act, particularly when that act likely took place earlier than argued by the prosecutor.

As previously noted, the prosecutor relied heavily on defendant's alleged admission that he arrived on the beach between 3:00 and 3:30. Additionally, the prosecutor pointed out that defendant's

own time line lacked credibility because the time line did not place him at the beach until *after* he was spotted by the Coast Guard, yet he testified that he was at the beach for approximately twenty minutes *before* seeing the Coast Guard boat. Defendant repeatedly maintained that he was merely providing rough estimates of the time it took to drive from place to place in Grand Rapids before leaving for Hoffmaster Park, the time he spent in the parking lot, the time it took to walk the trail, and the time he spent on the beach before seeing the Coast Guard boat. However, this lack of precision was used to establish a lack of credibility. Thus, absent any corroborating evidence with respect to the time defendant arrived at the park, it was reasonable for the jury to conclude that defendant could have been, as the prosecutor argued, at the *water* between 3:00 and 3:30. This created significant prejudice to defendant's case.

Even more prejudicial to defendant was the court's delay in ruling on the prosecutor's motion in limine. By delaying the ruling, the court created the very situation on which it relied in denying a continuance-- the prosecutor had already presented its case-in-chief and would be prejudiced by delaying the trial. Moreover, defense counsel, in his opening statement, told the jury that evidence would be presented showing that it was impossible for defendant to be at the site of the attack when it took place. Counsel was then precluded from presenting that evidence. This failure to follow through with promised evidence could have lent support to the prosecutor's contention that defendant was fabricating the chain of events prior to being spotted on the beach. Although defense counsel had discretion whether to raise this issue during his opening statement, we also note that the trial court at least implied, prior to opening statements, that the evidence would be allowed: "It would appear that if the call from the boat was around 3:52, and if, in fact, these people testify that they saw him arrive around 3:20, I'm not sure that the People are prejudiced by that." The evidence did establish that a call to the Coast Guard was probably made at approximately 3:52 and that the witnesses saw defendant arrive at approximately 3:20 p.m. Nevertheless, the court excluded the testimony.

Error in exclusion of evidence shall not be grounds for reversal unless it affirmatively appears that the error complained of resulted in a miscarriage of justice. MCL 769.26; MSA 28.1096. In applying this test, the reviewing Court shall not reverse unless it can be demonstrated that it is more probable than not that the outcome might have been different without the error. See *People v Lukity*, 460 Mich 484, 494-95; 596 NW2d 607 (1999). This analysis is performed by examining the entire record. *Id*., at 495. In this case, the harm to defendant seems clear. The times given by both the prosecutor's witnesses and defendant as to when certain events occurred were imprecise. Trey Scott of the Coast Guard saw defendant on the beach at approximately 4:05 p.m. While defendant estimated that he had been on the beach approximately twenty minutes before he saw the Coast Guard boat, suggesting he arrived at 3:45, it is not clear how long the boat was in the area before defendant spotted it. Rather, defendant only noticed the boat after he changed his clothing and after Scott began approaching defendant on the beach. Thus, the excluded testimony does not conflict with Scott's testimony that he saw defendant on the beach at 4:05, before defendant changed his clothing. The question, however, was whether defendant was at the site of the *assault* some time earlier. The church members' affidavits indicate that they saw defendant at the park entrance between 3:15 and 3:30 p.m. This would have made it highly improbable, although not impossible, for defendant to have been at the site of the assault, traveling *from* the beach, when it occurred.

The dissent offers three reasons why the proffered testimony would likely not have affected the outcome of the trial-- the fact that defendant could still have committed the assault, even if the excluded witnesses' testimony was accurate; defendant's behavior following the assault; and the eyewitness identifications. We respectfully disagree that these factors would have supported the jury verdict in light of the excluded testimony. We first address the possibility that defendant could have committed the assault, even if he was in the parking lot between 3:20 and 3:30. The witnesses testified that the attacker was traveling along the trail, moving away from the beach area when the attack took place. To conclude that defendant had time to get to the location of the attack via the Walk-A-Mile Trail, the jury would need to reach two preliminary conclusions: first, that defendant left the parking lot at 3:20-- the earliest estimate; and second, that the attack took place at 3:47-- the latest estimate. Only by reaching these conclusions could the jury conclude that defendant had sufficient time to reach the attack site, based on Hemmelsbach's testimony that a person, if running, could cover this distance in approximately thirty minutes. Thus, viewing the evidence in the light most favorable to the prosecutor, defendant could have been at the location of the attack as early as 3:47, but it is highly unlikely that he could have traveled the Walk-A-Mile Trail to the beach, then turned around and headed back into the dunes to be at the attack site, *coming from the beach*, at 3:47. Moreover, to reach this conclusion, the jury would have to either reject the excluded witnesses' testimony entirely or conclude that defendant ran from the parking lot to the dunes, doubled back to commit the crime, and the subsequent events took only five minutes. That is, in no more than five minutes, the victim ran to the boat and explained what happened, Joel Gauthier searched the dunes and returned to the boat to radio the Coast Guard, and the call was dispatched to Scott.[7] While defendant could have perhaps been hiding or waiting in the trees, it would have still been necessary for him to get past the site of the attack, without being seen by the children, then turn around and travel toward the children, who were walking and running toward the beach.

