STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 6, 2004
v	No. 242862 Wayne Circuit Court
QUINELL C. MAY, Defendant-Appellant.	LC No. 01-003438-01

Before: Borrello, P.J., and White and Smolenski, JJ.

PER CURIAM.

Defendant Quinell May appeals by right from his jury convictions of two counts of armed robbery, MCL 750.529, and one count of felony firearm, MCL 750.227b. The trial court sentenced him to 12 ½ to 25 years' imprisonment for the armed robbery conviction and 2 years' imprisonment for the felony firearm conviction. Defendant was accused of taking two high-school boys' jackets at gunpoint when the boys were walking to school. We affirm.

Defendant first claims that the trial court erred by refusing his request to file a late notice of alibi. Although defendant intended to present an alibi defense, he had difficulty locating his alibi witness and thus did not file the notice, believing that his efforts to locate the witnesses would be futile. But one witness, who lived in Ohio, was finally located. When the witness arrived on the second day of trial, however, the trial court would not allow him to testify, holding that defendant's negligence caused the delay in locating the witness. We review a trial court's decision whether to permit a party to introduce alibi evidence where the party has not complied with the notice-of-alibi statute for an abuse of discretion. *People v Travis*, 443 Mich 668, 679-680; 505 NW2d 563 (1993).

A defendant in a felony case may present an alibi witness to testify that defendant was somewhere else at the time the alleged crime occurred. See *People v Watk*ins, 54 Mich App 576, 580, 221 NW2d 437, 440 (1974); MCL 768.19. The statute requires that the defendant file a notice of alibi with the court "not less than 10 days before the trial of the case, or at such other time as the court directs." Our Supreme Court has construed the latter clause as a grant of discretion and has held that where a defendant does not meet the deadline, the trial court may still permit the alibi witness's testimony if certain conditions are met. See *Travis*, *supra* at 679-680. In *Travis*, the Court adopted the following test to determine whether, despite a defendant's failure to file a notice of alibi, an alibi witness should be allowed to testify:

> "In determining how to exercise its discretionary power to exclude the testimony of undisclosed witnesses . . . a district 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 arising out of the circumstances of the case." [*Id.* at 682, quoting *United States v Myers*, 550 F2d 1036, 1043 (CA 5, 1977).]

These factors must be balanced against the purpose behind requiring a defendant to file a notice of alibi: to safeguard against surprise and wrongful use, to allow the prosecutor time to investigate, to protect the public, and for trial efficiency. *Id.* at 676 n 7, n 8.

We must first examine the extent to which the prosecutor was prejudiced by defendant's failure to file a notice of alibi. In the case at hand, defendant notified the prosecutor of his intent to present an alibi defense on the record at a motion hearing on January 31, 2001, over four months before trial. However, the prosecutor did not have the names of the alibi witnesses, but was only put on notice of the intended defense. Later, though, the prosecutor received a witness list with the witnesses' names. The prejudice the state suffered was its inability to interview the potential witnesses. But in any event, the trial court had discretion not only to accept a late notice of alibi, but also to grant a continuance. Thus, the prejudice could have been alleviated, albeit with some inconvenience to both parties and the court.

The next area of inquiry is the reason for the nondisclosure. *Travis*, *supra* at 679-680. We note again that defense counsel did not fail to disclose the witnesses entirely; rather, he failed to file a formal notice of alibi. As stated, defense counsel informed the court and the prosecutor four months before trial that he was trying to find alibi witnesses. In fact, he petitioned the trial court for assistance because he expected the witnesses would be difficult to locate. Not disagreeing, the trial court appointed a private investigator to assist defendant, who was indigent, in locating the Ohio-based witnesses.

The record reflects that while awaiting trial, defendant was in solitary confinement, and communication with his attorney was limited to letters. In addition, before defendant could have visitors, his counsel had to move the court for permission. The record indicates that only one visit was granted, although it is not clear whether more were requested. That visit, requested by defendant's father, was granted on May 6, 2002, the first day of trial. According to defense counsel, defendant had "no contact with his parents or [] other witnesses" before that date. While these factors posed a problem for the defense to find and locate the witnesses, they cannot explain why the defense was unable to find these witnesses, despite the use of a court-appointed investigator.

While it is understandable for trial strategy purposes, that defense counsel did not file the notice of alibi without being certain he could actually produce the intended witnesses, had counsel filed the notice and proceeded with an alibi defense, this issue would be moot. Thus, we conclude that despite the uncertainties involved, defendant should have filed the notice anyway.

We must next examine the extent to which the harm caused by nondisclosure was mitigated by subsequent events. *Travis*, *supra* at 679-680. As stated, the trial court refused to

grant a continuance, so defendant had no opportunity to mitigate the harm caused by the failure to file a notice of alibi.

