STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEWOND MOZAT ESTES,

Defendant-Appellant.

UNPUBLISHED
January 23, 1998

No. 193364
Calhoun Circuit Court
LC No. 95-001238-FH

Before: Markey, P.J. and Michael J. Kelly and Whitbeck, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than fifty grams of a mixture containing cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant was sentenced to five to twenty years in prison. Defendant appeals by right. We affirm.

This case arises from the traffic stop of a car in which defendant was riding during the evening hours of December 15, 1993 in the City of Battle Creek. Battle Creek Police Department Officers Hampton and Vinson stopped the car. Officer Hampton testified that he noticed that defendant, who was sitting next to the rear door, made several furtive movements. Officer Hampton illuminated the rear interior of the car with his flashlight, saw a handgun on the floor by defendant, and immediately asked defendant to get out of the car. According to Officer Hampton, defendant attempted to push a baggy between the seat cushions and the wheel well just before getting out of the car. The baggy was later confirmed to contain about twenty-one grams of crack cocaine, although it did not have any identifiable fingerprints.

I

Defendant asserts that the trial court erred by denying an adjournment because the prosecution did not make proper efforts to obtain the testimony of Officer Vinson, who apparently resigned from the Battle Creek Police Department a few months after defendant's arrest. The lower court denied defendant's motions for adjournment to locate the officer. We review these decisions for an abuse of discretion and find none. *People v Burwick*, 450 Mich 281, 298; 537 NW2d 813 (1995).

We first note that, citing *People v Calhoun*, 178 Mich App 517; 444 NW2d 232 (1989), defendant asks this Court to remand the case to the trial court "for evidentiary hearing to ascertain whether Vinson could have been *produced* with reasonable diligence at trial and whether this defendant was prejudiced by his absence." (Emphasis supplied). Defendant completely misconstrues *Calhoun*. As the Court noted in that case:

> Additionally, the prosecutor's duty to produce res gestae witnesses has been replaced with an obligation to provide "reasonable assistance" to defendant in locating them, should defendant request such assistance. MCL 767.40a(5); MSA 28.980(1)(5). Thus, some of the purposes for an evidentiary hearing pursuant to *Robinson, supra,*[1] have been obviated by the statute's amendment. For example, it is no longer necessary to determine whether the prosecutor acted with due diligence in trying to locate or produce a res gestae witness. See *People v George,* 130 Mich App 174, 178; 342 NW2d 908 (1983).[2] [*Calhoun, supra* at 522.]

The amendment to which this Court referred in *Calhoun* occurred in 1986. Before this time, MCL 767.40; MSA 28.980, required that the prosecutor endorse *and produce* all res gestae witness. *People v Baskin,* 145 Mich App 526, 530-531; 378 NW2d 535 (1985). The amendment to the statute deleted the requirement that the prosecutor endorse and produce res gestae witnesses. *People v O'Quinn*, 185 Mich App 40, 44; 460 NW2d 264 (1990). The amended statute now provides, in relevant part:

> (1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.
>
> (2) The prosecuting attorney shall be under a continuing duty to disclose the names of any further res gestae witnesses as they become known.
>
> (3) No less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of witnesses the prosecuting attorney intends to produce at trial.
>
> (4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.
>
> (5) The prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and service process upon a witness. The request for assistance shall be made in writing by defendant or defense counsel not less than 10 days before the trial of the case or at such other time as the court directs. If the prosecuting attorney objects to a request by the defendant on the grounds that it is unreasonable, the

> prosecuting attorney shall file a pretrial motion before the court to hold a hearing to determine the reasonableness of the request.

The issue, therefore, is not whether the trial court committed error requiring reversal by failing to compel the prosecutor to "produce or make reasonable efforts to produce" Vinson as a requested res gestae witness; the prosecutor is no longer under any obligation to "produce" or "make reasonable efforts to produce" a res gestae witness. Rather, the prosecutor is under an obligation, upon written request, to provide reasonable assistance, including investigative assistance, "as may be necessary to locate and serve process on a witness." The issue, then, is whether the trial court committed error requiring reversal in its ruling upon defendant's request for reasonable assistance from the prosecution to locate and serve process upon Vinson.[3]

The amended information charging defendant with the crime of possession with intent to deliver less than fifty grams, filed on May 11, 1995, listed "John Vinson" as a witness. However, Vinson was not included in the list of witnesses that the prosecution intended to produce at trial, which was filed on June 2, 1995. On June 20, 1995, defense counsel filed a request, pursuant to MCL 767.40a(5); MSA 28.980(1)(5), for assistance in producing witnesses, including Vinson. On October 23, 1995, the defense filed a request providing that "pursuant to MCLA 767.40a(5) [defendant/Dewond Estes] hereby requests the prosecutor to produce at time of trial Witness JOHN VINSON listed on the Information." On October 26, 1995, the prosecution filed a document entitled, "Response to Request for Production of Witnesses," that provided the address indicated for Vinson by a check of his "operator license and vehicle registration."

