STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 14, 2013
v	No. 305687 Wayne Circuit Court
BRUCE MATHIS, Defendant-Appellant.	LC No. 11-002170-FC

Before: JANSEN, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and possession of a firearm by a felon (felon-in-possession), MCL 750.224f. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 3 to 20 years for the AWIGBH conviction and 3 to 10 years for the felon-in-possession conviction. He was also sentenced to a consecutive term of two years in prison for the felony-firearm conviction. We reverse.

Defendant argues that the trial court abused its discretion by denying his request to read the missing witness jury instruction, CJI2d 5.12. We agree.

We review for an abuse of discretion the trial court's determination of due diligence and the appropriateness of a missing witness jury instruction. *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004); see also *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

We conclude that the trial court misapprehended the law regarding due diligence, resulting in an abuse of discretion. We further conclude that the prosecutor did not exercise due diligence in its attempts to locate Mancil Brannon, a res gestae witness endorsed by the prosecution.

A res gestae witness is someone who has "witness[ed] some event in the continuum of the criminal transaction and [whose] testimony would . . . have aided in developing a full disclosure of the facts at trial." *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001). "A prosecutor who endorses a witness under MCL 767.40a(3) is obliged to exercise due diligence to produce that witness at trial." *Eccles*, 260 Mich App at 388. In fact, the prosecution is required to produce a listed witness at trial even if the prosecution was not actually required to

endorse the witness in the first instance. See *People v Wolford*, 189 Mich App 478, 483-484; 473 NW2d 767 (1991).

"A prosecutor who fails to produce an endorsed witness may show that the witness could not be produced despite the exercise of due diligence." *Eccles*, 260 Mich App at 388. "Due diligence" is the attempt to do everything reasonable to obtain the presence of a witness, not everything possible. *Id.* at 391; see also *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). "If the trial court finds a lack of due diligence, the jury should be instructed that it may infer that the missing witness's testimony would have been unfavorable to the prosecution's case." *Eccles*, 260 Mich App at 388; see also CJI2d 5.12.[1] A prosecutor's efforts to secure a witness must be reasonable based on "the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *Bean*, 457 Mich at 684.

The trial court abused its discretion when it determined that defendant was not entitled to the missing witness jury instruction set forth in CJI2d 5.12. First, the trial court misapplied the law regarding what prosecutorial actions constitute due diligence in general. Second, the trial court incorrectly concluded that the prosecution's efforts in locating Brannon constituted due diligence in this case.

The prosecution endorsed Brannon as a witness. However, on the day of trial, the prosecution notified the court and defendant that Brannon would not testify because the prosecution could not locate him. To establish that it exercised "due diligence," the prosecution was required to prove that it attempted to do everything reasonable in order to obtain Brannon's presence at trial. *Eccles*, 260 Mich App at 391.

The trial court based its decision, in part, on the erroneous assumption that defendant was required to show that the missing witness would have testified in his favor. As previously discussed, a defendant is entitled to a missing witness jury instruction whenever an endorsed witness cannot be located and the prosecution has not exercised due diligence in locating the witness. "[A] trial court's misapplication or misunderstanding of the law in reaching its decision . . . may constitute an abuse of discretion." *People v Cress*, 250 Mich App 110, 149; 645 NW2d 669 (2002), rev'd on other grounds 468 Mich 678 (2003).

Moreover, the trial court applied the wrong law to its analysis. As explained earlier, due diligence "is the attempt to do everything reasonable, not everything possible, to obtain the presence of a witness." *Eccles*, 260 Mich App at 391. But the trial court determined that the prosecution exercised due diligence in its attempts to locate Brannon because "some effort was made." "[S]ome effort" is not enough to prove due diligence. Because the court applied a lower standard to the facts of this case when a higher standard was required by law, the court's decision fell outside the range of reasonable and principled outcomes and therefore constituted an abuse of discretion.

[1] The missing witness jury instruction, CJI2d 5.12, provides that the jury may infer that the missing witness's testimony "would have been unfavorable to the prosecution's case."

The prosecution's efforts to locate Brannon did not constitute due diligence. According to Investigator Philip Wassenaar of the Detroit Police Department, the Detroit Police exercised very little effort to locate Brannon. Wassenaar was unsure if he ever spoke with Brannon at any time during the investigation, and he admitted that he never documented any of the efforts to locate Brannon. Wassenaar's only attempts at locating Brannon and ensuring his attendance at trial included issuing a subpoena and going to an address given to investigators by Brannon, which turned out to be a vacant home. It is unclear from the testimony whether Brannon actually received the subpoena. In addition, the prosecutor said the phone numbers she had for Brannon were disconnected; neither Wassenaar nor the prosecutor attempted to obtain a new working phone number for Brannon. While these actions were reasonable first steps, they were only *some* reasonable efforts to locate Brannon, not *every* reasonable effort as required by this Court's decision in *Eccles*.

In *Bean*, 457 Mich at 685-687, our Supreme Court determined that the prosecution had failed to exercise due diligence because, although the police made several attempts to locate the missing witness in the Detroit area, once the officers learned that the witness had moved to Washington, D.C., they ended their search. Because the police took no steps to locate the witness "in the area to which [he] evidently moved," the *Bean* Court determined that "the steps taken . . . did not constitute due diligence." *Id.* at 690.