Next we examine the weight of the properly admitted evidence supporting the defendant's guilt. *Travis, supra* at 679-680. The main evidence inculpating defendant was the two victims' eyewitness testimony. The victims gave a general description of the perpetrator, as to approximate age, height, weight, clothes, and skin tone. Two months later the victims were asked to view a photo line-up. Both victims chose defendant as the perpetrator, and he was arrested. Eyewitness testimony is the most powerful evidence submitted against an accused. Here the eyewitnesses were able to give a general description of the accused and then two months later, both identified him in a photo line-up. We find that this eyewitness testimony was overwhelming evidence of guilt.

While we find that defendant has submitted arguments to this Court that support his appeal for a new trial, we find this to be a close question. That stated, on a close question, we cannot hold that the trial court abused its discretion by not allowing the alibi testimony into evidence. We therefore affirm the decision of the trial court.

Defendant next argues that the trial court erred by refusing to appoint an expert witness to testify about the shortcomings of eyewitness testimony. Whether the trial court erred in denying a defendant's motion for appointment of an expert witness is reviewed for an abuse of discretion. *People v Tanner*, ____ Mich ____, ____; 671 NW2d 728 (2003). "'An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made.'" *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002), quoting *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Before a trial court can grant a defendant's request for an expert witness at the expense of the state, the defendant must show "'to the satisfaction of the judge . . . that there is a material witness in his favor . . . without whose testimony he cannot safely proceed to trial.'" *Lueth*, *supra* at 688, quoting MCL 775.15, citing *People v Herndon*, 246 Mich App 371, 399; 633 NW2d 376 (2001). Moreover, a defendant must make "a particularized showing of a need for an expert." *People v Leonard*, 224 Mich App 569, 584; 569 NW2d 663 (1997). To make this showing,

> "[A] defendant must demonstrate something more than a mere possibility of assistance from a requested expert; due process does not require the government automatically to provide indigent defendants with expert assistance upon demand. Rather, a fair reading of these precedents is that a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial." [*Id.* at 582, quoting *Moore v Kemp*, 809 F2d 702, 712 (CA 11, 1987), cert den 481 US 1054 (1987).]

Moreover, MCL 775.15 requires a defendant to show to the satisfaction of the trial judge "that he cannot safely proceed to a trial [without the proposed witness.]" *Id.*

Defendant's cursory arguments at the motion hearing that because the eyewitness testimony was the only evidence of the alleged crime, an expert was needed, did not suffice to show either that there was a reasonable probability that his desired expert would have been of assistance or that without the expert, defendant would have been denied a fundamentally fair trial. Thus, we find no error.

Last, defendant argues that two instances of prosecutorial misconduct denied him a fair trial and thus require reversal. Counsel did not object to the alleged errors at trial. Thus, our review of these matters is precluded "unless an instruction could not have cured the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice." *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999), citing *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). In other words, because defense counsel failed to object to the perceived misconduct, we cannot review it unless the prejudicial effect of the remark was so great that it could not have been cured by an appropriate instruction. *People v Duncan*, 402 Mich 1, 15-16; 260 NW2d 58 (1977) (citations omitted).

Defendant asserts error regarding the prosecutor's questioning of him regarding his prior conviction of receiving and concealing stolen property. Defendant admitted to the conviction on direct examination. On cross-examination, the prosecutor asked whether the conviction involved a car, and defendant answered that it did. Although defendant is correct that a prosecutor may not "interrogate the defendant regarding the collateral facts comprising [a] prior conviction" to which defendant has admitted on direct examination, the rule applies only where there has been a proper objection. See *People v Johnson*, 54 Mich App 678, 681; 221 NW2d 452 (1974). We do not find this error so egregious that it could not have been cured with an objection and a curative instruction.

Defendant also contends that the prosecutor wrongly asked defendant to comment on the prosecution's witnesses' veracity. We agree. Because the credibility of witnesses is within the purview of the jury, one witness's opinion of another's credibility is irrelevant and improper. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985.) Having found that the prosecutor's remarks were irrelevant and improper, we turn to MCL 769.26, which states:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

Thus, appellate courts should not reverse a conviction unless the error was prejudicial. *People v Mateo*, 453 Mich 203, 210; 551 NW2d 891 (1996); *People v Robinson*, 386 Mich 551, 562; 194 NW2d 709 (1972). The error is presumed to be harmless, and the defendant bears the burden of showing that the error resulted in a miscarriage of justice. People v Lukity, 460 Mich 484, 493-494; 596 NW2d 607 (1999); *People v Albers*, 258 Mich 578, 590; 672 NW2d 336 (2003). Taking into consideration the evidence offered against the defendant, we do not find that the comments were so egregious as to justify reversal.

Affirmed.

/s/ Stephen L. Borrello
/s/ Michael R. Smolenski

I concur in result only.

/s/ Helene N. White