

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES MOORE,

Defendant-Appellant.

UNPUBLISHED

January 26, 1999

No. 205016

Recorder's Court

LC No. 97-002340

Before: Kelly, P.J., and Hood and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of armed robbery, MCL 750.529; MSA 28.797, carjacking, MCL 750.529a; MSA 28.797(a), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to ten to twenty years' imprisonment for the armed robbery conviction, ten to twenty years' imprisonment for the carjacking conviction, and the mandatory two years' imprisonment for the felony-firearm conviction. The armed robbery and carjacking sentences run concurrently to each other, but consecutively to the felony-firearm sentence. We affirm.

First, defendant argues that he was denied the effective assistance of counsel because trial counsel failed to investigate and interview certain witnesses and subpoena a security videotape. We disagree. Because defendant failed to move for a *Ginther*¹ hearing or a new trial based on the ineffective assistance of counsel, this Court's review is limited to errors apparent on the record. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). To justify reversal under the state and federal constitutions for ineffective assistance of counsel, a defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Mitchell*, 454 Mich 145, 158; 560 NW2d 600 (1997); *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997).

Defendant first argues that defense counsel was ineffective because he failed to investigate and interview witnesses who were at the gas station when the complainant claimed that defendant took her car and wallet at gunpoint. A defense attorney must enjoy great discretion in the trying of a case,

especially with regard to trial strategy and tactics such as decisions concerning which witnesses to call or what evidence to present. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994); *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call these witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding. *Daniel, supra*, 207 Mich App 58. Moreover, a defendant must indicate the substance of the alleged witnesses' testimony. *People v Hyland*, 212 Mich App 701, 711; 538 NW2d 465 (1995), mod on other grounds 453 Mich 902 (1996).

No record was made regarding whether defense counsel did or did not investigate and interview witnesses who were at the gas station. Moreover, there is no record indicating whether defense counsel would have deemed these witnesses' alleged testimony helpful at trial. Nor has defendant indicated the substance of these alleged witnesses' testimony. *Hyland, supra*, 212 Mich App 711. Defendant has not affirmatively demonstrated that his trial counsel's performance was objectively unreasonable.

Defendant also argues that his defense counsel was ineffective because he did not object to the prosecution's failure to list the investigating officer on its witness list. However, from a review of the record, it does not appear that the prosecution failed to list the investigating officer on its witness list and therefore, defense counsel did not err in failing to raise a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Finally, defendant argues that defense counsel was ineffective because he failed to subpoena the security videotape from the gas station. However, defendant does not assert how he was prejudiced by this failure. Reversal is not justified under the state and federal constitutions for ineffective assistance of counsel because defendant failed to affirmatively demonstrate that defense counsel's performance was objectively unreasonable and that there was a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Mitchell, supra*, 454 Mich 158; *Leonard, supra*, 224 Mich App 592.

Defendant also argues that he was denied a fair trial because the prosecution failed to list three witnesses on its statutory witness list. We disagree. Defendant failed to preserve this issue in the lower court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Therefore, this Court will not reverse unless defendant establishes a clear and obvious error which would have prejudiced defendant by being decisive of the outcome. *People v Lane*, 453 Mich 132, 140 n 9; 551 NW2d 382 (1996).

The prosecution's duty under statute is to provide notice of known witnesses and reasonable assistance to locate witnesses on a defendant's request. MCL 767.40a; MSA 28.980(1); *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995). There is no requirement to exercise due diligence to discover the names of witnesses. *Burwick, supra*, 450 Mich 289. The listing requirement of the res gestae statute is "merely to notify the defendant of the witness' existence and res gestae status." *People v Calhoun*, 178 Mich App 517, 523; 444 NW2d 232 (1989). "A res gestae witness is a person who witnesses some event in the continuum of a criminal transaction and whose testimony will aid in developing a full disclosure of the facts." *People v O'Quinn*, 185 Mich App 40, 44; 460

NW2d 264 (1990). A res gestae witness includes not only one who witnesses a crime but one who is present at the scene of a crime. *People v Abdo*, 81 Mich App 635, 643; 265 NW2d 779 (1978).

Defendant argues that the prosecution failed to list the driver of the truck in which the complainant hid, “Kim,” and the officer who conducted the initial investigation on its statutory listing of res gestae witnesses. Because defendant failed to preserve this issue by objecting at trial, it is unclear whether the prosecution knew about the truck driver or knew the truck driver’s name. Therefore, defendant has not established a clear and obvious error, nor has he established that he was prejudiced by the absence of the truck driver on the prosecution’s witness list. *Grant, supra*, 445 Mich 553. “Kim” was not a res gestae witness as she did not witness the crime nor was she present at the crime scene. *Abdo, supra*, 81 Mich App 643. Therefore, the prosecuting attorney had no statutory obligation to include her name on the list. *Burwick, supra*, 450 Mich 289. Finally, there is no evidence on the record to support defendant’s argument that the investigating officer was not listed on the prosecution’s witness list. Accordingly, defendant was not denied a fair trial by the failure of the prosecution to list certain witnesses on its statutory witness list.

Defendant also argues that the trial court’s consideration of evidence of defendant’s flight was prejudicial. We disagree. Defendant failed to preserve this issue and, therefore, this Court will not reverse unless defendant establishes a clear and obvious error which would have prejudiced defendant by being decisive of the outcome. *Lane, supra*, 453 Mich 140 fn 9.

Evidence of flight is generally relevant and admissible as evidence of substantive matters such as purpose, intent, knowledge, or consciousness of guilt. *People v Cutchall*, 200 Mich App 396, 398; 504 NW2d 666 (1992). However, evidence of flight alone may remain insufficient to warrant conviction. *Cutchall, supra*, 200 Mich App 398. The trial court properly considered evidence of defendant’s flight on the issue of whether defendant knew he had no right to drive the complainant’s car. *Cutchall, supra*, 200 Mich App 398. Moreover, the trial court did not convict defendant relying solely on the evidence of flight.

Finally, defendant argues that the trial court invaded the prosecutor’s role when it questioned defendant’s witness, Charmaine Turner. A trial court may question a witness in order to clarify testimony or elicit additional relevant information. MRE 614; *People v Weathersby*, 204 Mich App 98, 109; 514 NW2d 493 (1994). In questioning a witness, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial. *Weathersby, supra*, 204 Mich App 109. However, a trial judge has more discretion to question witnesses during a bench trial than during a jury trial. *In re Forfeiture of \$1,159,420*, 194 Mich App 134, 153; 486 NW2d 326 (1992); *People Meatte*, 98 Mich App 74, 78; 296 NW2d 190 (1980).

A jury might well be unfavorably influenced against the defendant in a criminal case by the nature of the questions asked by the trial judge, the manner of his questioning and his apparent reaction thereto. Here there is nothing to suggest that the judge, as trier of the facts, was improperly influenced by the character of his questions propounded to the witness or the method of asking them or other demeanor of the judge. To suppose this

would be ludicrous indeed. [*People v Wilder*, 383 Mich 122, 125; 174 NW2d 562 (1970).]

From a review of the record, this Court concludes that the trial court did not ask intimidating, argumentative, prejudicial, unfair or partial questions. *Wilder, supra*, 383 Mich App 124. Accordingly, no bias appears on the record which would have prejudiced defendant.

Affirmed.

/s/ Michael J. Kelly

/s/ Harold Hood

/s/ Jane E. Markey

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).