In this case, like in *Bean*, the prosecution stopped searching for Brannon each time its first attempt was fruitless. For example, no efforts were made to contact Brannon by telephone after the prosecution reached disconnected numbers. Moreover, it does not appear that the prosecution or police even looked for an accurate phone number. They did not interview anyone close to Brannon, the other witnesses to the crime, or any family members who might have provided an accurate phone number. Similarly, Wassenaar made no attempt to determine if any of the neighbors living near the vacant home knew where Brannon lived. Instead, Wassenaar simply ended his search when he discovered that the house was vacant.

The prosecution took only minimal steps to ensure Brannon's presence at trial and did not "do everything reasonable," *Eccles*, 260 Mich App at 391, to locate Brannon. Thus, the trial court abused its discretion when it determined that defendant was not entitled to the missing witness jury instruction.

This is not the end of our inquiry, however. "[A] preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999), quoting MCL 769.26. "[T]he 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." *Lukity*, 460 Mich at 495.

We conclude that it is more probable than not that the trial court's failure to give the missing witness jury instruction affected the outcome of defendant's trial. Unlike *Lukity*, the present case *did* "present a simple credibility contest between [the victim] and defendant." *Id*. at 496. The victim and defendant were the only testifying witnesses who were present at the time of the dispute. If the jurors had been given the missing witness instruction, they could have

inferred that another eyewitness to the incident would have testified in favor of defendant, who claimed that he never shot the victim. This easily could have led the jury to conclude that defendant was not guilty and that defendant did not possess a gun. Defendant was prejudiced by the outcome-determinative error and is consequently entitled to a new trial.

Reversed.

/s/ Kathleen Jansen
/s/ Douglas B. Shapiro

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FORT HOOD, J. (*dissenting*).

I respectfully dissent.

At the start of trial, the prosecutor noted that her second witness, Mancil Brannon, did not appear in court that day. A subpoena was issued, but all phone numbers were disconnected, and the prosecutor was unable to contact him. Defense counsel indicated that he wanted to take due diligence testimony and requested an adverse inference instruction. Before trial commenced, a police officer was questioned regarding his efforts to contact Brannon who was endorsed by the prosecutor on the witness list. The officer indicated that he did not know if he actually spoke to Brannon. However, the individual the officer spoke to made it clear that he did not want to be involved in the case. Brannon gave a statement after the incident and acknowledged seeing one man push another. However, Brannon denied witnessing any shooting. With regard to his efforts to locate Brannon, the officer believed that the home address given for Brannon was a vacant home. The officer could not recall any other specifics regarding his attempt to locate Brannon. The trial court indicated that it was "leaning towards" giving the adverse witness instruction, but would discuss the issue with counsel when reviewing jury instructions. During opening statements, defense counsel advised the jury that, although five people were present in the home, only the victim would be produced to testify.

On February 12, 2011, the victim was visiting his neighbor, Joe. Defendant, the victim's friend for two years, was also at Joe's home with three to four other people.[1] The victim shared

[1] The victim did not know Joe's last name. Additionally, although the victim could identify three other individuals in the home by their first name, he did not know their last names.

his beer with Joe. The victim had recently ended his relationship with his girlfriend, and defendant tried to engage the victim in conversation. The victim did not want to talk and got up to leave the premises. Defendant stood up, and the men exchanged words. The victim pushed defendant away. Defendant stumbled back, then pulled a gun and shot the victim, striking him in the finger and in the leg. Everyone in the room walked over the victim and left. The victim lay on the porch and tried to use his telephone to call the police. He was unable to call, and Joe called the police.

On cross-examination, defense counsel asked the victim why Joe, his friend, did not come to his aid. The victim acknowledged that Joe did not intervene in the dispute between the victim and defendant, but noted that Joe was still his friend. Defense counsel then questioned whether Joe would attend the court proceedings. The victim testified that he saw Joe there. Defense counsel expressly asked, "You saw him here?" The victim responded, "He is here." At that time, defense counsel did not move for a recess to question Joe and add him to the defense witness list. Rather, counsel questioned the victim about what occurred after the shooting. The trial court interjected to determine if Joe was in the courtroom and on the witness list. The prosecutor indicated that he was not on the witness list. Defense counsel proceeded to inquire regarding the events following the shooting. There is no indication in the lower court record that defense counsel ever attempted to interview Joe and call him as a witness at trial.

Defendant testified that he was present at Joe's home when the victim was there. Although he acknowledged that the men exchanged words, he denied shooting the victim. Defendant testified that when he left Joe's home, no shooting had occurred.