In a document dated November 22, 1995 and filed with the trial court on November 28, 1995, the defense requested the prosecutor to "produce the following witnesses at the time of trial" and listed three witness including Vinson. This pleading also stated: "We have been unable to serve these witnesses. We are requesting the assistance of the prosecution in producing them at the time of the trial in this matter." This pleading further stated with regard to Vinson: "He is listed in the police reports as the reporting officer, and he has not been cooperating with defense efforts to serve him. On November 3, we received certified mail back from the address provided earlier by the prosecution." On December 1, 1995, the prosecution filed a motion requesting a hearing to determine the reasonableness of the defense request to produce Vinson as a witness. The prosecution asserted that, on June 21, 1995, and October 24, 1995, it provided the defendant with all the information the prosecution had regarding those witnesses and that the request to produce the witnesses was inappropriate. The prosecution asked the trial court to deny defendant's request on the ground that it had already complied with MCL 767.40a(5); MSA 28.980(1)(5). Alternatively, the prosecution asked the trial court to rule that, if the court required the prosecution to assist the defense under MCL 767.40a(5); MSA 28.980(1)(5), such assistance would be limited to the "location and service of process" on the witnesses and "that if said witnesses cannot be served or do not appear that there be no penalty to the prosecution." (Emphasis in the original).[4]

On the first day of trial, after jury selection but before the jury was sworn, the trial court took up pretrial motions. Defense counsel raised the issue of whether the prosecution "had done any due diligence on producing Mr. Vinson." The trial court, correctly, stated that the prosecution had no duty

to produce a witness. The trial court also stated that the matter of whether the prosecution had made reasonable efforts to help the defense subpoena Vinson could be addressed. Defense counsel then requested an adjournment of at least three days to try to locate Vinson. The trial court denied defendant's request for an adjournment.

The statutory obligation to provide such reasonable assistance, upon written request, is imposed "without a showing of demonstrated need or unsuccessful efforts on the part of the defense." *Burwick, supra* at 288. The Michigan Supreme Court in *Burwick* further stated:

> The Legislature could have, but did not, condition the addition or deletion of the witnesses the prosecution would produce on a showing of prior due diligence. *It could have, but did not, condition investigative assistance to the defense on defense counsel's due diligence in locating defense witnesses*. Thus, the Legislature apparently intended to eliminate distortions to the truth-finding process at this stage of the proofs whether due diligence hurdles were advanced by the defense or the prosecution. [*Id.* at 292; emphasis supplied.]

However, the remedy for a violation of MCL 767.40a(5); MSA 28.980(1)(5) is "confided to the discretion of the trial court." *Burwick, supra* at 298. We conclude that the trial court did not abuse its discretion when it ruled that the prosecution did not have a duty to produce a witness. We further conclude that the trial court did not abuse its discretion by declining to adjourn the trial for further efforts to produce Vinson. In sum, therefore, we conclude that the trial court did not abuse its discretion in its ruling upon defendant's request for reasonable assistance from the prosecution to locate and serve process upon Vinson.

II

Defendant argues that the trial court improperly allowed opinion and reputation testimony about Officer Hampton's character for truthfulness. Over defense objection, the deputy police chief of the Battle Creek Police Department testified that in his opinion, Officer Hampton was truthful and that Officer Hampton had a fine reputation for truthfulness. We review the admission of evidence for an abuse of discretion. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997). MRE 608(a) provides:

> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

The brief testimony by the deputy police chief about Officer Hampton's character was properly confined to the trait of truthfulness. *People v Slovinski*, 166 Mich App 158, 174; 420 NW2d 145 (1988). This testimony was admitted after several attempts by defense counsel and defense witnesses to establish untruthful motives for the two arresting officers' roles in this case, including testimony from defendant's mother that she once filed a complaint against Officer Hampton. Although the defense did

not put on a witness who expressly testified that Officer Hampton had the character trait of untruthfulness, the testimony from defendant's mother was only relevant to suggest that Officer Hampton had motive to implicate defendant falsely. Accordingly, this testimony amounted to an implicit attack on Officer Hampton's character for truthfulness. Thus, evidence of Officer Hampton's truthful character was properly admissible under MRE 608 to rebut this defense attack. The trial court did not abuse its discretion by admitting the testimony at issue.[5]

III

Defendant alleges three instances of prosecutorial misconduct in the course of the prosecutor's closing and rebuttal arguments that he argues require reversal of his conviction. However, our review of these allegedly improper remarks is precluded because, if these remarks had been improper, each could have been cured by a timely objection by defendant. Manifest injustice will not result if we decline to review this issue. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Messenger*, 221 Mich App 171, 179-180; 561 NW2d 463 (1997).