Turning to the dissent's theory that defendant could have used the stairs, then walked along the beach to the dunes area, we come to the same conclusion. That is, even under this theory, it is more probable than not that the jury would have reached a different conclusion if they had heard the excluded testimony. First, we note that the prosecutor did not suggest that defendant took the shorter route to the dunes area, and there was no testimony with respect to how long it would have taken a person to travel from the parking lot to the dunes via this route. Second, the Gauthiers testified that they remained on the boat while the children climbed the dunes, and that they definitely did not see defendant on the beach before they were alerted with regard to the attack. The dissent concludes that the excluded testimony "simply would not have established an unshakable alibi that placed defendant at a different place at the exact time of the assault." This is not the burden that defendant is required to overcome on appeal. Rather, defendant must convince this Court that it was more probable than not that the jury would have reached a different result without the error. *Lukity, supra* at 494-495. The jury was charged with finding defendant guilty only if the prosecutor proved the elements of the crime beyond a reasonable doubt. In our view, if the jury had been allowed to hear the excluded testimony, it would more probably than not would have raised at least a reasonable doubt with respect to whether defendant could have been at the scene of the attack when it took place. Thus, we believe the jury would probably have reached a different result had they been allowed to hear the excluded testimony.

We next turn to the dissent's reliance on defendant's actions following the attack, but fail to see

the significance of these acts with respect to defendant's guilt. Watching the Gauthiers through binoculars was a reasonable response to attempts to lure defendant's dog to their boat, and was not indicative of guilt in any respect. By way of analogy, would a bank robber stand across the street from the bank and watch the ongoing investigation through binoculars? Perhaps surreptitiously, but certainly not in plain view of the eyewitnesses and the police. Likewise, although a criminal might change his or her clothing or appearance following a crime, in an attempt to avoid identification, defendant's acts here do not evidence such intent. He changed his clothing almost in plain sight of the Gauthiers. And although he testified that he believed he was doing so discreetly, he left his dog on the beach and returned directly to the beach after changing. These are not the actions of a person attempting to disguise himself.

Finally, with respect to the dissent's reliance on the eyewitness testimony, we find this too, unpersuasive. We are cognizant of the fact that, regardless of "the subjective accuracy, completeness or good faith of witnesses," eyewitness identification is not infallible. *People v Anderson*, 389 Mich 155, 180; 205 NW2d 461 (1973). According to the victim's testimony, even before she could make out his features, she was "certain" that the man on the beach was the man she had encountered in the dunes. She based this identification on the fact that he had a similar backpack and on her "feeling" that this was the man. There is no doubt from the testimony that she was convinced her identification was accurate before she could clearly see defendant. Having already made the decision, there was an increased likelihood she would affirm that decision upon a closer look, even if the initial decision was erroneous. *See id.* at 218, citing *United States v Wade*, 388 US 218, 229; 87 S Ct 1926; 18 L Ed 2d 1149 (1967); *Simmons v United States*, 390 US 377, 383-384; 88 S Ct 967; 19 L Ed 2d 1247 (1968). We have no doubt that the victim believed, in good faith, that defendant was her attacker; but when we combine the significant possibility that defendant was not on the trail at the time of the attack with the factors which may have interfered with a more reliable identification-- the victim's brief observation of defendant on the trail, her premature identification decision, and the inconsistencies with respect to her description of defendant and his actual appearance and possessions-- we conclude that the victim's identification of defendant does not demonstrate the degree of reliability necessary to overcome the court's error in excluding the alibi testimony.