At the conclusion of the testimony, the trial court requested an offer of proof regarding the testimony that would have been given by missing witness Brannon. Defense counsel did not provide an offer of proof, but merely stated, "Well, he [Brannon] is endorsed." The trial judge noted that, according to Brannon's statement to police, he did not have any information regarding the shooting, and therefore, Brannon's testimony would not have benefited the defense. Again, defense counsel reiterated that once the prosecutor endorsed a witness, she had a duty to bring him to court. When pressed further by the trial court, defense counsel stated that it took courage to come to court and accuse a person of lying; it was easier not to come to court. The trial court noted that the same logic would apply to all parties because all of the men were friends and drinking buddies who did not want to be involved in the criminal matter. The trial court held that defendant was not entitled to an adverse witness instruction because some reasonable effort was made to locate the witness, and the witness would not have provided exculpatory evidence for defendant. Finally, the trial court stated that if the prosecutor had produced the witness, the defense likely would not have asked the witness any questions.

On appeal, defendant contends that the trial court erred by failing to provide the missing witness instruction when the prosecution did not produce an endorsed witness and did not establish due diligence in the attempted production of the witness. I would hold that defendant is not entitled to appellate relief. A claim of instructional error presents a question of law reviewed de novo, but the trial court's determination that the instruction applies to the facts of the case is reviewed for an abuse of discretion. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010). The jury instructions must include all elements of the charged offenses in addition to any material issues, defenses, and theories if supported by the evidence. *People v McGhee*, 268

Mich App 600, 606; 709 NW2d 595 (2005). Imperfect instructions are not erroneous if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Clark*, 274 Mich App 248, 255-256; 732 NW2d 605 (2007) (citation omitted). The defendant bears the burden of proving that a claim of instructional error resulted in a miscarriage of justice. *Dupree*, 486 Mich at 702; see also MCL 769.26 which provides:

> 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 matter of 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.

Defendant's claim of instructional error also arises from a purported violation of MCL 767.40a, the res gestae witness statute. A res gestae witness is an individual who witnesses some event in the continuum of the criminal transaction such that the testimony would aid in developing a full disclosure of the facts at trial. *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001). The prosecutor must include the names of all known res gestae witnesses on the witness list attached to the information and all known witnesses who might testify at trial. *Id*.; MCL 767.40a(1). The prosecutor has a continuing duty to disclose the names of res gestae witnesses as they become known. MCL 767.40a(2). Not less than 30 days before the trial, the prosecutor shall provide a list of all witnesses she intends to produce at trial, but may add or delete the witnesses upon leave of the court and for good cause shown or by stipulation of the parties. MCL 767.40a(3), (4). The prosecutor also has an obligation to provide law enforcement assistance to investigate and produce witnesses sought by the defense. MCL 767.40a(5); *Long*, 246 Mich App at 585-586.

The underlying purpose of MCL 767.40a is to provide notice to the accused of potential witnesses. *People v Callon*, 256 Mich App 312, 327; 662 NW2d 501 (2003). The plain language of MCL 767.40a reveals that the Legislature did not intend for the statute to act as a bar to relevant evidence. *Id*. Rather, the statute provides the trial courts with the discretion to permit the prosecution to amend its witness list at any time to add or delete witnesses. *Id*. Furthermore, the statute was not designed to allow defense counsel to engage in "gamesmanship." *Id*. at 328. Consequently, even if MCL 767.40a is violated, a defendant must show prejudice from the violation. *People v Hana*, 447 Mich 325, 358 n 10; 524 NW2d 682 (1994). Specifically, the defendant must demonstrate unfair prejudice that would warrant a new trial for a purported violation of MCL 767.40a. *Callon*, 256 Mich App at 328-329. Simply put, noncompliance does not mandate dismissal or reversal when defendant fails to establish prejudice. *People v Williams*, 188 Mich App 54, 58-60; 469 NW2d 4 (1991).

In the present case, I cannot conclude that the trial court's denial of the request for the adverse witness instruction premised on a violation of MCL 767.40a constituted an abuse of discretion. *Dupree*, 486 Mich at 702. First, I note that defense counsel did not proffer a valid reason for requiring Brannon's testimony at trial. When questioned by the trial court regarding the benefit of this testimony, defense counsel merely cited to the fact that the witness had been endorsed by the prosecution. The purpose of MCL 767.40a is to provide notice of potential witnesses, not to allow the defense to engage in gamesmanship. *Callon*, 256 Mich App at 327-

328. Moreover, irrespective of police efforts to ensure Brannon's presence at trial, another eyewitness to the events leading up to the shooting was present at trial, according to the victim. Despite "Joe's" appearance at trial, defense counsel did not seek a recess to interview Joe or move to add Joe to the witness list to allow him to testify at trial. Instead, defense counsel chose to deliberately proceed, consistent with his opening statement, with the testimony of the victim as the only witness to contradict defendant's version of events. Indeed, in closing argument, defense counsel faulted the prosecution for failing to call Joe as a witness. However, Joe was never endorsed by the prosecutor, and defense counsel declined to call Joe as a witness after being apprised of his presence in court. Therefore, even if it was assumed, without deciding, that a violation of MCL 767.40a occurred, defendant cannot establish prejudice from the violation when Joe, a res gestae witness, could have been called to testify at trial. *Hana*, 447 Mich at 358 n 10; *Williams*, 188 Mich App at 58-60. Defendant's claim of error does not entitle him to appellate relief.

I would affirm.

/s/ Karen M. Fort Hood