Nevertheless, even if the defense challenge to the remarks at issue had been preserved by objection below, we would not find error requiring reversal. We begin by recognizing that prosecutors are accorded great latitude with regard to their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Prosecutors are free to argue the evidence and all reasonable inferences therefrom as they relate to the prosecution theory of a case. *Id.*

Defendant asserts that the prosecution demeaned the integrity of defense counsel. In the portion of the prosecutor's rebuttal argument apparently referred to by defendant, the prosecutor discussed the characterization of parts of Officer Hampton's testimony as a "smoke screen" and proceeded to detail areas where the prosecutor disagreed with defense counsel's characterization of the officer's testimony. A prosecutor's comments should be considered in light of defense arguments. *Messenger, supra* at 181. In context, the prosecutor's remarks were proper as reasonable argument from the evidence that defense counsel inaccurately described Officer Hampton's testimony. *Bahoda, supra* at 282; *Messenger, supra* at 181.

Defendant also asserts that the prosecutor used improper opinion testimony about Officer Hampton's honesty and credibility. The initial premise of this argument is incorrect. As discussed in the preceding issue, the opinion and reputation testimony of the deputy police chief about Officer Hampton's character for truthfulness was properly admitted.

Defendant also suggests that the prosecutor improperly used the office of the deputy police chief to vouch for Officer Hampton's credibility. A prosecutor may not ask a jury to convict based on the prestige of the police. *People v Lucas*, 138 Mich App 212, 221; 360 NW2d 162 (1984). Here, the prosecutor stated: "You also heard from Deputy Chief Kruithoff who said this man's reputation for truthfulness is excellent. In his own personal opinion – this is the Deputy Chief of the Battle Creek Police Department – his opinion is that this man is an honest man." We do not consider these comments to have improperly placed the prestige of the deputy chief's office behind his opinion and reputation testimony about Officer Hampton's character for truthfulness. Rather, this was proper commentary on the evidence. *Bahoda, supra* at 282.

IV

Defendant argues that the jury was not properly instructed because the trial court's definition of constructive possession did not prohibit the jury from inferring defendant's guilt by his association with drug dealers. Jury instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is supporting evidence. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Although defendant's proposed instruction may have been more specific in some aspects, no error results from the omission of an instruction if the instructions as a whole cover the substance of the omitted instruction. *People v Messenger*, 221 Mich App 171, 177-178; 561 NW2d 463 (1997). The trial court's instruction fairly presented the theory of constructive possession and sufficiently protected defendant's rights. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996). Defendant's particular objection to the prosecution's alleged inference of guilt by association was sufficiently addressed by the portion of the trial court's instruction that defendant's mere presence when a crime was committed would not be sufficient to prove defendant's guilt. See CJI2d 8.5.

V

Defendant claims that the cumulative effect of error requires a new trial. However, in light of our conclusions that defendant has not established any of his claims of error, we disagree.

Affirmed.

/s/ Jane E. Markey
/s/ Michael J. Kelly
/s/ William C. Whitbeck

[1] 390 Mich 629; 213 NW2d 106 (1973).

[2] See also *Burwick*, *supra* at 289 (the prosecution's former statutory obligation to use due diligence to produce res gestae witnesses has been eliminated); *People v Paquette*, 214 Mich App 336, 343; 543 NW2d 342 (1995) (the prosecution no longer has a duty to produce res gestae witnesses).

[3] We note, as set out below, that the confusion over whether the prosecution had an obligation to "produce" Vinson, as opposed to an obligation to provide reasonable assistance including investigative assistance as may have been necessary to locate and serve process on Vinson, permeated defendant's requests at the trial court level. However, in the interest of fairness, we will treat defendant's requests as if they had been properly phrased as requests to provide reasonable assistance.

[4] We note that the trial court file includes a subpoena for Vinson, with the address provided to the defense by the prosecution, that is dated September 13, 1995 and that was filed with the trial court on December 15, 1995.

[5] We note that defendant does not even mention MRE 608 in presenting this issue in his brief. Rather, defendant incorrectly argues that there is a flat prohibition on one witness testifying about the veracity of another witness.