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UNPUBLISHED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.

METER, J. (*dissenting*).

I respectfully dissent. While I concede that the trial court may have improperly weighed the five factors from *People v Travis*, 443 Mich 668, 682; 505 NW2d 563 (1993), and therefore may have abused its discretion by failing to admit the proffered testimony, I do not believe the exclusion of the testimony affected the outcome of the trial. Under MCL 769.26; MSA 28.1096, error in the exclusion of evidence does not warrant reversal unless it affirmatively appears that the error resulted in a miscarriage of justice. "In other words, the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

I do not believe it to be more probable than not that the proffered testimony, if it had been admitted, would have affected the outcome of the trial. The victim, who observed her assailant in broad daylight, identified defendant as the assailant only minutes after the assault. Moreover, the detailed description she gave of the assailant, his clothing, and his appurtenances matched, in pertinent part, defendant's description. Two of the victim's companions, who saw a man pass them on the trail and walk towards the victim moments before the assault, identified defendant, only minutes after the assault, as the man they had seen on the trail. They, too, had observed the man in broad daylight.

Moreover, defendant's own testimony allowed for him to have been on the trail with the victim at the time of the assault. If the jury believed defendant's testimony (which he would certainly want them to do) that he arrived at the park between 3:00 and 3:30 p.m. and that it took him approximately forty minutes to reach the beach, he could still have been on the trail by 3:40 p.m. – in time to commit

the assault according to the timeline established by various witnesses. While the proffered testimony (that defendant arrived at the park between 3:20 and 3:30 p.m.) may have made it less likely that defendant could have reached the trail in time to commit the assault, I nevertheless do not believe, in light of the strong identification testimony by three different people[1] and in light of defendant's actions following the assault (changing his clothing in the woods and watching the victim and her companions through binoculars),[2] that this would have affected the outcome of the trial.

Indeed, even if the jury heard that defendant arrived at the park between 3:20 and 3:30 p.m., they nevertheless *could* have found that he committed the assault, since even under this time schedule, he could have reached the site of the assault by 3:40 p.m. if he used the flight of stairs near the parking lot and walked along the shoreline to the area where the victim and her companions were located. The proffered testimony simply would not have established an unshakable alibi that positively placed defendant at a different place at the exact time of the assault.[3] Nor, in light of the strong identification testimony, would the proffered testimony have created a reasonable doubt as to the identity of defendant as the perpetrator. Indeed, given (1) the fact that defendant could have committed the assault even under the proffered witnesses' time schedule, (2) the strong identification testimony by three different individuals, and (3) defendant's behavior following the assault, I do not find it more likely than not that the exclusion of the proffered testimony affected the outcome of the trial. See *Lukity, supra* at 495. Accordingly, I conclude that the exclusion of the testimony, even if erroneous, does not warrant reversal.

Nor would I reverse defendant's conviction based on the alleged ineffective assistance of his trial attorneys in failing to file a notice of alibi witnesses. To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of the prevailing professional norms, and (2) that but for the attorney's error or errors, a different outcome would reasonably have resulted. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Because I believe that the exclusion of the evidence would not reasonably have affected the outcome of the trial, I conclude that the failure of defendant's attorneys to file a notice of alibi witnesses did not deprive him of the effective assistance of counsel. *Id*.

I would affirm.

/s/ Patrick M. Meter

[1] The majority emphasizes that identification testimony is not infallible. Nevertheless, three positive identifications made in broad daylight, minutes after the assault, undoubtedly had a huge impact on the jurors. I do not believe that the jurors would have reasonably rejected this testimony if the alibi evidence had been admitted.

[2] The majority concludes that these actions were in no way indicative of guilt. In conjunction with the strong identification testimony, however, these actions did indeed have some probative value with regard to defendant's guilt.

[3] The majority states that "this is not the burden that defendant is required to overcome on appeal." However, I state this fact (that the excluded evidence did not establish an unshakable alibi) only to support my conclusion that the admission of the excluded evidence would not have affected that outcome of the trial. I do not suggest that only evidence of unshakable alibis are admissible; instead, I believe that *under the circumstances of this case*, the fact that the excluded evidence did not establish an unshakable alibi is relevant to whether the evidence would have affected the outcome of the trial.