Turning next to the Gauthier children's eyewitness identifications, we find similar reasons to question their reliability, regardless of the good faith on which they were made. Although the dissent concludes that the "three positive identifications made in broad daylight, minutes after the assault," had a significant impact on the jury, it is important to note that the two Gauthier children merely saw a man on the trail, and did not actually witness the attack. Reviewing the record as a whole, it is apparent that the Gauthier children, like the victim, identified defendant as the man on the trail before they could clearly see him. Moreover, their decision was influenced by the victim's declaration that she had spotted her attacker on the beach. The record does not indicate whether all three girls were scouring the beach, looking for suspects, but it is clear that the victim spotted defendant before either of the Gauthier children and that they merely confirmed her existing identification. Even innocent, subtle suggestive influences have been shown to be a significant factor with respect to misidentification, and we believe that the victim's existing identification could have influenced the Gauthier children's decisions. *Anderson, supra* 215-16.

While the dissent correctly notes that the victim's description of her attacker matched several aspects of defendant's appearance, there were also a number of troubling inconsistencies. It is true that each of these inconsistencies has a rational explanation, yet their cumulative effect confirms the significant possibility of mistaken identification. The witnesses saw the attacker at different places along the trail in the dunes, but none saw defendant's dog throughout the time they were in the dunes area. The victim and other witnesses distinctly remembered that the man on the trail in the dunes was wearing boat clogs and "salmon-colored" shorts, but could not remember clearly enough to determine whether he was wearing a shirt. None of the witnesses saw defendant wearing boat clogs on the beach, but they did notice his tennis shoes. His bag contained his pink shorts, but no boat clogs were found. The witnesses were each asked to describe the attacker's backpack but none mentioned the "bear bells" that apparently sounded whenever the pack moved. The witnesses saw a canteen hanging from the backpack of the man on the trail, but did not see a canteen on the pack on the beach and no canteen was taken into evidence. One officer testified that there was a canteen in the pack when defendant was arrested, but this officer was also mistaken with regard to many details of the investigation. This officer, in fact, testified at a pre-trial motion hearing that he identified defendant in the parking lot by the pink shorts he was wearing. Yet it is clear from the record that defendant was not wearing the pink shorts at the time of his arrest.

When we consider the various factors affecting the reliability of the eyewitness identifications in this case, the number of inconsistencies between the witnesses' descriptions and the realities of defendant's appearance and possessions, and the very significant possibility that defendant was not at the site of the attack when it took place, we must disagree with the dissent that the error here was harmless. Where error results in a miscarriage of justice, it must be corrected. *Lukity, supra* at 495. The primary purpose of a criminal trial is the search for the truth. We believe that evidence was denied to the fact finder that would likely have produced a more thorough search in this regard. Given our disposition of this claim, we need not reach defendant's contention that he was denied effective assistance of counsel.

Reversed and remanded for new trial. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Stephen J. Markman

[1] We note that, at the preliminary examination, the victim testified that Mr. Gauthier and his daughter went into the dunes so she could show him where the incident occurred. They then returned to their boat, and Mr. Gauthier went back to the dunes alone to search for the assailant. Neither the victim's trial testimony, nor testimony by the other members of the Gauthier family indicate that Mr. Gauthier may have made two trips into the dunes. This discrepancy may have affected the estimates regarding how long after the attack the Coast Guard was notified.

[2] Sabo's testimony was also inconsistent with respect to why he, rather than Guiterrez, ultimately took primary responsibility for the on-site investigation. Sabo testified that he took over the investigation and wrote the report because Guiterrez' shift was nearly over. However, Guiterrez' shift did not end until

6:00 p.m., nearly two hours after he was dispatched to the scene, and Guiterrez did not leave the park until approximately 6:45 p.m.

[3] The prosecutor later asserted that he relied on defendant's statement in presuming that defendant was at the *water* between 3:00 and 3:30, while defendant later clarified that he had arrived at the *park* between 3:00 and 3:30.

[4] Again, the record is inconsistent. According to all accounts of defendant's activities on the beach, he was no longer wearing the pink shorts when he left the beach area. Yet Sabo testified at a March 7, 1997 motion hearing that he identified defendant in the parking lot by, among other things, the pink shorts he was wearing.

[5] Hemmelsbach's testimony added to the confusion regarding defendant's clothing. She stated that, after talking with the Gauthier party, she began looking for a man wearing pink shorts. Yet it is clear that defendant was not wearing the pink shorts when he left the beach.

[6] Affidavit testimony was presented at the *Ginther* hearing following trial indicating that a private detective and one of defendant's proffered witnesses walked the Walk-A-Mile Trail in twenty-seven minutes. *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Hemmelsbach was uncertain, but agreed that the Walk-A-Mile Trail could have been named for its length, that is, one mile.

[7] We note that Officer Sabo testified that the dispatch was heard at 3:49-- only two minutes after the prosecutor's latest estimate of the time of the attack.